Date and Time: Wednesday, October 25, 2023 4:43:00 PM CST

Job Number: 208887883

Documents (100)

1. Spring Pharms., LLC v. Retrophin, Inc., 2019 U.S. Dist. LEXIS 61501

Client/Matter: -None-

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

2. Dakota Terr. Tours ACC v. Sedona-Oak Creek Airport Auth. Inc., 383 F. Supp. 3d 885

Client/Matter: -None-

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

3. Nicolosi Distrib. v. Finishmaster, Inc., 2019 U.S. Dist. LEXIS 62079

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

4. Waste Mgmt. of La., L.L.C. v. River Birch, Inc., 920 F.3d 958

Client/Matter: -None-

Search Terms: "antitrust law"

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

5. Sidibe v. Sutter Health, 2019 U.S. Dist. LEXIS 79683

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

6. [Wi-LAN Inc. v. LG Elecs., Inc., 382 F. Supp. 3d 1012]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
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7. [In re Pre-Filled Propane Tank Antirust Litig., 2019 U.S. Dist. LEXIS 246572]

Client/Matter: -None-

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

8. [Akers v. Md. State Educ. Ass'n, 376 F. Supp. 3d 563]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
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9. [Med Vets, Inc. v. Vip Petcare Holdings, Inc., 2019 U.S. Dist. LEXIS 68099]

Client/Matter: -None-

Search Terms: "antitrust law"

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

10. [Fireworks Lady & Co., LLC v. Firstrans Int'l Co., 2019 U.S. Dist. LEXIS 130887]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

11. ECB United States v. Savencia, 2019 U.S. Dist. LEXIS 229344

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

12. BookXchange FL, LLC v. Book Runners, LLC, 2019 U.S. Dist. LEXIS 70360

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

13. Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys., 922 F.3d 713

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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14. Bobcat N. Am., LLC v. Inland Waste Holdings, LLC, 2019 Del. Super. LEXIS 210

Client/Matter: -None-

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Search Type: Natural Language

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15. Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc., 2019 Cal. Super. LEXIS 92933

Client/Matter: -None-

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16. *Shandong Lihong Tech. v. Masimo Corp., 2019 Cal. Super. LEXIS 42196*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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17. *Vestis, LLC v. Caramel Sales, Ltd, 2019 U.S. Dist. LEXIS 127987*

Client/Matter: -None-

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

18. *Kickham Hanley PLLC v. Oakland Cty. Mich., 2019 Mich. App. LEXIS 1550*

Client/Matter: -None-

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Content Type	**Narrowed by**
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19. *SC Innovations, Inc. v. Uber Techs., Inc., 2019 U.S. Dist. LEXIS 74620*

Client/Matter: -None-

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20. *W. Air Charter v. Sojitz Corp., 2019 U.S. Dist. LEXIS 163181*

Client/Matter: -None-

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21. *City of Rockford v. Mallinckrodt ARD, Inc., 2019 U.S. Dist. LEXIS 103885*

Client/Matter: -None-

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

22. *In re Broiler Chicken Antitrust Litig., 2019 U.S. Dist. LEXIS 114664*

Client/Matter: -None-

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

23. *In re Commodity Exch., Inc., 2019 U.S. Dist. LEXIS 75886*

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

24. *Babb v. Cal. Teachers Ass'n, 378 F. Supp. 3d 857*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

25. *Black Bear Sports Grp. Inc. v. Amateur Hockey Ass'n of Ill., 2019 U.S. Dist. LEXIS 78770*

Client/Matter: -None-

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

26. *Powell v. Shelton, 386 F. Supp. 3d 842*

Client/Matter: -None-

Search Terms: "antitrust law"

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

27. [IQ Dental Supply, Inc. v. Henry Schein, Inc., 924 F.3d 57]

Client/Matter: -None-

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Search Type: Natural Language

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

28. [Maui Jim, Inc. v. SmartBuy Guru Enters., 386 F. Supp. 3d 926]

Client/Matter: -None-

Search Terms: "antitrust law"

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

29. [Apple Inc. v. Pepper, 139 S. Ct. 1514]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

30. [Jain Irrigation, Inc. v. Netafim Irrigation, Inc., 386 F. Supp. 3d 1308]

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

31. [Dockery v. Heretick, 2019 U.S. Dist. LEXIS 81748]

Client/Matter: -None-

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

32. Holmes v. Harris, 2019 U.S. Dist. LEXIS 136640

Client/Matter: -None-

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

33. AlterG, Inc. v. Boost Treadmills LLC, 388 F. Supp. 3d 1133

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

34. Monsanto Co. v. Hensel Seed Sols. LLC, 2019 U.S. Dist. LEXIS 84330

Client/Matter: -None-

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

35. FTC v. Qualcomm Inc., 411 F. Supp. 3d 658

Client/Matter: -None-

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

36. Blanton v. Domino's Pizza Franchising LLC, 2019 U.S. Dist. LEXIS 87737

Client/Matter: -None-

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

37. [RxStrategies, Inc. v. CVS Pharm., Inc., 390 F. Supp. 3d 1341]

Client/Matter: -None-

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

38. [Charah v. Sequoia Servs. LLC, 2019 NCBC LEXIS 87]

Client/Matter: -None-

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

39. [United States Bd. of Oral Implantology v. Am. Bd. of Dental Specialties, 390 F. Supp. 3d 892]

Client/Matter: -None-

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

40. [Estate of Schertz v. Jackson Nat'l Life Ins. Co., 2019 U.S. Dist. LEXIS 242428]

Client/Matter: -None-

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41. [Mai Larsen Designs v. Want2Scrap, LLC, 2019 U.S. Dist. LEXIS 92215]

Client/Matter: -None-

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42. [Chamber of Commerce of the United States v. City of Seattle, 426 F. Supp. 3d 786]

Client/Matter: -None-

Search Terms: "antitrust law"

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

43. *CRST Expedited, Inc. v. Swift Transp. Co of Ariz., LLC, 2019 U.S. Dist. LEXIS 93182*

Client/Matter: -None-

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

44. *California v. Allergan PLC, 2019 U.S. Dist. LEXIS 124674*

Client/Matter: -None-

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

45. *PNE Energy Supply LLC v. Eversource Energy, 396 F. Supp. 3d 200*

Client/Matter: -None-

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

46. *Brooks v. Tarsadia Hotels, 2019 U.S. Dist. LEXIS 98166*

Client/Matter: -None-

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

47. *In re Processed Egg Prods. Antitrust Litig., 392 F. Supp. 3d 498*

Client/Matter: -None-

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Search Type: Natural Language

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48. Provepharm, Inc. v. Akorn, Inc., 2019 U.S. Dist. LEXIS 98719

Client/Matter: -None-

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49. Cent. Valley Med. Grp., Inc. v. Indep. Physician Assocs. Med. Grp., Inc., 2019 U.S. Dist. LEXIS 100265

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

50. In re German Auto. Mfrs. Antitrust Litig., 392 F. Supp. 3d 1059

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Search Terms: "antitrust law"

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

51. Omnimax Int'l, Inc. v. Anlin Indus., 2019 U.S. Dist. LEXIS 102011

Client/Matter: -None-

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

52. Diva Limousine, Ltd. v. Uber Techs., Inc., 392 F. Supp. 3d 1074

Client/Matter: -None-

Search Terms: "antitrust law"

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

53. [In re Ry. Indus. Emple. No-Poach Antitrust Litig., 395 F. Supp. 3d 464]

Client/Matter: -None-

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Search Type: Natural Language

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

54. [FashionPass, Inc. v. Rent the Runway, Inc., 2019 U.S. Dist. LEXIS 138238]

Client/Matter: -None-

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

55. [Rabbe v. Farmers State Bank of Trimont, 2019 Minn. Dist. LEXIS 231]

Client/Matter: -None-

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56. [Marion Diagnostic Ctr., LLC v. McKesson Corp. (In re Generic Pharms. Pricing Antitrust Litig.), 386 F. Supp. 3d 477]

Client/Matter: -None-

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

57. [UNOX, Inc. v. Conway, 2019 NCBC 40]

Client/Matter: -None-

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58. [Unox, Inc. v. Conway, 2019 N.C. Super. LEXIS 267]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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59. [In re Loestrin 24 FE Antitrust Litig., 2019 U.S. Dist. LEXIS 118308]

Client/Matter: -None-

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

60. [Sheahan v. State Farm Gen. Ins. Co., 394 F. Supp. 3d 997]

Client/Matter: -None-

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Content Type	**Narrowed by**
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61. [Competition Commission of South Africa v Media 24 (Pty) Limited, 2019 SACLR LEXIS 26]

Client/Matter: -None-

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62. [Ashton Woods Holdings LLC v. USG Corp. (In re Domestic Drywall Antitrust Litig.), 399 F. Supp. 3d 280]

Client/Matter: -None-

Search Terms: "antitrust law"

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63. *In re McCormick & Co., 422 F. Supp. 3d 194*

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64. *Linde, LLC v. Valley Protein, LLC, 2019 U.S. Dist. LEXIS 115730*

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65. *United States v. Hyundai Oilbank Co., 2019 U.S. Dist. LEXIS 160981*

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66. *United States v. S-Oil Corp., 2019 U.S. Dist. LEXIS 159235*

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67. *Alarm Detection Sys. v. Orland Fire Prot. Dist., 929 F.3d 865*

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

68. *Ashton Woods Holdings LLC v. USG Corp. (In re Domestic Drywall Antitrust Litig.), 2019 U.S. Dist. LEXIS 116988*

Client/Matter: -None-

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

69. [Cheryl Lloyd Humphrey Land Inv. Co., LLC v. Resco Prods., 266 N.C. App. 255]

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

70. [Becton, Dickinson & Co. v. Cytek Biosciences, Inc., 2019 U.S. Dist. LEXIS 119276]

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71. [Home Depot, U.S.A., Inc. v. E.I. du Pont de Nemours & Co., 2019 U.S. Dist. LEXIS 136627]

Client/Matter: -None-

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

72. [Presque Isle Colon & Rectal Surgery v. Highmark Health, 391 F. Supp. 3d 485]

Client/Matter: -None-

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73. [Sec. Data Supply, LLC v. Nortek Sec. & Control LLC, 2019 U.S. Dist. LEXIS 122537]

Client/Matter: -None-

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

74. *Cent. Valley Med. Grp., Inc. v. Indep. Physician Assocs. Med. Grp., Inc., 2019 U.S. Dist. LEXIS 124388*

Client/Matter: -None-

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

75. *City of Oakland v. Oakland Raiders, 2019 U.S. Dist. LEXIS 124465*

Client/Matter: -None-

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76. *Clark v. WorldMark, 2019 U.S. Dist. LEXIS 124445*

Client/Matter: -None-

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

77. *Plymouth Cty. Ret. Sys. v. Patterson Cos., 2019 U.S. Dist. LEXIS 124014*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

78. *Huu Nguyen v. Nissan N. Am., Inc., 932 F.3d 811*

Client/Matter: -None-

Search Terms: "antitrust law"

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

79. *Admor HVAC Prods. v. Lessary, 2019 U.S. Dist. LEXIS 126744*

Client/Matter: -None-

Search Terms: "antitrust law"

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

80. *First Priority Emergency Vehicles, Inc. v. REV Ambulance Grp. Orlando, Inc., 2019 U.S. Dist. LEXIS 126616*

Client/Matter: -None-

Search Terms: "antitrust law"

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

81. *Gardiner v. St. Croix Dist. Governing Bd. of Dirs., 2019 VI SUPER 59U*

Client/Matter: -None-

Search Terms: "antitrust law"

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

82. *In re Capacitors Antitrust Litig., 2019 U.S. Dist. LEXIS 232309*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

83. *Patt v. Antech Diagnostics, Inc., 2019 U.S. Dist. LEXIS 213021*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

84. *[Tera Grp, Inc. v. Citigroup, Inc., 2019 U.S. Dist. LEXIS 128107]*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

85. *[EuroTec Vertical Flight Sols., LLC v. Safran Helicopter Engines S.A.S., 2019 U.S. Dist. LEXIS 129084]*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

86. *[Labor One, Inc. v. Staff Mgmt. Sols., LLC, 2019 U.S. Dist. LEXIS 130030]*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

87. *[Lawrence v. Wells Fargo Bank, N.A., 2019 U.S. Dist. LEXIS 132795]*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

88. *[Sinclair Oil Corp. v. Oneok Energy Servs. Co., L.P., 2019 U.S. Dist. LEXIS 246114]*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

89. *[Fireworks Lady & Co., LLC v. Firstrans Int'l Co., 2019 U.S. Dist. LEXIS 209935]*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

90. *In re Zetia (Ezetimibe) Antitrust Litig., 400 F. Supp. 3d 418*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

91. *Nat'l Football League's Sunday Ticket Antitrust Litig. v. DirecTV, LLC, 933 F.3d 1136*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

92. *NSS Labs, Inc. v. Symantec Corp., 2019 U.S. Dist. LEXIS 136742*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

93. *Dish Network, LLC v. Jadoo Tv, Inc., 2019 U.S. Dist. LEXIS 165946*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

94. *Entrata, Inc. v. Yardi Sys., 2019 U.S. Dist. LEXIS 156126*

Client/Matter: -None-

Search Terms: "antitrust law"

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

95. [3Shape Trios A/S v. Align Tech., Inc., 2019 U.S. Dist. LEXIS 137982]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

96. [State AG Litig. v. Acavis Holdco U.S. (In re Generic Pharms. Pricing Antitrust Litig.), 394 F. Supp. 3d 509]

Client/Matter: -None-

Search Terms: "antitrust law"

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

97. [Sitzer v. Nat'l Ass'n of Realtors, 2019 U.S. Dist. LEXIS 140195]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

98. [Trendsettah USA, Inc. v. Swisher Int'l, Inc., 2019 U.S. Dist. LEXIS 217428]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

99. [Tyntec Inc. v. Syniverse Techs., LLC, 2019 U.S. Dist. LEXIS 231273]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

100. *Diverse Power, Inc. v. City of Lagrange, 934 F.3d 1270*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

Spring Pharms., LLC v. Retrophin, Inc.

United States District Court for the Eastern District of Pennsylvania

April 9, 2019, Decided; April 10, 2019, Filed

CIVIL ACTION No. 18-cv-04553

Reporter
2019 U.S. Dist. LEXIS 61501 *; 2019-1 Trade Cas. (CCH) P80,733; 2019 WL 1558744

SPRING PHARMACEUTICALS, LLC, Plaintiff, v. RETROPHIN, INC., MARTIN SHKRELI, MISSION PHARMACAL COMPANY, and ALAMO PHARMA SERVICES, INC., Defendants.

Subsequent History: Motion granted by, Motion denied by, Request granted *Spring Pharms., LLC v. Retrophin, Inc., 2019 U.S. Dist. LEXIS 133316 (E.D. Pa., Aug. 7, 2019)*

Motion granted by, in part, Motion denied by, in part, Stay granted by, Dismissed by, in part *Spring Pharms., LLC v. Retrophin, Inc., 2019 U.S. Dist. LEXIS 213901 (E.D. Pa., Dec. 11, 2019)*

Core Terms

generic, pharmaceutical, Defendants', Mission, manufacturer, antitrust, asserts, allegations, branded, samples, discovery, drugs, tiopronin, motions, motion to dismiss, subject matter jurisdiction, pharmaceutical company, competitor, cystinuria, ingredient

Counsel: **[*1]** For SPRING PHARMACEUTICALS, LLC, Plaintiff: DAN K. WEBB, LEAD ATTORNEY, WINSTON & STRAWN, CHICAGO, IL; DAVID E. DAHLQUIST, KELLY E. MANNION, KURT A. MATHAS, MICHAEL P. TOOMEY, LEAD ATTORNEYS, WINSTON & STRAWN LLP, CHICAGO, IL; JOSEPH E. WOLFSON, LEAD ATTORNEY, STEVENS & LEE, PHILADELPHIA, PA.

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Judges: J. CURTIS JOYNER, J.

Opinion by: J. CURTIS JOYNER

Opinion

MEMORANDUM

Joyner, J.

Before the Court are Defendants' Motions to Dismiss and Memorandums in Support thereof (Doc. Nos. 39, 40, 41, 42, and 43) and Plaintiff's Opposition thereto (Doc. No. 50). We stay Defendants' Motions for ninety days to allow for limited jurisdictional discovery.

I. BACKGROUND [*2]

This case arises from an antitrust action brought by Plaintiff Spring Pharmaceuticals, LLC ("Spring") against Defendants Retrophin, Inc. ("Retrophin"), Martin Shkreli ("Shkreli"), Mission Pharmacal Company ("Mission"), and Alamo Pharma Services, Inc. ("Alamo") (collectively, "Defendants") for allegedly anticompetitive practices in the pharmaceutical market for the tiopronin branded product that Defendants manufacture and market, Thiola. Thiola is off-patent and currently the only FDA-approved tiopronin product for treatment of the rare genetic disease cystinuria, which causes recurring kidney stones. Compl. ¶¶1, 2, 49. The practices at issue are embodied by a business model in which Defendants remove Thiola from normal distribution channels and refuse to deal samples of Thiola which are necessary for any generic seeking FDA approval through the "Abbreviated New Drug Application" regulatory process. Id. ¶8, ¶29. Spring's principal claim is that Defendants violated federal antitrust laws by engaging in anticompetitive conduct to preclude Plaintiff from developing a generic competitor to Thiola and charging supracompetitive prices for its drug. Id. ¶¶9, 40, 45, 65, 67, 70, 71.

Under consideration **[*3]** is Defendant Retrophin's and Defendants Mission and Alamo's Motions to Dismiss for lack of subject-matter jurisdiction under *Fed. R. Civ. P. 12(b)(1)*, in which they are challenging Spring's constitutional standing, Defendant Shkreli's joinder thereto, and Plaintiff's Opposition thereto. The Court has considered the parties' submissions and decides this matter without oral argument. *Fed. R. Civ. P. 78*; *Loc. R. Civ. P. 7.1 (f)*.

II. Alleged Facts

Spring alleges that it is a new pharmaceutical company, formed with the intention of developing a generic drug to compete with the subject medication in this litigation, Thiola, the branded drug manufactured and marketed by Defendants. Thiola is an off-patent, prescription pharmaceutical product, not subject to regulations restricting generic development, with active ingredient tiopronin. Compl. ¶2. Thiola is used to treat patients with a chronic genetic disease, cystinuria, which causes recurring kidney stones. Id. ¶¶2, 88. Cystinuria affects approximately 1 in every 10,000 people with approximately 20,000 cases in the United States at present. Id. ¶ 82. Based on Retrophin's own reports, sales of Thiola have increased from nearly $55 million in 2015 to $71 million in 2016, and $82 million in 2017. Id. ¶87 n.49 **[*4]** (citing Retrophin Inc., Annual Report 46 (Form 10-K) (Feb. 27, 2018)).

Currently, Thiola is the only tiopronin drug with FDA approval. Id. ¶2. Plaintiff alleges that "there are no substitutes for Thiola," Id. ¶83, making demand for the drug inelastic. Other drugs, including Cuprimine (active ingredient, penicillamine) and Depen (a branded generic of penicillamine) have been FDA approved for treating cystinuria, yet they are "primarily indicated for a different disease," and have been "targeted" as less effective and safe than Thiola for treating cystinuria. Id.; Def. Retrophin Br. at 13, n. 3, Bansal Decl. Ex. A.

With the intention of ensuring the availability of "low-cost, generic drugs for millions of Americans," see *21 U.S.C.S. § 355*, in 1984 Congress enacted the Drug Price Competition and Patent Term Restoration Act ("Hatch-Waxman Act" or "Hatch-Waxman"), which provided a streamlined process for regulatory approval of generic drugs. Unlike the lengthy clinical trials necessary for "New Drug Applications" ("NDAs"), the alternative "Abbreviated New Drug Applications" ("ANDAs") allow generic manufacturers to "rely on the FDA's previous finding of safety and effectiveness with respect to the brand product **[*5]** — so long as the firm is able to demonstrate that the proposed generic is biologically equivalent to, and has the same active ingredients, route of administration, dosage form, strength, labeling, and conditions of use as, that brand drug." Compl. ¶30; see *21 U.S.C.S. §§ 355(j)(2)(A)(i)-(v)*. This showing is also referred to as "bioequivalence." The ANDA regulatory shortcut, by "allowing the generic to piggyback on the pioneer's approval efforts, 'speed[s] the introduction of low-cost generic drugs to market,' [and] thereby further[s] drug competition. *FTC v. Actavis, Inc., 570 U.S. 136, 143, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)* (citing *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, 566 U.S. 399, 405, 132 S. Ct. 1670, 182 L. Ed. 2d 678 (2012))*.

Central to Plaintiff's Complaint in this litigation, a generic drug manufacturer seeking to enter the pharmaceutical market through the abbreviated ANDA process must acquire samples of the listed drug[1] in order to demonstrate bioequivalence. The FDA has instructed, "[g]eneric manufacturers need anywhere from 2,000 to 5,000 doses of the branded drug in order to run studies to prove their generic medicine is the same [i.e. as safe and effective] as the branded drug." Compl. ¶33.[2] Once a manufacturer demonstrates bioequivalence, the generic may be subject to "substitution" laws adopted by most states, including Pennsylvania. Id. ¶35. These state Drug Product Selection **[*6]** ("DPS") laws allow, and sometimes require, pharmacists to substitute generic versions of branded prescriptions, unless a doctor provides otherwise.[3]

With this regulatory framework in mind, we turn to the parties in this litigation. Mission manufactured and marketed Thiola since 1988, id. ¶¶7-9, until it entered an agreement with Retrophin in 2014, granting Retrophin an exclusive license to market, sell, and commercialize Thiola in the United States. ¶¶7, 19. Defendant Shkreli, CEO of Retrophin until October, 2014, ¶13, signed the exclusive licensing agreement between Retrophin and Mission, ¶¶20-22, that extends through May 2029. ¶63. Defendant Alamo is a "wholly-owned subsidiary of Mission and provides exclusive sales services to Retrophin under the [licensing] Agreement." ¶¶20, 22.

At the heart of Plaintiff Spring's Complaint are allegations that Defendants acted in concert to block Spring's access to samples of Thiola that it needs **[*7]** to develop a generic competitor. ¶8. Defendants challenge the factual basis for Spring's constitutional standing. See Def. Retrophin Br. at 20-23 (Doc. No. 42); Defs. Mission and Alamo Br. at 13-15 (Doc. No. 41); Def. Shkreli Br. (Doc. No. 40). Therefore, before we may address the merits of Spring's allegations, we must address whether Spring has constitutional standing to sue.

III. Legal Standard

A party may assert the defense of lack of subject-matter jurisdiction on motion. *Fed. R. Civ. P. 12(b)(1)*. There is a "crucial distinction, often overlooked, between *12(b)(1)* motions that attack the complaint on its face and *12(b)(1)* motions that attack the existence of subject matter jurisdiction in fact, quite apart from any pleadings." *Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)*. See *Gould Elecs., Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000)* ("[a] *Rule 12(b)(1)* motion may be treated as either a facial or factual challenge to the court's subject matter jurisdiction.").

A facial attack provides similar procedural protections to a *Rule 12(b)(6)* "determination on the merits," which affords "the safeguard of having all its allegations taken as true" and all inferences drawn in favor of the plaintiff. *Mortensen, 549 F.2d at 891*. On a factual attack by contrast, "there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to **[*8]** the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations," because the court's "very power to hear the case" is in issue. Id.[4] See also *S.D. v. Haddon Heights Bd. of Educ., 722 F. App'x 119, 124 n. 7 (3d Cir. 2018)* (citing

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[1] A "list drug" refers to "the particular FDA-approved brand drug at issue." Compl. ¶31, *§§ 355(j)(7)*.

[2] Statement from FDA Commissioner Scott Gottlieb, M. D., on new agency actions to further deter 'gaming' of the generic drug approval process by the use of citizen petitions, U.S. FOOD & DRUG ADMIN. (Oct. 2, 2018), https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm622252.htm.

[3] Martin H. Redish and Sopan Joshi, Litigating Article IIII Standing: A Proposed Solution to the Serious (But Unrecognized) Separation of Powers Problem, *162 U. Penn. L. Rev. 1373, 1381 (2014)*.

Constitution Party v. Aichele, 757 F.3d 347, 358 (3d Cir. 2014 (internal citations omitted))(supporting the Third Circuit's view that since "a factual challenge 'concerns the actual failure of a plaintiff's claims to comport factually with the jurisdictional prerequisites,'" we are permitted to "independently evaluate all the evidence to resolve disputes over jurisdictional facts."). E.g., *CNA, 535 F.3d at 139* (quoting *United States ex rel. Atkinson v. Pa. Shipbuilding Co., 473 F.3d 506, 514 (3d Cir. 2007))* (holding we have authority to 'make factual findings which are decisive to the issue.'"). On a factual attack under *Rule 12(b)(1)*, the "burden of proving subject matter jurisdiction [is] on the plaintiff." Id.

A factual challenge under *Rule 12(b)(1)* may be made prior to service of an answer. *Berardi v. Swanson Mem'l Lodge No. 48 of Fraternal Order of Police, 920 F.2d 198, 200 (3d Cir. 1990)*. **[*9]** Although Plaintiff contends that a defendant's factual attack on jurisdiction may not be made "until after answering the complaint," Pl. Opp. at 51 n. 40, the Third Circuit has clarified, "[a]lthough dictum in Mortensen seems to support [Spring's] argument, we are convinced that the argument is wrong." Id. See id. ([T]he requirement in *[Rule] 12(b)* that a motion to dismiss for lack of jurisdiction must be made before pleading if a further pleading is required would make little sense if the factual basis for subject matter jurisdiction could not be contested until after an answer is filed.").

IV. Discussion

Plaintiff Spring asserts that it has constitutional standing to bring this antitrust cause of action against Defendants. In short, Spring argues it is a pharmaceutical company that has taken substantial steps toward developing a generic version of Defendants' drug, Thiola, and that but for Defendants' refusal to sell samples of Thiola to distributors, wholesalers, or Plaintiff, Plaintiff is precluded from developing a generic competitor, and Defendant continues to unlawfully monopolize the tiopronin market.

Pursuant to *Fed. R. Civ. P. 12(b)(1)*, Defendant Retrophin mounts a factual attack to Plaintiff Spring's constitutional standing. Accordingly, Retrophin seeks "limited discovery to test Spring's assertions." Def. Retrophin Br. at 20.

Constitutional standing and antitrust standing are distinct. *Phila. Taxi Ass'n v. Uber Techs., 886 F.3d 332, 343 (3d Cir. 2018)* (citing *Ethypharm S.A. Fr. v. Abbott Labs., 707 F.3d 223, 232 (3d Cir. 2013)*. "In order to establish an actionable antitrust violation, a plaintiff must plead a basis for both Article III and antitrust standing." *Schuylkill Health Sys. v. Cardinal Health 200, LLC, No. 12-7065, 2014 U.S. Dist. LEXIS 103663 at *8 (E.D. Pa. July 30, 2014)*. "While **[*10]** '[h]arm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact,' courts must also consider 'whether the plaintiff is a proper party to bring a private antitrust action.'" *Phila. Taxi Ass'n v. Uber Techs., 886 F.3d 332 (3d Cir. 2018)* (quoting *Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 535 n. 31, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*. "Because antitrust standing is prudential, we are not bound to address it first, because it 'does not affect the subject matter jurisdiction of the court, as Article III standing does.'" *Phila. Taxi Ass'n v. Uber Techs., 886 F.3d 332 n. 7 (3d Cir. 2018)* (quoting *Ethypharm S.A. Fr., 707 F.3d at 232*). Furthermore, the Third Circuit has indicated that antitrust standing is "one of the prudential limitations" on constitutional standing and is part of the merits analysis. *Ethypharm S.A. Fr., 707 F.3d at 232*.[5] "Regardless of any additional requirements applicable to a particular type of action, a plaintiff

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[4] See *id. at 1376* (arguing that in the interest of avoiding pressuring defendants to settle before a case or controversy has been conclusively established, "it is critical to resolve disputes over subject matter jurisdiction (both legal and factual) at the very outset of litigation." Waiting to resolve standing until as late as trial is permissible under the Supreme Court's approach to standing analyses as set forth in *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. However, "[b]y deferring resolution of the standing issue, courts force defendants into a Hobson's choice—either incur the expense of litigation or settle the case—without having conclusively established the existence of a valid case or controversy.").

[5] See *Ethypharm S.A. Fr., 707 F.3d at 232 n.17* (quoting ***Palmyra Park Hosp. Inc. v. Phoebe Putney Mem'l Hosp., 604 F.3d 1291, 1299 (11th Cir. 2010))*** (noting that the Third Circuit is persuaded by the Eleventh Circuit's view that antitrust standing requires a plaintiff "do more than meet the basic 'case or controversy' requirement that would satisfy constitutional standing;

must always demonstrate that a justiciable case or controversy exists sufficient to invoke the jurisdiction of the federal courts." ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 302 (3d Cir. 2012) (citing Sullivan v. D.B. Invs., Inc., 667 F.3d 273, 307 (3d Cir. 2011)).

To satisfy the threshold Article III standing requirements, a plaintiff's allegations must show "(1) an injury that is (2) 'fairly traceable to the defendant's allegedly unlawful conduct' and that is (3) 'likely to be redressed by the requested relief.'" Lujan, 504 U.S. at 590 (quoting Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)). Accord *Ballentine v. United States, 486 F.3d 806, 48 V.I. 1059 (3d Cir. 2007)*. First, the injury-in-fact must be "distinct and palpable," Danvers Motor Co., Inc. v. Ford Motor Co., 432 F.3d 286, 291 (3d Cir. 2005), "concrete **[*11]** and particularized," Askew v. Trs. of the Gen. Assembly of the Church of the Lord Jesus Christ of the Apostolic Faith, Inc., 776 F. Supp. 2d 25, 29 (E.D. Pa. 2011), as well as "actual or imminent, not 'conjectural' or 'hypothetical,'" Lujan, 504 U.S. at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)). Second, Plaintiff's allegations must show a "causal connection" between their injury and Defendants' allegedly illegal conduct. "[T]hat is, the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." Id. (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976)). "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Id. at 561 (quoting Simon, 426 U.S. at 38, 43). "These requirements ensure that plaintiffs have a 'personal stake' or 'interest' in the outcome of the proceedings, 'sufficient to warrant . . . [their] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on . . .[their] behalf.'" Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164, 176 (3d Cir. 2001) (quoting Wheeler v. Travelers Ins. Co., 22 F.3d 534, 537-38 (3d Cir. 1994)).

When a Plaintiff seeks injunctive relief, as Spring does here, Plaintiff must show that the threat of injury-in-fact is "imminent." ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 301 (3d Cir. 2012) (quoting Summers v. Earth Island Inst., 555 U.S. 488, 493, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009)). "A mere 'possibility' of future injury is insufficient." In re Thalomid & Revlimid Antitrust Litig., Civil Action No. 14-6997, 2018 U.S. Dist. LEXIS 186457 at *28 (D.N.J. Oct. 30, 2018) (quoting ZF Meritor, 696 F.3d at 301 (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983))). The "imminence" inquiry focuses on whether Plaintiffs can show "sufficient facts" to support the conclusion that they are "*likely* ***[*12]*** to suffer future injury;" McNair v. Synapse Grp. Inc., 672 F.3d 213, 223 (3d Cir. 2012)(citation omitted); or, in other words that future injury is "certainly impending and [will] proceed with a high degree of certainty." McCray v. Fid. Nat'l Title Ins. Co., 682 F.3d 229, 243 (3d Cir. 2012). "Vague" assertions of desire [to enter the relevant pharmaceutical market] "without any descriptions of concrete plans," are insufficient to support a finding of actual or imminent injury." ZF Meritor, 696 F.3d at 301 (citing Summers, 555 U.S. at 496). Additionally, to have constitutional standing, a plaintiff seeking an injunction must show "'continuing, present adverse effects'" of defendant's challenged conduct." Id. (quoting O'Shea v. Littleton, 414 U.S. 488, 495-96, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)). The party "invoking federal jurisdiction[,] bears the burden of establishing" the elements of standing. Id. at 561.

"It is well settled that standing cannot be 'inferred argumentatively from averments in the pleadings,' but rather must affirmatively appear in the record (internal citations omitted)." Askew, 776 F. Supp. at 28 (quoting Grace v. Am. Cent. Ins. Co., 109 U.S. 278, 284, 3 S. Ct. 207, 27 L. Ed. 932 (1883)). As in Askew, "[b]ecause defendants present factual evidence of [Spring's] lack of standing, we will treat this motion accordingly." Id.

Defendants argue Spring lacks constitutional standing. In their "factual attack," Defendants assert that "Spring is not a generic pharmaceutical company; it has not developed, is not developing, and is not 'ready to **[*13]** begin development' of a generic version of tiopronin. Rather, it is a company apparently formed by a former associate of Winston & Strawn (litigation counsel in this lawsuit), and his wife, a CPA, as a vehicle to bring this litigation." Def. Retrophin Br. at 20. To support their theory, Defendants contend that Spring does not have an office, only a "'virtual' and shared workspace," Bansal Decl. Ex. M; that their co-founder, Mr. Li, has been kept "apprised of developments in ***antitrust law***," by virtue of his background as a lawyer, Def. Retrophin Br. at 14, and that Spring lacks the

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instead, the party must show that it satisfies a number of prudential considerations aimed at preserving the effective enforcement of the antitrust laws.").

financial and scientific capabilities to develop a generic and submit an ANDA for FDA approval. Defendants Mission and Alamo additionally argue that Spring is not authorized under state or federal law to be sold prescription drugs. Defs. Mission and Alamo Br. at 14, Doc. No. 41.

Plaintiff rebuts Defendants' factual attack, putting forth three arguments. First, Plaintiff asserts it is a new pharmaceutical company formed with the intent of developing a generic version of Thiola. Second, Plaintiff asserts it has taken substantial steps to develop a generic version of Defendants' drug, which can be completed once **[*14]** it is able to acquire Thiola samples for bioequivalence testing. Third, Plaintiff asserts it has communicated with consultants to help navigate the regulatory process of filing an abbreviated new drug application, and that it has secured financing to bring its generic product to market, pending access to Thiola samples. See Pl. Opp. at 49-50, Doc. No. 50.

To support its claim of standing, Plaintiff alleges that in November, 2017, Spring Pharmaceuticals "was formed as a family-run business" with the "mission . . . to develop lower-priced pharmaceutical products to compete with off-patent and off-exclusivity brand drugs." Li Decl. ¶¶2, 8; Doc. No. 50, Ex. 1. Plaintiff avers that it is "currently . . . developing a generic version of Thiola." Id. Plaintiff disputes Defendants' assertion that Spring was formed only as a pretext for filing this litigation, and that Mr. Li's background in antitrust litigation indicates that Spring is a shell-company. Plaintiff attests that before his legal career, Mr. Li worked for "seven years on projects for Aventis ([a] pharmaceutical manufacturer), Cytyc ([a] medical device manufacturer), and AstraZeneca ([a] pharmaceutical manufacturer)." Id. ¶4. Notably, **[*15]** Mr. Li asserts that his background in the pharmaceutical industry includes having worked at SPH Sine Pharmaceutical Laboratories Co., LTD. ("Sine Pharma"), an eminent Chinese-based pharmaceutical company, which manufactures a tiopronin product with the same "active ingredient" as Thiola. Id. ¶6-7.

Next, to dispute Defendants' allegation that "the only two individuals Retrophin has been able to identify as being affiliated with Spring in any way are 'its CEO,' Mr. Li. . .and his wife, Ms. Hua," "who according to publicly available materials is a Certified Public Accountant ('CPA') employed by Freddie Mac," Def. Retrophin Br. at 11 and 14, Plaintiff asserts that "[t]he other co-founder of Spring Pharmaceuticals, also one of [Mr. Li's] family members, had more than 30 years of experience in the pharmaceutical industry in China before he retired from SPH Sine Pharmaceutical Laboratories Co., Ltd." Li. Decl. ¶6. This co-founder has yet to be named in the parties' pleadings. Additionally, Plaintiff asserts that its "Chief Scientific Officer," Pl. Opp. at 51, although not named, is a partner in the consulting firm with which Spring has an agreement to "oversee the development work and prepare **[*16]** Spring's ANDA submission." Id.; Compl. ¶12.

In rebuttal to Defendants' attack on Plaintiff's preparedness, Spring asserts it is "ready and able" to compete, "except for its lack of access to samples." Compl. ¶68; Li. Decl. ¶10. Specifically, in accordance with a "well-developed business model in the pharmaceutical industry" of partnering with contract development and manufacturing organizations ("CDMOs"), to avoid capital-intensive costs of drug development, Plaintiff asserts it has "an agreement" with a CDMO experienced in launching generic drugs; Li. Decl. ¶11; and that it has "an agreement with a consulting firm" to assist it in navigating the regulatory requirements of submitting an ANDA. Id. ¶12.

Additionally, Plaintiff disputes Defendant Mission's argument that Spring is "not registered in the FDA database of 'drug establishments,'" nor authorized by the relevant state and federal authorities to receive prescription drugs (were Mission to sell Plaintiff Thiola samples). Def. Mission Br. at 14, Doc. No. 41 (citing *25 Tex. Admin. Code § 229.429(f)(2)* (2010)). In rebuttal, Plaintiff asserts that the CDMO with which it has an "agreement" is registered as a 'drug establishment' with the FDA, Li. Decl. ¶11, and that it **[*17]** is "commonplace with pharmaceutical outsourcing [for] all product samples, active pharmaceutical ingredients, and other chemical products [to] be shipped directly to the CDMO's facilities." Id.

Although Plaintiff has not named the CDMO, the consulting firm, nor the Chief Scientific Officer with whom it alleges it has entered agreements as part of its preparation for developing a generic competitor to Thiola, Plaintiff attests that it has not revealed the identity of its partners due to "confidentiality agreements. . .which prohibit the disclosure of confidential contract terms and/or its partners' identities without a court order requiring such disclosure and/or without the benefit of a protective order entered by the court." Id. ¶11 n. 8.

Finally, with regard to its financial preparedness to enter the pharmaceutical market as a generic competitor to Thiola, Plaintiff alleges that it "has received funding from Vannin Capital LLC ("Vannin")" as well as from "other investors," and that Mr. Li, a co-founder of Spring, has "contributed personal funds to the company." Id. ¶13. Defendants retort that "[t]he only public record of Spring's funding sources" is the Vannin lien, "filed on August **[*18]** 10, 2018, two months before" this lawsuit. Bansal Decl., Ex. N.

Considering that Spring has rebutted Defendants' jurisdictional challenge, we stay Defendants' motions for a period of ninety days to allow for discovery limited to the question of whether Plaintiff Spring has standing to sue under Article III. See *Askew, 776 F. Supp. 2d at 28* (ordering "standing-related discovery and den[ying] defendants' motion to dismiss without prejudice pending the completion of that discovery).[6] That being said, we note that Mortensen warns that "the 'concededly rigorous standard' [applied by *Hospital Building Co. v. Rex Hospital, 425 U.S. 738, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)]*, would apply equally in dismissals pursuant to *Fed. R. Civ. P. 12(b)(1)* [as they would to motions under *12(b)(6)*] and that dismissals of *Sherman Act* claims prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Mortensen, 549 F.2d at 891*.

V. CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss are stayed. An appropriate Order will follow.

ORDER

AND NOW, this 9th day of April, 2019 upon consideration of Defendants' Motions to Dismiss and Memorandums in Support thereof (Doc. Nos. 39, 40, 41, 42, and 43) and Plaintiff's Opposition thereto (Doc. No. 50), it is hereby ORDERED:

1. Defendants' Motions are STAYED for ninety days from the **[*19]** date of this order to allow for discovery limited to the jurisdictional issue raised on Defendants' Motions under *Federal Rule of Civil Procedure 12(b)(1)*.
2. On conclusion of limited discovery, the Parties may submit supplemental briefing to bring this matter back before the Court.

BY THE COURT:

/s/ J. Curtis Joyner

J. CURTIS JOYNER, J.

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[6] See Redish and Joshi, *162 U. Penn. L. Rev. at 1378* ("The Court should instruct lower courts to resolve questions about Article III standing as soon as its existence is put into doubt. Specifically, courts should address all factual issues relevant to standing by conducting limited discovery and making credibility determinations without inferences in favor of the plaintiff. This proposal requires all issues of standing to be raised on a *Rule 12(b)(1)* motion to dismiss.").

Dakota Terr. Tours ACC v. Sedona-Oak Creek Airport Auth. Inc.

United States District Court for the District of Arizona

April 10, 2019, Decided; April 10, 2019, Filed

No. CV-17-08162-PCT-DWL

Reporter
383 F. Supp. 3d 885 *; 2019 U.S. Dist. LEXIS 61678 **; 2019-1 Trade Cas. (CCH) P80,735; 2019 WL 1557517

Dakota Territory Tours ACC, et al., Plaintiffs, v. Sedona-Oak Creek Airport Authority Incorporated, et al., Defendants.

Prior History: *Dakota Terr. Tours ACC v. Sedona-Oak Creek Airport Auth. Inc., 2018 U.S. Dist. LEXIS 226993 (D. Ariz., July 26, 2018)*

Core Terms

airport, lease, bid, sublease, municipalities, allegations, immunity, municipal airport, competitor, anticompetitive, antitrust, pleadings, amended complaint, district court, antitrust claim, anti trust law, conspiracy, lawsuit, entity, email, space, motion to dismiss, state-action, air, settlement, regulations, taxicab, tours, entitled to immunity, factual allegations

Counsel: **[**1]** For Dakota Territory Tours ACC, An Arizona close corporation, Plaintiff: Bradley D Weech, Marshall Ray Hunt, LEAD ATTORNEYS, Davis Miles McGuire Gardner PLLC, Tempe, AZ; Jeffrey Dale Gardner, Jimmie W Pursell, Jr., Paul G Johnson, LEAD ATTORNEYS, Jennings Strouss & Salmon PLC - Phoenix - Washington St, Phoenix, AZ.

For Solid Edge Aviation, Plaintiff: Jeffrey Dale Gardner, Jimmie W Pursell, Jr., Paul G Johnson, LEAD ATTORNEYS, Jennings Strouss & Salmon PLC - Phoenix - Washington St, Phoenix, AZ.

For Yavapai, County of, Defendant: Georgia A Staton, Lori Lea Voepel, Robert R Berk, Jones Skelton & Hochuli PLC, Phoenix, AZ.

Judges: Dominic W. Lanza, United States District Judge.

Opinion by: Dominic W. Lanza

Opinion

[*887] WO

ORDER

INTRODUCTION

Dakota Territory Tours ACC ("Dakota") is a company that offers helicopter tours in northern Arizona. For years, Dakota subleased space at the Sedona Airport and ran its tours from that location. In 2014, Dakota became embroiled in litigation concerning its lease with the Sedona Oak-Creek Airport Authority, Inc. ("SOCAA"), the non-profit entity that operates the airport on behalf of Yavapai County ("the County"). In 2017, the parties entered into settlement agreement to resolve that litigation. **[**2]** Among other things, the settlement agreement terminated Dakota's sublease but required SOCAA to issue a request for proposal ("RFP") so that interested parties, including Dakota, could submit new bids to use space at the airport. Dakota submitted a bid in response to the RFP but its bid wasn't accepted. Instead, SOCAA accepted a competing bid from Guidance **[*888]** Air Service, LLC ("Guidance"), a rival helicopter tour operator that already leased other space at the airport.

In their amended complaint, which was filed in August 2018, Dakota and Solid Edge Aviation (collectively, "Plaintiffs") allege the RFP process was a "sham" designed to exclude Dakota from the airport. Among other things, Plaintiffs allege that SOCAA altered the selection criteria at the last moment in an effort to disadvantage them, accepted Guidance's bid even though it was 32% lower than theirs, refused to produce Guidance's full bid during a subsequent bid protest, presented false testimony during a state-court hearing related to the bid protest, conducted a pretextual audit of their taxes, and lodged a false complaint about their operations with the Federal Aviation Administration.

Although Plaintiffs have raised troubling **[**3]** allegations about how the RFP process was conducted, this case does not involve a challenge to that process in the traditional sense (ordinarily, bid protests alleging improprieties in RFP processes are governed by state law and brought in state court). Instead, the amended complaint asserts antitrust claims against four different defendants: SOCAA, SOCAA's former director Amanda Shankland ("Shankland"), Guidance, and the County (collectively, "Defendants").

Plaintiffs have now voluntarily dismissed their claims against SOCAA, Shankland, and Guidance (Doc. 115), but their claims against the County remain pending. The County has moved for judgment on the pleadings (Doc. 79) and, as discussed below, its motion will be granted for two independent reasons. First, time and again over the last half-century, plaintiffs have attempted to bring antitrust claims against airports and airport operators under the theory that the airport's refusal to provide a lease (or similar concession) amounted to anticompetitive conduct and/or contributed to monopolization. The courts have, almost without exception, rejected such lawsuits because (1) municipal airports generally enjoy immunity from antitrust **[**4]** liability in this context pursuant to the so-called "state action" doctrine, which was first established in *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, and (2) run-of-the-mill bid protests can't, in any event, be repackaged as antitrust claims. These principles generally doom Plaintiffs' attempt to transform their dissatisfaction with the RFP process into an antitrust lawsuit.

Second, the amended complaint is devoid of any plausible allegation that the County was responsible for transforming the RFP process into a sham. Thus, although the County perhaps could have exercised more care in overseeing how SOCAA was administering the RFP process, Plaintiffs have not articulated facts that would permit the County to be sued under a conspiracy theory. It is a tertiary player in this dispute—Plaintiffs' true dispute lies with SOCAA, and that dispute doesn't sound in ***antitrust law***.

BACKGROUND

I. Procedural Background

In August 2017, Dakota filed its original complaint. (Doc. 1.)

In July 2018, the Court issued a pair of orders rejecting Dakota's claims against the County and Guidance. (Docs. 68, 69.) First, the Court concluded the County was entitled to judgment on the pleadings because its "only involvement in this matter is as owner of **[**5]** the Sedona Airport and landlord to SOCAA. . . . [Dakota] has not demonstrated that Yavapai County meaningfully participated in the RFP process that awarded the sublease to Guidance. . . . Yavapai County was not involved in SOCAA's decision-making process and **[*889]** was a passive lessor during the RFP process." (Doc. 69 at 4-5.)[1] Second, as for Guidance, the Court similarly concluded that although Dakota "alleges that SOCAA came up with the plan to replace [Dakota] with Guidance . . . at no point does [Dakota] allege that Guidance colluded with SOCAA to do so." (Doc. 68 at 3-5.) The Court further concluded that Dakota's allegations "demonstrate that Guidance was not involved in SOCAA's decision-making process and was a passive bidder during the RFP process" and that Dakota was seeking to improperly "blame[] Guidance for actions that, even if taken as true, could only have only been plausibly committed by SOCAA." (Doc. 68 at 3-5.)

In August 2018, Dakota, along with new plaintiff Solid Edge, filed an amended complaint alleging violations under *sections 1* and *2* of the *Sherman Act* against all Defendants. (Doc. 72.)

In September 2018, Defendants filed a trio of dispositive motions: the County filed a renewed **[**6]** motion for judgment on the pleadings (Doc. 79), Guidance filed a motion to dismiss under *Rule 12(b)(6)* (Doc. 80), and SOCAA and Shankland filed a separate motion to dismiss under *Rule 12(b)(6)* (Doc. 81).

In October 2018, this case was transferred to the undersigned judge. (Doc. 94.)

In November 2018, the three dispositive motions became fully briefed. (Docs. 85, 88, 89, 99, 100, 101.)

On April 4, 2019, the Court issued an order setting oral argument on the dispositive motions on April 10, 2019. (Doc. 110.)

On April 9, 2019, Plaintiffs filed a stipulation dismissing their claims against SOCAA, Shankland, and Guidance without prejudice. (Doc. 115.)

On April 10, 2019, the Court heard oral argument on the County's motion. During the argument, Plaintiffs asked the Court to defer ruling on the motion because the parties were hoping to finalize a settlement within the next week. The County disagreed and asked the Court to rule on the motion because the potential settlement was still tentative.

II. Factual Allegations In The Amended Complaint

A. **The Parties**

Dakota operates helicopter and fixed wing air tours out of the Sedona Airport. (Doc. 72 ¶ 5.) Solid Edge has common ownership with Dakota and serves as Dakota's Part 135 **[**7]** Operating Company. (*Id.* ¶ 6.)

Guidance, like Dakota, operates air tours out of the airport and "is a direct competitor of . . . Dakota." (*Id.* ¶ 10.)

SOCAA is a non-profit corporation that "purports to be an independent airport authority and is empowered to operate, manage and oversee the Sedona Airport pursuant to a long-term written lease agreement with Yavapai." (*Id.* ¶ 7.) SOCAA maintains subleases on buildings, aircraft parking pads, and facilities on the airport premises. (*Id.*) It also owns and operates the airport's only fixed base operator, Red Rock Aviation. (*Id.*) The airport is operated according to a Master Plan. (*Id.* ¶¶ 15-16.)

Shankland was the General Manager and/or Airport Director of the airport acting on behalf of SOCAA since at least 2016. (*Id.* ¶ 9.)

The County, which owns the airport, has a long-term contract with SOCAA under which SOCAA must manage the airport **[*890]** for the "public good" and in a prudent and businesslike manner. (*Id.* ¶ 8.)

B. **Dakota's Sublease with SOCAA and Litigation Involving the Sublease**

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[1] The Court also concluded that, to the extent Dakota was asserting a claim for money damages against the County, that claim was barred by the Local Government Antitrust Act. (Doc. 69 at 3-4.)

Plaintiffs had a sublease with SOCAA that originally ran until August 2014 and was later extended until April 2017. (*Id.* ¶ 24.) Plaintiffs ran their air tour operations out **[**8]** of the subleased on-airport space. (*Id.* ¶ 25.)

In November 2014, Plaintiffs and SOCAA became involved in litigation over, among other things, SOCAA's breach of the sublease. (*Id.* ¶ 30.)

On April 27, 2017, the parties settled the litigation. (*Id.* ¶ 34.) The settlement agreement provided that SOCAA would prepare and issue an RFP to sublease on-airport operational space that had been occupied by Plaintiffs. (*Id.* ¶ 35.)

While the lawsuit was pending, there were email communications between SOCAA and certain County officials. On March 14, 2017, SOCAA's President Giorgio Cagliero ("Cagliero") sent an email to County Supervisor Randy Garrison ("Garrison") in which he suggested a meeting to address SOCAA's "problem tenant," which presumably referred to Dakota. (*Id.* ¶ 32.) The email stated there had been "developments in the litigation that [] could be better addressed by a joint Airport Authority/Yavapai County team." (*Id.*) The email further suggested that Cagliero, Shankland, and two SOCAA board members meet with Garrison, another individual, and the County Attorney sometime in the following two weeks. (*Id.*)

C. **The "Sham" Bidding Process**

Although SOCAA had represented to Plaintiffs that they could **[**9]** have input into drafting the RFP, the day after settlement, SOCAA transmitted an RFP to a County official, Assistant Administrator Jack Fields ("Fields"), for review. (*Id.* ¶¶ 37, 40.) Fields suggested some general language and SOCAA issued the RFP later that same day. (*Id.* ¶ 40.)

The RFP was for a different modular building than had been indicated in the settlement agreement. (*Id.* ¶ 46.) It also lacked information necessary for valid RFPs. (*Id.* ¶ 47.) And, during the meeting at which voting on the RFP took place, SOCAA altered the selection criteria in a way that disadvantaged Plaintiffs. (*Id.* ¶ 67.)

Guidance was awarded the RFP (the "SOCAA-Guidance Sublease") even though Guidance did not intend to use the subleased space within two months of the RFP's publication, as required by the RFP. (*Id.* ¶ 50.) Also, Guidance's bid was 32% lower than Plaintiffs' bid. (*Id.* ¶ 55.)

The County and the FAA did not participate in the initial award decision, and no one from either entity was present at the meeting awarding the RFP to Guidance. (*Id.* ¶ 73.)

In approving the SOCAA-Guidance Sublease, the County ignored material terms of the Master Lease. (*Id.* ¶¶ 88, 89.)

Within seven minutes after the meeting **[**10]** awarding the RFP to Guidance, SOCAA's counsel sent a letter demanding that Dakota vacate its leased space at the airport. (*Id.* ¶ 71.)

D. **Subsequent Activity**

SOCAA told Plaintiffs that the County and the FAA approved the RFP, so Plaintiffs requested the names of the individuals involved in the approval. (*Id.* ¶ 60.) SOCAA claimed it didn't know the names, but Plaintiffs located Fields, who denied any involvement beyond a partial review and suggestion of general language. (*Id.*)

SOCAA has refused to produce Guidance's full bid, in violation of the law, **[*891]** falsely claiming that Guidance and Plaintiffs had agreed to keep this information secret. (*Id.* ¶ 68.)

Plaintiffs discovered after the bid-selection meeting that even before the RFP had been awarded, SOCAA had discouraged employees from applying to work for Plaintiffs. (*Id.* ¶ 69.)

Plaintiffs submitted a written protest on July 20, 2017. (*Id.* ¶ 74.) In her written decision denying this protest, Shankland asserted the airport could not support more than one operator, which directly contradicted the Master Plan. (*Id.* ¶ 76.)

On July 21, 2017, Plaintiffs sued SOCAA and Shankland in Arizona state court. (*Id.* ¶ 78.) The court in that case granted a temporary **[**11]** restraining order ("TRO") prohibiting Dakota's eviction. (*Id.*) At a later hearing to determine whether to leave this TRO in place, SOCAA contended that Plaintiffs were not qualified to bid on the sublease because they were not authorized to conduct Part 135 operations. (*Id.* ¶ 81.) To support this argument, SOCAA presented an alleged independent consultant to provide expert testimony on compliance. (*Id.* ¶ 82.) Neither the expert nor SOCAA revealed that the expert worked for Guidance. (*Id.* ¶ 83.)

SOCAA has also subsequently engaged in other conduct favoring Guidance over Plaintiffs, including bringing a forcible entry and detainer action to eject Solid Edge from the subleased space, but not bringing a similar action against any related businesses that Guidance uses. (*Id.* ¶ 90.) SOCAA also audited Plaintiffs for certain taxes but did not audit Guidance in the same way. (*Id.* ¶ 94.)

"SOCAA and/or Guidance" called the FAA hotline to complain that Plaintiffs were not authorized to conduct Part 135 operations, which resulted in an investigation and a decision that the complaints were unsubstantiated. (*Id.* ¶ 93.)

E. **Effect of the SOCAA-Guidance Sublease**

The amended complaint alleges that the relevant **[**12]** product/service market for antitrust purposes in this case is on-airport air tours originating from and returning to the Sedona Airport. (*Id.* ¶¶ 101, 117.) The relevant geographic market is the Sedona area. (*Id.* ¶¶ 101, 117.)

The amended complaint further alleges that significant and high barriers to market entry exist in the form of regulations, licensing, insurance premiums, and high capital investment, which discourage new entry into the market. (*Id.* ¶ 106.)

Shankland has indicated that SOCAA would charge Plaintiffs a fee for every takeoff and landing, which at the moment would require Plaintiffs to pay at least an additional $45,000 per month to conduct business as an off-airport air tour provider, which effectively excludes Plaintiffs from conducting air tours from the Sedona airport. (*Id.* ¶ 22.)

LEGAL STANDARD

"[T]o survive a motion to dismiss, a party must allege 'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *In re Fitness Holdings Int'l, Inc., 714 F.3d 1141, 1144 (9th Cir. 2013)* (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009))*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Iqbal, 556 U.S. at 678*). **[**13]** "[A]ll well-pleaded allegations of material fact in the complaint are accepted as true and are construed in the light most favorable to the non-moving party." *Id. at 1144-45* (citation omitted). However, the court need not accept legal conclusions couched as factual allegations. **[*892]** *Iqbal, 556 U.S. at 679-80*. Moreover, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id. at 679*. The court also may dismiss due to "a lack of a cognizable legal theory." *Mollett v. Netflix, Inc., 795 F.3d 1062, 1065 (9th Cir. 2015)* (citation omitted).

A motion for judgment on the pleadings under *Rule 12(c)* is "functionally identical" to a *Rule 12(b)(6)* motion to dismiss. *Cafasso v. Gen. Dynamics C4 Sys., 637 F.3d 1047, 1055 n.4 (9th Cir. 2011)* (citations omitted); *see also* *Harris v. Cty. of Orange, 682 F.3d 1126, 1131 (9th Cir. 2012)* ("*Iqbal* applies to *Rule 12(c)* motions") (citation omitted). Therefore, a motion for judgment on the pleadings "is properly granted when, taking all the allegations in the non-moving party's pleadings as true, the moving party is entitled to judgment as a matter of law." *Fajardo v. Cty. of L.A., 179 F.3d 698, 699 (9th Cir. 1999)*; *see also* *Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 955 (9th Cir. 2004)* (when ruling on a *Rule 12(c)* motion, the court must "accept as true all allegations in [the plaintiff's] complaint and treat as false those allegations in the answer that contradict [the plaintiff's] allegations").

ANALYSIS

I. Background On Antitrust Claims Against Airport Operators **[**14]**

Over the last half-century, plaintiffs have frequently attempted to assert antitrust claims against airports and airport operators after unsuccessfully bidding for a lease or concession at the airport. Accordingly, before addressing Plaintiffs' claims against the County, it is helpful to provide an overview of some of the relevant caselaw.

A. **Appellate Decisions**

1. Airline Lease Cases

In *E.W. Wiggins Airways v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir. 1966)*, the plaintiff was a company that had, "[f]or many years," conducted operations at Logan Airport pursuant to a lease. *Id. at 54*. Following the expiration of the lease in December 1959, the Massachusetts Port Authority—the government entity responsible for operating the airport on behalf of the state—solicited bids for a new lease. *Id.* Although the plaintiff expressed interest in renewing the lease, the Port Authority awarded it to a competitor under murky circumstances. *Id. at 54-55*.[2] In response, the plaintiff sued the Port Authority and the competitor, asserting claims under *sections 1* and *2* of the Sherman Act. *Id. at 53*. The district court dismissed for failure to state a claim and the First Circuit affirmed. First, the court held the Port Authority was immune from suit under the *Parker* state-action doctrine because it "was acting as an instrumentality **[**15]** or agency of the state" at the time of the challenged conduct and the conduct was undertaken "pursuant to the legislative mandate imposed upon it to operate and manage the airport and establish rules and regulations for its use." *Id. at 55-56*. Second, and alternatively, the court held that an antitrust conspiracy was not "sufficiently alleged in the complaint" because "[a]ll that the plaintiff alleges is that the Authority agreed . . . [to] make [the competitor] the sole and exclusive fixed base **[*893]** operator at Logan . . . [and] entered into a lease with [the competitor] under which the [competitor] was to become the sole operator. These facts do not make out a case of conspiracy nor from them can any conspiracy be reasonably inferred. This was a simple agreement or arrangement. The fact that it was exclusive does not under these circumstances necessarily make it a conspiracy or illegal." *Id. at 56*.

The Tenth Circuit addressed a similar situation in *Pueblo Aircraft Service, Inc. v. City of Pueblo, Colo., 679 F.2d 805 (10th Cir. 1982)*. Between 1970 and 1977, the plaintiff conducted operations at a municipal airport, which was operated by the city of Pueblo, pursuant to a lease with the City. *Id. at 806-07*. Several months before the lease was set to expire, the City initiated a "public bidding" process. ***[**16]*** *Id.* Although the plaintiff submitted a bid to extend its lease, the City accepted a bid from a competitor. *Id.* Afterward, the plaintiff brought an antitrust lawsuit against the City, the City's aviation director, and the competing company whose bid was accepted. *Id. at 805-06*. The district court granted the defendants' motion for summary judgment and the Tenth Circuit affirmed. Although the court acknowledged that municipalities are not automatically exempt from the antitrust laws under *Parker*, it held that the City was entitled to immunity because "the State of Colorado has specifically authorized the City to acquire and operate a municipal airport and [declared] that such acquisition and operation [qualify as] 'public, governmental functions, exercised for a public purpose and matters of public necessity.'" *Id. at 807-08* (citations omitted). This statute, the court concluded, qualified as an "affirmative legislative action" by the state of Colorado that "granted City an exemption from operation of federal antitrust laws." *Id. at 809*.

A few years later, in *Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91 (2d Cir. 1986)*, the Second Circuit reached a similar result. In 1979, the plaintiff entered into a 10-year lease with the town of East Hampton to conduct operations at a municipal **[**17]** airport owned by the town. *Id. at 93*. During the first few years of the lease, the plaintiff only operated during the summer. *Id.* In 1984, the plaintiff sought to begin offering off-season service, too,

[2] Specifically, the alleged murky circumstances were that "early in 1960 the Authority, acting through one of its members, contacted [the competitor] and as a result of subsequent meetings the Authority and [the competitor] entered into a conspiracy under which the Authority would refuse to allow the plaintiff to remain at Logan . . . and that [the competitor] would then take over their operations and become the sole and exclusive fixed base operator at Logan." *Id. at 54-55*.

but the town board refused to allow the change. *Id.* In response, the plaintiff brought an antitrust lawsuit against the town, various town officials, and a competing airline that was allowed to operate during the off-season. *Id.* The district court granted the defendants' motion to dismiss and the Second Circuit affirmed, holding that the town enjoyed immunity under *Parker*'s state-action doctrine because the New York legislature had enacted various statutes that "confer authority upon municipalities to operate local airports" and these statutes amounted to a "delegation of authority . . . that municipal airport operators may enter into exclusive lease arrangements." *Id. at 95-96*. The court further noted that, given this conclusion "that the state action doctrine bar[s] the antitrust claims against the Town of East Hampton, there is no basis for holding that [the competitor airline] conspired with the Town to violate the antitrust laws." *Id. at 97*.

The next relevant decision is *California Aviation, Inc. v. City of Santa Monica, 806 F.2d 905 (9th Cir. 1986)*. In 1966, the plaintiff entered into **[**18]** a 30-year lease with the city of Santa Monica to lease space at the Santa Monica municipal airport. *Id. at 907*. The lease included a provision that forbade the plaintiff from selling certain petroleum products for lower prices than the City charged. *Id.* The plaintiff brought an antitrust lawsuit against the City, arguing this contractual term amounted to "unlawful **[*894]** price fixing and unfair competition," but the district court granted the City's motion for summary judgment and the Ninth Circuit affirmed, holding that the City was entitled to immunity under the *Parker* state-action doctrine, even though "no state statute articulates and affirmatively expresses a state policy of allowing municipalities to fix the minimum price of fuel at airports," because the California legislature had enacted other statutes that generally authorized municipalities to enter into exclusive contracts when operating airports. *Id. at 907-08* (citation omitted).

Finally, in 2010, the First Circuit decided *Rectrix Aerodrome Ctrs. v. Barnstable Mun. Airport Comm'n, 610 F.3d 8 (1st Cir. 2010)*. There, the plaintiff was a company that entered into a lease in 2002 to operate a hangar at a municipal airport owned by the town of Barnstable. *Id. at 9*. The counterparty to the lease was the Barnstable Municipal Airport Commission, an **[**19]** entity that had been created by the town and was vested under state law with "various powers relating to airport operations, including, among other things, the power[s] to lease land." *Id. at 9 n.1*. After the Commission refused to allow the plaintiff to sell jet fuel, the plaintiff asserted antitrust claims against the Commission, several of its managers and executives, and its outside counsel. *Id. at 9*. The district court granted the defendants' motion to dismiss and the First Circuit affirmed. The court began by noting that, "[a]lthough not automatically treated as states, municipal entities (like BMAC) can invoke state action immunity—as can municipal officials acting for them—if they act pursuant to a 'clearly articulated and affirmatively expressed' state policy to displace competition with regulation." *Id. at 13* (citations omitted). The court concluded that Massachusetts had enacted such a state policy by passing a statute that authorized airport commissions to "adopt rules and regulations for the use of municipal airports." *Id.* (citation omitted). The court explained that, although "[t]his may seem a rather bland basis for attributing to the state legislature a purpose to allow the suppression of competition, **[**20]** . . . the case law has interpreted the protection hospitably." *Id.* The court further noted that "[c]ases from other circuits have similarly found that municipal airports can benefit from state action immunity" and the "operative [statutory] language was in many cases similar." *Id.*

2. Taxicab Concession Cases

In *Padgett v. Louisville & Jefferson County Air Board, 492 F.2d 1258 (6th Cir. 1974)*, a group of independent taxicab operators brought antitrust claims against the Louisville and Jefferson County Air Board—a "quasi-governmental agency" responsible for operating an airport in Kentucky—after the agency rejected their bids for a taxicab concession at the airport and awarded the concession to a competing company. *Id. at 1258*. The district court granted the agency's motion to dismiss and the Sixth Circuit affirmed, holding that the agency was immune from suit under *Parker* because Kentucky had "legislatively created [the agency] whose charge is, inter alia, to operate the airport. There is no question in our own minds but that the regulation of ground transportation services is necessarily incident to the management and operation of the airport facilities." *Id.* Thus, the court "conclude[d] that the Board in contracting for cab service at the airport was exercising a valid governmental **[**21]** function to which the antitrust laws do not apply." *Id.*

Similarly, in *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co., 760 F.2d 607 (5th Cir. 1985)*, a group of independent taxicab operators, who had submitted an unsuccessful bid to the city of Houston for an exclusive concession over passenger service at the **[*895]** Houston airport, brought an antitrust lawsuit against the City and the competitor who'd been awarded the concession. *Id. at 609-10*. The district court granted summary judgment to the defendants and the Fifth Circuit affirmed, holding that "the City of Houston is immune from federal antitrust liability for its treatment of taxicabs at [the Houston] Airport" because the Texas legislature had enacted a statute that "specifically authorized its municipalities to grant contracts for the provision of goods and services at their airports." *Id. at 610* (citation omitted). Although this statute did not specifically mention how cities should regulate the provision of taxicab services at airports, the court concluded its "broad phrasing is a strong indication of the state's desire to abdicate in favor of municipal prescience with regard to airport management." *Id.*

B. **District Court Decisions**

In *Hillman Flying Service, Inc. v. City of Roanoke, 652 F. Supp. 1142 (W.D. Va. 1987)*, the plaintiff conducted operations at a municipal airport owned by the city of Roanoke pursuant **[**22]** to a lease with the City. *Id. at 1144*. Although a competing business at the airport was allowed to sell aviation fuel, the City forbade the plaintiff from doing so. *Id.* In response, the plaintiff brought an antitrust lawsuit against the City and four of its officials, as well as the competitor and one of its vice presidents, alleging that the fuel-sale prohibition was the product "of an illicit conspiracy between [the competitor] and the city" and infusing its complaint "with very serious charges of bribery, strong arm tactics, and impropriety by the defendants." *Id.* The district court granted the defendants' motion to dismiss, holding (as relevant here) that they were entitled to immunity from the plaintiff's Sherman Act claims under the *Parker* state-action doctrine. *Id. at 1145-46*. In reaching this conclusion, the court emphasized that the Virginia legislature had enacted statutes that afforded municipalities "the general authority" to operate airports. *Id.* Although these statutes did "not expressly anticipate exclusive or anticompetitive arrangements," the court concluded that "a legislature's express endorsement of anticompetitive behavior is unnecessary for a municipality's immunity under the antitrust **[**23]** laws." *Id.*

Queen City Aviation, Inc. v. City of Allentown, 1992 U.S. Dist. LEXIS 9042, 1992 WL 131148 (E.D. Pa. 1992), involved similar allegations. There, the plaintiff conducted operations at a municipal airport owned by the city of Allentown pursuant to a lease with the City. *1992 U.S. Dist. LEXIS 9042, [WL] at *1*. When the lease expired, the City "made public a proposal package for Request for Proposals to lease" the space and ultimately accepted a bid submitted by one of the plaintiff's competitors. *Id.* In response, the plaintiff filed an antitrust lawsuit against the City, arguing—just as Plaintiffs argue here—that "[t]he bid specifications and procedures . . . were inconsistent, ambiguous, vague and contrary to law for a variety of reasons" and that the City had "exhibited an animus toward the plaintiff and . . . acted in an unfair and discriminatory manner." *Id.* The district court granted the City's motion to dismiss, noting that "plaintiff's complaint is nothing more than an expression of its disappointment that city officials, after inviting bids, decided to offer its franchise . . . to someone else." *1992 U.S. Dist. LEXIS 9042, [WL] at *2*. The court elaborated that "the circumstances plaintiff alleges simply do not give rise to the level of a violation of the Sherman Act *§§ 1* and *2*." *1992 U.S. Dist. LEXIS 9042, [WL] at *4*.

Finally, in *Deak-Perera Hawaii, Inc. v. Department of Transportation, State of Hawaii, 553 F. Supp. 976 (D. Haw. 1983)*, the plaintiff was a company that provided exchange services **[**24]** for foreign currency. *Id. at 978-79*. For 20 years, the plaintiff was granted an exclusive concession by the Hawaii **[*896]** State Department of Transportation to provide such services at the Honolulu International Airport. *Id.* However, in 1982, after the plaintiff's concession expired, the department awarded the concession to a competitor, rejecting the plaintiff's bid. *Id.* In response, the plaintiff brought an antitrust lawsuit against the department and several of its executives. *Id. at 977*. The district court granted the defendants' motion for summary judgment, holding that they qualified for immunity under the *Parker* state-action doctrine because (1) the department was "legally an instrumentality of the State of Hawaii" (2) even if it were merely considered a political subdivision of the state, the state had enacted statutes authorizing the department to enter into the type of exclusive-dealing contract being challenged. *Id. at 982-89*.

II. <u>The County Is Entitled To Judgment On The Pleadings</u>

A. **Immunity Under The State-Action Doctrine**

In their motion to dismiss, SOCAA and Shankland argued, among other things, that they are entitled to immunity under the *Parker* state-action doctrine. Specifically, they argued that *Parker* is applicable **[**25]** here because various provisions of Arizona law authorize SOCAA to operate the Sedona Airport. (Doc. 81 at 8-10). In their response, Plaintiffs argued the state-action doctrine is inapplicable because (1) "the Arizona statutes do not state or imply that SOCAA may engage in anti-competitive conduct in administering the Sedona Airport," (2) the state of Arizona doesn't supervise SOCAA's operation of the airport, and (3) state supervision is necessary under *Parker* because SOCAA itself isn't a municipality. (Doc. 89 at 8-9.) In their reply, SOCAA and Shankland argued that (1) SOCAA qualifies as an instrumentality of the County under Arizona statutory law and caselaw, so state supervision isn't required under *Parker*, and (2) the state statutes authorizing it to run the airport don't need to specifically authorize anticompetitive behavior in order to trigger immunity under *Parker*. (Doc. 101 at 3-6.)

Although Plaintiffs have now dismissed their claims against the SOCAA defendants (Doc. 115), the potential availability of immunity under the state-action doctrine remains a relevant consideration. This is because Plaintiffs are asserting conspiracy claims against the County predicated on an agreement **[**26]** between the County and SOCAA to violate the antitrust laws. Thus, if the SOCAA defendants are entitled to immunity under *Parker*, Plaintiffs' claims against the County also must fail. *Montauk-Caribbean Airways, 784 F.2d at 97* (given the conclusion "that the state action doctrine bar[s] the antitrust claims against the Town of East Hampton, there is no basis for holding that [the competitor airline] conspired with the Town to violate the antitrust laws"); *see also E.W. Wiggins Airways, 362 F.2d at 56*.[3]

The Court concludes that the SOCAA defendants are, in fact, entitled to immunity under the state-action doctrine. As noted in Part A above, courts have repeatedly invoked this doctrine when rejecting antitrust claims against airports and airport operators. When the entity responsible for operating an airport is a literal arm of the state—as was the case in **[*897]** *Deak-Perera Hawaii* (the Hawaii Department of Transportation)—the doctrine's applicability is obvious. In contrast, when the entity is a town, city, or county, the analysis becomes more complicated and requires consideration of whether the municipality's "anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.'" **[**27]** *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 39, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)* (quoting *Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978))*.

Such a state policy exists here. Arizona law specifically provides that "[t]he governing body of a city or town or the board of supervisors of a county may . . . [a]cquire, establish, construct, own, control, lease, equip, improve, maintain, operate and regulate airports for the use of aircraft within or outside the limits of the city, town or county." *A.R.S. § 28-8411(A)(1)*. The only limitation on this power is that the town, city, or county may not "restrict or limit the length or width of an airstrip or runway used for the landing and takeoff of aircraft." *Id. § 28-8411(B)(1)*.

Plaintiffs argue these statutes are insufficient to trigger immunity under *Parker* because they don't expressly authorize municipalities to engage in anticompetitive behavior when operating airports. This argument is unavailing. As the Supreme Court has explained, a state legislature need not "expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects." *Town of Hallie, 471 U.S. at 43*. Instead, the statute need only "clearly contemplate that a city may engage in anticompetitive conduct" or render such anticompetitive conduct a "foreseeable result" of what it authorizes. *Id. at 42*. *See also City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 372-73, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)* **[**28]** ("We have rejected the contention that this requirement can be met only if the delegating statute explicitly permits the displacement of competition . . . . It is enough, we have held, if suppression of competition is the 'foreseeable result' of what the statute authorizes . . . .") (quoting *Town of Hallie, 471 U.S. at 42*)). Because the statutory provisions at issue here vest Arizona municipalities with such broad authority to operate airports, they contemplate

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[3] Additionally, although the County didn't raise the issue of *Parker* immunity in its renewed motion for judgment on the pleadings, it seems to the Court that the County would have an even stronger claim under *Parker* than SOCAA. As noted *infra*, one of Plaintiffs' arguments here is that SOCAA doesn't qualify for immunity because it's a non-governmental entity. That argument obviously wouldn't apply to the County.

anticompetitive conduct on the part of municipal airport operators and render such conduct foreseeable. These provisions are functionally identical to many of the statutory provisions that were deemed sufficient to trigger *Parker* immunity in the cases identified in Part A above. *See, e.g., Rectrix Aerodrome Ctrs., 610 F.3d at 13* (Massachusetts law was sufficient under *Parker*, even though it only "adopt[ed] rules and regulations for the use of municipal airports," because although "[t]his may seem a rather bland basis for attributing to the state legislature a purpose to allow the suppression of competition, . . . the case law has interpreted the protection hospitably") (citations omitted); *Pueblo Aircraft, 679 F.2d at 807-08* (Colorado law was sufficient under *Parker* because it "specifically authorized the City to acquire and operate a municipal airport and [declared] that such acquisition and operation [qualify as] 'public, governmental functions, exercised for a public purpose and matters of public necessity'"); *Indep. Taxicab Drivers' Emps., 760 F.2d at 610* (Texas law was sufficient under *Parker*, even though it didn't specifically mention how cities should regulate taxicab services at airports, because the statutes' "broad phrasing is a strong indication of the state's desire to abdicate in favor of municipal prescience with regard to airport management"); **[*898]** *Hillman Flying Serv., 652 F. Supp. at 1145-46* (Virginia law was sufficient under *Parker*, even though the relevant statutes did "not expressly anticipate exclusive or anticompetitive arrangements," because they afforded municipalities "the general authority" to operate airports).

Finally, Plaintiffs are also incorrect in their assertion that the immunity analysis requires an additional step here (*i.e.*, proof of active supervision by the state) because SOCAA is a private organization, not a town or county. Under Arizona law, SOCAA is considered a "body politic" that is "exercising its powers for the benefit of the people, for the improvement of the people's health and welfare and for the increase of the people's traffic and prosperity." *A.R.S. § 28-8424(A)*. The courts have treated such entities as functionally identical to cities, towns, and counties for purposes of the *Parker* immunity analysis. *See, e.g., Rectrix Aerodrome Ctrs., 610 F.3d at 9* & *9 n.1, 13* (treating as a "municipal entity" and granting immunity **[**29]** to the Barnstable Municipal Airport Commission, an entity that had been created by the town and was vested under state law with "various powers relating to airport operations, including, among other things, the power[] to lease land"); *Padgett, 492 F.2d at 1258* (granting immunity to the Louisville and Jefferson County Air Board, a "quasi-governmental agency" responsible for operating an airport in Kentucky).

B. **Plausibility**

Plaintiffs' claims against the County also fail for an independent reason. The Court previously rejected those claims because "Plaintiff simply does not allege facts sufficient to demonstrate that Yavapai County did anything more than own the Sedona Airport during the RFP process." (Doc. 69 at 5.) In its renewed motion for judgment on the pleadings, the County argues the new factual allegations in the amended complaint remain insufficient to show it was part of any illicit agreement. (Doc. 79 at 9-10, 12.)[4] In their response, Plaintiffs argue their new allegations are sufficient and emphasize the allegations concerning the "communications between SOCAA's president and County Supervisor Garrison," which they contend "evidence an agreement to oust Dakota and install Guidance." (Doc. 85 at 8-11.) **[**30]**

The Court agrees with the County that the amended complaint remains deficient. For example, one of the new factual allegations pertaining to the County is that, on March 14, 2017, SOCAA's president (Cagliero) sent an email to a County representative (Garrison) to suggest a meeting to address SOCAA's "problem tenant." (Doc. 72 ¶ 32.) The email stated there had been "developments in the litigation that [] could be better addressed by a joint Airport Authority/Yavapai County team." (*Id.*) Plaintiffs then allege that "[i]n furtherance of the 'Airport Authority/Yavapai County team's' goal of dealing with the 'problem tenant,' on March 24, 2017, ten days after Cagliero emailed Garrison, SOCAA attorney Tony Cullum transmitted a letter to Dakota beginning the process of terminating the

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[4] The County also seeks judgment on the pleadings because (1) Plaintiffs fail to allege it possessed monopoly power in the relevant market, as required for a *section 2* claim and (2) Plaintiffs fail to allege a plausible "antitrust injury," as required for both a *section 1* and *section 2* claim. (Doc. 79 at 7-13.) Additionally, the County argues that Plaintiffs' request for injunctive relief is improper because (1) Plaintiffs have not stated a valid claim under the Sherman Act and (2) the amended complaint doesn't identify any ongoing conduct by the County that is causing or threatens to cause future harm. (*Id.* at 13.) The Court declines to reach these arguments because it is ruling in the County's favor on alternative grounds.

Dakota Lease." (*Id.* ¶ 33.) **[*899]** According to Plaintiffs, "[w]ith SOCAA and Yavapai's plan in place, SOCAA began negotiating a 'settlement' of the Litigation with Dakota." (*Id.* ¶ 34.)

But Plaintiffs also acknowledge in the amended complaint that "despite the purported requirements of the RFP, the Yavapai County Board of Supervisors . . . did not participate in the initial award decision. No one from [Yavapai County] **[**31]** was present at the June 26, 2017 meeting, although Yavapai County officials provided input to the RFP process and later approved the sublease." (*Id.* ¶ 73.) Plaintiffs' main allegation against the County, thus, seems to be that it "ignored a material term of the Master Lease and approved the Guidance sublease." (*Id.* ¶ 88.)

Such allegations do not plausibly suggest an illegal agreement or conspiracy between the County and any other defendants. Plaintiffs have pleaded facts showing only that an officer of SOCAA sent an email to a County official suggesting a meeting and that the County later approved the SOCAA-Guidance Sublease. Although Plaintiffs include the phrases "SOCAA and Yavapai's plan" (*id.* ¶ 34) and "Airport Authority/Yavapai County team" (*id.* ¶¶ 33, 39), they fail to include any concrete factual allegations regarding what this plan was or what this team did. Moreover, it is unremarkable that SOCAA might refer to Dakota as a "problem tenant" at the time this email was sent, given that SOCAA and Dakota were embroiled in pending civil litigation at the time. The fact such an email was sent to a County representative (who had a legitimate need to be apprised of the status of ongoing **[**32]** litigation), coupled with a request for a future meeting, does not give rise to a legitimate inference that the purpose of the requested meeting was to hatch a plan to violate the antitrust laws by creating a sham RFP process. *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1049 (9th Cir. 2008)* ("Allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws.").

In sum, Plaintiffs have not pleaded "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement" involving the County, given that Plaintiffs have not alleged the County had any other involvement or interaction with the other defendants regarding the sublease. *Twombly, 550 U.S. at 556*. No allegations in the complaint plausibly suggest that the County's ultimate approval of the SOCAA-Guidance Sublease resulted from any conspiracy or agreement between the County and the other defendants.

III. Scope of Dismissal

"[L]eave to amend may be denied . . . if amendment of the complaint would be futile." *Albrecht v. Lund, 845 F.2d 193, 195 (9th Cir. 1988)*. "An amendment is futile when 'no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient **[**33]** claim or defense.'" *Missouri ex rel. Koster v. Harris, 847 F.3d 646, 656 (9th Cir. 2016)* (citation omitted). Moreover, when a court has already granted the plaintiff leave to amend, the court has "particularly broad" discretion in deciding whether to grant further leave to amend. *Chodos v. W. Publ'g Co., 292 F.3d 992, 1003 (9th Cir. 2002)* (citation omitted).

The Court denies further leave to amend here. There are no new factual allegations Plaintiffs could offer to overcome the deficiencies identified above.

Accordingly, **IT IS ORDERED** that:

[*900] 1. The County's motion for judgment on the pleadings (Doc. 79) is **granted**;

2. The Amended Complaint (Doc. 72) is **dismissed with prejudice** as to the County; and

3. The Clerk of Court shall enter judgment accordingly and terminate this action. Dated this 10th day of April, 2019.

/s/ Dominic W. Lanza

Dominic W. Lanza

United States District Judge

Nicolosi Distrib. v. Finishmaster, Inc.

United States District Court for the Northern District of California, San Jose Division

April 10, 2019, Decided; April 10, 2019, Filed

Case No. 18-cv-03587-BLF

Reporter
2019 U.S. Dist. LEXIS 62079 *; 2019-1 Trade Cas. (CCH) P80,736; 2019 WL 1560460

NICOLOSI DISTRIBUTING, INC., Plaintiff, v. FINISHMASTER, INC., et al., Defendants.

Prior History: *Nicolosi Distrib. v. FinishMaster, Inc., 2018 U.S. Dist. LEXIS 139266, 2018 WL 3932554 (N.D. Cal., Aug. 16, 2018)*

Core Terms

discounts, alleges, distributors, paint, shops, customers, purchasing, personal jurisdiction, relevant market, up-front, rebates, geographic, leave to amend, body shop, smaller, seller, price discrimination, products, supplies, secret, fails, cause of action, Sherman Act, offering, motion to dismiss, interchangeable, competitor, selling, buyers, prices

Counsel: **[*1]** For Nicolosi Distributing, Inc., Plaintiff: Elizabeth Betowski, LEAD ATTORNEY, Herman Franck, Franck and Associates, Sacramento, CA.

For FinishMaster, Inc., Uni-Select, Inc., Defendants: David Craig Kiernan, LEAD ATTORNEY, Craig Ellsworth Stewart, Hilary Ann Soloff, Jones Day, San Francisco, CA.

Judges: BETH LABSON FREEMAN, United States District Judge.

Opinion by: BETH LABSON FREEMAN

Opinion

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS WITH LEAVE TO AMEND IN PART AND WITHOUT LEAVE TO AMEND IN PART

[Re: ECF 53]

Before the Court is Defendants FinishMaster, Inc. ("FinishMaster") and Uni-Select, Inc.'s ("Uni-Select") motion to dismiss Plaintiff Nicolosi Distributing, Inc.'s ("Nicolosi") First Amended Complaint. Mot., ECF 53. The Court held a hearing on the motion on March 7, 2019. For the reasons stated on the record and as set forth below, the motion is GRANTED WITH LEAVE TO AMEND IN PART AND WITHOUT LEAVE TO AMEND IN PART.

I. BACKGROUND

In its order denying Plaintiff's motion for preliminary injunction and granting Defendants' motion to dismiss Plaintiff's Complaint, the Court detailed the factual background of this case. *See* MTD Order, ECF 49. In brief, Nicolosi is a small distributor of automotive paints and supplies **[*2]** in the San Francisco Bay Area. First Am. Compl. ("FAC") ¶¶

29, 38, ECF 50. FinishMaster, a wholly owned subsidiary of Uni-Select, is a large automotive paint and supplies distributor and a direct competitor of Nicolosi. FAC ¶¶ 30-32. In this action, Nicolosi accuses Defendants of various antitrust violations resulting from FinishMaster's alleged use of exclusive dealing contracts with autobody shops (including huge up-front payments by FinishMaster and super-deep price discounts for the customer), its acquisition of smaller competitor-distributors, and its unlawful tying of products. *See generally* FAC. Nicolosi also accuses Defendants of unlawful discriminatory pricing.

The Court previously granted with leave to amend Defendants' motion to dismiss Plaintiff's Complaint ("MTD Order"). The Court first details that order and then describes the new allegations in Plaintiff's FAC aimed at remedying the deficiencies the Court identified in its MTD Order.

A. The Court's MTD Order

In its MTD Order, the Court held that Nicolosi failed to state a claim for any of its four causes of action (under *Sections 1* and *2* of the *Sherman Act* and related state law claims) and that Nicolosi failed to allege that the Court **[*3]** has personal jurisdiction over Uni-Select.

The Court first analyzed Nicolosi's cause of action under *Section 1* of the Sherman Act, *15 U.S.C. § 1*. The Court held that Nicolosi had, for several reasons, failed to demonstrate that FinishMaster's exclusive dealing contracts "sufficiently foreclosed competition in a substantial share of the line of commerce affected," as required to state a claim under *Section 1*. MTD Order at 6.

First, Nicolosi failed to plausibly allege that Bay Area A-list shops who purchase Axalta paint constitute the relevant market. Geographically, Nicolosi failed to demonstrate why the nine-county Bay Area constituted the appropriate "area of effective competition where buyers can turn for alternate sources of supply." *Id.* at 6-7 (quoting *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1490 (9th Cir. 1991))*. Nicolosi also had improperly defined the market based on the type of customer—namely the list level of body shops—as opposed to based on the products sold. *Id.* at 7 (citing *Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1045 (9th Cir. 2008))*. Because Nicolosi had not distinguished A-, B-, and C-list shops in terms of their ability or desire to purchase paint, it had not properly alleged that B- and C-list shops should be excluded from the relevant market. Similarly, Nicolosi failed to allege why Axalta paint did not have economic substitutes in **[*4]** the market that should be included in the market definition. *Id.*

Second, Nicolosi failed to demonstrate that FinishMaster had foreclosed a substantial share of the market because it had alleged that Finishmaster had at most 33% of the market share, but even that amount was dubious given the allegation that other major distributors exist in the market and potentially share in the unaccounted-for 33% of the market. *Id.*

Third, and finally, Nicolosi failed to allege that FinishMaster's activities had any anti-competitive effects in the market, such as reduced economic output or increased prices for consumers. *Id.* at 7-8.

The Court then held that these deficiencies also barred Nicolosi's *Section 2* claim. Nicolosi's failure to plausibly allege an appropriate relevant market, what percentage of the market FinishMaster had captured, and any anti-competitive impacts on the market caused by FinishMaster's acts doomed its *Section 2* claim. Because the Court dismissed both federal law claims, it also dismissed Nicolosi's derivative state law claims. *Id.* at 8-9.

The Court then held that Nicolosi failed to plausibly allege that the Court has personal jurisdiction over Uni-Select. Nicolosi did not rely on general jurisdiction, but instead **[*5]** alleged that the Court had specific jurisdiction over Uni-Select seemingly based on Uni-Select's status as FinishMaster's parent company (and thus based on FinishMaster's actions in the state) and based on Uni-Select's actions in the state through its provision of funds directly to FinishMaster. The Court rejected both sets of allegations as insufficient to allege personal jurisdiction over Uni-Select.

B. The First Amended Complaint

In its First Amended Complaint, Nicolosi attempts to remedy the deficiencies identified in this Court's MTD Order and brings additional claims against Defendants. *See* Opp. at 1-2, ECF 54 (chart setting forth new allegations and deficient areas they attempt to address).

Nicolosi includes new allegations aimed at more clearly delineating the relevant market. As to geography, it reduces the size of the market from a nine-county Bay Area market to a four-county Bay Area market. *See, e.g.*, FAC ¶¶ 40, 106. Nicolosi supports this geographic limitation by alleging that customers generally require delivery of the paint on a same-day basis. FAC ¶ 105. As such, distributors, including FinishMaster, have a "pattern and practice" of having distribution centers "in close proximity **[*6]** to the auto body shop customers," leading to shops throughout each county. FAC ¶¶ 105, 107, 110. Moreover, the distributors have agreements that are granted on a "county-by-county basis," based on "long-established custom and practice of the paint manufacturers." FAC ¶ 105. Nicolosi alleges that each of these facts indicates that the market should be defined as a "local county-by-county geographic market." FAC ¶ 110. Nicolosi also added allegations to support its argument that Axalta paint does not have economic substitutes in the market. Though Nicolosi admits that paint brands are "more or less interchangeable" and that a "shop can switch" the paint brand it purchases, Nicolosi alleges that "it's a hugely complicated process that is in fact rarely done." FAC ¶ 162. By contrast, Nicolosi did not add new allegations to further delineate the A-, B-, and C-list shops in terms of their willingness or ability to purchase paint. Though at times Nicolosi appears to allege that the relevant market is A- and B-list shops, elsewhere he clearly limits the market to A-list shops only. *See, e.g.*, FAC ¶¶ 66, 101.

As to FinishMaster's market share, Nicolosi alleges that FinishMaster has approximately **[*7]** 85% of the A-list body shop market. FAC ¶¶ 66, 101, 143. Elsewhere, Nicolosi alleges that smaller distributors "account for selling approximately two-thirds of the Bay Area Market." FAC ¶ 66.

As to the anti-competitive impacts on the market, Nicolosi alleges that FinishMaster's vertical exclusive supply and tying restraints do not enhance Interbrand competition or provide other market efficiencies because they have not improved FinishMaster's provision of services to customers. FAC ¶¶ 44-47, 112. FinishMaster's exclusive dealing contracts, which come with deep up-front payments and discounts to the customer, in tandem with FinishMaster's purchasing of small distributors in the area, has kept other smaller distributors from selling to A-list customers, and leads to a cycle of FinishMaster purchasing smaller distributors and gaining more of the market. FAC ¶¶ 66, 125. Nicolosi alleges that, at least as to one business, if FinishMaster were not allowed to use exclusive supply agreements, Nicolosi could "provide a matching or better offer" to the customer. FAC ¶ 92.

As to the Court's personal jurisdiction over Uni-Select, Nicolosi alleges that Uni-Select funds FinishMaster's actions, intending **[*8]** as part of its business strategy for FinishMaster to use the money to purchase smaller distributors and fund the up-front discounts to the A-list customers in California. FAC ¶¶ 8, 31, 34, 51-55, 78, 233-34, 247, 264. It also alleges that Uni-Select has substantial contacts with California because FinishMaster has activities throughout California, and Uni-Select is FinishMaster's parent company. FAC ¶¶ 32, 33.

As with the original Complaint, based on these alleged actions, Nicolosi asserts the following causes of action: (1) violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*, for entering into agreements in restraint of trade; (2) violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*, for unlawful monopolization and/or attempted monopolization; (3) violation of the *Cartwright Act*, *California Bus. & Prof. Code §§ 16720*, *16726*; and (4) violation of *Cal. Bus. & Prof. Code § 17200, et seq.*

Nicolosi also asserts the following new causes of action against Defendants, supported by new allegations: (5) price discrimination in violation of the *Robinson-Patman Act*, *15 U.S.C. § 13(f)*; (6) secret rebates in violation of *Cal. Bus. & Prof. Code § 17045*; (7) tying in violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*; and (8) tying in violation of *Cal. Bus. & Prof. Code § 16727*.

To support its Robinson-Patman Act claims, Nicolosi alleges that Defendants knowingly induce and receive discriminatory price discounts **[*9]** from Axalta, the paint manufacturer, that are not offered to Nicolosi and other small distributors. FAC ¶¶ 202-240. First, Nicolosi alleges that Axalta gives FinishMaster a $10 million discount on its purchases, but this discount was never offered to Nicolosi. FAC ¶¶ 205-10. Defendants allegedly knew that Nicolosi never received this discount because they purchased all of the distributors large enough to make a similar $10 million order, and because the discount is offered in rush circumstances and FinishMaster knows it is the "go-to entity" in such circumstances because other smaller distributors cannot qualify for such purchases so quickly. FAC ¶¶ 208-09. Second, Nicolosi alleges that Axalta helps FinishMaster provide the up-front discounts offered to the body shops. FAC ¶¶ 223-26. Nicolosi alleges it was never offered similar discounts, FAC ¶ 229; however, it also alleges that Axalta offers it the "top-level of discounts in exactly the same way and level as are similarly available to FinishMaster" and that Axalta "has a corporate policy of giving all distributors the same discount packages." FAC ¶¶ 85-86; *see also* FAC ¶¶ 91-92 (alleging Axalta gave Nicolosi "special discounting **[*10]** arrangements").

These same allegations underpin Nicolosi's secret rebate claim. *See, e.g.*, FAC ¶¶ 245, 247 (alleging $10 million discount and up-front discount are not offered to Nicolosi on same terms). Nicolosi claims that both the $10 million discount and the up-front monies discount are kept secret. FAC ¶¶ 247-48. Nicolosi is injured by these acts because Axalta is helping its competitor and keeping it out of the market. *See, e.g.*, FAC ¶ 250-57.

Finally, Nicolosi alleges that in FinishMaster's exclusive supply agreements with body shops, it unlawfully ties the purchase of paint to the purchase of all nonpaint supplies. FAC ¶¶ 258-84. As proof, Nicolosi quotes portions of an exclusive supply agreement FinishMaster uses that says that the customer "shall purchase 100% of its paint and material requirements exclusively" from FinishMaster. FAC ¶ 272. These tying arrangements have excluded Nicolosi from selling even nonpaint products to A-list autobody shops. *See, e.g.*, FAC ¶ 267.

II. LEGAL STANDARD

"A motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim upon which relief can be granted 'tests the legal sufficiency of a claim.'" *Conservation Force v. Salazar, 646 F.3d 1240, 1241-42 (9th Cir. 2011)* (quoting *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001))*. When determining whether a claim has been stated, **[*11]** the Court accepts as true all well-pled factual allegations and construes them in the light most favorable to the plaintiff. *Reese v. BP Exploration (Alaska) Inc., 643 F.3d 681, 690 (9th Cir. 2011)*. However, the Court need not "accept as true allegations that contradict matters properly subject to judicial notice" or "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)* (internal quotation marks and citations omitted). While a complaint need not contain detailed factual allegations, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

If the Court concludes that the complaint should be dismissed, it must then decide whether to grant leave to amend. Under *Rule 15(a) of the Federal Rules of Civil Procedure*, leave to amend "shall be freely given when justice so requires," bearing in mind "the underlying purpose of *Rule 15* . . . [is] to facilitate decision on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)* (en banc) (internal quotation marks and citation omitted). Nonetheless, a district court may deny leave to amend a complaint **[*12]** due to "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *See* *Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 532 (9th Cir. 2008)*.

III. DISCUSSION

After reviewing the relevant briefing and hearing argument on the record, the Court finds that Nicolosi has failed to (1) state a claim for any of its eight causes of action; and (2) to demonstrate that this Court has personal jurisdiction over Uni-Select.

The Court first revisits Nicolosi's four original causes of action, and then discusses each new cause of action in turn. The Court then discusses personal jurisdiction over Uni-Select.

A. Claims 1-4: Sherman Act *Sections 1* and *2*; Cartwright Act, *Cal. Bus. & Prof. Code §§ 16720*, *16726*; and California Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200, et seq*.

The FAC defines the relevant product and geographic markets as "a submarket of distribution of Axalta-made automotive paint lines and 3M sandpaper, tape, masking paper, and other related non-paint auto body supplies to A- List auto body shops located in either of San Mateo County, Santa Clara County, Alameda County or San Francisco County." FAC ¶ 40. Nicolosi's FAC goes some way toward **[*13]** remedying the deficiencies from its Complaint with respect to the relevant market, such as the geographic scope and the limitation to Axalta paint. However, Nicolosi has made no modification to the limitation to A-list customers, as opposed to A-, B-, and C- list customers. In any event, on all three points Nicolosi has not plausibly alleged that FinishMaster has foreclosed a substantial enough portion of the relevant market to be liable under the Sherman Act and related state laws.

First, Nicolosi has narrowed its alleged geographic market from the nine-county Bay Area to only four counties—San Mateo, Santa Clara, Alameda, San Francisco—alleging that the market is defined by same-day delivery requirements. *See, e.g.*, FAC ¶ 105. Although same-day delivery may factually support a narrow geographic market, Nicolosi's inclusion of four neighboring counties is not plausible because there is no reason to exclude other neighboring counties, even under Plaintiff's own reasoning. For example, Plaintiff's market would exclude an autobody shop in Orinda (Contra Costa County) purchasing from a distributor in Oakland (Alameda County), where the distance between the two is only 8.6 miles. *See* Google **[*14]** Maps, maps.google.com (Oakland, CA to Orinda, CA). At the same time, Plaintiff's market would include an autobody shop in Livermore (Alameda County) purchasing from the same Oakland distributor, where the distance is 33 miles. *Id.* (Livermore, CA to Oakland, CA). Or more expansively, it would include an autobody shop in Gilroy (Santa Clara County) purchasing from a distributor in Livermore (Alameda County), where the distance is over 60 miles. *Id.* (Gilroy, CA to Livermore, CA). Because Nicolosi does not allege why these discrepancies make sense given the market, Nicolosi's narrow market is simply not plausible. *See* *Twombly, 550 U.S. at 570*. Though Nicolosi defines the geographic market in terms of its own customer base, *see* FAC ¶ 106, and alleges that distributors have stores on a "county-by-county" basis, FAC ¶ 105, these limitations do not explain the discrepancies above and thus are not enough to allege a plausible market. *See* *Sidibe v. Sutter Health, 4 F. Supp. 3d 1160, 1175 (N.D. Cal. 2013)* (holding complaint insufficiently alleged relevant geographic market in part because "Plaintiffs provide[d] no factual allegations to support drawing lines at [] county borders"); *see also* *Concord Assocs., L.P. v. Entm't Properties Tr., 817 F.3d 46, 53-55 (2d Cir. 2016)* (affirming dismissal of complaint because it did not plausibly allege that geographic market **[*15]** for racing/gambling market should be limited to the Catskills).

Second, Nicolosi seeks to limit the relevant market to a single paint brand, Axalta. But it acknowledges that paint brands are interchangeable and offers only a conclusory reason to limit the market to a single brand. The totality of Plaintiff's allegations is set forth in FAC ¶ 162, which states: "Paint brands are more or less interchangeable; yes a shop can switch, but it's a hugely complicated process that is in fact done rarely." This allegation simply is not sufficient to make Plaintiff's claim of lack of interchangeability plausible. *See* *Apple, Inc. v. Psystar Corp., 586 F. Supp. 2d 1190, 1198 (N.D. Cal. 2008)* (holding complaint did not plausibly allege single-brand market because "[s]ingle-brand markets are, at a minimum, extremely rare" and the complaint "fail[ed] to allege facts plausibly supporting the counterintuitive claim that Apple's operating system is so unique that is suffers *no* actual or potential competitors").

Third, Nicolosi asks this Court to find that A-list customers constitute a "customer-type submarket," and thus can be a relevant market. Opp. at 3-5. But black-letter law dictates that to define the relevant market, courts look to the geographic market and the *product* market, not **[*16]** the customer market. *See* *Brown Shoe Co. v. United States,* 370 U.S. 294, 324, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962) ("The 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country')."); Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1446 (9th Cir. 1988) ("The term 'relevant market' encompasses notions of geography as well as product use, quality, and description."). The product market is not defined in terms of the customer, but rather "includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." Oltz, 861 F.2d at 1446; *see also* United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956) ("[N]o more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce', monopolization of which may be illegal."). As the Ninth Circuit has made clear, "the relevant market must be a *product* market. The consumers do not define the boundaries of the market; the products or producers do." Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1045 (9th Cir. 2008) (emphasis in original) (footnote omitted) (citing Brown Shoe, 370 U.S. at 325). Put another way, "[t]he relevant market . . . includes the full range of selling opportunities reasonably open to rivals, namely, all the product and geographic sales they may readily compete for, using easily convertible plants and marketing **[*17]** organizations." Omega Envt'l., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162 (9th Cir. 1997) (quoting 2A Philip E. Areeda et al., ***Antitrust Law*** ¶ 570b1 at 278 (1995)).[1]

Here, Nicolosi has not alleged why B-list and C-list shops should not be "include[d] in the full range of selling opportunities reasonably open" to Nicolosi as a rival of FinishMaster. Because Nicolosi fails to allege why B- and C-list shops would not desire to or cannot purchase paint from Nicolosi or why Nicolosi could not otherwise sell to these shops, it has failed to show that these consumers should be excluded from the relevant market, particularly where there is only a single product at issue with no alleged differentiation. In fact, at the hearing on the motion, Nicolosi's counsel conceded that he created the term "A-list, and that "A-list" is not an accepted industry term.

With B- and C-list shops included in the market, Nicolosi alleges at most that FinishMaster has 33% of the market, *see* FAC ¶ 66(f), but even that is not a plausible inference because Nicolosi alleges that the "smaller" distributors have two-thirds of the market share, leaving the three larger distributors (one of which is FinishMaster) and the manufacturers themselves to share the remaining 33%. FAC ¶¶ **[*18]** 62, 66, 96. An allegation that the defendant has less than 33% market share is not sufficient to establish a Section 1 or Section 2 claim, particularly in light of the fact that the FAC does not provide any details concerning the exclusivity agreements themselves, such as the duration of the agreements or what proportion of FinishMaster's sales are a result of such agreements. *See* Feitelson v. Google Inc., 80 F. Supp. 3d 1019, 1029-30 & n.8 (N.D. Cal. 2015) (substantial share is "40-50% of the relevant market"); Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1438 (9th Cir. 1995) (50% and 30% market shares are presumptively insufficient to establish market power for actual and attempted monopolization claims, respectively). What's more, Nicolosi still fails to plausibly allege that any of FinishMaster's actions, be it buying up smaller distributors or entering into exclusive supply agreements, has an anticompetitive effect on the market, such as reduced output or increased prices. *See* Coal. for Icann Transparency Inc. v. Verisign, Inc., 464 F. Supp. 2d 948, 964 (N.D. Cal. 2006). Quite the contrary, Nicolosi alleges that these acts have led to price discounts for customers. *See* FAC ¶¶ 66, 88, 93.

For these reasons, Nicolosi's Sherman Act 1 and 2 claims fail. Because Nicolosi has already had the opportunity to amend as to these same deficiencies, further amendment would be futile. And because Nicolosi's state law claim under the Cartwright **[*19]** Act, California Bus. & Prof. Code §§ 16720, 16726, is based on the same underlying actions as its federal antitrust claims, its state law antitrust claim similarly fails. *See* Opp. at 15-17; Eastman v. Quest Diagnostics Inc., 724 F. App'x 556, 559 n.2 (9th Cir. 2018). Likewise, to the extent Nicolosi's claim under Cal. Bus. & Prof. Code § 17200, et seq., is premised on this conduct, it too fails.

For the foregoing reasons, Nicolosi's claims 1-4 are DISMISSED WITH PREJUDICE.

[1] Nicolosi's reliance on CACI 3414, *see* Opp. at 5, is misplaced, as that jury instruction pertains to defining the *geographic* market, not the product market.

B. Claim 5: Price Discrimination, Robinson-Patman Act, *15 U.S.C. § 13(f)*

Nicolosi's next claim is for unlawful price discrimination under the Robinson-Patman Act ("RPA"), *15 U.S.C. § 13(f)* based on Axalta allegedly giving FinishMaster 10% discounts on $10 million purchases and Axalta's sharing in FinishMaster's up-front rebates to body shops. *See, e.g.*, FAC ¶¶ 85-86, 91-92, 202-240.

The RPA "prohibits sellers from discriminating on price in the sale of like goods, and thereby reducing competition, unless the price differential can be justified by savings to the seller." *Gorlick Distribution Centers, LLC v. Car Sound Exhaust Sys., Inc., 723 F.3d 1019, 1021 (9th Cir. 2013)*. The RPA contains a counterpart provision that makes it unlawful for buyers "knowingly to induce or receive a discrimination in price which is prohibited by this section." *Id.* (quoting *15 U.S.C § 13(f)*). A buyer can only be liable under the RPA were "the seller is in violation of the Act as well." *Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1283 (9th Cir. 1983)*; *accord Great Atl. & Pac. Tea Co. v. F.T.C., 440 U.S. 69, 77, 99 S. Ct. 925, 59 L. Ed. 2d 153 (1979)* ("[B]uyer liability under *§ 13(f)* is dependent on seller liability **[*20]** under *§ 13(a)*."). Thus, Nicolosi must allege a violation of the RPA by Axalta under *Section 13(a)* by pleading the following four elements: "(1) the relevant sales were made in interstate commerce; (2) the products sold were of the same grade and quality; (3) that [the seller] discriminated in price as between [the plaintiff] and another purchaser; and (4) the discrimination had a prohibited effect on competition." *High Tek USA, Inc. v. Heat & Control, Inc., No. 12-CV-00805 YGR, 2012 U.S. Dist. LEXIS 100538, 2012 WL 2979051, at *4 (N.D. Cal. July 18, 2012)* (citing *Texaco Inc. v. Hasbrouck, 496 U.S. 543, 556, 110 S. Ct. 2535, 110 L. Ed. 2d 492 (1990))*. Moreover, to be liable for the seller's price discrimination, the buyer (FinishMaster) must know "both that (1) [it] was receiving a lower price than a competitor and (2) the seller would have 'little likelihood of a defense' for offering that price." *Gorlick, 723 F.3d at 1022*. Nicolosi fails to plausibly allege several of these elements.

First, Nicolosi has not plausibly alleged that Axalta discriminated in price as between Nicolosi and FinishMaster. In fact, Nicolosi's FAC alleges in several places that Nicolosi receives the same discounts as FinishMaster and that this equality is pursuant to Axalta policy. *See, e.g.*, FAC ¶¶ 85-86, 91-92. Though elsewhere Nicolosi alleges it was never offered the $10 million discount, FAC ¶¶ 217, 229, these allegations **[*21]** are contradicted by the FAC's other allegations. Without some additional evidence of discrimination, use of a volume discount does not plausibly imply price discrimination where there may be a legitimate reason that the seller is using such a discount. *See Automatic Canteen Co. of Am. v. FTC, 346 U.S. 61, 71, 73 S. Ct. 1017, 97 L. Ed. 1454, 49 F.T.C. 1763 (1953)*. Nicolosi also fails to allege that there was price discrimination between "two completed, substantially contemporaneous sales by the same seller." *Design & Office Concepts, Inc. v. Haworth, Inc.*, No. C-94-20905 PVT, 1995 WL 325986, at *1 (N.D. Cal. May 25, 1995). As to the 10% discount, the FAC is sparse on information regarding when and how Axalta offered the discounts to FinishMaster, and, equally importantly, what discounts it did or did not offer to Nicolosi around the same time for the same goods. As to the up-front rebates, the FAC is similarly deficient and does not clearly allege what up-front rebate help Axalta was or was not offering to Nicolosi when it was allegedly offering such help to FinishMaster. Moreover, Nicolosi has failed to demonstrate how such up-front rebates are tied to the sale of "tangible goods" to FinishMaster, considering the up-front rebates are offered to body shops (not distributors) and the rebate sharing is not otherwise allegedly related to FinishMaster's **[*22]** purchase of paint from Axalta. *See May Dep't Store v. Graphic Process Co., 637 F.2d 1211, 1214 (9th Cir. 1980)*. All of these deficiencies also make Nicolosi's allegations that it suffered injury because of such price discrimination implausible.

Second, Nicolosi has not plausibly alleged that FinishMaster knew that Axalta was engaging in any alleged price discrimination. Nicolosi's allegations of knowledge are largely conclusory. At most, Nicolosi factually alleges that FinishMaster knew that Axalta would go to it instead of other distributors to get quick $10 million revenues and that FinishMaster has bought up everyone big enough to make a similar $10 million order. FAC ¶¶ 206, 207, 209, 226. But such facts do not support a plausible inference that FinishMaster knew that Axalta was not offering such discounts to other distributors contemporaneously or would not offer such discounts to other distributors should they be able to qualify. Indeed, Nicolosi indicates it may have been able to qualify, but it itself does not know if Axalta would offer it the discount on certain payment terms. FAC ¶ 208. Without more facts about the price discrimination itself, and how FinishMaster would have known it was anything other than a lawful volume discount, the Court cannot **[*23]** plausibly infer that FinishMaster knowingly received or induced any alleged discriminatory prices. *Cf. Gorlick, 723 F.3d at 1021* (affirming grant of summary judgment because there was no evidence that the superior prices and discounts "resulted from anything other than the significant differences in how the two companies did business").

Because Nicolosi may be able to cure these deficiencies, and because Nicolosi has not previously had an opportunity to amend on this claim, claim 5 is DISMISSED WITH LEAVE TO AMEND.

C. Claim 6: Secret Rebates, *Cal. Bus. & Prof. Code § 17045*

Nicolosi next claims that Axalta's $10 million discount and rebate-sharing constitutes a secret rebate under *Cal. Bus. & Prof. Code § 17045*. *Section 17045* states that "[t]he secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful." A claim under *Section 17045* has three elements: "(1) there must be a secret allowance of an unearned discount; (2) there must be injury to a competitor; and (3) the allowance **[*24]** must tend to destroy competition." *PHL Variable Ins. Co. v. Crescent Fin. & Ins. Agency, Inc., No. 16-CV-01307-CAS, 2018 U.S. Dist. LEXIS 52210, 2018 WL 1577709, at *5 (C.D. Cal. Mar. 26, 2018)* (citations and internal quotation marks omitted).

This claim fails for many of the same reasons as Nicolosi's RPA claim fails. Because Nicolosi's allegations are internally inconsistent with respect to whether it received similar discounts as FinishMaster, these facts bely the argument that the $10 million discount was secret. Nicolosi also does not adequately allege that these discounts were "unearned," including by distinguishing the discount and the up-front rebates from lawful volume discounts. And as with its RPA claim, Nicolosi does not allege that these discounts were "not extended to all purchasers purchasing upon like terms and conditions" because it does not allege any contemporaneous purchase by Nicolosi for a different price. *But see Packaging Sys., Inc. v. PRC-Desoto Int'l, Inc., 268 F. Supp. 3d 1071, 1087 (C.D. Cal. 2017)* (holding that a court can plausibly infer a tendency to destroy competition from allegations of discriminatory pricing).

Because Nicolosi may be able to cure these deficiencies, and because Nicolosi has not previously had an opportunity to amend on this claim, claim 6 is DISMISSED WITH LEAVE TO AMEND.

D. Claims 7 & 8: Tying under Sherman Act *Section 1* and *Cal. Bus. & Prof. Code § 16727*

Finally, Nicolosi alleges that FinishMaster has unlawfully tied **[*25]** the sale of paint to the sale of related automotive products. At the hearing, Nicolosi's counsel confirmed that the only evidence Nicolosi has of this tying is that FinishMaster's exclusive dealing agreement with the body shops says that the body shops will purchase all of their paint and supplies from FinishMaster. *See* FAC ¶ 272. The contract does not say that FinishMaster required the body shops to purchase the supplies in order to purchase the paint. But to state a valid tying claim, Nicolosi must plausibly allege that FinishMaster "condition[ed] the sale of one product (the tying product) on the buyer's purchase of a second product (the tied product)." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1178 (9th Cir. 2016)* (citation omitted). A tie only exists where "the defendant improperly imposes conditions that explicitly or practically require buyers to take the second product if they want the first one." *Id.* (quoting 10 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 1752b (3d ed. 2011)). "Even when a defendant sells two distinct products and its customers buy them both, we must still ask whether the two products were tied together." Areeda & Hovenkamp, Fundamentals of ***Antitrust Law*** § 17.11B at 17-132 (4th ed. 2018). The contract alone does not **[*26]** raise any plausible inference that the shops *had* to buy the supplies in order to also buy the paint from FinishMaster. Because Nicolosi does not, and admittedly cannot, allege that FinishMaster conditioned the body shops' purchase of paint on their purchase of supplies, Nicolosi's tying claims fail as a matter of law.

As such, Nicolosi's claims 7 and 8 are DISMISSED WITH PREJUDICE.

E. Personal Jurisdiction Over Uni-Select

Nicolosi has also failed to plausibly allege that the Court has personal jurisdiction over Uni-Select. Nicolosi does not challenge the Court's ruling that Uni-Select is not subject to general jurisdiction here. MTD Order. at 9-10. As to specific jurisdiction, the FAC still asserts personal jurisdiction over Uni-Select based on its status as FinishMaster's parent company, its provision of funds to FinishMaster to fund up-front rebates to body shops, and its alleged involvement in FinishMaster's business strategy of purchasing smaller distributors and offering up-front rebates. *See, e.g.*, FAC ¶¶ 8, 31, 32, 78, 141. And Nicolosi again relies on the same evidence submitted in support of its opposition to Defendants' original motion to dismiss, including Uni-Select's annual reports, FinishMaster's **[*27]** press releases, excerpts from depositions of various individuals, and exemplar contracts. *See* Opp. at 23 (citing Franck Decl., Exhs. A-O, ECF 28-3). However, Nicolosi does not point to any specific information in this evidence that would bolster its personal jurisdiction argument. *See* Opp. 23-25 (citing evidence as a whole).

These three bases fail to establish personal jurisdiction. As the Court noted in its MTD Order, Uni-Select's role as a parent corporation is insufficient without allegations or evidence that Uni-Select has pervasive control over FinishMaster. *See* *Ranza v. Nike, Inc., 793 F.3d 1059, 1070-71 (9th Cir. 2015)*; *see also Holland Am. Line Inc. v. Wartsila N. Am., Inc., 485 F.3d 450, 459 (9th Cir. 2007)*. Likewise, Nicolosi still does not allege or provide evidence to show that provision of funds to FinishMaster by Uni-Select was "purposefully direct[ed]" at California, or FinishMaster's exclusive agreements therein. *See* *Williams v. Yamaha Motor Co., 851 F.3d 1015, 1023 (9th Cir. 2017)*. Nicolosi, who bears the burden of demonstrating personal jurisdiction, does not cite to a single case in which a parent corporation's mere funding of a subsidiary corporation or aiding in corporate strategy was sufficient to establish minimum contacts with the forum state. Thus, these alleged facts and the accompanying evidence are insufficient to establish personal jurisdiction over Uni-Select. Because **[*28]** Nicolosi has had the opportunity to amend on this point before, further amendment would be futile.

As such, all claims against Uni-Select are DISMISSED WITHOUT PREJUDICE for lack of personal jurisdiction. Plaintiff may refile its claims against Uni-Select in a proper forum.

IV. ORDER

For the foregoing reasons and those stated on the record at the hearing, Defendants' motion to dismiss for failure to state a claim and for lack of personal jurisdiction as to Defendant Uni-Select is GRANTED WITH LEAVE TO AMEND IN PART AND WITHOUT LEAVE TO AMEND IN PART as follows:

1. Claims 1-4 are DISMISSED WITH PREJUDICE.
2. Claims 5 and 6 are DISMISSED WITH LEAVE TO AMEND.
3. Claims 7 and 8 are DISMISSED WITH PREJUDICE.
4. All claims against Uni-Select are DISMISSED WITHOUT PREJUDICE to Uni-Select's refiling them in a proper forum.

Nicolosi's second amended complaint is due **on or before May 13, 2019**. Plaintiff may not add parties or claims without leave of the Court.

IT IS SO ORDERED.

Dated: April 10, 2019

/s/ Beth Labson Freeman

BETH LABSON FREEMAN

United States District Judge

Waste Mgmt. of La., L.L.C. v. River Birch, Inc.

United States Court of Appeals for the Fifth Circuit

April 10, 2019, Filed

No. 18-30139

Reporter
920 F.3d 958 *; 2019 U.S. App. LEXIS 10678 **

WASTE MANAGEMENT OF LOUISIANA, L.L.C., Plaintiff-Appellant v. RIVER BIRCH, INCORPORATED; ALBERT J. WARD, JR.; FREDERICK R. HEEBE; HIGHWAY 90, L.L.C., Defendants-Appellees.

Subsequent History: Rehearing denied by, Rehearing, en banc, denied by *Waste Mgmt. of La., L.L.C. v. River Birch, Inc., 927 F.3d 914, 2019 U.S. App. LEXIS 19513 (5th Cir. La., June 28, 2019)*

US Supreme Court certiorari denied by *River Birch, Inc. v. Waste Mgmt. of La, L.L.C., 2019 U.S. LEXIS 7470 (U.S., Dec. 9, 2019)*

Prior History: [1]** Appeal from the United States District Court for the Eastern District of Louisiana.

Waste Mgmt. of La., LLC v. River Birch, Inc., 2014 U.S. Dist. LEXIS 43590 (E.D. La., Mar. 31, 2014)
Waste Mgmt. of La., LLC v. River Birch, Inc., 2017 U.S. Dist. LEXIS 182362 (E.D. La., Nov. 3, 2017)
Waste Mgmt. of La., LLC v. River Birch, Inc., 2015 U.S. Dist. LEXIS 39338 (E.D. La., Mar. 27, 2015)

Disposition: VACATED AND REMANDED.

Core Terms

landfill, summary judgment, bribe, Defendants', conspiracy, bribery, shutter, environmental, campaign contribution, conspired, executive order, emergency, campaign, competitors, cleanup, motive, prices, district court, deposition, circumstantial evidence, proximate cause, antitrust, tends, emergency order, antitrust case, shutdown, authorization, contributions, Hurricane, announced

LexisNexis® Headnotes

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

Civil Procedure > Dismissal > Involuntary Dismissals > Motions

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

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

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

The United States Court of Appeals for the Fifth Circuit reviews the district court's grant of a motion to dismiss de novo. Dismissal is appropriate when the plaintiff has failed to allege enough facts to state a claim to relief that is plausible on its face.

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

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

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

HN2[] **Standards of Review, De Novo Review**

The United States Court of Appeals for the Fifth Circuit reviews the district court's grant of defendants' motion for summary judgment de novo, and applies the same criteria employed by the district court. Summary judgment is proper only when it appears that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. On summary judgment the inferences to be drawn from the underlying facts contained in the affidavits, depositions, and exhibits of record must be viewed in the light most favorable to the party opposing the motion. Credibility determinations have no place in summary judgment proceedings because non-movants' summary judgment evidence must be taken as true. Moreover, when state of mind is an essential element of the nonmoving party's claim, it is less fashionable to grant summary judgment because a party's state of mind is inherently a question of fact which turns on credibility.

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

HN3[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

An act of racketeering activity, commonly referred as a "predicate act," includes any act or threat involving bribery which is chargeable under State law and punishable by imprisonment for more than a year. *18 U.S.C.S. § 1961(1)*.

Criminal Law & Procedure > ... > Bribery > Public Officials > Elements

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

HN4[] **Public Officials, Elements**

Louisiana's public bribery statute, *La. Rev. Stat. Ann. § 14:118*, defines public bribery as the giving or offering to give, directly or indirectly, anything of apparent present or prospective value to any public official, with the intent to influence his conduct in relation to his position, employment, or duty. Louisiana courts interpreting this statute have found that the defendant must have "specific intent" to commit the crime of bribery. The inquiry under the Louisiana statute, then, is whether the gift is made with the intent to influence the conduct of the public servant in relation to his position, employment, or duty. Specific intent to bribe may be determined from all the facts and circumstances surrounding the case.

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

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Bribery

Torts > ... > Multiple Defendants > Concerted Action > Civil Conspiracy

Governments > Courts > Common Law

HN5[] Private Actions, Racketeer Influenced & Corrupt Organizations

The *Racketeer Influenced and Corrupt Organizations Act (RICO)* creates a private civil action to be brought by any person injured in his business or property by reason of a violation of *section 1962* of this chapter. *18 U.S.C.S. § 1962*, which contains RICO's criminal provision, makes it unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. Conspiracy to violate *§ 1962* is also unlawful. And bribery is a predicate offense and enumerated as a "racketeering activity" under *18 U.S.C.S. § 1961(1)*. The U.S. Supreme Court requires plaintiffs to establish both but for cause and proximate cause in order to show injury by reason of' a RICO violation. Proximate cause should be evaluated in light of its common-law foundations and requires some direct relation between the injury asserted and the injurious conduct alleged. When a court evaluates a RICO claim for proximate cause, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries.

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

Evidence > Burdens of Proof > Allocation

Evidence > Types of Evidence > Circumstantial Evidence

HN6[] Racketeer Influenced & Corrupt Organizations, Claims

A plaintiff in an action under the *Racketeer Influenced and Corrupt Organizations Act* need not rely on direct evidence to establish both but for cause and proximate cause; causation can be proven with circumstantial evidence.

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN7[] Conduct Evidence, Prior Acts, Crimes & Wrongs

Evidence that is intrinsic to the case is not limited by *Fed. R. Evid. 404(b)*, such that "other act" evidence may be used to show that the actor acted similarly in the case before the court. Other act evidence is intrinsic when the evidence of the other act and the evidence of the crime charged are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged. Moreover, intrinsic evidence is admissible to complete the story of the crime by proving the immediate context of events in time and place, and to evaluate all of the circumstances under which the defendant acted. Intrinsic evidence does not implicate *Rule 404(b)*, and consideration of its admissibility pursuant to that rule is unnecessary.

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN8[] Conduct Evidence, Prior Acts, Crimes & Wrongs

Fed. R. Evid. 404(b)(1) provides: Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

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

Criminal Law & Procedure > ... > Crimes Against Persons > Bribery > Public Officials

Evidence > Types of Evidence > Circumstantial Evidence

HN9[] **Jury Trials, Province of Court & Jury**

It is rare in public bribery cases that there is definitive "smoking gun" evidence to show a payment was made to an official to influence the official to perform some act. It is critical in such cases that inferences from circumstantial evidence about intent and motives about which reasonable minds could differ be sorted out by the jury.

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

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

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN10[] **Racketeer Influenced & Corrupt Organizations, Claims**

A plaintiff in an action under the *Racketeer Influenced and Corrupt Organizations Act (RICO)*: does not need to disprove a defendant's explanation of the situation in order to survive summary judgment. A RICO plaintiff need only present evidence that would permit a reasonable finder of fact to accept his interpretation of the facts. The decision as to whether to believe plaintiff's or defendant's explanation of the facts requires the type of credibility determination by the court that is plainly inappropriate on motion for summary judgment.

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For RIVER BIRCH, INCORPORATED, HIGHWAY 90, L.L.C., Defendants - Appellees: Thomas More Flanagan, Camille Elise Gauthier, Flanagan Partners, L.L.P., New Orleans, LA.

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Judges: Before DAVIS, COSTA, and OLDHAM, Circuit Judges. ANDREW S. OLDHAM, Circuit Judge, dissenting.

Opinion by: W. EUGENE DAVIS

Opinion

[*961] W. EUGENE DAVIS, Circuit Judge:

This appeal challenges the district court's order granting partial summary judgment in favor of Defendants River Birch, Inc., Albert Ward, Frederick Heebe and Highway **[**2]** 90, L.L.C (hereinafter sometimes collectively referred as "River Birch"). Plaintiff Waste Management alleged that Defendants bribed former New Orleans Mayor Ray Nagin to shut down a landfill opened in the city in the aftermath of Hurricane Katrina. Plaintiff was the operator of the shuttered landfill, and Defendants owned and operated competing landfills. Plaintiff alleged that the closure of its Chef Menteur landfill caused it to lose business that accrued to the benefit of its competitor, the River Birch landfill. On summary judgment, the district court concluded that the *Rule 56* evidence presented no jury question regarding the essential causation element to Plaintiff's civil action under the *Racketeer Influenced and Corrupt Organizations Act* ("RICO"), *18 U.S.C. § 1962(c)* and *(d)*. Specifically, the district court, without considering whether Defendants' $20,000 campaign contribution was a bribe, held that the summary judgment evidence failed to create a genuine issue of material fact to allow a jury to find that this payment was the but for and proximate cause of Nagin's decision to shut down Plaintiff's landfill at Chef Menteur Highway.

Upon careful review of the summary judgment record, however, we disagree. **[**3]** We are persuaded that the evidence, which is primarily circumstantial in nature, is sufficient for a jury to make positive findings on both Plaintiff's claim that the $20,000 payment to Nagin was a bribe and that the bribe was causally related to Nagin's action in shuttering the Chef Menteur landfill. We therefore vacate the district court's judgment and remand this case for further proceedings.

I. Background

In August 2005, after the passage of Hurricane Katrina, which devastated large portions of New Orleans, there was an urgent need for additional landfill capacity in which to deposit the extensive waste. Given the scope of the damage, Mayor Ray Nagin[1] declared a state of emergency on August 31, 2005 and renewed that emergency declaration fifteen times. The final renewal was issued on November 3, 2006, and it expired thirty days later.

In November 2005, Waste Management submitted a proposal to open a landfill on **[*962]** Chef Menteur Highway in New Orleans East. Although authorization for such a landfill would ordinarily require a conditional use permit from the New Orleans City Council, Mayor Nagin believed that the city had an immediate need for additional landfill capacity. On February **[**4]** 9, 2006, Nagin, pursuant to his emergency declaration, issued Executive Order CRN 06-03 to suspend provisions of the comprehensive zoning ordinance for six months to authorize the construction and operation of a landfill at the Chef Menteur location. The City of New Orleans then entered into a written agreement with Waste Management to open the landfill; this agreement, however, did not mention an end date. On February 14, 2006, Nagin submitted an emergency disaster cleanup site request for approval to the Louisiana Department of Environmental Quality ("LDEQ") to open the landfill at Chef Menteur for "the duration of the Hurricane Katrina disaster cleanup efforts, at this time estimated to be 12 months." It is uncontested that Nagin had authority to extend the six-month suspension of the zoning ordinance at least until his emergency powers expired on December 3, 2006.

Mayor Nagin's order authorizing the landfill was not well-received by residents of New Orleans East or by the City Council. On April 6, 2006, the City Council passed a resolution condemning Nagin's February 9 executive order based on community opposition to the Chef Menteur landfill.

Around this time, Mayor Nagin was engaged **[**5]** in a hotly contested campaign for re-election. A runoff was scheduled for May 20, 2006. Two weeks before the runoff election, Mayor Nagin called Defendant Ward and asked for a campaign contribution. Ward discussed this request with Heebe, and they decided to make a $20,000 contribution through four shell corporations established by Defendants—each donating $5,000.[2] The contribution

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[1] Nagin was the Mayor of the City of New Orleans from May 2002 to May 2010. In 2013, a federal grand jury returned a 21-count indictment against Nagin, charging him with one count of conspiracy to commit honest-services wire fraud and bribery; six counts of bribery; nine counts of honest-services wire fraud; one count of conspiracy to commit money laundering; and four counts of filing false tax returns. After trial, the jury returned guilty verdicts on all counts of the indictment, except for one count of bribery. The district court sentenced Nagin to ten years in prison. *See* *United States v. Nagin, 810 F.3d 348 (5th Cir. 2016)*.

[2] Under Louisiana election law, donating to campaigns "through or in the name of another, directly or indirectly" is illegal. *LA. R.S. § 18:1505.2(A)(1)*. Moreover, the campaign contribution limit per individual in this election was $5,000. *See id.* *§ 18:1505.2*.

was made on May 16, 2006. According to Nagin, however, he did not remember the conversation with Ward and was not aware of the contribution. Nagin was subsequently re-elected mayor.

On July 13, 2006, Nagin announced in a court affidavit—in a lawsuit secretly financed by Defendants—that he would not extend his February 9 executive order authorizing the Chef Menteur landfill and would allow it to expire on August 14, 2006. On August 14, the City sent a cease and desist letter to Waste Management, ordering the closure of the landfill.

II. Procedural History

Waste Management filed the instant RICO action in September 2011. In its first amended complaint, Plaintiff alleged that Defendants bribed Henry Mouton,[3] a former commissioner for the Louisiana Department of Wildlife and Fisheries, to influence Nagin to **[**6]** shut down the Chef Menteur landfill. The district court dismissed the claims without prejudice because **[*963]** the amended complaint did not allege how Mouton's conduct was the but for and proximate cause of Nagin's decision.

Waste Management next filed a second amended complaint, alleging that (1) Mouton's lobbying and (2) Defendants' campaign contribution to Nagin led to the landfill's closure. On March 27, 2015, the district court dismissed the action insofar as the alleged bribery of Mouton was concerned. But the court did not dismiss the claims based on allegations concerning the $20,000 campaign contribution to Nagin.

In its third amended complaint, Waste Management included all of the factual allegations regarding the Defendants' conduct with respect to both Mouton and Nagin. Defendants filed another motion to dismiss and a motion to strike the allegation relating to Mouton's role in the scheme to shut down the landfill. The district court denied their motions. Over a year of discovery then followed, including depositions of Mouton and Nagin.

After discovery, Defendants moved for partial summary judgment, arguing that Plaintiff failed to establish that the campaign contribution to **[**7]** Nagin constituted bribery. Defendants further argued that, even if it was bribery, it was not the but for and proximate cause of Nagin's decision to close down the Chef Menteur landfill. The district court agreed and dismissed Plaintiff's RICO claims, stating that "the circumstantial evidence on which Waste Management relies is far too speculative and conclusory to permit a reasonable trier of fact to find the requisite causal connection." We now consider the issues presented in this appeal below.

III. *Rule 12(b)(6)* Dismissal as Related to Henry Mouton

A. Standard of Review

Before examining the summary judgment evidence, we briefly address Waste Management's appeal of the district court's March 27, 2015 order granting Defendants' *Rule 12(b)(6)* motion, which dismissed Plaintiff's suit "insofar as those claims are predicated on Defendants' alleged bribery of Mouton." ***HN1***[] We review the district court's grant

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[3] On February 25, 2011, Mouton was charged with one count of conspiracy to receive illegal payoffs by an agent of a program receiving federal funds, in violation of *18 U.S.C. § 371*; three counts of receipt of illegal payoffs by an agent of a program receiving federal funds, in violation of *18 U.S.C. § 666(a)(1)(B)*; and four counts of making false statements to federal agents, in violation of *18 U.S.C. § 1001(a)(2)*. On June 1, 2011, Mouton pled guilty to conspiracy to receive illegal payoffs, pursuant to a plea agreement with the Government. *See* *United States v. Mouton, No. 11-CR-48, 2013 U.S. Dist. LEXIS 79070, 2013 WL 2455934, at *1-2 (E.D. La. June 5, 2013)*.

of a motion to dismiss de novo.[4] Dismissal is appropriate when the plaintiff has failed to allege "enough facts to state a claim to relief that is plausible on its face."[5]

B. Analysis

Here, Plaintiff's second amended complaint alleges that Mouton—who pled guilty to accepting bribes from Defendants for attempting to **[**8]** close down other landfills—was also bribed by Defendants to assist in persuading Nagin to shutter the Chef Menteur landfill. According to Plaintiff, this scheme was "part of a well-orchestrated campaign to unlawfully and unfairly influence the approval, permitting, and operations of the River Birch Defendants' landfill competitors." Based on the pleadings, we find that the second amended complaint alleged a plausible claim of Mouton's involvement in the instant case. The allegations, if true, warrant relief under RICO.[6] We therefore vacate the district court's *Rule 12(b)(6)* ruling insofar as it precludes consideration of Defendants' alleged bribery of Mouton and his efforts to **[*964]** further Defendants' alleged scheme to shutter the Chef Menteur landfill.

IV. SUMMARY JUDGMENT

On appeal, Defendants argue that Plaintiff failed to put forth competent evidence that their $20,000 campaign contribution to Nagin's re-election campaign was a bribe under Louisiana law, and even if it was a bribe, it did not cause Nagin to shutter the Chef Menteur landfill.

A. Standard of Review

We consider the district court's grant of Defendants' motion for summary judgment dismissing Plaintiff's RICO claims against Defendants. ***HN2***[] We **[**9]** review this de novo,[7] and we apply the same criteria employed by the district court.[8] "Summary judgment is proper only when it appears that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."[9] "On summary judgment the inferences to be drawn from the underlying facts contained in the affidavits, depositions, and exhibits of record must be viewed in the light most favorable to the party opposing the motion."[10] "Credibility determinations have no place in summary judgment proceedings" because "non-movants' summary judgment evidence must be taken as true."[11] Moreover,

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[4] *Wampler v. Sw. Bell Tel. Co., 597 F.3d 741, 744 (5th Cir. 2010)*.

[5] *Id.* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*.

[6] Our discussion below fleshes out in more detail how Mouton's involvement is important to the determination of Defendants' liability under RICO.

[7] *See Whitley v. BP. P.L.C., 838 F.3d 523, 526 (5th Cir. 2016)*; *Burnett Ranches, Ltd. v. United States, 753 F.3d 143, 146 (5th Cir. 2014)*.

[8] *See Turner v. Baylor Richardson Med. Ctr., 476 F.3d 337, 343 (5th Cir. 2007)*.

[9] *Reingold v. Swiftships, Inc., 126 F.3d 645, 646 (5th Cir. 1997)* (citing *Fed. R. Civ. P. 56*).

[10] *Id.* (citation omitted).

[11] *Koerner v. CMR Constr. & Roofing, L.L.C., 910 F.3d 221, 227 (5th Cir. 2018)* (quoting *Richardson v. Oldham, 12 F.3d 1373, 1379 (5th Cir. 1994))*.

"[w]hen state of mind is an essential element of the nonmoving party's claim, it is less fashionable to grant summary judgment because a party's state of mind is inherently a question of fact which turns on credibility."[12]

B. Analysis

We turn first to Plaintiff's argument that the $20,000 contribution by Defendants to Nagin was a bribe and a "predicate act" under RICO. ***HN3***[] An act of "racketeering activity," commonly referred as a "predicate act,"[13] includes "any act or threat involving . . . bribery . . . which is chargeable under State law and punishable by imprisonment **[**10]** for more than a year."[14]

We look to Louisiana law for the definition of a bribe. ***HN4***[] Louisiana's public bribery statute, Revised Statute *§ 14:118*, defines public bribery as "the giving or offering to give, directly or indirectly, anything of apparent present or prospective value to any [public official], with the intent to influence his conduct in relation to his position, employment, or duty."[15] Louisiana courts interpreting this statute have found that the defendant must have "specific intent" to commit the crime of bribery.[16] "The inquiry under the Louisiana **[*965]** statute, then, is whether the gift is made . . . with the intent to influence the conduct of the public servant in relation to his position, employment, or duty."[17] Specific intent to bribe may be determined from all the facts and circumstances surrounding the case.[18]

HN5[] RICO creates a private civil action to be brought by "[a]ny person injured in his business or property by reason of a violation of *section 1962* of this chapter . . . ."[19] *Section 1962*, which contains RICO's criminal provision, makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate . . . **[**11]** commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity."[20] Conspiracy to violate *section 1962* is also unlawful.[21] And relevant here, bribery is a predicate offense and enumerated as a "racketeering activity" under *18 U.S.C. § 1961(1)*.

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12 *Int'l Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1265 (5th Cir. 1991)*.

13 *See Dev. Corp. v. Benison, No. 7:15-CV-02160-LSC, 2018 U.S. Dist. LEXIS 184408, 2018 WL 5537766, at *5 (N.D. Ala. Oct. 29, 2018)* (citation omitted); *Sebago, Inc. v. Beazer E., Inc., 18 F. Supp. 2d 70, 79 (D. Mass. 1998)* (citation omitted).

14 *18 U.S.C. § 1961(1)*.

15 *LA. R.S. § 14:118 (A)(1)*.

16 *See State v. Hingle, 677 So. 2d 603, 607 (La. Ct. App. 2d Cir. 1996)* ("Specific intent is a state of mind and need not be proved as a fact, but may be inferred from the circumstances of the transaction and the actions of the defendant. Specific intent exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act.") (citations omitted); *State v. Kyzar, 509 So. 2d 147, 151 (La. Ct. App. 1st Cir. 1987)* ("All that the [public bribery] statute requires is the 'intent to influence,'" and "[t]he action induced need not be corrupt or illegal.") (citing *State v. Ponthier, 391 So. 2d 1138, 1139 (La. 1980))*.

17 *United States v. L'Hoste, 609 F.2d 796, 807 (5th Cir. 1980)* (applying Louisiana law); *see also State v. Smith, 252 LA. 636, 212 So. 2d 410, 412 (La. 1968)*.

18 *See L'Hoste, 609 F.2d at 808*.

19 *18 U.S.C. § 1964(c)*.

20 *Id. § 1962(c)*.

21 *Id. § 1962(d)*.

"The Supreme Court requires plaintiffs to establish both but for cause and proximate cause in order to show injury 'by reason of' a RICO violation."[22] "Proximate cause should be evaluated in light of its common-law foundations [and] . . . requires 'some direct relation between the injury asserted and the injurious conduct alleged.'"[23] "When a court evaluates a RICO claim for proximate cause, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries."[24] Therefore, to satisfy the causation element of RICO in this case, Plaintiff has the burden of establishing that the payment to Nagin was the but for cause and proximate cause of his decision to shutter the landfill.[25] This burden requires Plaintiff to establish that its damages "w[ere] a foreseeable and natural consequence" of Defendants' action.[26]

Under this causation standard, the resolution **[**12]** of this appeal requires us to examine, in detail, the summary judgment evidence to determine whether that evidence, along with the inferences that a jury could draw from that evidence, would create a fact question on these issues.***HN6***[] A plaintiff need not rely on direct evidence; causation can be proven with circumstantial evidence.[27]

[*966] *1. The Evidence Relied Upon by Defendants in Support of Summary Judgment*.

River Birch argues first that no evidence supports Waste Management's theory that the $20,000 campaign contribution it made through related shell corporations was intended as a bribe—that is, to intentionally influence Mayor Nagin to shut down the Chef Menteur landfill. River Birch points to the lack of evidence of a *quid pro quo* agreement between Defendants and Mayor Nagin or indeed that Defendants asked Nagin to do anything for them.

Moreover, Defendants emphasize that it is neither illegal nor unusual for them to make a campaign contribution because they rely on the goodwill of political entities in large part for their business. They also assert that they must make campaign contributions to level the playing field and to give them access to political decision-makers. Defendants also **[**13]** point out that no evidence was produced of any conversation or other communication between them and Nagin around the time of the alleged bribe.

2. The Evidence Relied Upon by Plaintiff in Opposition to Summary Judgment.

Waste Management argues that a jury could reasonably conclude from circumstantial evidence that the $20,000 contribution by River Birch's shell corporations to Nagin was a bribe. Plaintiff bases its argument on the circumstances surrounding Defendants' alleged bribery of Mouton and other circumstances around the payment to Nagin. Moreover, Plaintiff points out that the district court failed to address evidence on Mouton in its summary judgment opinion.

a. Henry Mouton

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[22] *Torres v. S.G.E. Mgmt., L.L.C., 838 F.3d 629, 636 (5th Cir. 2016)* (en banc) (citing *Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 654, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008))*.

[23] *Id.* (citing *Hemi Grp., LLC v. City of New York, 559 U.S. 1, 9, 130 S. Ct. 983, 175 L. Ed. 2d 943 (2010))*.

[24] *Id.* (citing *Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 461, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006))*.

[25] *See Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)*.

[26] *Bridge, 553 U.S. at 657*.

[27] *See United States v. Jones, 873 F.3d 482, 490 (5th Cir. 2017)* (permitting jury to find RICO enterprise by circumstantial evidence); *United States v. Griffin, 324 F.3d 330, 357-58 (5th Cir. 2003)*.

Mouton was a former commissioner for the Louisiana Department of Wildlife and Fisheries. Waste Management argues that Mouton played a large role in Defendants' underlying scheme to shutter the Chef Menteur landfill. In 2011, Mouton pled guilty to violating *18 U.S.C. § 371*, admitting that he received bribes for using his official position to assist Defendants by influencing public officials to help Defendants shutter landfill competitors. Relevant here, Mouton's factual basis supporting his guilty plea provides:

> Shortly after **[**14]** Hurricane Katrina made landfall in August of 2005, Co-conspirator "A" and other Co-conspirators recognized the potential to obtain millions of dollars in revenue for the collection and disposal of storm debris from storm ravaged areas. . . . Co-conspirator "A" conspired with Mouton to shutter the competition. The plan was to eliminate the competition and increase the revenue of Co-conspirator "A" by increasing the amount of storm debris deposited in the landfills owned by Co-conspirator "A."

Mouton confirmed at his deposition in this case that Co-conspirator "A" was Defendant Heebe and that the Chef Menteur landfill was one of the landfills that was targeted as part of the scheme he had with Heebe. Moreover, as part of the campaign of Defendants to shutter the Chef Menteur landfill, Mouton testified that Heebe and Ward, or their attorneys, wrote or assisted in drafting a letter for Mouton to send to the Louisiana Department of Environmental Quality, as well as federal agencies, urging the closure of the Chef Menteur landfill for alleged environmental reasons.[28] Mouton, presumably for the benefit **[*967]** of Defendants, also sent copies of the letter to the City of New Orleans.

Under *Rule 56*, we construe **[**15]** Waste Management's summary judgment evidence as true;[29] this includes statements made in Mouton's factual basis and deposition. Defendants and Mouton knew that Nagin was the critical decision-maker who had authority to either extend or decline to extend the temporary order allowing the Chef Menteur landfill to continue operations. A jury could therefore conclude that Mouton's communication of allegedly false environmental concerns about the landfill to state and federal agencies was designed to have these government agencies influence Nagin to shut down the landfill. Because Mouton's action in this respect could be seen as part of the overall plan to shutter the Chef Menteur landfill, evidence of Defendants' conduct in bribing Mouton to participate is intrinsic to this case.

In *United States v. Rice*, we explained that ***HN7***[] evidence that is intrinsic to the case is not limited by *Federal Rule of Evidence 404(b)*,[30] such that "other act" evidence may be used to show that the actor acted similarly in the case before the court.[31] We stated that "'other act' evidence is 'intrinsic' when the evidence of the other act and the evidence of the crime charged are 'inextricably intertwined' or both acts are part of a 'single criminal episode' **[**16]** or the other acts were 'necessary preliminaries' to the crime charged."[32] Moreover, "[i]ntrinsic evidence is admissible to 'complete the story of the crime by proving the immediate context of events in time and place,' and to

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[28] On April 6, 2006, Mouton sent this letter and notice of intention to file a citizen's suit regarding the Chef Menteur landfill, alleging violations of the *Clean Water Act, 33 U.S.C. § 1251 et seq.* This letter was addressed to the Administrator of the Environmental Protection Agency and forwarded to, among others, the Regional Administrator of the EPA, the U.S. Attorney General, the Louisiana Attorney General, Secretary of LDEQ, U.S. Attorney for the Eastern District of Louisiana, and Criminal Division of the Internal Revenue Service.

[29] *Koerner, 910 F.3d at 227*.

[30] ***HN8***[] *Federal Rule of Evidence 404(b)(1)* provides: "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."

[31] *607 F.3d 133, 141 (5th Cir. 2010)*.

[32] *Id.* (quoting *United States v. Williams, 900 F.2d 823, 825 (5th Cir. 1990))*.

'evaluate all of the circumstances under which the defendant acted.'"[33] We explained that "[i]ntrinsic evidence does not implicate *[R]ule 404(b)*, and 'consideration of its admissibility pursuant to [that rule] is unnecessary.'"[34]

Although *Rice* is a criminal case, the same rationale applies in the civil context.[35] This is particularly true here, where the elements in the criminal-RICO context overlap with the elements of a civil-RICO case.[36] So, in this case, based on Mouton's testimony that there was a scheme to shutter the Chef Menteur landfill, the evidence suggesting Defendants' intent to bribe Mouton can be considered by the jury in determining Defendants' motive and intent **[*968]** in connection with their contribution to Nagin's campaign.[37]

Waste Management also points to the additional fact that these contributions in the amount of $5,000 each were made not in Defendants' names, but rather by four shell corporations owned by Defendants. **[**17]** The parties do not dispute that River Birch, Heebe and Ward funded these contributions. And these contributions, in fact, violated Louisiana law, which prohibits a party from making political contributions in the names of others.[38] Plaintiff argues that Defendants' attempt to conceal the true source of the contributions raises an inference that their contributions were intended to cover up evidence of wrongdoing. Moreover, one of the shell corporations that made a $5,000 campaign donation to Nagin—Westside Construction Services—was the same entity Heebe used to pay Mouton.

Mouton also assisted Defendants in other ways to achieve the scheme's objective. On April 6, 2006, at Defendants' request, Mouton threatened the City with a lawsuit seeking an injunction to close the Chef Menteur landfill for environmental reasons. Mouton did not follow through with this threat, but Defendants recruited certain plaintiffs who resided in the area of the landfill and, again using the shell corporation Westside Construction Services, financed a lawsuit against the City seeking closure of the landfill. All along, Defendants remained in the background and concealed their role in the litigation.

Moreover, **[**18]** Waste Management points out that Mayor Nagin was convicted of public bribery in a totally different scheme in 2013,[39] which would serve as strong impeachment material to undermine all of Nagin's testimony, including his denial that he was paid by Defendants to close the landfill.

Plaintiff also points to the timing of Defendants' $20,000 payment to Nagin, on the eve of the expiration of the emergency order, as support for Plaintiff's position that the payment was to influence Nagin to close the landfill. Plaintiff considers it relevant that when Heebe and Ward became concerned that Nagin may not have been fully aware of their $20,000 contribution, Ward sent a letter, delivered to Nagin's campaign by Ward's chauffeur, just three days before the expiration of the emergency order reminding Nagin of the campaign payment and Defendants' earlier support of him.

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[33] *Id.* (citations omitted).

[34] *Id.* (quoting *United States v. Garcia, 27 F.3d 1009, 1014 (5th Cir. 1994))* (bracket original); *see also* *United States v. Freeman, 434 F.3d 369, 374 (5th Cir. 2005)* (holding "[i]ntrinsic evidence is generally admissible" and its "admission is not subject to *[R]ule 404(b)*.").

[35] *See, e.g.,* *Elliot v. Turner Const. Co., 381 F.3d 995, 1004 (10th Cir. 2004)* (holding evidence intrinsic to plaintiff's negligence claim admissible because it was "part of the same tortious event" and essential to illustrate events leading up to plaintiff's injuries).

[36] *See* *St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 446 n.15 (5th Cir. 2000)*. Civil-RICO liability arises under RICO. *18 U.S.C. § 1964(c)*; *see also* *Anza, 547 U.S. at 453* ("One of RICO's enforcement mechanisms is a private right of action. . . .").

[37] To be clear, we do not intend to preempt the district court's right to rule on any evidentiary objection that this evidence is not intrinsic. The district court must rule on the objection, if raised, based on the evidence at trial.

[38] *See* *LA. R.S. § 18:1505.2(a)(1)*.

[39] See *supra* note 1 for description of Nagin's criminal conviction.

HN9[] It is rare in public bribery cases that there is definitive "smoking gun" evidence to show a payment was made to an official to influence the official to perform some act—and there is no such evidence here.[40] It is critical in cases such as this that inferences from circumstantial evidence about intent and motives about which reasonable **[**19]** minds could differ be sorted out by the jury.[41]

[*969] *b. Causation*

Defendants argue next that even if the question of whether their $20,000 payment was a bribe must go to the jury, they are still entitled to summary judgment because there is no evidence that the payment proximately caused Mayor Nagin to close the landfill. Defendants' principal argument—that the evidence does not support any causal connection between Defendants' $20,000 payment and Nagin's ultimate decision to shut down the Chef Menteur landfill—rests on the executive order itself and Nagin's deposition testimony. The executive order authorized the Chef Menteur landfill to operate for six months from the date it was signed on February 9, 2006. Nagin testified that when he signed the executive order, he never intended to extend it or to allow the landfill to remain open after that date.

But a jury could reasonably find otherwise. As indicated above, Mayor Nagin's felony conviction for public bribery in a different scheme provides abundant fodder for impeaching his testimony. It is also obvious that Nagin had an interest in avoiding further criminal or civil jeopardy for participating in another bribery scheme. Moreover, **[**20]** a jury could infer that Nagin's acceptance of bribes, while holding public office, was a part of his "pattern of conduct" or "modus operandi."

There was also other evidence tending to undermine Mayor Nagin's testimony that he never intended to authorize the landfill to operate past August 2006, when the emergency order was set to expire. This is reflected by the request signed by Nagin, which was submitted to LDEQ (five days after Nagin signed the emergency order) seeking approval of the City's plan to open the Chef Menteur landfill "for the duration of the Katrina cleanup."

Also, Mayor Nagin, in an apparent effort to quash environmental concerns of his constituents who lived in the area of the landfill, announced on June 30, 2006, the favorable results of environmental testing. Nagin then announced two weeks later, on July 13, 2006, his decision to shutter the landfill. This tends to support Waste Management's argument that Nagin suddenly reversed his position about extending authorization to leave the landfill open. In other words, a jury could question why Nagin made the positive announcement on June 30, 2006, unless he planned to allow the landfill to remain open.

In addition to Waste **[**21]** Management's surprise about the closing of the landfill in August, federal and state officials also testified that they were taken aback at the abrupt closure of the landfill. In particular, Dr. Chuck Carr Brown, who oversaw the Katrina debris cleanup at LDEQ, testified by deposition that he understood the City had planned to keep the Chef Menteur landfill open as long as LDEQ needed it for the disaster cleanup. Dr. Brown was surprised and confused when he learned of the Mayor's decision not to extend the authorization of the Chef Menteur landfill, particularly given the Mayor's recent announcement of the environmental testing of the landfill. Dr. Brown immediately sought a clarification from the City as to why it had changed its position, and he sought to explain the dire need for the landfill and the adverse consequences from its closing. The apparent sudden reversal of Nagin's position on whether to close the landfill, which was contrary to the understanding held by the

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[40] *See* *United States v. Elliott, 571 F.2d 880, 898 (5th Cir. 1978)* ("Like a criminal conspiracy, a RICO enterprise cannot be expected to maintain a high profile in the community. Its affairs are likely to be conducted in secrecy and to involve a minimal amount of necessary contact between participants.").

[41] *See* *United States v. Garza, 574 F.2d 298, 304-05 (5th Cir. 1978)* ("[I]t is the jury's duty to draw whatever permissible inferences it may from circumstantial evidence that usually forms the basis for finding criminal intent, and to find a verdict founded on whatever permissible inferences the jury chooses to draw.") (citation omitted); *Crowe v. Henry, 115 F.3d 294, 298 (5th Cir. 1997)*.

environmental agencies, supports the inference that Mayor Nagin's original intention was for the Chef Menteur landfill to operate for the duration of the Katrina cleanup.

Even though Defendants argue that the City **[**22]** Council had exclusive regulatory authority over zoning, Nagin could have renewed his executive order while his general **[*970]** emergency declaration was in effect,[42] which would have allowed the Chef Menteur landfill to continue operations without a conditional use permit.

In summary, Mayor Nagin in February 2006 signed the executive order, the agreement with Waste Management, and the LDEQ form seeking approval to open and maintain the Chef Menteur landfill until the Katrina cleanup was complete. Nagin was re-elected on May 20, 2006, with the Chef Menteur landfill operating and no indication that he would no longer support it. After extensive environmental testing with LDEQ confirmed that there were no environmental hazards at the Chef Menteur landfill, on June 30, 2006, Nagin publicly announced those results, stating the test results "should ease the concerns of the citizens." Then, on July 10, 2006, Ward wrote to remind Nagin's associates of Defendants' large financial contributions ($20,000 in 2006 and $40,000 in 2005) that Defendants had made "on a direct basis with Mayor Nagin." Only three days later, by affidavit filed in a litigation secretly financed by Defendant River Birch, Nagin **[**23]** announced that he would not renew the executive order. This chain of events, if accepted by the jury, supports the inference that Defendants' bribery of Mayor Nagin influenced his actions in refusing to extend the executive order. A reasonable jury could also infer causation from Mayor Nagin's disregard of the evidence that the Chef Menteur landfill was safe and badly needed in the City's disaster cleanup. Accordingly, we hold that Plaintiff has provided sufficient evidence to survive a summary judgment challenge in this case.

* * *

The dissent is correct that this case is a close call. Evidence here—along with the reasonable inferences drawn from this evidence—could reasonably show either political pressure or pay-to-play bribes that motivated Nagin to shutter the Chef Menteur landfill. But the dissent is wrong to suggest that *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*.[43] alters the summary judgment standard in this RICO case to preclude the jury from evaluating this evidence and deciding what inferences to draw from the evidence it accepts.

We begin with a recap. *Matsushita* was an antitrust case that challenged Japanese television manufacturers' lowering of prices as anti-competitive. **[**24]** [44] The Supreme Court held that "a plaintiff seeking damages for a violation of *§ 1* [of the *Sherman Act*] must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently."[45] The Court found that the plaintiffs' substantive claim of conspiracy to engage in predatory pricing made no economic sense because such a scheme was risky and self-deterring as it was too costly to the conspirators.[46] The Court held that the general summary judgment rule applied: "[I]nferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the [summary judgment] motion."[47] And the Court recognized that "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* case."[48] So considered altogether, in this antitrust context, the Court concluded that if

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[42] *See LA. R.S. § 29:721 et seq.*

[43] *475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

[44] *Id. at 577-78*.

[45] *Id. at 588*.

[46] *Id. at 594-95*.

[47] *Id. at 587-88* (citation omitted).

[48] *Id. at 588*.

a plaintiff relies on circumstantial **[*971]** evidence of an agreement rather than express acts, and if the claim against a defendant appears implausible, a plaintiff has an additional evidentiary burden to survive a summary judgment attack:

> [T]he absence of any plausible motive to engage in the conduct charged is highly relevant to whether a 'genuine issue **[**25]** for trial' exists within the meaning of *Rule 56(e)*. Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.[49]

Put differently, if it appears that a defendant lacks a plausible motive for engaging in anticompetitive conduct, in order to survive summary judgment, an antitrust plaintiff must present evidence that "show[s] that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [plaintiffs]."[50] *Matsushita* confines courts from drawing inferences in antitrust cases that are at odds with economic theory (specifically, predatory pricing).[51]

The *Matsushita* Court's antitrust lesson on summary judgment is not applicable here.[52] The dissent falls into error by extending it to our civil-RICO case. Using circumstantial evidence to conclude that a **[*972]** bribe occurred is

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[49] *Id. at 596-97*.

[50] *Id. at 588*.

[51] *Matsushita* built upon *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* by holding that "***antitrust law*** limits the range of permissible inferences from ambiguous evidence." *Matsushita, 475 U.S. at 588*. "The Court's rationale for awarding summary judgment to the defendants in *Matsushita*, then, turned to a large extent on its rejection of a substantive theory of ***antitrust law***—implausible theories of predatory pricing were now disfavored as a matter of substantive law." EDWARD J. BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 9.5, at p. 423 (2019).

[52] The summary judgment standard, as applied in *Matsushita*, was predicated on substantive ***antitrust law***. As Professor Brunet states:

> Standing on its own, however, apart from the [1986 summary-judgment] trilogy, *Matsushita* functions best as a model for antitrust summary judgment. The Court's discussion on the summary judgment process repeatedly refers to substantive antitrust doctrine. For example, the Court's statement that "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* [*Sherman Act*] case" was a response to the plaintiffs' contention that all inferences "must be viewed in the light most favorable to the party opposing the [summary judgment] motion." Moreover, the Supreme Court framed the burden placed on the nonmovant in a specific antitrust factual context.

Id. at 425 (citations omitted).

Other scholars share a similar characterization of the *Matsushita* opinion. *See, e.g.*, JAMES WM. MOORE ET AL., 11 *Moore's Federal Practice § 56.22[2][c]* (3d ed. 2018). Specifically, they recognize:

> The [Supreme] Court found the plaintiff's theory of a long-running predatory pricing scheme implausible because it would require defendants to incur substantial losses jointly for years without an intervening opportunity to recoup monopoly profits.
>
> The Supreme Court then incorporated the substantive evidentiary standard applicable in **[**27]** antitrust cases into its analysis, noting that "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* [of the *Sherman Act*] case." Under substantive ***antitrust law***, conduct that is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. Therefore, to survive a motion for summary judgment, the plaintiffs had to present evidence that tended to exclude the possibility that the alleged conspirators acted independently.

not at odds with economic **[**26]** theory. Both Nagin and River Birch allegedly sought monetary gains; Waste Management's argument does not defy settled economic principles.[53]

The dissent, without citation, insists that "[i]n RICO conspiracies, like antitrust ones, the plaintiff has an affirmative obligation to negate other innocent explanations for the defendants' conduct." The dissent goes further: "To carry [plaintiff's] burden, Waste Management must produce evidence that 'tends to exclude the possibility' Mayor Nagin was motivated by politics rather than bribes." We have not imposed such a heightened burden on a RICO plaintiff.[54] Rather, we have maintained, **[**28]** and our precedent holds, that ***HN10***[] a RICO plaintiff:

> does not need to disprove [a defendant's] explanation of the situation in order to survive summary judgment. [A RICO plaintiff] need only present evidence that would permit a reasonable finder of fact to accept his interpretation of the facts. . . . The decision as to whether to believe [plaintiff's or defendant's] explanation of the facts requires the type of credibility determination by the court that is plainly inappropriate on motion for summary judgment.[55]

We have been reminded by the Supreme Court since *Matsushita* that, on summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his [or her] favor."[56] In *Tolan v. Cotton*, though recognizing **[*973]** that it "is not equipped to correct every perceived error coming from the lower federal courts," the Supreme Court "intervene[d]" to summarily reverse our *Rule 56* dismissal, calling it "a clear misapprehension of summary judgment standards. . . ."[57] We need not repeat this rebuke.

This close case—where the evidence could support a verdict **[**29]** for either side, depending upon the evidence the jury credits and the reasonable inferences drawn from that evidence—is tailor-made for a trial, not summary

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Id. (citations omitted); *see* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments*?, *78 N.Y.U. L. Rev. 982, 1044-68 (2003)* (concluding that *Matsushita* "seems specific to the antitrust context").

[53] It is telling that River Birch has never thought the instant case has anything to do with *Matsushita* and that case's point about economic rationality. Defendants never raised it. Nagin's and Mouton's history of receiving bribes shows there is nothing economically irrational about that conduct.

[54] The dissent cites a number of cases, *see post*, at 31 (opinion of OLDHAM, J.), that "apply *Matsushita* in non-antitrust cases." That's not surprising, considering that *Matsushita* is one of the most-cited Supreme Court cases. But in non-antitrust context, courts apply *Matsushita* for its statement of the general *Rule 56* standard: "When the moving party has carried its burden under *Rule 56(c)*, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita, 475 U.S. at 586-87* (citations omitted). The cases cited by the dissent show precisely that.

The dissent argues that Waste Management, in response to a summary judgment motion, has an affirmative duty to negate River Birch's argument that Nagin shuttered the landfill due to political pressure. In taking this position, the dissent refuses to accept the reading of *Matsushita* by courts, scholars and civil procedure treatise authors who recognize that this part of the *Matsushita* holding was governed by substantive ***antitrust law*** that required the plaintiff to show a plausible economic motive for plaintiff's predatory acts to prevail in that *§ 1* antitrust case. Application of the dissent's rule, based on an extended reading of *Matsushita*, on RICO and other civil cases would turn summary judgment on its head.

[55] *See Crowe v. Henry, 115 F.3d 294, 298 (5th Cir. 1997)*; *see also, e.g., Whelan v. Winchester Prod. Co., 319 F.3d 225, 228 (5th Cir. 2003)* (applying general *Rule 56* summary judgment standard in RICO case).

[56] *Tolan v. Cotton, 572 U.S. 650, 656, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014)* (per curiam) (summarily reversing our entry of summary judgment emphasizing "a 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'") (citing *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*); *see also, e.g.,* ***Thomas v. Nugent, 572 U.S. 1111, 134 S. Ct. 2289, 189 L. Ed. 2d 169 (2014)*** (remanding case in light of *Tolan*).

[57] *Tolan, 572 U.S. at 659*.

judgment. A question that "turns on state of mind," that is, Nagin's reasoning for shuttering the Chef Menteur landfill and River Birch's decision to discreetly transfer and donate funds to Nagin through shell corporations, is "often inappropriate for resolution at the summary judgment stage."[58] We hold that the correct disposition of this civil-RICO appeal is to remand it for trial so that a jury can sort out the facts and decide what appropriate inferences should be drawn from those facts.[59]

V. Conclusion

For the above reasons, we are satisfied that the record reflects genuine issues of material fact as to both whether the Defendants' campaign contribution to Nagin was a bribe and whether the payment was the but for and proximate cause of Nagin's decision to close the Chef Menteur landfill. We therefore VACATE the district court's judgment and REMAND for further proceedings consistent with this opinion. We also VACATE the district court's March 27, 2015 order of dismissal insofar as that order bars consideration **[**30]** of evidence related to Mouton.

VACATED AND REMANDED.

Dissent by: ANDREW S. OLDHAM

Dissent

ANDREW S. OLDHAM, Circuit Judge, dissenting:

"[Bad] facts make bad law." *Wyeth v. Levine, 555 U.S. 555, 604, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009)* (Alito, J., dissenting). Ray Nagin accepted bribes. So did Henry Mouton. But the question is not whether Nagin and Mouton are crooks. The question is whether Waste Management can use civil RICO against a competitor with *zero* evidence of causation. With greatest respect for my colleagues and their views on this difficult case, I'd say no.

I.

Long ago, we worried that summary judgment could be a "catch penny contrivance to take unwary litigants into its toils and deprive them of a trial." *Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940)*. That view was common at the time. In the years following the adoption of *Rule 56* in 1938, "the courts [were], if anything, overhesitant **[*974]** in granting the relief." Charles E. Clark, *Summary Judgments—a Proposed Rule of Court*, 2 F.R.D. 364, 366 (1943); *see also* Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423 (1929) (explaining the need for a summary judgment rule). The hesitancy was rooted in an institutional concern that summary judgment would transgress the sanctity of the jury room. *See, e.g., Avrick v. Rockmont Envelope Co., 155 F.2d 568, 571 (10th Cir. 1946)* ("The power to pierce the flimsy and transparent factual veil should be temperately and cautiously used lest abuse reap **[**31]** nullification.").

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[58] *See Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1449 (5th Cir. 1993)*; *Int'l Shortstop, 939 F.2d at 1265*.

[59] To the extent the dissent is concerned about chilling *First Amendment* rights, our decision today does no such thing. We recognize that Supreme Court precedent safeguards political speech. *See Citizens United v. FEC, 558 U.S. 310, 339-40, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010)*. But such protection, afforded by the *First Amendment*, does not extend to certain illegal activities. *See, e.g., McCutcheon v. FEC, 572 U.S. 185, 192, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014)* (noting *First Amendment* does not protect *quid pro quo* corruption). Under Louisiana law, political donations, like the ones by Defendants, cannot be made in disguise and veiled by shell corporations to bypass campaign-contribution limits. The *First Amendment* is therefore not implicated here. Indeed, the dissent's point about the *First Amendment* is again one River Birch did not think worth making. And rightly so.

Then came 1986. In a trilogy of summary-judgment opinions, the Supreme Court told us we had it all wrong. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Each was a landmark in its own right. And each held the lower federal courts were unduly penurious in meting out summary judgment.

Take *Matsushita*, for example. American television manufacturers sued Japanese competitors for predatory pricing. The plaintiffs alleged their Japanese competitors had conspired to drive down prices and put the Americans out of business. The Third Circuit found myriad material factual disputes that precluded summary judgment for the defendants. For example, it highlighted evidence the Japanese companies entered "formal agreements" to fix minimum prices, undercut those agreements through "a variety of rebate schemes," and concealed the rebates from both the American and Japanese governments. Matsushita, 475 U.S. at 581. And it was undisputed the Japanese companies entered *other* price-fixing conspiracies. *See* id. at 595-96 (conceding "direct evidence" of such). Obviously, in the abstract, one could believe the Japanese conspirators had conspired once again.

Still, the Supreme Court reversed the denial of summary judgment. Two of its reasons apply directly here. First, **[**32]** the Court held the American plaintiffs "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action." Id. at 588. Put differently, the plaintiffs must present evidence that "tends to exclude the possibility" their competitors acted innocently. *Ibid.* (quotation omitted). Second, and crucially, the Court held evidence of other conspiracies is *insufficient* to bridge that gap. Sure, the Court conceded, it's possible the Japanese companies were up to their old conspiratorial tricks. But "their conduct [was also] consistent with other, equally plausible explanations"—including a non-conspiratorial desire to gain market share by driving down prices. Id. at 596-97. That the Japanese companies conspired in the past would not allow a jury to reasonably infer they conspired again.

We've generally heeded the Supreme Court's admonishment. We've recognized that the *Celotex-Anderson-Matsushita* "trilogy . . . made it clear that our earlier approach to Rule 56 was wrong-headed because it was simply inconsistent with the plain language of the rule." Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (per curiam) (citations omitted); *see also* Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1423 (5th Cir. 1996) (en banc) (noting "the growing judicial recognition of the many benefits **[**33]** of summary judgment"), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1); Calpetco 1981 v. Marshall Expl., Inc., 989 F.2d 1408, 1415 (5th Cir. 1993) (similar). And we've held "[t]estimony **[*975]** based on conjecture or speculation is insufficient to raise an issue of fact to defeat a summary judgment motion." Ruiz v. Whirlpool, Inc., 12 F.3d 510, 513 (5th Cir. 1994) (following *Anderson*). Put differently, "summary judgment is appropriate in *any* case where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant." Little, 37 F.3d at 1075 (quotation omitted); *accord* Anderson News, L.L.C. v. Am. Media, Inc., 899 F.3d 87, 98 (2d Cir. 2018) ("The question is not whether the plaintiff's inferences are so far fetched that a trier of fact should not be allowed to consider them, but whether the evidence, though not far-fetched, sufficed to meet the plaintiff's burden of proof." (alterations and citation omitted)).

II.

This case certainly smells fishy. River Birch made campaign donations to Mayor Nagin, who refused to reauthorize the landfill of River Birch's competitor, Waste Management. But if *Matsushita* teaches us anything, it's that foul-smelling facts don't preclude summary judgment. We should be especially careful to heed that lesson in civil RICO cases like this one. Before asking a jury to separate official acts motivated by bribery from those motivated by the **[**34]** public interest, we should be quite sure there is *some* evidence that could satisfy the plaintiff's burden of proof.

A.

The dispute at the heart of this case is *why* Mayor Nagin refused to reauthorize a landfill. There's an innocent explanation: The landfill was politically unpopular, and Nagin did not want to continue taking political heat for authorizing it. Then there's a sinister explanation: River Birch bribed him.

A straightforward application of *Matsushita* precludes asking a jury to choose between them. As in *Matsushita*, it's the plaintiff's burden to connect its injuries to its competitors' alleged conspiracy. To carry that burden, Waste Management must produce evidence that "tends to exclude the possibility" Mayor Nagin was motivated by politics rather than bribes. *475 U.S. at 588* (quotation omitted). Evidence that is "as consistent with" politics as it is with bribes does not suffice because it does nothing to help the jury choose between "competing inferences." *Ibid.*

The evidence of Nagin's political motivations is undisputed and overwhelming. Waste Management attempts to overcome that evidence in various ways. They make all involved look, well, trashy. But they fail to create a jury question. **[**35]**

1.

Let's start with the undisputed evidence of Nagin's independent motivation to close the landfill. This landfill was wildly unpopular. Everyone hated it. Waste Management's predecessor in interest attempted to open it in the mid-1990s. The New Orleans City Council rejected the effort. Waste Management purchased an option to try again in 2001 and 2002. It too failed.

Then came Hurricane Katrina. That catastrophe made the politically impossible possible—at least temporarily. On February 9, 2006, Mayor Nagin issued an emergency executive order. It allowed Waste Management to open the landfill immediately and secure Council approval for it later. Even in the immediate aftermath of Katrina—when the need for new landfills was patent—the political backlash was swift and vicious.

Before the landfill could open on an emergency basis, the City Council issued a scathing rebuke of the project. In a unanimous resolution, the Council noted "a great majority" of the affected residents voiced "vehement opposition" to the landfill. **[*976]** New Orleans City Council Resolution R-06-156, at 1 (Apr. 6, 2006). It noted the Mayor had bypassed all "public input" in unilaterally issuing the emergency order. *Ibid.* It **[**36]** noted the federal government had not determined the levee system surrounding the landfill was "safe." *Id.* at 1. Moreover, the Mayor had not determined his chosen landfill was the best of the "environmentally sound alternatives." *Id.* at 2. The Council therefore unanimously and "strongly urge[d]" the Mayor to revoke his order "immediately." *Id.* at 2. And it again emphasized its resolution was "based upon overwhelming community opposition" to the landfill. *Id.* at 1.

The political opposition was so strong it was literally national news. *See, e.g.*, Leslie Eaton, *A New Landfill in New Orleans Sets Off a Battle*, N.Y. TIMES (May 8, 2006). There's not a scintilla of evidence this political fury was fake. This was not some "AstroTurf" campaign financed by the defendants. For example, Councilwoman Cynthia Hedge-Morrell opposed the landfill because it "would harm the environment and lessen the possibility that people would return to New Orleans East." By all accounts, this was genuine grassroots outrage about the prospect of an eighty-foot trash tower in a poor neighborhood populated predominantly by people of color. There is no dispute this outrage gave Nagin ample political motivation not to renew the landfill's emergency authorization. **[**37]**

Nor is there a scintilla of evidence that anyone thought the Mayor's emergency order was anything other than temporary. The order suspended the zoning laws "for a period of six months unless earlier rescinded by [the Mayor] or other operation of law." As an expressly bargained-for condition of the order, Waste Management "stated its plan to file" the same zoning application required of every other landfill operator in New Orleans. The Mayor also expressly bargained for Waste Management's help in creating political support for the landfill through "the appropriate neighborhood meetings." So as things stood on February 9, 2006, Waste Management had up to six months to get its ducks in a row—to open the landfill, sell the plan to affected citizens, win support for it on the City Council, and finish its paperwork. And Waste Management had a *maximum* of six months to do all that. By its terms, after all, the order could be rescinded at any time.

So how could Waste Management think—but for any intervening bribery—it was in the clear? Well, it didn't. According to its emails, Waste Management knew it had a maximum of six months to complete a task list that had proved impossible for a decade. **[**38]** And it also knew the effort would require heavy political lifting. That's why Waste Management had a "Gov Affairs Strategy Meeting" to discuss both "How do we keep [the landfill] open beyond [the] 6 month order?" and "How do we manage [the situation] politically?"

Waste Management apparently wanted to manage this politically by convincing Mayor Nagin to extend his emergency order—and continue shouldering political blame for the landfill. But there is no evidence Mayor Nagin wanted to continue facing criticism for unilaterally authorizing the landfill. When pressed at its *Rule 30(b)(6)* deposition to identify *anything* to suggest it *ever* convinced the Mayor to be the political fall-guy (again), Waste Management could say only that some unidentified person who may or may not work for some government entity may or may not have "implied" it at some unspecified time in some unspecified way.

Of course, it's possible that—but for the defendants' campaign contributions—Nagin wanted to continue shouldering the political blame for an eight-story garbage **[*977]** pile in voters' backyards. It's possible Nagin wanted to repeat the decision that earned him a unanimous rebuke from the City Council, scathing coverage in the **[**39]** *New York Times*, and vehement opposition back home. Anything is possible. But there's no evidence of it. Much less is there evidence the Mayor changed his mind and opposed a politically unpopular landfill *because of* River Birch's four campaign contributions.[1]

2.

But wait, says Waste Management: These are not ordinary campaign contributions because Nagin took bribes in other instances. Therefore, they say, the jury could find he did so here.

It's true Nagin is in prison for accepting unrelated bribes. It's also legally irrelevant.

In *Matsushita*, the Third Circuit relied on "direct evidence" the Japanese television makers had engaged in price-fixing conspiracies in Japan. *In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 305 (3d Cir. 1983)*, *rev'd sub nom.* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. It held evidence of these other conspiracies "may be circumstantial evidence of a broader conspiracy." *Ibid.* And it further held such circumstantial evidence precluded summary judgment because, after all, a reasonable jury could infer once a conspirator, always a conspirator. It's also easy to see how documented, direct proof of **[**40]** conspiracies back in Japan would powerfully impeach any denial of conspiracies in the United States.

I likewise agree with my esteemed colleagues "a jury could infer that Nagin's acceptance of bribes, while holding public office, was a part of his 'pattern of conduct' or 'modus operandi.'" *Ante*, slip op. at 15. And I agree Nagin's bribery conviction would serve as powerful impeachment of his testimony. *Ibid.* But that sort of evidence did not change the propriety of summary judgment in *Matsushita*. Nor should it here.

That's because surviving summary judgment requires more than character evidence and impeachment material. In RICO conspiracies, like antitrust ones, the plaintiff has an affirmative obligation to negate other innocent explanations for the defendants' conduct. And the Supreme Court could not have been clearer in holding other bad acts won't do the trick:

> The "direct evidence" on which the court [of appeals] relied was evidence of *other* combinations, not of a predatory pricing conspiracy. . . . Evidence that tends to support any of these collateral conspiracies thus says little, if anything, about the existence of a conspiracy to charge below-market prices in the American market over a period of **[**41]** two decades.

Matsushita, 475 U.S. at 595-96.

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[1] The entirety of defendants' alleged bribes are four publicly reported campaign contributions of $5,000, all made on May 16, 2006. To put these numbers in perspective, Nagin reported $590,747.00 in contributions for the seven-week period between May 1 and June 19, 2006. *See Candidate's Report, Report Number 10056*, LA. ETHICS ADMIN. PROGRAM, 1-2 (filed June 27, 2006), http://ethics.la.gov/CampaignFinanceSearch/ShowEForm.aspx?ReportID=10056. The defendants' $20,000 constitutes a mere 3% of that seven-week total. And across the 2006 primary and general election, Nagin spent $2,491,147.95. *See* Brian Brox, *Elections and Voting in Post-Katrina New Orleans*, SOUTHERN STUDIES: AN INTERDISCIPLINARY JOURNAL OF THE SOUTH, Fall/Winter 2009, at 8, 15. The defendants' $20,000 is 0.8% of that total. The record does not reveal a reason to think these relatively small sums of money loomed larger in Mayor Nagin's calculus than the obvious political implications of reauthorizing the landfill.

[*978] This was no fleeting thought. It was a thoroughly reasoned response to the principal basis for the dissent, which criticized the majority for "mak[ing] assumptions that invade the factfinder's province." *Id. at 601* (White, J., dissenting). Justice White explained:

> [A]fter reviewing evidence of cartel activity in Japan, collusive establishment of dumping prices in this country, and long-term, below-cost sales, the Third Circuit held that a factfinder could reasonably conclude that the [illegal horizontal agreement] was not a simple price-raising device. . . . I see nothing erroneous in this reasoning.

Id. at 605. Justice White's understanding of the summary judgment standard would obviously necessitate reversal here. But "[t]his is one of those instances in which the dissent clearly tells us what the law is not. It is not as if the proposition had not occurred to the majority of the Court." *Kobach v. U.S. Election Assistance Comm'n, 772 F.3d 1183, 1188 (10th Cir. 2014)*.[2]

The majority responds that *Matsushita* is irrelevant because this is not an antitrust case. *See ante*, slip op. at 19-20. But *Matsushita* "did not introduce a special burden . . . in antitrust cases"; it "merely articulated" a requirement applicable to *all* cases under Rule 56. *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 468, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. That's why courts routinely apply *Matsushita* in **[**42]** non-antitrust cases. *See Ricci v. DeStefano, 557 U.S. 557, 586, 129 S. Ct. 2658, 174 L. Ed. 2d 490 (2009)*; *Scott v. Harris, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)*; *NLFC, Inc. v. Devcom Mid-Am., Inc., 45 F.3d 231, 235 (7th Cir. 1995)*; *Sylvia Dev. Corp. v. Calvert Cty., 48 F.3d 810, 818 (4th Cir. 1995)*; *Leonard v. Dixie Well Serv. & Supply, Inc., 828 F.2d 291, 294 (5th Cir. 1987)*. "[T]he universal applicability of the Supreme Court's analysis in *Matsushita*" is well established. *In re Managed Care Litig., 430 F. Supp. 2d 1336, 1345 (S.D. Fla. 2006)*. That's because *Matsushita* requires summary judgment *anytime* the evidence is "as consistent with" lawful conduct as with unlawful conduct.

True, other parts of *Matsushita*'s reasoning are not relevant here. For example, no one argues that Nagin "lack[ed] a plausible motive for" accepting a bribe or that the alleged bribery scheme "ma[kes] no economic sense." *Ante*, slip op. at 18-19 (characterizing *Matsushita*). But the "economic rationality" of the alleged conduct, *ante*, slip op. at 20 n.53, does not justify a trial in this case, just as it wouldn't have in *Matsushita*. The *Matsushita* Court expressly denied that "a plausible reason to conspire" combined with "ambiguous conduct could suffice to create a triable issue of conspiracy." *475 U.S. at 597 n.21*. Regardless of economics, "conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." *Ibid.*

Other lower courts have attempted the majority's move, and it did not end well. In *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, **[*979]** 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, the Supreme Court issued another landmark procedural ruling in an antitrust case. Some argued *Twombly* ***[**43]*** 's reading of Federal Rule of Civil Procedure 8 should be limited to "the context of an antitrust dispute." *Ashcroft v. Iqbal, 556 U.S. 662, 684, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. But the Court emphatically rejected that argument. *Twombly*—like *Matsushita*—"interpret[ed] and appli[ed]" the Federal Rules of Civil Procedure, which govern "all civil actions and proceedings in the United States district courts." *Ibid.* (quotation omitted). So *Matsushita*—like *Twombly*—applies to all cases, not just antitrust ones.

But even if that weren't true, *Matsushita* would remain applicable to civil RICO cases like this one. "Antitrust cases are particularly instructive in the civil RICO context because, as the Supreme Court has observed, 'the civil action

[2] Given that prior-crimes evidence doesn't help with Nagin, it definitely doesn't help with Mouton. Mouton regulated shrimping. The only evidence tying him to the landfill is a letter he sent to the EPA regarding a citizen suit. He never met Nagin, never worked for him, never talked to him (about the landfill or anything else), and never had any influence over him. Accordingly, Waste Management cannot show Mouton was connected in any way to Nagin, much less that he caused Nagin to refuse to reauthorize the landfill. *Cf. Boyle v. United States, 556 U.S. 938, 947 n.4, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 (2009)* (individuals who act "independently and without coordination" are not part of RICO association). Mouton is irrelevant.

provision of RICO was patterned after the Clayton Act.'" In re Managed Care Litig., 430 F. Supp. 2d at 1345 (quoting Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 150, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987)). The majority simply cannot ignore *Matsushita* as just "an antitrust case."

3.

Waste Management also claims to have three pieces of evidence tending to show the defendants' campaign contributions caused the Mayor to change his mind. They tend to show no such thing.

The first is an "Emergency Disaster Cleanup Site Request" filed by the Mayor's office on February 14, 2006. The Mayor's office filed it five days after Nagin signed his emergency order. Through it, Nagin asked the Louisiana Department **[**44]** of Environmental Quality ("LDEQ") to provide emergency state approval for the landfill. And in it, Nagin requested state approval for "the duration of the Hurricane Katrina disaster cleanup efforts, at this time estimated to be 12 months." But that says nothing about whether Nagin was willing to wage political war against his City Council for 12 months. There's nothing illegal about wanting the State to approve a landfill for 12 months and demanding political buy-in from the City Council in half that time. Moreover, the LDEQ request was filed almost two months *before* the Council formally excoriated Nagin for authorizing the landfill. To the extent the LDEQ request shows Nagin changed his mind, it is perfectly consistent with his doing so in response to a bruising political fight. As we know from *Matsushita*, that consistency precludes this case from reaching a jury.

The second piece of evidence is a city press release from June 30, 2006. That release was headlined "Lab Results Show No Air or Water Contaminations at Chef Hwy Landfill." And it attributes a quote to Nagin, who hoped the sampling results would "ease the concerns of the citizens." But environmental concerns were only one **[**45]** of the reasons the landfill was a political mess. The city's leaders also worried the landfill would displace a community of color. *See, e.g.*, Affidavit of Councilwoman Cynthia Hedge-Morrell. No amount of lab sampling would change that. And in all events, the landfill was a political albatross around the Mayor's neck. There is nothing illegal about an elected official using favorable test results to defend against a political liability. Nor is there anything irrational about making the best of a bad political situation in June before cutting bait in August.

The third piece of evidence is a letter from the LDEQ dated July 14, 2006. In it, LDEQ officials said they "were surprised" to learn of Nagin's decision not to renew his emergency authorization for the landfill. **[*980]** "It has been our understanding and impression," they wrote, "that you supported the use of the Chef Menteur site to dispose of" hurricane debris. The city attorney responded that the city is not "oppos[ed]" to the landfill. To the contrary, the city attorney expressly stated the LDEQ would be "justified" in authorizing the landfill at *the state level*. Nagin simply refused to continue waging a lone-ranger political war against **[**46]** his City Council at *the local level*. In short, if the State was willing to take the blame, all the better—but Nagin was not going to take it himself. Far from supporting an inference Nagin was motivated by bribes from River Birch, this last piece of evidence suggests he was motivated by politics.

B.

Make no mistake. Like my colleagues, I am convinced post-Katrina local politics were odiferous. And sometimes criminal. Still, that does not mean Waste Management's civil RICO claim against River Birch is the proper remedy.

"Civil RICO is an unusually potent weapon—the litigation equivalent of a thermonuclear device." Miranda v. Ponce Fed. Bank, 948 F.2d 41, 44 (1st Cir. 1991). The statute punishes defendants with treble damages, attorney's fees, and the "stigmatizing" label "racketeer." *Ibid.* That alone gives even "spurious claims" tantalizing "*in terrorem* settlement value." Haroco, Inc. v. Am. Nat'l Bank & Tr. Co. of Chi., 747 F.2d 384, 399 n.16 (7th Cir. 1984), *aff'd*, 473 U.S. 606, 105 S. Ct. 3291, 87 L. Ed. 2d 437 (1985).

But that's not the worst of it. "RICO has been interpreted so broadly that it has been used more often against respected businesses with no ties to organized crime, than against the mobsters who were the clearly intended target of the statute." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 526, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985) (Powell, J., dissenting); *see also* id. at 499 (majority op.) ("It is true that private civil actions under the statute are being brought **[**47]** almost solely against [respected businesses], rather than against the archetypal, intimidating mobster."). The predicate acts for civil RICO are *so* broad that racketeering claims are *de riguer* in commercial litigation. In the words of Abner Mikva—who voted against RICO as a member of Congress before applying it as a judge on the D.C. Circuit—civil RICO is "a weapon against legitimate businessmen in ordinary commercial disputes. The civil RICO count today has become boilerplate in commercial lawsuits." Abner Mikva & G. Robert Blakey, *RICO and its Progeny: Good or Bad Law*?, 12 Notre Dame J.L. Ethics & Pub. Pol'y 369, 372 (1986).[3]

To be clear, I am not saying any particular person involved in this commercial dispute is or is not a legitimate businessman. What I am saying is equal justice under the law applies equally to crook and cherub. **[*981]** *Cf.* Kimmelman v. Morrison, 477 U.S. 365, 380, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) ("The constitutional rights of criminal defendants are granted to the innocent and the guilty alike."); Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978) ("Yes, I'd give the Devil benefit of law, for my own safety's sake." (quoting ROBERT BOLT, A MAN FOR ALL SEASONS, Act I, p. 147 (Three Plays, Heinemann ed. 1967)). And regardless of the merits in this case, we must worry the rules we devise today will ensnare innocent civil RICO defendants tomorrow. **[**48]** *Cf.* Haroco, 747 F.2d at 399 n.16 ("After all, the line between fraud and mistake or misunderstanding can be a very fine one. It is, therefore, important that, in the further development of civil RICO, criminal fraud be clearly distinguished from less egregious conduct.").

The error costs are particularly high here because this case combines civil RICO with the First Amendment. The First Amendment protects political speech. *See* Citizens United v. FEC, 558 U.S. 310, 339-40, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010). That includes large donations to candidates and committees. *See* McCutcheon v. FEC, 572 U.S. 185, 203-04, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014) (plurality); *id. at 230-31* (Thomas, J., concurring in the judgment). Of course, the First Amendment does not protect "'*quid pro quo*' corruption." *Id. at 192*. But if we're not careful, our efforts to carve out unprotected speech can run headlong into the core of the First Amendment. *See, e.g.,* United States v. Alvarez, 567 U.S. 709, 723, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012) (noting Congress can criminalize some kinds of lying, but it must be careful not to "chill" protected speech). If we are unwilling to rigorously apply Rule 56, future would-be speakers may remain silent rather than risk a civil RICO trial.

Again, 1986's summary-judgment trilogy provides a way out of this box. The Supreme Court directs us to consider "the actual quantum and quality of proof necessary to support liability." Anderson, 477 U.S. at 254. That means a summary-judgment court must consult the underlying substantive law. *See ibid.;* Matsushita, 475 U.S. at 597-98. Here, **[**49]** the underlying law includes both the First Amendment (as in *Anderson*) and conspiracy (as in *Matsushita*). It also includes the line between political speech and corruption (as in *McCutcheon*). Putting all of that together, Waste Management can survive summary judgment *only* by pointing to *some* evidence of "'*quid pro quo*' corruption." McCutcheon, 572 U.S. at 207. This, the majority concedes, Waste Management cannot do. *See ante*, slip op. at 14.

* * *

This is a tough case. We have not one but two individuals who were convicted of taking bribes. We have the rough-and-tumble local politics of post-Katrina New Orleans. And we have fierce competitors in the landfill industry. The majority and I disagree about whether all of this belongs in front of a civil RICO jury. But I think our disagreement is driven more by this case's facts than by a fundamental disagreement about the post-1986 summary judgment

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[3] At a debate hosted by Notre Dame, Mikva explained:

In preparing for my appearance here today, I went through some of the cases in which a civil RICO claim has been filed. And the range of cases boggle[s] the mind. These are not cases against Mafia figures. These have nothing to do with some poor merchant who has been squeezed by the mafiosi in a loan transaction. RICO makes its appearance in everything from divorce suits to religious disputes, to suits against one of the national candidates for President, to a major political party, and to just about every kind of garden variety of contractual and securities dispute that you could imagine between businessmen, to corporate raids, to defenses against corporate raids, to state efforts to collect state sales taxes from local businessmen.

If you find it hard to relate that potpourri to organized crime or racketeering, you are not alone.

Id. at 371.

standard. And I don't read the majority to allow any of these issues to reach the jury—including, for example, whether the Mayor "disregard[ed]" his policy advisors, *ante*, slip op. at 17—without the totality of the facts presented in this highly unusual case.

No one finds these facts more troubling than I do. But as Justice Scalia once said, "[t]he judge who always **[**50]** likes the results he reaches is a bad judge." Clare Kim, *Justice Scalia: Constitution Is "Dead,"* MSNBC (Oct. 2, 2013, 10:03 PM), **[*982]** http://www.msnbc.com/the-last-word/justice-scalia-constitution-dead. I don't like granting summary judgment to campaign-finance violators. Nor do I like giving the benefit of the doubt to disgraced ex-government officials. But, in the absence of evidence, it's what the law commands. I respectfully dissent.

LexisNexis

Sidibe v. Sutter Health

United States District Court for the Northern District of California

April 12, 2019, Decided; May 9, 2019, Filed

Case No. 12-cv-04854-LB

Reporter

2019 U.S. Dist. LEXIS 79683 *; 2019-1 Trade Cas. (CCH) P80,765; 2019 WL 2078788

DJENEBA SIDIBE, et al., Plaintiffs, v. SUTTER HEALTH, Defendant.

Prior History: *Sidibe v. Health, 2018 U.S. Dist. LEXIS 20350 (N.D. Cal., Feb. 7, 2018)*

Core Terms

Markets, Candidate, patients, network, health plan, geographic, percent, redirection, hospital service, drive, non-Kaiser, enrollees, material fact, hypothetical, increased price, monopolist, hypothetical-monopolist, Knox-Keene Act, antitrust, rural, inpatient, providers, residents, minutes, Overview, insured, REDACTED, summary judgment, non-Sutter, estimated

LexisNexis® Headnotes

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

HN1[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Market power is the ability to raise price profitably by restricting output. A defendant firm has market power if it can raise price without a total loss of sales. The substantial market power that concerns ***antitrust law*** arises when the defendant (1) can profitably set prices well above its costs and (2) enjoys some protection against rivals' entry or expansion that would erode such supracompetitive prices and profits. For antitrust purposes, therefore, market power is the abilities (1) to price substantially above the competitive level and (2) to persist in doing so for a significant period without erosion by new entry or expansion.

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

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

A market is the group of sellers or producers who have the actual or potential ability to deprive each other of significant levels of business. To define a market is to identify those producers providing customers of a defendant firm (or firms) with alternative sources for the defendant's product or service. A market for antitrust purposes includes both a product market and a geographical market. The relevant product market must encompass the product at issue as well as all economic substitutes for the product. The relevant geographic market is the area of effective competition where buyers can turn for alternate sources of supply. A properly defined market excludes other potential suppliers (1) whose product is too different (product dimension) or too far away (geographic dimension) and (2) who are not likely to shift promptly to offer defendant's customers a suitably proximate (in both product and geographic terms) alternative.

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

HN3[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A tying arrangement is a device used by a seller with market power in one product market to extend its market power to a distinct product market. To accomplish this objective, the seller conditions the sale of one product (the tying product) on the buyer's purchase of a second product (the tied product). The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. Tying arrangements are forbidden on the theory that, if the seller has market power over the tying product, the seller can leverage this market power through tying arrangements to exclude other sellers of the tied product.

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

HN4[] **Tying Arrangements, Sherman Act Violations**

In all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product. In the context of a tying claim under § 1 of the Sherman Antitrust Act, whether a defendant has market power cannot be evaluated unless the court first defines the relevant market. In cases involving allegations of horizontal restraints (imposed by agreements between competitors), courts might not need to precisely define the relevant market to conclude that these agreements were anticompetitive, but in cases involving allegations of vertical restraints (involving agreements between firms at different levels of distribution), courts must first define the relevant market. Congress has prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. An element of fuzziness would seem inherent in any attempt to delineate the relevant geographical market. The boundaries of a relevant geographic market need not be defined with scientific precision, or by metes and bounds as a surveyor would lay off a plot of ground, Rather, the relevant geographic market should correspond to the commercial realities of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area.

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

HN5[] **Tying Arrangements, Sherman Act Violations**

A common method to determine the relevant geographic market in the context of a tying claim under § 1 of the Sherman Antitrust Act is to find whether a hypothetical monopolist could impose a small but significant nontransitory increase in price (SSNIP) in the proposed market. This hypothetical-monopolist test asks what would happen if a single firm became the only seller in a candidate geographical region. If that hypothetical monopolist could profitably raise prices above competitive levels, the region is a relevant geographical market. But if customers would defeat the attempted price increase by buying from outside the region, it is not a relevant market; the test should be rerun using a larger candidate region. Courts have recognized that a hypothetical monopolist's ability to impose a SSNIP of five percent may satisfy the hypothetical-monopolist test.

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

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

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

HN6[] **Entitlement as Matter of Law, Appropriateness**

The court must grant a motion for summary judgment if the movant shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. Material facts are those that may affect the outcome of the case. A dispute about a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN7[] **Burdens of Proof, Movant Persuasion & Proof**

The party moving for summary judgment bears the initial burden of informing the court of the basis for the motion, and identifying portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. To meet its burden, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. If the moving party meets its initial burden, then the burden shifts to the non-moving party to produce evidence supporting its claims or defenses. The non-moving party may not rest upon mere allegations or denials of the adverse party's evidence, but instead must produce admissible evidence that shows there is a genuine issue of material fact for trial. If the non-moving party does not produce evidence to show a genuine issue of material fact, the moving party is entitled to summary judgment.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN8[] **Summary Judgment, Evidentiary Considerations**

In ruling on a motion for summary judgment, the court does not make credibility determinations or weigh conflicting evidence. Instead, it views the evidence in the light most favorable to the non-moving party and draws all factual inferences in the non-moving party's favor.

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

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

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

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

Defining the relevant geographic markets in an antitrust case is generally a question for the jury. The plaintiffs bear the ultimate burden of defining the relevant geographic markets. On a motion for summary judgment, if the plaintiff's evidence cannot sustain a jury verdict on the issue of market definition, summary judgment is appropriate. On a summary-judgment motion, the court must view the evidence and draw all inferences with respect to defining the relevant geographic market in the light most favorable to the non-moving party. While the plaintiff bears the burden of demonstrating a relevant market at trial, the moving party has the burden on summary judgment of demonstrating that there is no genuine issue of material fact. If there is a dispute of material fact regarding the proper geographic markets, summary judgment must be denied.

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

Evidence > Types of Evidence > Testimony > Expert Witnesses

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

The absence of expert testimony on the issue of relevant market and like issues is not, per se, fatal to a plaintiff's antitrust claims. In other words, expert testimony is not required, but in its absence a plaintiff must show by other evidence sufficient facts from which a jury could infer market share, market power, relevant market, monopolization, dangerous probability of monopolization, and the like.

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

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

Defining the relevant markets in an antitrust case is typically a question of fact.

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

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

The U.S. Supreme Court has recognized that an element of fuzziness would seem inherent in any attempt to delineate the relevant geographical market in an antitrust case, and thus the boundaries of a relevant geographic market need not be defined with scientific precision,, or by metes and bounds as a surveyor would lay off a plot of ground.

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

HN13[] **Market Definition, Relevant Market**

Courts have recognized that a hypothetical monopolist's ability to impose a significant nontransitory increase in price of five percent may satisfy the hypothetical-monopolist test to determine the relevant geographic market in an antitrust case.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN14[] **Expert Witnesses, Daubert Standard**

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case. *Fed. R. Evid. 702*. Under Daubert, the trial court must act as a gatekeeper to exclude junk science that does not meet *Rule 702*'s reliability standards by making a preliminary determination that the expert's testimony is reliable. Daubert does not require a court to admit or to exclude evidence based on its persuasiveness; rather it requires a court to admit or exclude evidence based on its scientific reliability and relevance. Thus, an expert's inference or assertion must be derived by the scientific method to be admissible. A trial court has broad latitude not only in determining whether an expert's testimony is reliable, but also in deciding how to determine the testimony's reliability.

Evidence > Admissibility > Expert Witnesses

HN15[] **Admissibility, Expert Witnesses**

Where experts' opinions are not the junk science *Fed. R. Evid. 702* was meant to exclude, the interests of justice favor leaving difficult issues in the hands of the jury and relying on the safeguards of the adversary system — vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof — to attack shaky but admissible evidence.

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Judges: LAUREL BEELER, United States Magistrate Judge.

Opinion by: LAUREL BEELER

Opinion

(REDACTED) ORDER (1) GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, (2) DENYING IN PART AND DENYING AS MOOT IN PART DEFENDANT'S MOTION TO EXCLUDE PLAINTIFFS' EXPERT, AND (3) DENYING AS MOOT PLAINTIFFS' MOTION TO EXCLUDE DEFENDANT'S EXPERT

Re: ECF Nos. 272, 311-1 (under seal) and 494-2 (redacted version), 409-3 (under seal) and 503 (redacted version)

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INTRODUCTION

In this putative class action, seven plaintiffs (five individuals who enrolled in health insurance from the health plans Aetna, Anthem Blue Cross, and Blue Shield, and two companies that paid for health insurance for their employees) are suing Sutter Health, which owns and operates **[*6]** a network of hospitals and medical-service providers in Northern California, for violations of the *federal Sherman Antitrust Act*, the *California Cartwright Act*, and the *California Unfair Competition Law*.

The plaintiffs allege that Sutter has "market power" in eight specific "geographic markets" (the "Candidate Tying Markets") in Northern California, where Sutter's hospitals are either the only hospital in the market (i.e., a monopoly) or the predominant provider in the market.[1] The plaintiffs allege that in order for health plans like Aetna, Anthem Blue Cross, and Blue Shield to assemble health-insurance products that are commercially marketable to individuals and to employers purchasing insurance for their employees, health plans must have those Sutter hospitals in their provider networks.[2] The plaintiffs allege that Sutter imposes "all or nothing" terms on health plans, telling health plans that they cannot include those hospitals as in-network providers unless they also accept as in-network providers Sutter's hospitals in four other geographic markets (the "Candidate Tied Markets") at the prices that Sutter dictates.[3] The plaintiffs allege that Sutter charges supra-competitive rates **[*7]** at its hospitals in the Candidate Tied Markets.[4] Because Sutter has tied access to the "must have" hospitals in the Candidate Tying Markets to acceptance of its supra-competitive rates for its hospitals in the Candidate Tied Markets, Sutter forces

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[1] Fourth Amend. Compl. ("4AC") - ECF No. 202 at 4 (¶ 4), 10 (¶¶ 30-31), 29 (¶¶ 86-87). Citations refer to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of documents.

[2] *See id.* at 4 (¶ 6), 11-12 (¶ 35).

[3] *Id.* at 4 (¶ 6), 11 (¶ 33). The court refers to the Candidate Tying Markets and the Candidate Tied Markets collectively as the "Candidate Markets."

[4] *Id.* at 4 (¶ 5), 33 (¶ 103).

health plans to pay higher rates for hospital services than they otherwise would pay but for this tying arrangement[5] — higher rates that in turn are passed downstream to individuals and employers who buy health insurance.[6]

Sutter moves for summary judgment on the ground that the plaintiffs have not met their burden of establishing that their proposed Candidate Markets are properly defined "geographic markets" for antitrust purposes.[7] In their complaint, the plaintiffs define their Candidate Markets by reference to "Hospital Service Areas" ("HSAs") as set out in an industry source called the *Dartmouth Atlas of Health Care* ("*Dartmouth Atlas*").[8] Sutter argues that *Dartmouth Atlas* HSAs do not define geographic markets for antitrust purposes, citing the report of its expert Dr. Gautam Gowrisankaran. The plaintiffs respond that documents and testimony (from health plans and from Sutter) and the competing report of their expert Dr. Tasneem Chipty **[*8]** support their position that their Candidate Markets are relevant geographic markets for antitrust purposes. Both sides have filed cross-motions to exclude the other side's expert.[9]

The court holds that there are disputes of material fact about whether the plaintiffs can establish that their Candidate Markets are properly defined geographic markets for antitrust purposes.[10] The court grants summary judgment with respect to the Davis HSA Candidate Tying Market and otherwise denies Sutter's motion for summary judgment. The court denies in part and denies as moot in part Sutter's motion to exclude Dr. Chipty and denies as moot the plaintiffs' motion to exclude Dr. Gowrisankaran.

BACKGROUND

1. Antitrust and Markets Generally

1.1 "Market Power"

HN1[] "Market power is the ability to raise price profitably by restricting output." *Ohio v. Am. Express Co., 138 S. Ct. 2274, 2288, 201 L. Ed. 2d 678 (2018)* (emphasis removed) (quoting Philip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application ¶ 5.01 (4th ed. 2017)). "A defendant firm has market power if it can raise price without a total loss of sales." Philip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application ¶ 5.01 (4th ed. **[*9]** 2018) (Areeda & Hovenkamp). "[T]he substantial market power that concerns ***antitrust law*** arises when the defendant (1) can profitably set prices well above its costs and (2) enjoys some protection against rival[s'] entry or expansion that would erode such supracompetitive prices and profits." *Id.* "For antitrust purposes, therefore, market power is the abilities (1) to price substantially above the competitive level and (2) to persist in doing so for a significant period without erosion by new entry or expansion." *Id.* (emphasis removed).

[5] *Id.* at 5 (¶ 9), 33 (¶¶ 103-05).

[6] *Id.* at 5 (¶ 8), 34-35 (¶¶ 109-12).

[7] Def. MSJ - ECF No. 272.

[8] 4AC - ECF No. 202 at 3-4 (¶¶ 3-4), 17-24 (¶¶ 53-67).

[9] Pls. Mot. to Exclude Gowrisankaran - ECF Nos. 311-1 (under seal), 494-2 (redacted version); Def. Mot. to Exclude Chipty - ECF Nos. 409-3 (under seal), 503 (redacted version).

[10] The court does not address whether HSAs are geographic markets for antitrust purposes generally, only that there are disputes of material facts as to whether the specific Candidate Markets that the plaintiffs propose — which here are defined by reference to HSAs — are geographic markets for antitrust purposes here.

1.2 "Market"

HN2[] "'[A] market is the group of sellers or producers who have the actual or potential ability to deprive each other of significant levels of business.'" *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 784 (9th Cir. 2015)* (quoting *Rebel Oil Co., Inc. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir 1995))*. "To define a market is to identify those producers providing customers of a defendant firm (or firms) with alternative sources for the defendant's product or service." Areeda & Hovenkamp ¶ 530a.

A market for antitrust purposes includes both a "product market" and a "geographical market." *Hicks v. PGA Tour, Inc., 897 F.3d 1109, 1120 (9th Cir. 2018)* (citing *Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1104 (9th Cir. 1999))*. The relevant product market "'must encompass the product at issue as well as all economic substitutes for the product.'" *Id.* (quoting *Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1045 (9th Cir. 2008))*. The relevant geographic market "is the 'area of effective **[*10]** competition where buyers can turn for alternate sources of supply.'" *St. Luke's, 778 F.3d at 784* (quoting *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1490 (9th Cir. 1991))*. "A properly defined market excludes other potential suppliers (1) whose product is too different (product dimension) or too far away (geographic dimension) and (2) who are not likely to shift promptly to offer defendant's customers a suitably proximate (in both product and geographic terms) alternative." Areeda & Hovenkamp ¶ 530a.

1.3 "Tying"

This case involves allegations of an anticompetitive restraint known as "tying." ***HN3***[] "A tying arrangement is a device used by a seller with market power in one product market to extend its market power to a distinct product market." *Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 912 (9th Cir. 2008)* (citing *Paladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1159 (9th Cir. 2003))*. "To accomplish this objective, the seller conditions the sale of one product (the tying product) on the buyer's purchase of a second product (the tied product)." *Id.* (citing *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 461, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*; Richard A. Posner, ***Antitrust Law*** 197 (2d ed. 2001)). "'The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.'" *Id. at 913-14* (emphasis **[*11]** removed, internal brackets omitted) (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984))*. "Tying arrangements are forbidden on the theory that, if the seller has market power over the tying product, the seller can leverage this market power through tying arrangements to exclude other sellers of the tied product." *Id. at 912* (citing *Jefferson Parish, 466 U.S. at 14*; *Fortner Enters., Inc. v. U.S. Steel Corp., 394 U.S. 495, 517-18, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969) (White, J., dissenting))*.

1.4 Requirement to Define the Relevant Market

HN4[] "[I]n all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product." *Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 46, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*. In the context of a tying claim under *Section 1 of the Sherman Antitrust Act*, whether a defendant has market power "cannot be evaluated unless the Court first defines the relevant market." *Am. Express, 138 S. Ct. at 2285 & n.7*.[11]

[11] In cases involving allegations of horizontal restraints (imposed by agreements between competitors), courts might not need to "precisely define the relevant market to conclude that these agreements were anticompetitive," but in cases involving allegations of vertical restraints (involving agreements between firms at different levels of distribution), courts must "first define[] the relevant

"Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one." *Brown Shoe Co. v. United States, 370 U.S. 294, 336, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. "An element of 'fuzziness would seem inherent in any attempt to delineate the relevant geographical market.'" *United States v. Conn. Nat'l Bank, 418 U.S. 656, 669, 94 S. Ct. 2788, 41 L. Ed. 2d 1016 (1974)* (quoting *United States v. Phila. Nat'l Bank, 374 U.S. 321, 360 n.37, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963))*. The boundaries of a relevant geographic market "need not . . . be defined with scientific precision," *id.*, or "by metes and bounds as a surveyor would lay off a plot of ground," *United States v. Pabst Brewing Co., 384 U.S. 546, 549, 86 S. Ct. 1665, 16 L. Ed. 2d 765 (1966)*. Rather, the relevant geographic market should "'correspond to the commercial realities' of the **[*12]** industry and be economically significant." *Brown Shoe, 370 U.S. at 336-37*. "Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area." *Id.* (citing cases).

1.5 The "Hypothetical Monopolist" Test for Defining a Relevant Geographic Market

HN5[] "A common method to determine the relevant geographic market . . . is to find whether a hypothetical monopolist could impose a 'small but significant nontransitory increase in price' ('SSNIP') in the proposed market." *St. Luke's, 778 F.3d at 784*; *accord* *FTC v. Advocate Health Care Network, 841 F.3d 460, 468 (7th Cir. 2016)*; *FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 338 (3d Cir. 2016)*. This hypothetical-monopolist test "asks what would happen if a single firm became the only seller in a candidate geographical region." *Advocate Health, 841 F.3d at 468* (citing *FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1038, 383 U.S. App. D.C. 341 (D.C. Cir. 2008))*. "If that hypothetical monopolist could profitably raise prices above competitive levels, the region is a relevant geographical market." *Id.* (citing Kenneth G. Elzinga & Anthony W. Swisher, *Limits of the Elzinga-Hogarty Test in Hospital Mergers: The Evanston Case*, 18 Int'l J. of the Econ. of Bus. 133, 136 (2011)). "But if customers would defeat the attempted price increase by buying from outside the region, it is not a relevant market; the test should be rerun using a larger candidate region." *Id.* (citing *St. Luke's, 778 F.3d at 784*; *In re Se. Milk Antitrust Litig., 739 F.3d 262, 277-78 (6th Cir. 2014))* **[*13]** . Courts have recognized that a hypothetical monopolist's ability to impose a SSNIP of five percent may satisfy the hypothetical-monopolist test. *Penn State Hershey, 838 F.3d at 338 nn.1-2* (citing U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizonal Merger Guidelines* § 4.1.2 (2010); *St. Luke's, 778 F.3d at 784 n.9*).

Analyzing how buyers would respond to a hypothetical-monopolist seller's imposing a SSNIP requires defining the buyers and sellers in the relevant market.

2. Health-Care Buyers, Sellers, and Markets

"The market for hospital services and medical care is complex." *Cascade Health, 515 F.3d at 891*. There are at least three transactions involved in providing hospital services and health care in connection with health insurance.

2.1 Hospitals Sell Hospital Services to Health Plans

First, hospitals sell hospital services to health-insurance plans. Hospitals and health plans negotiate whether a given hospital will be included in the health plan's network and negotiate the rates that the health plan will pay the hospital for its hospital services. *St. Luke's, 778 F.3d at 784 & n.10* (citing Gregory Vistnes, *Hospitals, Mergers, and*

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market." *Am. Express, 138 S. Ct. at 2285 n.7*. Tying is a vertical restraint. *Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1198-99 (9th Cir. 2012)*.

The plaintiffs argue that market definition is not a required element of their state-law Cartwright Act claims. Pls. Mot. for Summary J. ("MSJ") Opp'n - ECF No. 494 at 8. Because the court holds that there are disputes of material fact regarding the plaintiffs' geographic-market definitions that are sufficient to defeat summary judgment, the court need not decide whether market definitions are a necessary element of a Cartwright Act claim.

Two-Stage Competition, 67 Antitrust L.J. 671, 672, 674 (2000)). These negotiations are highly price-sensitive. *Advocate Health, 841 F.3d at 465* (citing Vistnes, 67 Antitrust L.J. at 674-75). All else being equal, hospitals prefer higher rates and health plans prefer lower rates. *Cascade Health, 515 F.3d at 892* ("Insurers are usually commercial health insurance companies that seek **[*14]** to buy medical services from hospitals on the best terms possible. . . . It follows that hospitals prefer high reimbursement rates and insurers prefer low reimbursement rates, as each group pursues its own economic interest.").

While hospital services are delivered to the health plan's enrollees (i.e., patients), the health plan negotiates whether a hospital will be included in the health plan's provider network and buys the services that the hospital sells. *Cascade Health, 515 F.3d at 892* ("Hospitals . . . provide services to patients and sell services to insurers."); *see St. Luke's, 778 F.3d at 784* ("the vast majority of health care consumers are not direct purchasers of health care — [(1)] the consumers purchase health insurance and [(2)] the insurance companies negotiate directly with the providers," such as hospitals); *Advocate Health, 841 F.3d at 470* ("[C]onsumers do not directly pay the full cost of hospital care. Instead, insurance companies cover most hospital costs.") (citing Elzinga & Swisher, 18 Int'l J. of the Econ. of Bus. at 138); *Penn State Hershey, 838 F.3d at 342* ("[P]atients, in in large part, do not feel the impact of price increases. Insurers do. And they are the ones who negotiate directly with the hospitals to determine both reimbursement rates and the hospitals that will be included in their networks.").[12]

2.2 Health Plans [*15] Sell Health Insurance to Individuals and Employers

Second, health plans sell health insurance to consumers. The consumers are individuals (who directly purchase health insurance for themselves or their families) and employers (which purchase health insurance for their employees). *Cascade Health, 515 F.3d at 892*; *St. Luke's, 778 F.3d at 784*. Health plans' selling of insurance to employers may be further divided into two transactions. Gregory S. Vistnes & Yianis Sarafidis, *Cross-Market Hospital Mergers: A Holistic Approach*, 79 Antitrust L.J. 253, 266 (2013). First, health plans compete to be one of a limited number of health plans that employers offer to their employees. *Id.* at 266-67. Second, after employers select them, health plans compete to be chosen by employees. *Id.* at 267; *accord* Vistnes, 67 Antitrust L.J. at 678 ("A health plan must ensure not only that employees will choose the plan if offered, but also that employers will choose to offer it.").

An important way that health plans compete for consumers is their provider networks: the hospitals, physicians, and ancillary providers that the health plan offers "in network" and that enrollees are encouraged to use. Vistnes & Sarafidis, 79 Antitrust L.J. at 267. All else being equal, a health plan with a more comprehensive provider network will be more attractive to consumers. *Id.* At the same **[*16]** time, health plans that have high-priced providers in their networks have higher costs. *Id.* Thus, in choosing how inclusive their provider network is, health plans balance the benefit of more comprehensive networks with the costs of paying more to providers in their networks. *Id.*

2.3 Hospitals Attract Health-Plan Enrollees

Third, hospitals seek to attract health-plan enrollees who need hospital services to come to them (as opposed to other hospitals). *St. Luke's, 778 F.3d at 784 n.10* (citing Vistnes, 67 Antitrust L.J. at 681-82); *Advocate Health, 841 F.3d at 460* (citing Vistnes, 67 Antitrust L.J. at 672); *Penn State Hershey, 838 F.3d at 342* (citing Vistnes, 67 Antitrust L.J. at 672).

Unlike health plans, which are sensitive to the prices that hospitals charge for their services, enrollees "are 'largely insensitive' to price" because the prices that hospitals charge are largely borne by the enrollees' health plans, not by the enrollees. *St. Luke's, 778 F.3d at 784 n.10* (citing Vistnes, 67 Antitrust L.J. at 682); *accord Advocate Health,*

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[12] In some instances, a hospital might sell hospital services directly to an individual patient (e.g., an uninsured patient who directly pays the hospital out-of-pocket). This case, however, relates only to enrollees in health-insurance plans. *See* 4AC - ECF No. 204 at 3 (¶¶ 1-2).

841 F.3d at 471 ("Insured patients are usually not sensitive to retail hospital prices, while insurers respond to both prices and patient preferences.") (citing Vistnes, 67 Antitrust L.J. at 677, 680); Penn State Hershey, 838 F.3d at 342 ("Patients are largely insensitive to healthcare prices because they utilize insurance, which covers the majority of their healthcare costs."). Instead of taking price into account, enrollees choose hospitals "based mostly on non-price factors, **[*17]** such as location or quality of services." Penn State Hershey, 838 F.3d at 341; *accord* St. Luke's, 778 F.3d at 784 n.10 (citing Vistnes, 67 Antitrust L.J. at 682); Advocate Health, 841 F.3d at 465 (citing Vistnes, 67 Antitrust L.J. at 677, 682).[13]

2.4 The Relevant Product Market Is the Market for Hospitals Selling Inpatient Hospital Services to Health Plans

The plaintiffs plead in their complaint both (1) a relevant product market for hospitals selling inpatient hospital services to commercial health plans[14] and (2) a relevant product market for health plans selling health insurance to individuals and employers.[15]

Sutter moves for summary judgment on the ground that the plaintiffs have not established the relevant geographic markets for the first product market: the market for hospitals selling inpatient hospital services to health plans.[16] In this motion, Sutter does not challenge any product-market definition or the geographic markets for health plans selling health insurance to individuals and employees.[17]

STATEMENT

In their complaint, the plaintiffs propose twelve Candidate Markets: eight Candidate Tying Markets and four Candidate Tied Markets.[18] The eight Candidate Tying Markets are:

1. the Antioch HSA, as defined in the *Dartmouth Atlas*,[19]

2. the Auburn HSA, as defined in the *Dartmouth Atlas*,[20]

3. the Crescent City HSA, as defined in the *Dartmouth* ***[*18]*** *Atlas*,[21]

4. the Davis HSA, as defined in the *Dartmouth Atlas*,[22]

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[13] Some enrollees may be more directly sensitive to price, e.g., enrollees in high-deductible plans. *See* Penn State Hershey, 838 F.3d at 342 n.6.

[14] 4AC - ECF No. 204 at 15 (¶ 47).

[15] *Id.* at 25 (¶¶ 68-69).

[16] Def. MSJ - ECF No. 272 at 11-13.

[17] *Id.* at 14.

[18] 4AC - ECF No. 204 at 17-24 (¶¶ 56-67).

[19] Zip codes 94505, 94509, 94511, 94513, 94514, 94531, 94548, and 94561. *Id.* at 18 (¶ 56).

[20] Zip codes 95602, 95603, 95604, 95614, 95631, 95658, 95664, 95701, 95703, 95713, 95714, 95717, 95722, and 95736. *Id.* (¶ 57).

[21] Zip codes 95531, 95532, 95538, 95543, 95548, 95567, and 97415. *Id.* at 19 (¶ 58).

[22] Zip codes 95616, 95617, 95618, 95620, and 95694. *Id.* (¶ 59).

5. the Jackson HSA, as defined in the *Dartmouth Atlas*,[23]

6. the Lakeport HSA, as defined in the *Dartmouth Atlas*,[24]

7. the Tracy HSA, as defined in the *Dartmouth Atlas*,[25] and

8. the Berkeley HSA, as defined in the *Dartmouth Atlas*,[26] combined with the Oakland HSA, as defined in the *Dartmouth Atlas*.[27]

The four Candidate Tied Markets are:

1. the Modesto HSA, as defined in the *Dartmouth Atlas*,[28]

2. the Sacramento HSA, as defined in the *Dartmouth Atlas*,[29]

3. the San Francisco HSA, as defined in the *Dartmouth Atlas*,[30] and

4. the Santa Rosa HSA, as defined in the *Dartmouth Atlas*.[31]

The following map, taken from the plaintiffs' Fourth Amended Complaint, identifies the geographic layout of the Candidate Tying Markets (in red) and the Candidate Tied Markets (in green).

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[23] Zip codes 95232, 95255, 95601, 95629, 95640, 95642, 95644, 95646, 95654, 95665, 95666, 95669, 95675, 95685, 95689, and 95699. *Id.* at 20 (¶ 60).

[24] Zip codes 95426, 95435, 95451, 95453, 95458, 95464, 95485, and 95493. *Id.* (¶ 61).

[25] Zip codes 95304, 95376, 95377, 95378, and 95391. *Id.* at 21 (¶ 62).

[26] Zip codes 94530, 94701, 94702, 94703, 94704, 94705, 94706, 94707, 94708, 94709, 94710, 94712, and 94720. *Id.* (¶ 63).

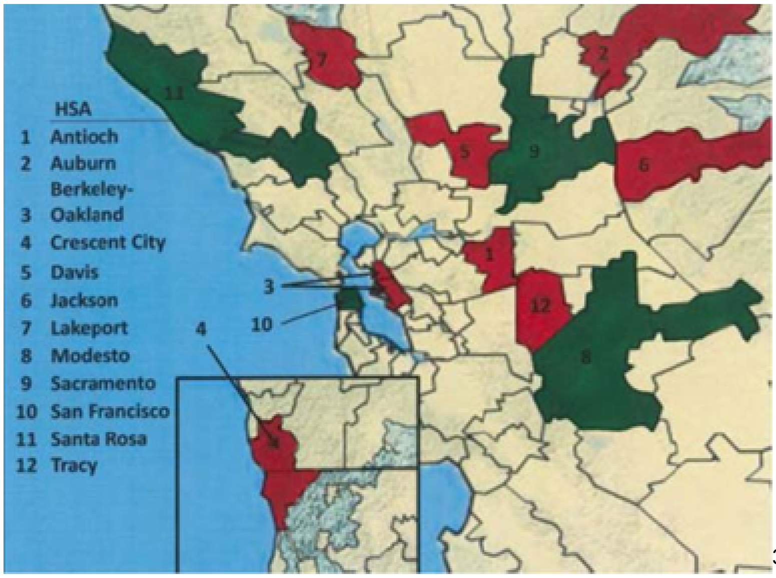
[27] Zip codes 94502, 94604, 94608, 94612, 94620, 94649, 94661, 94601, 94605, 94609, 94613, 94617, 94621, 94662, 94602, 94606, 94610, 94614, 94618, 94623, 94659, 94666, 94603, 94607, 94611, 94615, 94619, 94624, and 94660. *Id.*

[28] Zip codes 95307, 95230, 95313, 95319, 95320, 95322, 95323, 95326, 95328, 95329, 95350, 95351, 95352, 95353, 95354, 95355, 95356, 95357, 95358, 95360, 95363, 95366, 95367, 95368, 95385, 95386, 95387, and 95397. *Id.* at 22 (¶ 64).

[29] Zip codes 94203, 94204, 94205, 94206, 94207, 94208, 94209, 94211, 94229, 94230, 94232, 94234, 94235, 94236, 94237, 94239, 94240, 94244, 94245, 94247, 94248, 94249, 94250, 94252, 94254, 94256, 94257, 94258, 94259, 94261, 94262, 94263, 94267, 94268, 94269, 94271, 94273, 94274, 94277, 94278, 94279, 94280, 94282, 94283, 94284, 94285, 94286, 94287, 94288, 94289, 94290, 94291, 94293, 94294, 94295, 94296, 94297, 94298, 94299, 95605, 95612, 95615, 95624, 95626, 95639, 95651, 95652, 95655, 95659, 95662, 95668, 95670, 95672, 95673, 95680, 95683, 95690, 95691, 95693, 95741, 95757, 95758, 95759, 95762, 95798, 95799, 95811, 95812, 95813, 95814, 95815, 95816, 95817, 95818, 95819, 95820, 95821, 95822, 95823, 95824, 95825, 95826, 95827, 95828, 95829, 95830, 95831, 95832, 95833, 95834, 95835, 95836, 95837, 95838, 95840, 95851, 95852, 95853, 95860, 95864, 95865, 95866, 95867, 95894, and 95899. *Id.* at 22-23 (¶ 65).

[30] Zip codes 94102, 94103, 94104, 94105, 94107, 94108, 94109, 94110, 94111, 94112, 94114, 94115, 94116, 94117, 94118, 94119, 94120, 94121, 94122, 4123, 94124, 94126, 94127, 94129, 94130, 94131, 94132, 94133, 94134, 94137, 94139, 94140, 94141, 94142, 94143, 94144, 94145, 94146, 94147, 94151, 94158, 94159, 94160, 94161, 94163, 94164, 94172, 94177, and 94188. *Id.* at 23 (¶ 66).

[31] Zip codes 94926, 94927, 94928, 94931, 95401, 95402, 95403, 95404, 95405, 95406, 95407, 95409, 95412, 95421, 95436, 95439, 95445, 95446, 95452, 95459, 95462, 95468, 95471, 95480, 95486, 95492, 95494, and 95497. *Id.* at 24 (¶ 67).



[32]

At the hearing on Sutter's motion for summary judgment, the plaintiffs stipulated that summary judgment should be granted with respect to the Davis HSA.[33]

1. The *Dartmouth Atlas of Health Care* and "Hospital Service Areas"

The plaintiffs define their Candidate Markets by reference to "Hospital Service Areas," or "HSAs," set out in the *Dartmouth Atlas*, an industry source compiled by the Dartmouth **[*19]** Institute for Health Policy & Clinical Practice and available at http://www.dartmouthatlas.org.[34] The following summarizes the *Dartmouth Atlas*'s identification of HSAs.[35]

In 1996, the Center for the Evaluative Clinical Sciences at Dartmouth Medical School published the first edition of the *Dartmouth Atlas*.[36] The *Dartmouth Atlas* defined 3,436 "Hospital Service Areas," or "HSAs," that (according to the *Dartmouth Atlas* group) represented "'the geographic boundaries of naturally occurring health care markets in the United States.'"[37] The *Dartmouth Atlas* identified these HSAs through a three-step process that used the location of acute-care hospitals in the United States in 1992 and Medicare patient-discharge data for 1992 and 1993.[38]

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[32] *Id.* at 12 (¶ 37).

[33] Hr'g Tr. - ECF No. 611 at 126.

[34] 4AC - ECF No. 204 at 3 (¶ 3), 10 (¶ 30), 17-24 (¶¶ 53-67).

[35] Sutter's expert Dr. Gowrisankaran discusses the *Dartmouth Atlas* and how the *Dartmouth Atlas* group construed the "Hospital Service Areas," or "HSAs." The plaintiffs and their expert Dr. Chipty do not contend that Dr. Gowrisankaran's discussion about how the *Dartmouth Atlas* group constructed HSAs is inaccurate. *See generally* Chipty Dep. - ECF No. 479-2 at 56-57 (pp. 55-56). The court thus recounts a portion of Dr. Gowrisankaran's discussion as background about what HSAs are. The court does not adopt Dr. Gowrisankaran's discussions on this topic as a fact finding and instead summarizes his discussions to provide background on HSAs.

[36] Gowrisankaran Decl. - ECF No. 272-3 at 18 (¶ 26).

[37] *Id.* (quoting *Dartmouth Atlas*).

[38] *Id.* at 20 (¶ 30).

First, each acute-care hospital in the United States in 1992 was assigned to the town or city where it was located.[39] The 3,953 towns or cities that contained at least one acute-care hospital were defined as "candidate HSAs."[40]

Second, using Medicare patient-discharge data for 1992 and 1993, each zip code in the country was assigned to one of the 3,953 candidate HSAs.[41] All zip codes were assigned **[*20]** to the candidate HSA where the plurality of Medicare discharges for residents from that zip code had been hospitalized.[42] If a plurality of a candidate HSA's residents' Medicare hospitalizations took place in another candidate HSA, then the first HSA was eliminated as a candidate HSA, and its zip codes were reassigned to other HSAs.[43] Approximately 500 candidate HSAs were eliminated in this way.[44]

Third, the *Dartmouth Atlas* group visually examined the boundaries of each HSA and performed manual adjustments to reach contiguous HSAs (including reassigning "island" zip codes, which had been assigned to a non-contiguous HSA, to the HSA that surrounded them).[45]

In constructing HSAs, the *Dartmouth Atlas* group did not use patient-discharge data from commercial-health-plan enrollees; it used only Medicare-patient-discharge data.[46] The *Dartmouth Atlas* group has not redefined HSAs since they were first constructed, meaning that HSAs are still defined based on patient-discharge data from 1992-1993.[47] The plaintiffs' expert Dr. Chipty and Sutter's expert Dr. Gowrisankaran agree that HSAs were not created to delineate antitrust markets and that not all HSAs are antitrust markets.[48]

[*21] 2. The Candidate Tying Markets

In their complaint, the plaintiffs alleged seven Candidate Tying Markets (excluding the Davis HSA). The following gives an overview of each Candidate Tying Market and then summarizes evidence relevant to the markets and Sutter's motion for summary judgment. There are three categories of evidence that are relevant: (1) evidence relating to the application of *California's Knox-Keene Health Care Service Plan Act of 1985, Cal. Health & Safety*

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[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at 21 (¶ 30).

[46] *Id.* at 27 (¶ 43); *see also* Dartmouth Atlas Project, General FAQ, https://www.dartmouthatlas.org/faq (last visited Apr. 12, 2019) ("[Q.] Why does the Dartmouth Atlas Project focus on Medicare data? Are there similar variations in utilization and spending in the under-65 population? [A.] The Centers for Medicare and Medicaid Services (CMS), the federal agency that collects data for every person and provider using Medicare health insurance, makes available a uniform national claims database for research purposes. There is no counterpart to this database for the commercially insured population. However, similar studies we have done using state all-payer data in Pennsylvania and Virginia, and with Blue Cross Blue Shield data in Michigan, have shown similar variations among the under-65 population.").

[47] Gowrisankaran Decl. - ECF No. 272-3 at 19 (¶ 27); *see also* Dartmouth Atlas Project, About Our Regions, http://archive.dartmouthatlas.org/data/region (last visited Apr. 12, 2019) ("When these regions were created in the early 1990s, most hospital service areas contained only one hospital. In the intervening years, hospital closures have left some HSAs with no hospital; these HSAs have been maintained as distinct areas in order to preserve the continuity of the database.").

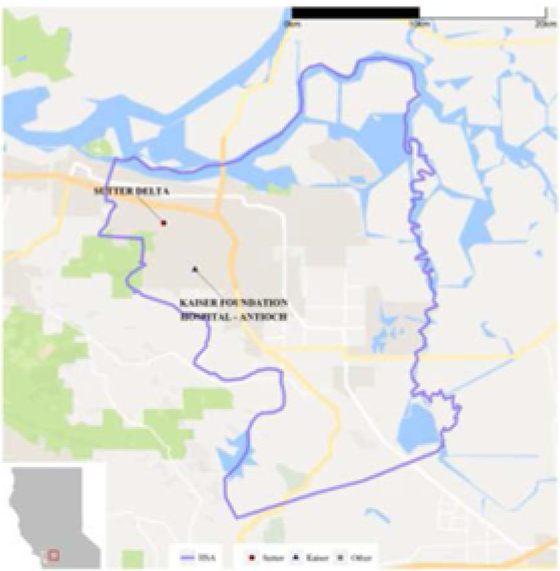
[48] Gowrisankaran Decl. - ECF No. 272-3 at 18 (¶ 26); Chipty Decl. - ECF No. 494-1 at 106 (¶ 144).

Code §§ 1340 et seq., and California Code of Regulations title 28, § 1300.51(d)(H)(ii) (collectively, "Knox-Keene Act"), (2) a "redirection analysis" by the health plan Blue Shield of California, and (3) other testimony and documentary evidence from health plans and Sutter.

2.1 The Antioch HSA

2.1.1 Overview

The Antioch HSA includes the city of Antioch in Contra Costa County, California. There are approximately 172,000 residents in the Antioch HSA.[49] Excluding a hospital operated by Kaiser Permanente ("Kaiser"),[50] there is one hospital in the Antioch HSA: Sutter Delta Medical Center ("Sutter Delta").[51]



[52]

Between 40 and 45 percent of the non-Kaiser, commercially insured patients residing in the Antioch HSA stay in the Antioch HSA for inpatient hospital services, and the remaining 55 to 60 percent travel out of the Antioch HSA **[*22]** for inpatient hospital services.[53] Dr. Chipty stated that the patients who stay in the Antioch HSA drive an average of 17 minutes for their care and the patients who travel out of the Antioch HSA drive an average of 44 minutes for their care.[54]

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[49] Chipty Decl. - ECF No. 494-1 at 82-83 (¶ 107).

[50] Kaiser Permanente is another large hospital system in Northern California. 4AC - ECF No. 204 at 10-11 (¶ 32). Kaiser operates in a "closed system," where (other than in emergencies) its hospitals offer inpatient hospital services only to Kaiser health plans and not to other health plans. *Id.* The plaintiffs therefore allege that Kaiser's hospitals do not compete with Sutter's hospitals with respect to selling inpatient hospital services to non-Kaiser health plans. *Id.* Sutter does not challenge the exclusion of Kaiser in its motion for summary judgment. Def. MSJ - ECF No. 272 at 19 n.7 ("[T]his Motion generally focuses on data that exclude Kaiser in keeping with Plaintiffs' approach to market definition in this case.").

[51] Chipty Decl. - ECF No. 494-1 at 81 (¶ 106); Gowrisankaran Decl. Ex. 1A - ECF No. 272-3 at 60.

[52] Chipty Decl. - ECF No. 494-1 at 82 (¶ 106).

[53] *Id.* (¶ 107) (40%/60%); Gowrisankaran Decl. Fig. 5 - ECF No. 272-3 at 46 (44.2%/55.8%).

[54] Chipty Decl. - ECF No. 494-1 at 82 (¶ 107).

2.1.2 Knox-Keene Act

A former Senior Vice President of the health plan Blue Shield stated in a sworn declaration that California's Knox-Keene Act "requires Blue Shield to create a network with access to health care providers such that 'all enrollees have a residence or workplace within 30 minutes or 15 miles of a contracting or plan-operated hospital[.]'"[55] The former Senior Vice President explained, "[f]or example, if one of Blue Shield's self-funded customers has an employee living in a rural area of Northern California, and the only hospital within 30 minutes or 15 miles of his residence or workplace was a Sutter hospital, the law mandates that Sutter's hospital be included in the network."[56]

At the end of 2014, Blue Shield's then-effective agreement with Sutter was scheduled to automatically terminate (absent a renewal).[57] Blue Shield had to file "transition disengagement plans" with the California Department of Managed Health Care ("DMHC").[58] The **[*23]** DMHC reviewed Blue Shield's proposed termination of Sutter Delta as an in-network hospital and whether the termination complied with the Knox-Keene Act.[59] The DMHC sent a notice to Blue Shield that it effectively had to keep Sutter Delta in its network for certain hospital services, and allow its enrollees to use Sutter Delta, because there were no other alternative hospitals that complied with Knox-Keene Act requirements.[60]

Dr. Gowrisankaran stated that 51 percent of patients discharged from a non-Kaiser hospital in the Antioch HSA (i.e., Sutter Delta) live within a 30-minute drive of another non-Sutter, non-Kaiser hospital in another HSA.[61] That means that 49 percent of patients do not live within a 30-minute drive of another non-Sutter, non-Kaiser hospital.[62]

2.1.3 Blue Shield redirection analysis

A former Senior Vice President of the health plan Blue Shield of California stated in a sworn declaration that "consumer demand dictated the geographic 'footprint' of Blue Shield's networks. Many self-funded payors and insured employers who contract with Blue Shield have members throughout Northern California. Therefore, providing broad geographic coverage for members is important. In addition, **[*24]** certain Sutter hospitals and physician groups are 'must have' providers because particular Blue Shield customers insist that they be included in the network."[63] The former Senior Vice President stated that "Sutter's 'all or nothing' negotiation strategy, and

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[55] Joyner Decl. - ECF No. 497 at 7 (¶ 20).

[56] *Id.*

[57] Barnes Dep. - ECF Nos. 311-15 at 13 (under seal), 494-10 at 13 (redacted version) (p. 538); DMHC Letter-ECF No. 494-13 at 3 (BSC_SutterSub00062560).

[58] Barnes Dep. - ECF No. 494-10 at 13-14 (pp. 538-39).

[59] DMHC Letter - ECF No. 494-13 at 3 (BSC_SutterSub00062560); *see* Barnes Dep. - ECF No. 494-10 at 14 (p. 539); Barnes Dep. - ECF No. 494-13 at 12 (p. 542).

[60] Barnes Dep. - ECF No. 494-10 at 13-14 (pp. 538-39); Barnes Dep. - ECF No. 494-13 at 12 (p. 542); Barnes Dep. - ECF No. 494-11 at 11 (p. 543); DMHC Letter - ECF No. 494-13 at 3-5 (BSC_SutterSub00062560-62).

[61] Gowrisankaran Decl. Ex. 8 - ECF No. 272-3 at 68. Dr. Gowrisankaran referred to discharges from hospitals within the Antioch HSA, excluding Kaiser hospitals. Because Sutter Delta is the only non-Kaiser hospital in the Antioch HSA, these discharges necessarily are discharges from Sutter Delta.

[62] Dr. Gowrisankaran referred to whether patients live within 30 minutes of a non-Sutter, non-Kaiser hospital in another HSA. Because there are no other non-Sutter, non-Kaiser hospitals in the Antioch HSA, patients who do not live within 30 minutes of a non-Sutter, non-Kaiser hospital in another HSA necessarily do not live within 30 minutes of any non-Sutter, non-Kaiser hospital other than Sutter Delta.

[63] Joyner Decl. - ECF No. 497 at 7-8 (¶ 21).

leveraging of its market position in multiple counties (where they are dominant) to demand higher rates across the board has forced Blue Shield to accept Sutter's significantly higher pricing."[64] The former Senior Vice President stated that "Sutter's prices were 'materially higher' than the average prices in Northern California and across the state[.]"[65]

Blue Shield conducts "redirection analyses" whenever its contract with Sutter comes up for renewal, because it has to determine the cost of terminating its contract with Sutter.[66] As Blue Shield's Director of Provider Contracting for Northern California testified, when Blue Shield's contract with Sutter comes up for renewal, "one of those reports we have run is, okay, if Sutter's out of network, what can be redirected elsewhere, where are their alternatives, what our cost implications are."[67] The redirection analysis that Blue Shield conducted in 2014 ("Blue Shield Redirection Analysis") **[*25]** included an estimate that if Blue Shield were to terminate its contract with Sutter and Sutter Delta became an out-of-network hospital, then [TEXT REDACTED BY THE COURT] percent of Blue Shield enrollees who used Sutter Delta could be "redirected" to other hospitals ([TEXT REDACTED BY THE COURT]) and [TEXT REDACTED BY THE COURT] percent of enrollees would stay with Sutter Delta, even if Sutter were out of network and they had to pay higher costs.[68]

The Director acknowledged that "[t]here [wa]s no, you know, set criteria" for coming up with the redirection percentages listed in the Blue Shield Redirection Analysis (for Sutter Delta or for any other hospital).[69] He testified that, "you have got to use your experience of the marketplace and understanding of which hospitals are compl[e]mentary, how far apart they are from one another, preferences of members."[70] He acknowledged that he did not look at any patient-admission patterns or data and did not test his assumptions and that there was no way for a third party to replicate his analysis.[71]

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[64] *Id.* at 19 (¶¶ 58-59) (internal brackets and some internal quotation marks omitted); *see also* Joyner Decl. Ex. 18 (Unchecked Provider Clout presentation) - ECF No. 499 at 13 (BSC_UFCW-00045213) ("[T]he Sutter system operates 24 facilities in 17 northern counties — sole provider in five counties — controls nearly 50 percent of [Blue Shield of California] spend in 10 or their 17 counties[.] Sutter negotiation . . . — leverage its market position in multiple counties (where they are dominant) to demand higher rates across the board[.]").

[65] Joyner Decl. - ECF No. 497 at 19 (¶ 60).

[66] Barnes Dep. - ECF Nos. 469-2 at 12, 23 (under seal), 493 at 12, 23 (redacted version) (pp. 426, 437).

[67] Barnes Dep. - ECF Nos. 469-2 at 12 (under seal), 493 at 12 (redacted version) (p. 426).

[68] Blue Shield Redirection Analysis - ECF Nos. 469-2 at 63 (under seal), 493 at 63 (redacted version) (BSC_SutterSub00037814). The Redirection Analysis includes an Excel chart with a column for Sutter hospitals associated with columns for "Alternative Hospitals" and "Expected Allocation %." *Id.* at 62-63. Blue Shield's Director of Provider Contracting for Northern California explained that the "Expected Allocation %" column indicates Blue Shield's estimate of where its enrollees would go to get medical care if the corresponding Sutter hospital were no longer in network. Barnes Dep. - ECF 503-1 at 47-50 (pp. 436-39); *see* Barnes Dep. - ECF No. 493 at 19-20 (pp. 433-34) (discussing the 95-percent-of-billed-charges rates for out-of-network patients); *see also* Barnes Dep. - ECF Nos. 428-6 at 69 (under seal), 479-5 at 69 (redacted version) (p. 469) (allocation-percentage estimates were for [TEXT REDACTED BY THE COURT]).

The Director testified about some of the reasons he arrived at that estimate, including the reasons that Antioch is a [TEXT REDACTED BY THE COURT], and it is [TEXT REDACTED BY THE COURT] Barnes Dep. - ECF Nos. 469-2 at [TEXT REDACTED BY THE COURT] (under seal), 493 at [TEXT REDACTED BY THE COURT] (redacted version) (pp. [TEXT REDACTED BY THE COURT]).

[69] Barnes Dep. - ECF No. 493 at 26 (p. 440).

[70] *Id.; see also id.* ("I could have hospitals right next door to each other, but if one had a very bad reputation you are not going to be able to channel there.").

[71] Barnes Dep. - ECF No. 503-1 at 62-65 (pp. 730-33).

2.1.4 Other evidence

In a 2008 internal email ("UnitedHealthcare Email"), the Director of Provider Services for Northern California **[*26]** for the health plan UnitedHealthcare wrote to several of her colleagues that Sutter "ha[s] geographic monopolies for hospital services in the following submarkets — . . . Antioch . . . ."[72] The UnitedHealthcare director further stated that "[d]espite widespread Broker acknowledgement of the high cost of Sutter, it is not feasible to present an HMO [health-maintenance organization] or FFS [fee-for-service] network in Northern CA that does not include them. In addition, many of our largest national accounts require Sutter network participation to retain and grow business."[73]

2.2 The Auburn HSA

2.2.1 Overview

The Auburn HSA includes the city of Auburn in Placer County, California. There are approximately 69,000 residents in the Auburn HSA.[74] The is one hospital in the Auburn HSA: Sutter Auburn Faith Hospital ("Sutter Auburn").[75]


[76]

Between 30 and 37 percent of the non-Kaiser, commercially insured patients residing in the Auburn HSA stay in the Auburn HSA for inpatient hospital services, and the remaining 63 to 70 percent travel out of the Auburn HSA for inpatient hospital services.[77] Dr. Chipty stated that the patients who stay in the Auburn HSA drive an average of 18 minutes for their care and the **[*27]** patients who travel out of the Auburn HSA drive an average of 45 minutes for their care.[78]

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[72] UnitedHealthcare Email - ECF No. 311-20 at 2 (under seal) (UHC-00134453).

[73] *Id.*

[74] Chipty Decl. - ECF No. 494-1 at 92-93 (¶ 120).

[75] *Id.* at 91 (¶ 119); Gowrisankaran Decl. Ex. 1A - ECF No. 272-3 at 60.

[76] Chipty Decl. - ECF No. 494-1 at 92 (¶ 119).

[77] *Id.* (¶ 120) (37%/63%); Gowrisankaran Decl. Fig. 5 - ECF No. 272-3 at 46 (30.3%/69.7%).

[78] Chipty Decl. - ECF No. 494-1 at 92 (¶ 120).

2.2.2 Knox-Keene Act

Dr. Gowrisankaran stated that 44 percent of patients discharged from a non-Kaiser hospital in the Auburn HSA (i.e., Sutter Auburn) live within a 30-minute drive of another non-Sutter, non-Kaiser hospital in another HSA.[79] That means that 56 percent of patients do not live within a 30-minute drive of another non-Sutter, non-Kaiser hospital.[80]

2.2.3 Blue Shield redirection analysis

The Blue Shield Redirection Analysis estimated that if Blue Shield were to terminate its contract with Sutter and Sutter Auburn became an out-of-network hospital, then [TEXT REDACTED BY THE COURT] percent of Blue Shield enrollees who used Sutter Auburn could be "redirected" to [TEXT REDACTED BY THE COURT] ([TEXT REDACTED BY THE COURT]) and [TEXT REDACTED BY THE COURT] percent of enrollees would stay with Sutter Auburn, even if Sutter were out of network and they had to pay higher costs.[81]

2.2.4 Other evidence

The UnitedHealthcare Email stated that Sutter "ha[s] geographic monopolies for hospital services in the following submarkets — Auburn . . . . Despite widespread Broker acknowledgement of the high cost **[*28]** of Sutter, it is not feasible to present an HMO or FFS network in Northern CA that does not include them. In addition, many of our largest national accounts require Sutter network participation to retain and grow business."[82]

The Vice President for Network Management in Northern California at the health plan Aetna testified that "using my definition of monopoly meaning a must-have from a marketability standpoint, ... there are some rural hospitals where Sutter hospitals are really it for a given area," including Sutter Auburn.[83] The Vice President explained, "[s]o my own terms, a monopoly, it's really the must-have from a marketability or a member perception standpoint."[84]

2.3 The Crescent City HSA

2.3.1 Overview

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[79] Gowrisankaran Decl. Ex. 8 - ECF No. 272-3 at 68. Dr. Gowrisankaran referred to discharges from hospitals within the Auburn HSA, excluding Kaiser hospitals. Because Sutter Auburn is the only hospital in the Auburn HSA, these discharges necessarily are discharges from Sutter Auburn.

[80] Dr. Gowrisankaran referred to whether patients live within 30 minutes of a non-Sutter, non-Kaiser hospital in another HSA. Because there are no other non-Sutter, non-Kaiser hospitals in the Auburn HSA, patients who do not live within 30 minutes of a non-Sutter, non-Kaiser hospital in another HSA necessarily do not live within 30 minutes of any non-Sutter, non-Kaiser hospital other than Sutter Auburn.

[81] Blue Shield Redirection Analysis - ECF Nos. 469-2 at 62 (under seal), 493 at 62 (redacted version) (BSC_SutterSub00037814). Blue Shield's Director of Provider Contracting for Northern California testified about some of the reasons for that estimate, including the reason that Auburn is a [TEXT REDACTED BY THE COURT] and that the [TEXT REDACTED BY THE COURT] Barnes Dep. - ECF Nos. 469-2 at [TEXT REDACTED BY THE COURT] (under seal), 493 at [TEXT REDACTED BY THE COURT] (redacted version) (pp. [TEXT REDACTED BY THE COURT]).

[82] UnitedHealthcare Email - ECF No. 311-20 at 2 (under seal) (UHC-00134453).

[83] Welsh Dep. - ECF No. 311-5 at 7-8 (under seal) (pp. 196-97).

[84] *Id.* at 7 (p. 196).

The Crescent City HSA includes the city of Crescent City in Del Norte County, California. The Crescent City HSA also extends into Oregon.[85] There are approximately 35,000 residents in the Crescent City HSA.[86] There is one hospital in the Crescent City HSA: Sutter Coast Hospital ("Sutter Coast").[87]

[88]

Between 72 and 77 percent of the non-Kaiser, commercially insured patients residing in the Crescent City HSA stay in the Crescent City HSA for inpatient hospital services, and the remaining 23 **[*29]** to 28 percent travel out of the Crescent City HSA for inpatient hospital services.[89] Dr. Chipty stated that the patients who stay in the Crescent City HSA drive an average of 32 minutes for their care and the patients who travel out of the Crescent City HSA to another California hospital drive an average of 275 minutes for their care.[90]

2.3.2 Knox-Keene Act

At the end of 2014, Blue Shield's then-effective agreement with Sutter was scheduled to automatically terminate (absent a renewal).[91] The DMHC reviewed Blue Shield's proposed termination of Sutter Coast as an in-network hospital and whether the termination complied with the Knox-Keene Act.[92] The DMHC sent a notice to Blue Shield that it effectively had to keep Sutter Coast in its network for certain hospital services, and allow its enrollees to use Sutter Coast, because there were no other alternative hospitals that complied with Knox-Keene Act requirements.[93]

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85 Chipty Decl. - ECF No. 494-1 at 73 (¶ 96); Gowrisankaran Decl. - ECF No. 272-3 at 32 n.78 (¶ 50 n.78).

86 Chipty Decl. - ECF No. 494-1 at 74-75 (¶ 97).

87 *Id.* at 73 (¶ 96); Gowrisankaran Decl. Ex. 1B - ECF No. 272-3 at 61.

88 Chipty Decl. - ECF No. 494-1 at 74 (¶ 96).

89 *Id.* at 75 (¶ 97) (72%/28%); Gowrisankaran Decl. Fig. 5 - ECF No. 272-3 at 46 (77.0%/23.0%).

90 Chipty Decl. - ECF No. 494-1 at 75 & n.193 (¶ 97 & n.193). Dr. Chipty was not able to calculate the average driving time for patients that traveled out of the Crescent City HSA to an Oregon hospital. *Id.* at 75 n.193 (¶ 97 n.193).

91 Barnes Dep. - ECF Nos. 311-15 at 13 (under seal), 494-10 at 13 (redacted version) (p. 538); DMHC Letter-ECF No. 494-10 at 3 (BSC_SutterSub00062477).

92 DMHC Letter - ECF No. 494-10 at 3 (BSC_SutterSub00062477); *see* Barnes Dep. - ECF No. 494-10 at 14-15 (pp. 539-40).

93 Barnes Dep. - ECF No. 494-10 at 13-15 (pp. 538-40); DMHC Letter - ECF No. 494-10 at 3-5 (BSC_SutterSub00062477-79).

Dr. Gowrisankaran stated that zero percent of patients discharged from a non-Kaiser hospital in the Crescent City HSA (i.e., Sutter Coast) live within a 30-minute drive of another non-Sutter, non-Kaiser hospital in another HSA.[94] — which means that 100 percent of patients do not live **[*30]** within a 30-minute drive of another non-Sutter, non-Kaiser hospital.[95]

2.3.3 Blue Shield redirection analysis

The Blue Shield Redirection Analysis included an estimate that if Blue Shield were to terminate its contract with Sutter and Sutter Coast became an out-of-network hospital, then percent of Blue Shield enrollees who used Sutter Coast would stay with Sutter Coast, even if Sutter were out of network and they had to pay higher costs.[96]

2.3.4 Other evidence

The Vice President for Network Management in Northern California at Aetna testified that "using my definition of monopoly meaning a must-have from a marketability standpoint, ... there are some rural hospitals where Sutter hospitals are really it for a given area," including Sutter Coast.[97]

Sutter maintained an internal "model amendment" ("Sutter Model Amendment") that it used as a proposal in negotiating contracts with health plans.[98] The Sutter Model Amendment included a term, "Rural Hospitals," defined as "a designation given by Sutter Health to any facility which acts as a sole practical resource for acute care and emergency care within the community it serves."[99] Sutter's Chief Contracting Officer explained that "Rural Hospital" was "a term to describe a rural hospital that in all **[*31]** practical reality was the hospital, the local hospital in that community, typically a more rural community[that d]oesn't have other hospitals in the local vicinity."[100] The Sutter Model Amendment identified Sutter Coast as a "Rural Hospital."[101]

In 2001, Sutter entered into an amendment agreement with the health plan Blue Cross of California ("Sutter Blue Cross Amendment"). The Sutter Blue Cross Amendment included a term, "Rural Hospitals," defined as "a designation given by Sutter Health to any facility which acts as a sole practical resource for acute care and emergency care within the rural community it serves, and the next closest facility is at least 30 miles away from the

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[94] Gowrisankaran Decl. Ex. 8 - ECF No. 272-3 at 68. Dr. Gowrisankaran referred to discharges from hospitals within the Crescent City HSA, excluding Kaiser hospitals. Because Sutter Coast is the only hospital in the Crescent City HSA, these discharges necessarily are discharges from Sutter Crescent City.

[95] Dr. Gowrisankaran referred to whether patients live within 30 minutes of a non-Sutter, non-Kaiser hospital in another HSA. Because there are no other non-Sutter, non-Kaiser hospitals in the Crescent City HSA, patients who do not live within 30 minutes of a non-Sutter, non-Kaiser hospital in another HSA necessarily do not live within 30 minutes of any non-Sutter, non-Kaiser hospital other than Sutter Coast.

[96] Blue Shield Redirection Analysis - ECF Nos. 469-2 at 63 (under seal), 493 at 63 (redacted version) (BSC_SutterSub00037814). Blue Shield's Director of Provider Contracting for Northern California testified about some of the reasons for that estimate, including [TEXT REDACTED BY THE COURT] Barnes Dep. - ECF Nos. 469-2 at [TEXT REDACTED BY THE COURT] (under seal), 493 at [TEXT REDACTED BY THE COURT] (redacted version) (pp. [TEXT REDACTED BY THE COURT]).

[97] Welsh Dep. - ECF No. 311-5 at 7-8 (under seal) (pp. 196-97).

[98] Brendt Dep. - ECF Nos. 313-3 at 86 (under seal), 494-17 at 86 (redacted version) (p. 184); Brendt Dep. - ECF No. 494-17 at 91-92 (pp. 189-90).

[99] Sutter Model Amendment - ECF Nos. 313-3 at 8 (under seal), 494-17 at 8 (redacted version) (DEF007581579).

[100] Brendt Dep. - ECF Nos. 313-3 at 99-100 (under seal), 494-17 at 99-100 (redacted version) (pp. 197-98).

[101] Sutter Model Amendment - ECF Nos. 313-3 at 36 (under seal), 494-17 at 36 (redacted version) (DEF007581607); Brendt Dep. - ECF Nos. 313-3 at 104 (under seal), 494-17 at 104 (redacted version) (p. 202).

Rural Hospital."[102] The Sutter Blue Cross Amendment identified Sutter Coast as a "Rural Hospital."[103] Anthem Blue Cross's Director of Network Development for Northern California (from 2001 to 2005) and Vice President of Provider Engagement and Contracting for California (from 2009 to 2011) acknowledged in testimony that Sutter Coast was a rural hospital and agreed that it was "essentially the only game in town."[104]

2.4 The Jackson HSA

2.4.1 Overview

The Jackson HSA includes the city of Jackson in Amador County, California. There are approximately 34,000 residents in the Jackson HSA.[105] There is one hospital in the Jackson HSA: Sutter Amador **[*32]** Hospital ("Sutter Amador").[106]

[107]

Between 43 and 65 percent of the non-Kaiser, commercially insured patients residing in the Jackson HSA stay in the Jackson HSA for inpatient hospital services, and the remaining 35 to 57 percent travel out of the Jackson HSA for inpatient hospital services.[108] Dr. Chipty stated that the patients who stay in the Jackson HSA drive an average of 21 minutes for their care and the patients who travel out of the Jackson HSA drive an average of 71 minutes for their care.[109]

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[102] Sutter Blue Cross Amendment - ECF No. 494-5 at 8 (DEF000097801).

[103] Sutter Blue Cross Amendment - ECF No. 311-10 at 41, 43 (under seal), 494-5 at 41, 43 (redacted version) (DEF000097834, DEF000097836).

[104] Ramseier Dep. - ECF No. 311-9 at 6 (under seal) (p. 139).

[105] Chipty Decl. - ECF No. 494-1 at 85-86 (¶ 111).

[106] *Id.* at 84 (¶ 110); Gowrisankaran Decl. Ex. 1A - ECF No. 272-3 at 60.

[107] Chipty Decl. - ECF No. 494-1 at 85 (¶ 110).

[108] *Id.* at 86 (¶ 111) (43%/57%); Gowrisankaran Decl. Fig. 5 - ECF No. 272-3 at 46 (64.2%/35.8%).

[109] Chipty Decl. - ECF No. 494-1 at 86 (¶ 111).

2.4.2 Knox-Keene Act

At the end of 2014, Blue Shield's then-effective agreement with Sutter was scheduled to automatically terminate (absent a renewal).[110] The DMHC reviewed Blue Shield's proposed termination of Sutter Amador as an in-network hospital and whether the termination complied with the Knox-Keene Act.[111] The DMHC sent a notice to Blue Shield that it effectively had to keep Sutter Amador in its network for certain hospital services, and allow its enrollees to use Sutter Amador, because there were no other alternative hospitals that complied with Knox-Keene Act requirements.[112]

Dr. Gowrisankaran stated that 29 percent of patients discharged from a non-Kaiser hospital in the Jackson HSA (i.e., Sutter **[*33]** Amador) live within a 30-minute drive of another non-Sutter, non-Kaiser hospital in another HSA.[113] That means that 71 percent of patients do not live within a 30-minute drive of another non-Sutter, non-Kaiser hospital.[114]

2.4.3 Blue Shield redirection analysis

The Blue Shield Redirection Analysis included an estimate that if Blue Shield were to terminate its contract with Sutter and Sutter Amador became an out-of-network hospital, [TEXT REDACTED BY THE COURT] percent of Blue Shield enrollees who used Sutter Amador would choose to stay with Sutter Amador even if Sutter were out of network and they had to pay higher costs.[115]

2.4.4 Other evidence

The UnitedHealthcare Email stated that Sutter "ha[s] geographic monopolies for hospital services in the following submarkets — . . . Amador . . . . Despite widespread Broker acknowledgement of the high cost of Sutter, it is not feasible to present an HMO or FFS network in Northern CA that does not include them. In addition, many of our largest national accounts require Sutter network participation to retain and grow business."[116]

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110 Barnes Dep. - ECF Nos. 311-15 at 13 (under seal), 494-10 at 13 (redacted version) (p. 538); DMHC Letter- ECF No. 494-11 at 3 (BSC_SutterSub00062387).

111 DMHC Letter - ECF No. 494-11 at 3 (BSC_SutterSub00062387); *see* Barnes Dep. - ECF No. 494-10 at 14 (p. 539); Barnes Dep. - ECF No. 494-11 at 11-12 (pp. 543-44).

112 Barnes Dep. - ECF No. 494-10 at 13-14 (pp. 538-39); Barnes Dep. - ECF No. 494-11 at 11-12 (pp. 543-44); DMHC Letter - ECF No. 494-11 at 3-5 (BSC_SutterSub00062387-89).

113 Gowrisankaran Decl. Ex. 8 - ECF No. 272-3 at 68. Dr. Gowrisankaran referred to discharges from hospitals within the Jackson HSA, excluding Kaiser hospitals. As Sutter Amador is the only hospital in the Jackson HSA, these discharges necessarily are discharges from Sutter Amador.

114 Dr. Gowrisankaran referred to whether patients live within 30 minutes of a non-Sutter, non-Kaiser hospital in another HSA. Because there are no other non-Sutter, non-Kaiser hospitals in the Jackson HSA, patients who do not live within 30 minutes of a non-Sutter, non-Kaiser hospital in another HSA necessarily do not live within 30 minutes of any non-Sutter, non-Kaiser hospital other than Sutter Amador.

115 Blue Shield Redirection Analysis - ECF Nos. 469-2 at 63 (under seal), 493 at 63 (redacted version) (BSC_SutterSub00037814). Blue Shield's Director of Provider Contracting for Northern California testified about some of the reasons for that estimate, including the reasons that one alternative hospital was [TEXT REDACTED BY THE COURT] and another alternative hospital was [TEXT REDACTED BY THE COURT] Barnes Dep. - ECF Nos. 469-2 at [TEXT REDACTED BY THE COURT] (under seal), 493 at [TEXT REDACTED BY THE COURT] (redacted version) (pp. [TEXT REDACTED BY THE COURT]).

116 UnitedHealthcare Email — ECF No. 311-20 at 2 (under seal) (UHC-00134453).

Aetna's Vice President for Network Management in Northern California testified that "using my definition of monopoly meaning a must-have **[*34]** from a marketability standpoint, ... there are some rural hospitals where Sutter hospitals are really it for a given area," including Sutter Amador.[117]

The Sutter Model Amendment identifies Sutter Amador as a "Rural Hospital" that "acts as a sole practical resource for acute care and emergency care within the community it serves" and a hospital "that in all practical reality was the hospital, the local hospital in that community, typically a more rural community[that d]oesn't have other hospitals in the local vicinity."[118] The Sutter Blue Cross Amendment similarly identifies Sutter Amador as a "Rural Hospital" that "acts as a sole practical resource for acute care and emergency care within the rural community it serves, and [where] the next closest facility is at least 30 miles away from the Rural Hospital."[119] Anthem Blue Cross's former Director of Network Development for Northern California and Vice President of Provider Engagement and Contracting for California acknowledged in testimony that Sutter Amador was a rural hospital and agreed that it was "essentially the only game in town."[120]

2.5 The Lakeport HSA

2.5.1 Overview

The Lakeport HSA includes the city of Lakeport in Lake County, California. There are approximately 27,000 residents in the Lakeport **[*35]** HSA.[121] There is one hospital in the Lakeport HSA: Sutter Lakeside Hospital ("Sutter Lakeside").[122]

[123]

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[117] Welsh Dep. — ECF No. 311-5 at 7-8 (under seal) (pp. 196-97).

[118] Sutter Model Amendment — ECF Nos. 313-3 at 8, 34 (under seal), 494-17 at 8, 34 (redacted version) (DEF007581579, DEF007581605); Brendt Dep. — ECF Nos. 313-3 at 99-100, 102 (under seal), 494-17 at 99-100, 102 (redacted version) (pp. 197-98, 200).

[119] Sutter Blue Cross Amendment — ECF No. 494-5 at 8 (DEF000097801); Sutter Blue Cross Amendment — ECF Nos. 311-10 at 37, 39 (under seal), 494-5 at 37, 39 (redacted version) (DEF000097830, DEF000097832).

[120] Ramseier Dep. — ECF No. 311-9 at 6 (under seal) (p. 139).

[121] Chipty Decl. — ECF No. 494-1 at 78-79 (¶ 102).

[122] *Id.* at 77 (¶ 101); Gowrisankaran Decl. Ex. 1A — ECF No. 272-3 at 60.

Between 41 and 50 percent of the non-Kaiser, commercially insured patients residing in the Lakeport HSA stay in the Lakeport HSA for inpatient hospital services, and the remaining 50 to 59 percent travel out of the Lakeport HSA for inpatient hospital services.[124] Dr. Chipty stated that the patients who stay in the Lakeport HSA drive an average of 16 minutes for their care and the patients who travel out of the Lakeport HSA drive an average of 107 minutes for their care.[125]

2.5.2 Knox-Keene Act

At the end of 2014, Blue Shield's then-effective agreement with Sutter was scheduled to automatically terminate (absent a renewal).[126] The DMHC reviewed Blue Shield's proposed termination of Sutter Lakeside as an in-network hospital and whether the termination complied with the Knox-Keene Act.[127] The DMHC sent a notice to Blue Shield that it effectively had to keep Sutter Lakeside in its network for certain hospital services, and allow its enrollees to use Sutter Lakeside, because there were no other alternative hospitals that complied with Knox-Keene Act requirements.[128]

Dr. Gowrisankaran stated that 45 percent **[*36]** of patients discharged from a non-Kaiser hospital in the Lakeport HSA (i.e., Sutter Lakeside) live within a 30-minute drive of another non-Sutter, non-Kaiser hospital in another HSA.[129] That means that 55 percent of patients do not live within a 30-minute drive of another non-Sutter, non-Kaiser hospital.[130]

2.5.3 Blue Shield redirection analysis

The Blue Shield Redirection Analysis included an estimate that if Blue Shield were to terminate its contract with Sutter and Sutter Lakeside became an out-of-network hospital, [TEXT REDACTED BY THE COURT] percent of Blue Shield enrollees who used Sutter Lakeside could be "redirected" to other hospitals ([TEXT REDACTED BY THE COURT]) and [TEXT REDACTED BY THE COURT] percent of enrollees would stay with Sutter Lakeside, even if Sutter were out of network and they had to pay higher costs.[131]

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123 Chipty Decl. — ECF No. 494-1 at 78 (¶ 101).

124 *Id.* (¶ 102) (50%/50%); Gowrisankaran Decl. Fig. 5 — ECF No. 272-3 at 46 (41.8%/58.2%).

125 Chipty Decl. — ECF No. 494-1 at 78 (¶ 102).

126 Barnes Dep. — ECF Nos. 311-15 at 13 (under seal), 494-10 at 13 (redacted version) (p. 538); DMHC Letter— ECF No. 494-12 at 3 (BSC_SutterSub0267438).

127 DMHC Letter — ECF No. 494-12 at 3 (BSC_SutterSub0267438); *see* Barnes Dep. — ECF No. 494-10 at 14-15 (pp. 539-40); Barnes Dep. — ECF No. 494-12 at 12 (p. 541); Barnes Dep. — ECF No. 494-13 at 12 (p. 542).

128 Barnes Dep. — ECF No. 494-10 at 13-15 (pp. 538-40); Barnes Dep. — ECF No. 494-12 at 12 (p. 541); Barnes Dep. — ECF No. 494-13 at 12 (p. 542); DMHC Letter — ECF No. 494-12 at 3-5 (BSC_SutterSub0267438-40).

129 Gowrisankaran Decl. Ex. 8 — ECF No. 272-3 at 68. Dr. Gowrisankaran referred to discharges from hospitals within the Lakeport HSA, excluding Kaiser hospitals. Because Sutter Lakeside is the only hospital in the Lakeport HSA, these discharges necessarily are discharges from Sutter Lakeside.

130 Dr. Gowrisankaran referred to whether patients live within 30 minutes of a non-Sutter, non-Kaiser hospital in another HSA. Because there are no other non-Sutter, non-Kaiser hospitals in the Lakeport HSA, patients who do not live within 30 minutes of a non-Sutter, non-Kaiser hospital in another HSA necessarily do not live within 30 minutes of any non-Sutter, non-Kaiser hospital other than Sutter Lakeside.

131 Blue Shield Redirection Analysis — ECF Nos. 469-2 at 62 (under seal), 493 at 62 (redacted version) (BSC_SutterSub00037814). Blue Shield's Director of Provider Contracting for Northern California testified about some of the reasons for that estimate, including the reasons that one alternative hospital was [TEXT REDACTED BY THE COURT] and another alternative hospital was [TEXT REDACTED BY THE COURT] Barnes Dep. — ECF Nos. 469-2 at [TEXT REDACTED

2.5.4 Other evidence

The UnitedHealthcare Email stated that Sutter "ha[s] geographic monopolies for hospital services in the following submarkets — . . . Clearlake . . . . Despite widespread Broker acknowledgement of the high cost of Sutter, it is not feasible to present an HMO or FFS network in Northern CA that does not include them. In addition, many of our largest national **[*37]** accounts require Sutter network participation to retain and grow business."[132]

Aetna's Vice President for Network Management in Northern California testified that "using my definition of monopoly meaning a must-have from a marketability standpoint, ... there are some rural hospitals where Sutter hospitals are really it for a given area," including Sutter Lakeside.[133]

The Sutter Model Amendment identifies Sutter Lakeside as a "Rural Hospital" that "acts as a sole practical resource for acute care and emergency care within the community it serves" and a hospital "that in all practical reality was the hospital, the local hospital in that community, typically a more rural community[that d]oesn't have other hospitals in the local vicinity."[134] The Sutter Blue Cross Amendment also identifies Sutter Lakeside as a "Rural Hospital" that "acts as a sole practical resource for acute care and emergency care within the rural community it serves, and [where] the next closest facility is at least 30 miles away from the Rural Hospital."[135] Anthem Blue Cross's former Director of Network Development for Northern California and Vice President of Provider Engagement and Contracting for California acknowledged in testimony that Sutter Lakeside was a rural hospital and **[*38]** agreed that it was "essentially the only game in town."[136]

2.6 The Tracy HSA

2.6.1 Overview

The Tracy HSA includes the city of Tracy in San Joaquin County, California. There are approximately 84,000 residents in the Tracy HSA.[137] There is one hospital in the Tracy HSA: Sutter Tracy Community Hospital ("Sutter Tracy").[138]

BY THE COURT] (under seal), 493 at [TEXT REDACTED BY THE COURT] (redacted version) (pp. [TEXT REDACTED BY THE COURT]).

132 UnitedHealthcare Email — ECF No. 311-20 at 2 (under seal) (UHC-00134453).

133 Welsh Dep. — ECF No. 311-5 at 7-8 (under seal) (pp. 196-97).

134 Sutter Model Amendment — ECF Nos. 313-3 at 8, 36 (under seal), 494-17 at 8, 36 (redacted version) (DEF007581579, DEF007581607); Brendt Dep. — ECF Nos. 313-3 at 99-100, 104 (under seal), 494-17 at 99-100, 104 (redacted version) (pp. 197-98, 202).

135 Sutter Blue Cross Amendment — ECF No. 494-5 at 8 (DEF000097801); Sutter Blue Cross Amendment — ECF No. 311-10 at 41, 43 (under seal), 494-5 at 41, 43 (redacted version) (DEF000097834, DEF000097836).

136 Ramseier Dep. — ECF No. 311-9 at 6 (under seal) (p. 139).

137 Chipty Decl. — ECF No. 494-1 at 89-90 (¶ 116).

138 *Id.* at 88 (¶ 115); Gowrisankaran Decl. Ex. 1A — ECF No. 272-3 at 60.

[139]

Approximately 57 percent of the non-Kaiser, commercially insured patients residing in the Tracy HSA stay in the Tracy HSA for inpatient hospital services, and the remaining 43 percent travel out of the Tracy HSA for inpatient hospital services.[140] Dr. Chipty stated that the patients who stay in the Tracy HSA drive an average of nine minutes for their care and the patients who travel out of the Tracy HSA drive an average of 51 minutes for their care.[141] Dr. Gowrisankaran stated that 100 percent of patients discharged from a non-Kaiser hospital in the Tracy HSA (i.e., Sutter Tracy) live within a 30-minute drive of another non-Sutter, non-Kaiser hospital in another HSA.[142]

2.6.2 Blue Shield redirection analysis

The Blue Shield Redirection Analysis included an estimate that if Blue Shield were to terminate its contract with Sutter and Sutter Tracy became an out-of-network hospital, then [TEXT **[*39]** REDACTED BY THE COURT] percent of Blue Shield enrollees who used Sutter Tracy could be "redirected" to other hospitals ([TEXT REDACTED BY THE COURT]) and [TEXT REDACTED BY THE COURT] percent of enrollees would stay with Sutter Tracy, even if Sutter were out of network and they had to pay higher costs.[143]

2.6.3 Other evidence

The UnitedHealthcare Email stated that Sutter "ha[s] geographic monopolies for hospital services in the following submarkets — . . . Tracy . . . . Despite widespread Broker acknowledgement of the high cost of Sutter, it is not

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[139] Chipty Decl. — ECF No. 494-1 at 89 (¶ 115).

[140] *Id.* (¶ 116) (57%/43%); Gowrisankaran Decl. Fig. 5 — ECF No. 272-3 at 46 (57.1%/42.9%).

[141] Chipty Decl. — ECF No. 494-1 at 89 (¶ 116).

[142] Gowrisankaran Decl. Ex. 8 — ECF No. 272-3 at 68. Dr. Gowrisankaran referred to discharges from hospitals within the Tracy HSA, excluding Kaiser hospitals. Because Sutter Tracy is the only hospital in the Tracy HSA, these discharges necessarily are discharges from Sutter Tracy.

[143] Blue Shield Redirection Analysis — ECF Nos. 469-2 at 62 (under seal), 493 at 62 (redacted version) (BSC_SutterSub00037814). Blue Shield's Director of Provider Contracting for Northern California testified about some of the reasons for that estimate, including [TEXT REDACTED BY THE COURT] Barnes Dep. — ECF Nos. 469-2 at [TEXT REDACTED BY THE COURT] (under seal), 493 at [TEXT REDACTED BY THE COURT] (redacted version) (pp. [TEXT REDACTED BY THE COURT]).

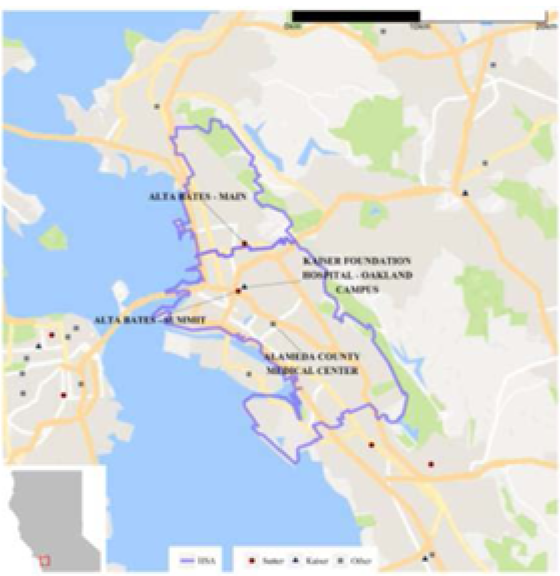
feasible to present an HMO or FFS network in Northern CA that does not include them. In addition, many of our largest national accounts require Sutter network participation to retain and grow business."[144]

Aetna's Vice President for Network Management in Northern California testified that "using my definition of monopoly meaning a must-have from a marketability standpoint, ... I would say probably Sutter Tracy down in Tracy is the only hospital in that particular town[.]"[145]

2.7 The Combined Berkeley-Oakland HSAs

2.7.1 Overview

The Berkeley HSA includes the city of Berkeley in Alameda County, California. The Oakland HSA includes the city of Oakland **[*40]** in Alameda County, California. There are approximately 506,000 residents in the combined Berkeley-Oakland HSAs.[146] Excluding one Kaiser hospital, there are two hospitals in the combined Berkeley-Oakland HSAs: Sutter Alta Bates Medical Center ("Sutter Alta Bates") (which has three campuses: Alta Bates in Berkeley and Herrick in Berkeley, collectively "Alta Bates Main," and Alta Bates Summit in Oakland) and a non-Sutter hospital, Alameda County Medical Center.[147]



[148]

Sutter Alta Bates and Summit previously were separately owned hospitals. *See* *California v. Sutter Health Sys., 130 F. Supp. 2d 1109, 1112 (N.D. Cal. 2001)*. In 1998, Sutter and Summit signed an agreement to merge the Alta Bates and Summit facilities. *Id. at 1115*. The California Attorney General filed suit in this district to enjoin the merger. *Id. at 1117*. The court denied the California Attorney General's preliminary-injunction motion, *id. at 1137*, and the merger went through.[149] A 2011 study found that after Summit merged with Sutter, Summit raised its prices by 29 to 72

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[144] UnitedHealthcare Email — ECF No. 311-20 at 2 (under seal) (UHC-00134453).

[145] Welsh Dep. — ECF No. 311-5 at 7-8 (under seal) (pp. 196-97).

[146] Chipty Decl. — ECF No. 494-1 at 70-71 (¶ 92).

[147] *Id.* at 67-68 (¶¶ 90-91); Gowrisankaran Decl. Ex. 1A — ECF No. 272-3 at 60.

[148] Chipty Decl. — ECF No. 494-1 at 70 (¶ 91).

percent. Advocate Health, 841 F.3d at 472 (citing Steven Tenn, *The Price Effects of Hospital Mergers: A Case Study of the Sutter-Summit Transaction*, 18 Int'l J. of the Econ. of Bus. 65, 75-76 (2011)). Sutter Summit's price change was 28 to 44 percent larger than the average price change from a control group **[*41]** of hospitals. Tenn, 18 Int'l J. of the Econ. of Bus. at 76, 79. Health plans responded by paying Sutter Summit's increased prices. *See id.*

Approximately 80 percent of the non-Kaiser, commercially insured patients residing in the combined Berkeley-Oakland HSAs stay in the combined Berkeley-Oakland HSAs for inpatient hospital services, and the remaining 20 percent travel out of the combined Berkeley-Oakland HSAs for inpatient hospital services.[150] Dr. Chipty stated that the patients who stay in the combined Berkeley-Oakland HSAs drive an average of 14 minutes for their care and the patients who travel out of the combined Berkeley-Oakland HSAs drive an average of 45 minutes for their care.[151] Dr. Gowrisankaran stated that 100 percent of patients discharged from a non-Kaiser hospital in the combined Berkeley-Oakland HSAs live within a 30-minute drive of another non-Sutter, non-Kaiser hospital in another HSA.[152]

2.7.2 Blue Shield redirection analysis

The Blue Shield Redirection Analysis included an estimate that if Blue Shield were to terminate its contract with Sutter and the Sutter Alta Bates hospitals became out-of-network hospitals, then [TEXT REDACTED BY THE COURT] percent of Blue Cross enrollees who use each of the **[*42]** Alta Bates hospitals could be "redirected" to other hospitals and [TEXT REDACTED BY THE COURT] percent of enrollees would stay with Sutter Alta Bates, even if Sutter were out of network and they had to pay higher costs.[153]

Blue Shield's Vice President overseeing pricing and forecasting testified that [TEXT REDACTED BY THE COURT][154]

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[149] The court in the 2001 *Sutter* case denied the preliminary-injunction motion in part because it held that the California Attorney General had not proven a well-defined geographic market. Id. at 1132. To assess the geographic market, the court applied a test known as the Elzinga-Hogarty test, "a two-part test which examines current market behavior through an analysis of hospital service areas and patient flow data." Id. at 1120. "The Elzinga-Hogarty test was once the preferred method to analyze the relevant geographic market and was employed by many courts. But subsequent empirical research demonstrated that utilizing patient flow data to determine the relevant geographic market resulted in overbroad markets with respect to hospitals. Professor Elzinga himself testified before the FTC that this method 'was not an appropriate method to define geographic markets in the hospital sector.'" Penn State Hershey, 838 F.3d at 340 (citing In re Evanston Nw. Healthcare Corp., No. 9315, 2007 FTC LEXIS 210, 2007 WL 2286195, at *64 (F.T.C. Aug. 6, 2007), and distinguishing Sutter, 130 F. Supp. 2d 1109, and other older cases). More recent court decisions have rejected the Elzinga-Hogarty test as generating geographic markets that are too large, which then hurt consumers because they understate the anticompetitive effects of hospital consolidation. Advocate Health, 841 F.3d at 472; *see generally* id. at 469-73 (discussing the flaws of the Elzinga-Hogarty test); Penn State Hershey, 838 F.3d at 340-343 (same).

[150] Chipty Decl. — ECF No. 494-1 at 70 (¶ 92) (79%/21%); Gowrisankaran Decl. Fig. 5 — ECF No. 272-3 at 46 (80.2%/19.8%).

[151] Chipty Decl. — ECF No. 494-1 at 70 (¶ 92).

[152] Gowrisankaran Decl. Ex. 8 — ECF No. 272-3 at 68.

[153] Blue Shield Redirection Analysis — ECF Nos. 469-2 at 62-63 (under seal), 493 at 62-63 (redacted version) (BSC_SutterSub00037814). Blue Shield's Director of Provider Contracting for Northern California testified about some of the reasons for that estimate, including the reasons that the Oakland-Berkeley corridor is a [TEXT REDACTED BY THE COURT] Barnes Dep. — ECF Nos. 469-2 at [TEXT REDACTED BY THE COURT] (under seal), 493 at [TEXT REDACTED BY THE COURT] (redacted version) (pp. [TEXT REDACTED BY THE COURT]).

[154] Beuoy Dep. — ECF Nos. 311-7 at 7 (under seal), 494-4 at 7 (redacted version) (p. 157). The Vice President testified that he did not participate in any analyses or conversations regarding whether Blue Shield would have a viable network in Alameda without including Sutter facilities. *Id.*

2.7.3 Other evidence

The UnitedHealthcare Email stated that Sutter "ha[s] geographic monopolies for hospital services in the following submarkets — . . . Berkeley, Oakland . . . . Despite widespread Broker acknowledgement of the high cost of Sutter, it is not feasible to present an HMO or FFS network in Northern CA that does not include them. In addition, many of our largest national accounts require Sutter network participation to retain and grow business."[155]

Aetna's Vice President for Network Management in Northern California testified that "using my definition of monopoly meaning a must-have from a marketability standpoint, one would be Alta Bates Summit Medical Center, which it's — it's the only hospital really for Oakland and Berkeley for commercial business, yeah, you have got — you have got either to cross the bridge or go through the tunnel or drive to Alameda **[*43]** to really get to the next hospital. So from a marketing standpoint it's a must have."[156]

3. The Candidate Tied Markets

The plaintiffs in their complaint alleged four Candidate Tied Markets. The following gives an overview of each Candidate Tied Market and then summarizes certain analyses of the Candidate Markets by the plaintiffs' expert Dr. Chipty.

For the Candidate Tied Markets, Dr. Chipty conducted a "diversion analysis" to study the question of where patients would go if they could no longer go to their first-choice hospital and, based on diversion ratios and data on hospital prices and margins, analyzed how much a profit-maximizing hypothetical monopolist that controlled all non-Kaiser hospitals in each Candidate Tied Market could raise prices at the Sutter hospital in the market.[157]

Dr. Chipty first constructed a patient-level model of non-Kaiser hospitals that patients choose based on factors including (1) patient characteristics, such as age, gender, income, and distance (in minutes) from different hospital choices, (2) patient medical needs, and (3) hospital characteristics, including whether the hospital is a teaching hospital, whether it is a designated trauma facility, and whether **[*44]** it offers the medical services that the patient needs.[158] She used these results to estimate the "utility" that each patient would obtain from each hospital.[159]

Dr. Chipty then conducted a diversion analysis, a counterfactual experiment where she removed the predicted first-choice hospital from each patient's choice set and asked where the patient would go instead.[160] She computed for each area resident the probability of that resident's choosing each alternative hospital.[161] She also computed "aggregate diversion" levels of the share of all area residents choosing alternative hospitals.[162]

Dr. Chipty then conducted an analysis to calculate the profit-maximizing price increase that a hypothetical monopolist could impose on hospitals in each Candidate Tied Market based on a model of the bargaining

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[155] UnitedHealthcare Email — ECF No. 311-20 at 2 (under seal) (UHC-00134453).

[156] Welsh Dep. — ECF No. 311-5 at 7 (under seal) (p. 196).

[157] Chipty Decl. — ECF No. 494-1 at 13-15 (¶¶ 14-16).

[158] *Id.* at 39 (¶ 50).

[159] *Id.*

[160] *Id.* at 39-40 (¶ 51).

[161] *Id.* at 40 (¶ 51).

[162] *Id.*

framework between hospitals and health plans that takes into account the diversion ratio of hospitals to other in-area or out-of-area hospitals and the hospitals' prices and contribution margins.[163]

3.1 The Modesto HSA

3.1.1 Overview

The Modesto HSA includes the city of Modesto in Stanislaus County, California. There are approximately 342,000 residents in the Modesto HSA.[164] Excluding one Kaiser hospital, there **[*45]** are two hospitals in the Modesto HSA: Sutter Memorial Medical Center Modesto ("Sutter Modesto") and a non-Sutter hospital, Doctors Medical Center.[165]

166

Between 81 and 84 percent of the non-Kaiser, commercially insured patients residing in the Modesto HSA stay in the Modesto HSA for inpatient hospital services, and the remaining 16 to 19 percent travel out of the Modesto HSA for inpatient hospital services.[167] Dr. Chipty stated that the patients who stay in the Modesto HSA drive an average

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[163] *Id.* at 43-44 (¶¶ 58-59). Dr. Chipty stated that she was unable to conduct a similar diversion analysis for the Candidate Tying Markets because, with respect to six of the proposed Candidate Tying Markets, there are no non-Kaiser hospitals in the Candidate Tying Markets where patients at the Sutter hospitals could be diverted, so the in-area diversion ratio would necessarily be zero percent. *Id.* at 41 (¶ 54). For the seventh Candidate Tying Market —the combined Berkeley-Oakland HSAs — Dr. Chipty stated that the one non-Sutter hospital (Alameda County Medical Center) was perceived to be of lower quality and thus there were "effectively" no other non-Kaiser hospitals in combined Berkeley-Oakland HSAs where patients at Sutter Alta Bates could be diverted. Chipty Decl. — ECF Nos. 311-3 at 71-72 (under seal), 494-1 at 71-72 (redacted version) (¶¶ 93-94). Dr. Chipty notes, however, that Alameda County Medical Center was among the highest recipients of patients diverted from Sutter Alta Bates. Chipty Decl. — ECF No. 494-1 at 72 n.184 (¶ 94 n.184).

[164] *Id.* at 61 (¶ 79).

[165] *Id.* at 59-60 (¶ 78); Gowrisankaran Decl. Ex. 1A — ECF No. 272-3 at 60.

[166] Chipty Decl. — ECF No. 494-1 at 60 (¶ 78).

[167] *Id.* at 61 (¶ 79) (81%/19%); Gowrisankaran Decl. Fig. 5 — ECF No. 272-3 at 46 (83.9%/16.1%).

of 18 minutes for their care and the patients who travel out of the Modesto HSA drive an average of 71 minutes for their care.[168]

3.1.2 Dr. Chipty's analyses

Dr. Chipty conducted a diversion analysis to ask where patients would go if Sutter Modesto were removed from each patient's choice set.[169] She estimated that 61 percent of patients would go to another hospital inside the Modesto HSA and that 39 percent of patients would go to a hospital outside the Modesto HSA.[170] She then conducted an analysis to calculate the profit-maximizing price increase that a hypothetical monopolist could impose and estimated that a hypothetical monopolist that controlled all of the non-Kaiser hospitals in the Modesto HSA would find it profitable **[*46]** to raise Sutter Modesto's price between 12 and 20 percent over Sutter Modesto's actual prices from 2010 to 2012.[171]

3.2 The Sacramento HSA

3.2.1 Overview

The Sacramento HSA includes the city of Sacramento in Sacramento County, California. There are approximately 879,000 residents in the Sacramento HSA.[172] Excluding two Kaiser hospitals, there are four hospitals in the Sacramento HSA: Sutter Medical Center, Sacramento ("Sutter Sacramento") and three non-Sutter hospitals, University of California Davis Medical Center, Methodist Hospital of Sacramento, and Mercy General Hospital.[173]

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168 Chipty Decl. — ECF No. 494-1 at 61 (¶ 79). Dr. Gowrisankaran did not analyze the percentage of patients discharged from a non-Kaiser hospital in the Candidate Tied Market HSAs who live within a 30-minute drive of a non-Sutter hospital in another HSA, Gowrisankaran Decl. Ex. 8 — ECF No. 272-3 at 68, and thus those numbers are not included for the Candidate Tied Markets.

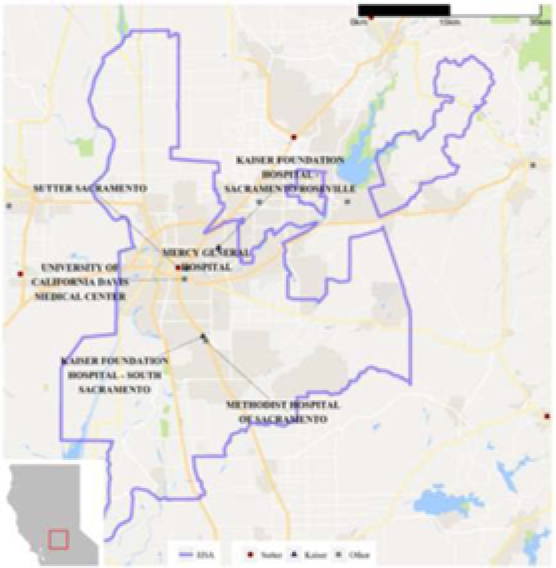
169 Chipty Decl. — ECF No. 494-4 at 61-62 (¶ 80).

170 *Id.*

171 *Id.* at 62 (¶ 81).

172 *Id.* at 49-50 (¶ 67).

173 *Id.* at 47-48 (¶ 66); Gowrisankaran Decl. Ex. 1A — ECF No. 272-3 at 60.



[174]

Between 78 and 82 percent of the non-Kaiser, commercially insured patients residing in the Sacramento HSA stay in the Sacramento HSA for inpatient hospital services, and the remaining 18 to 22 percent travel out of the Sacramento HSA for inpatient hospital services.[175] Dr. Chipty stated that the patients who stay in the Sacramento HSA drive an average of 17 minutes for their care and the patients who travel out of the Sacramento HSA drive an average of 38 minutes for their care.[176]

3.2.2 Dr. Chipty's analyses

Dr. Chipty conducted a diversion analysis to ask where patients would go if Sutter Sacramento were removed from each **[*47]** patient's choice set.[177] She estimated that 61 percent of patients would go to another hospital inside the Sacramento HSA and that 39 percent of patients would go to a hospital outside the Sacramento HSA.[178] She then conducted an analysis to calculate the profit-maximizing price increase that a hypothetical monopolist could impose and estimated that a hypothetical monopolist that controlled all of the non-Kaiser hospitals in the Sacramento HSA would find it profitable to raise Sutter Sacramento's price between 11 and 12 percent over Sutter Sacramento's actual prices from 2010 to 2012.[179]

3.3 The San Francisco HSA

3.3.1 Overview

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[174] Chipty Decl. — ECF No. 494-1 at 49 (¶ 66).

[175] *Id.* (¶ 67) (78%/22%); Gowrisankaran Decl. Fig. 5 — ECF No. 272-3 at 46 (81.6%/18.4%).

[176] Chipty Decl. — ECF No. 494-1 at 49 (¶ 67).

[177] *Id.* at 51-52 (¶¶ 68-69).

[178] *Id.*

[179] *Id.* at 52-53 (¶ 70).

The San Francisco HSA includes the City and County of San Francisco. There are approximately 740,000 residents in the San Francisco HSA.[180] Excluding one Kaiser hospital, there are seven hospitals in the San Francisco HSA: Sutter's California Pacific Medical Center ("CPMC") (which has four campuses: Davies, Pacific, and California, collectively "CPMC Main," and St. Luke's) and six non-Sutter hospitals (Chinese Hospital, Laguna Honda Hospital and Rehabilitation Center, San Francisco General Hospital Medical Center, St. Francis Memorial Hospital, St. Mary's Medical Center-San **[*48]** Francisco, and University of San Francisco Medical Center).[181]

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Between 95 and 98 percent of the non-Kaiser, commercially insured patients residing in the San Francisco HSA stay in the San Francisco HSA for inpatient hospital services, and the remaining three to four percent travel out of the San Francisco HSA for inpatient hospital services.[183] Dr. Chipty stated that the patients who stay in the San Francisco HSA drive an average of 16 minutes for their care and the patients who travel out of San Francisco HSA drive an average of 45 minutes for their care.[184]

3.3.2 Dr. Chipty's analyses

Dr. Chipty conducted a diversion analysis to ask where patients would go if CPMC Main and CPMC St. Luke's were removed from each patient's choice set.[185] She estimated that 65 percent of patients would go to another hospital inside the San Francisco HSA and that 35 percent of patients would go to a hospital outside the San Francisco HSA.[186] She then conducted an analysis to calculate the profit-maximizing price increase that a hypothetical monopolist could impose and estimated that a hypothetical monopolist that controlled all of the non-Kaiser hospitals

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[180] *Id.* at 49-50 (¶ 67).

[181] *Id.* at 53-54 (¶ 72); Gowrisankaran Decl. Ex. 1A — ECF No. 272-3 at 60.

[182] Chipty Decl. — ECF No. 494-1 at 55 (¶ 33).

[183] *Id.* (¶ 74) (95%/5%); Gowrisankaran Decl. Fig. 5 — ECF No. 272-3 at 46 (97.5%/2.5%).

[184] Chipty Decl. — ECF No. 494-1 at 55 (¶ 74).

[185] *Id.* at 56-58 (¶ 75).

[186] *Id.* at 51-52 (¶ 69).

in the San Francisco HSA would find it profitable to raise CPMC **[*49]** Main's price by 13 percent over CPMC Main's actual prices from 2010 to 2012.[187]

3.4 The Santa Rosa HSA

3.4.1 Overview

The Santa Rosa HSA includes the city of Santa Rosa in Sonoma County, California. There are approximately 256,000 residents in the Santa Rosa HSA.[188] Excluding one Kaiser hospital, there are two hospitals in the Santa Rosa HSA: Sutter Santa Rosa Regional Hospital ("Sutter Santa Rosa") and one non-Sutter hospital, Santa Rosa Memorial Hospital.[189]

[190]

Between 75 and 83 percent of the non-Kaiser, commercially insured patients residing in the Santa Rosa HSA stay in the Santa Rosa HSA for inpatient hospital services, and the remaining 17 to 25 percent travel out of the Santa Rosa HSA for inpatient hospital services.[191] Dr. Chipty stated that the patients who stay in the Santa Rosa HSA drive an average of 20 minutes for their care and the patients who travel out of the Santa Rosa HSA drive an average of 67 minutes for their care.[192]

3.4.2 Dr. Chipty's analyses

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[187] *Id.* at 58-59 (¶ 76).

[188] *Id.* at 65 (¶ 84).

[189] *Id.* at 63 (¶ 83); Gowrisankaran Decl. Ex. 1A — ECF No. 272-3 at 60.

[190] Chipty Decl. — ECF No. 494-1 at 64 (¶ 83).

[191] *Id.* at 65 (¶ 84) (75%/25%); Gowrisankaran Decl. Fig. 5 — ECF No. 272-3 at 46 (82.7%/17.3%).

[192] Chipty Decl. — ECF No. 494-1 at 55 (¶ 74).

Dr. Chipty conducted a diversion analysis to ask where patients would go if Sutter Santa Rosa were removed from each patient's choice set.[193] She estimated that 73 percent of patients would go to another hospital inside the Santa Rosa HSA and that **[*50]** 27 percent of patients would go to a hospital outside the Sutter Rosa HSA.[194] She then conducted an analysis to calculate the profit-maximizing price increase that a hypothetical monopolist could impose and estimated that a hypothetical monopolist that controlled all of the non-Kaiser hospitals in the Santa Rosa HSA would find it profitable to raise Sutter Santa Rosa's price between seven and ten percent over Sutter Santa Rosa's actual prices from 2010 to 2012.[195]

STANDARD OF REVIEW

HN6[] The court must grant a motion for summary judgment if the movant shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. Material facts are those that may affect the outcome of the case. *Anderson, 477 U.S. at 248*. A dispute about a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *Id. at 248-49*.

HN7[] The party moving for summary judgment bears the initial burden of informing the court of the basis for the motion, and identifying portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. To meet its burden, **[*51]** "the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102 (9th Cir. 2000)*; *see* *Devereaux v. Abbey, 263 F.3d 1070, 1076 (9th Cir. 2001)* ("When the nonmoving party has the burden of proof at trial, the moving party need only point out 'that there is an absence of evidence to support the nonmoving party's case.'") (quoting *Celotex, 477 U.S. at 325*).

If the moving party meets its initial burden, then the burden shifts to the non-moving party to produce evidence supporting its claims or defenses. *Nissan Fire & Marine, 210 F.3d at 1103*. The non-moving party may not rest upon mere allegations or denials of the adverse party's evidence, but instead must produce admissible evidence that shows there is a genuine issue of material fact for trial. *See* *Devereaux, 263 F.3d at 1076*. If the non-moving party does not produce evidence to show a genuine issue of material fact, the moving party is entitled to summary judgment. *See* *Celotex, 477 U.S. at 323*.

HN8[] In ruling on a motion for summary judgment, the court does not make credibility determinations or weigh conflicting evidence. Instead, it views the evidence in the light most favorable to the non-moving party and draws all factual inferences **[*52]** in the non-moving party's favor. *E.g.,* *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; *Ting v. United States, 927 F.2d 1504, 1509 (9th Cir. 1991)*.

ANALYSIS

1. Framing the Issues

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[193] *Id.* at 56-58 (¶ 75).

[194] *Id.* at 65-66 (¶ 85).

[195] *Id.* at 66 (¶ 86).

Before addressing the specifics of the parties' arguments, the court frames the issues relating to Sutter's limited motion for summary judgment.

First, as applied here to the product market of hospitals selling inpatient hospital services to health plans, the hypothetical-monopolist test for defining geographic markets focuses on the responses of health plans, as opposed to patients, to a price increase by hypothetical-monopolist hospitals.

Second, on this limited motion, the plaintiffs do not have to establish definitively that their Candidate Markets are in fact relevant geographic markets for antitrust purposes. In that vein, at this juncture, the plaintiffs do not need to exclude definitively all other possible geographic markets. If there is a dispute of material fact about whether the Candidate Markets could be relevant geographic markets, then the court must deny Sutter's summary-judgment motion.

Third, on this limited motion, there is no per se requirement that the plaintiffs present expert testimony or an econometric analysis in support of their Candidate Markets. If non-expert evidence raises a dispute of **[*53]** material fact, then the court must deny Sutter's summary-judgment motion.

The next sections address in more detail these three issues.

1.1 As Applied Here, the Hypothetical-Monopolist Test Focuses on How Health Plans, as Opposed to Patients, Would Respond to a Monopolist Hospital

As discussed above, the hypothetical-monopolist test for defining geographic markets "asks what would happen if a single firm became the only seller in a candidate geographical region." *Advocate Health, 841 F.3d at 468* (citing *Whole Foods, 548 F.3d at 1038*). The test then asks whether that hypothetical monopolist could profitably impose a small but significant nontransitory increase in price, or whether consumers would respond to a SSNIP by buying the product from outside the proposed geographic region (i.e., by buying from a seller other than the hypothetical monopolist), thus making the hypothetical monopolist's SSNIP unprofitable. *St. Luke's, 778 F.3d at 784*.

Here, the consumers responding to a hypothetical-monopolist hospital's SSNIP are health plans, not the health-plan enrollees (i.e., patients), because health plans (not enrollees) directly pay the hospital's price increases. As the Third Circuit explained:

> Imagine that a hospital raised the cost of a procedure from $1,000 to $2,000. The patient **[*54]** who utilizes health insurance will still have the same out-of-pocket costs before and after the price increase. It is the insurer who will bear the immediate impact of that price increase. Not until the insurer passes that cost on to the patient in the form of higher premiums will the patient feel the impact of that price increase. And even then, the cost will be spread among many insured patients; it will not be felt solely by the patient who receives the higher-priced procedure. This is the commercial reality of the healthcare market as it exists today.

Penn State Hershey, 838 F.3d at 342; *see* *Brown Shoe, 370 U.S. at 336* (geographic markets must "correspond to the commercial realities of the industry"). Thus, as the Ninth Circuit has recognized, because "the vast majority of health care consumers are not direct purchasers of health care — the consumers purchase health insurance and the insurance companies negotiate directly with the providers, the . . . correct[] focus[is] on the likely response of insurers to a hypothetical demand by all the [hospitals] in a particular market for a SSNIP." *St. Luke's, 778 F.3d at 784* (internal quotation marks omitted); *see* *id. at 784 n.10* (because patients are "largely insensitive" to price, antitrust analysis focuses on the interactions between hospitals **[*55]** and health plans, not hospitals and patients) (citing Vistnes, 67 Antitrust L.J. at 678, 681-82, 692). Citing the Ninth Circuit's decision in *St. Luke's*, the Third and Seventh Circuits similarly have held that "when we apply the hypothetical monopolist test, we must also do so through the lens of the insurers," *Penn State Hershey, 838 F.3d at 342*, and that "[t]he geographic market question is therefore most directly about 'the likely response of insurers,' not patients, to a price increase," *Advocate Health, 841 F.3d at 471*.[196]

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[196] Sutter cites *ProMedica Health System, Inc. v. FTC, 749 F.3d 559 (6th Cir. 2014)*, to argue that distinguishing between health plans versus patients as the relevant consumers is "an argument about semantics." Def. MSJ — ECF No. 272 at 16. *ProMedica* does not hold that distinguishing between health plans and patients is "semantics" in all contexts. That case involved a merger between two of the four hospital systems in Lucas County, Ohio: ProMedica and St. Luke's. *Id. at 561*. The FTC challenged the merger as adversely affecting competition in violation of the Clayton Act. *Id.* There was no dispute about the relevant geographic market. *Id. at 565*. Instead, the main issue was whether ProMedica had rebutted the presumption that the merger would affect competition adversely. *Id. at 568* (noting that the merger resulted in a Herfindahl-Hirschman market-concentration index between 4,391 to 6,854, far above the threshold of 2,500 where a merger is presumed to be anticompetitive), *571-72* (addressing ProMedica's arguments that it rebutted the presumption). The Sixth Circuit noted that what was "more remarkable is what ProMedica does not argue. By way of background, the goal of ***antitrust law*** is to enhance consumer welfare. . . . But ProMedica did not even attempt to argue before the [Federal Trade] Commission, and does not attempt to argue here, that this merger would benefit consumers (as opposed to only the merging parties themselves) in any way. To the contrary, St. Luke's CEO admitted that a merger with ProMedica might 'harm the community by forcing higher rates on them.'" *Id. at 571* (internal brackets omitted). ProMedica argued that the FTC erred in addressing whether the two merging hospitals were substitutes for each other from the perspective of patients, rather than health plans. *Id. at 572*. The Sixth Circuit rejected that argument as "an argument about semantics. [Health plans] assemble networks based primarily upon patients' preferences, not their own; and thus the extent to which an MCO regards ProMedica and St. Luke's as close substitutes depends upon the extent to which the [health plan]'s members do." *Id.* But this statement does not mean that the Sixth Circuit endorsed a view that distinguishing between health plans and patients is "semantics" in all contexts, such as in the context of a hypothetical-monopolist test (a test the *ProMedica* court never addressed) to define a geographic market for hospitals' selling hospital services to health plans. Even if it were, this out-of-circuit pronouncement would not be controlling in light of the Ninth Circuit's more recent, binding opinion in *St. Luke's* on this issue.

It may be proper to focus on the response of patients, as opposed to health plans, in other contexts, such as in antitrust cases brought by medical providers alleging that they have been shut out of competing for patients. Sutter cites a number of these cases. Def. MSJ — ECF No. 272 at 15, 24-25. For example, one of the cases that Sutter cites, *Little Rock Cardiology Clinic PA v. Baptist Health, 591 F.3d 591 (8th Cir. 2009)*, involved allegations by cardiologists that a large hospital system and a health plan conspired to shut them out from competing to attract patients to their clinic (instead of the hospitals). *Id. at 597*. In the context of the doctors' claims that they were shut out from competing for patients, it made sense to examine from where doctors draw their patients. *Id. at 599*; *see* *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 67 (1st Cir. 2004)* ("the concern in an ordinary exclusive dealing claim by a shut-out supplier is with the available market *for the supplier,"* as opposed to the buyer) (emphasis in original). Other cases that Sutter cites are similar. *See* *Gordon v. Lewistown Hosp., 423 F.3d 184, 198 (3d Cir. 2005)* (ophthalmologist alleging that hospital attempted to prevent him from competing to obtain or retain patients); *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1, 309 F.3d 836, 838 (5th Cir. 2002)* (outpatient surgery clinic alleging that large hospital attempted to monopolize the outpatient-surgery market); *Minn. Ass'n of Nurse Anesthetists v. Unity Hosp., 208 F.3d 655, 658-59 (8th Cir. 2000)* (nurse anesthetists alleging that hospitals and doctors conspired to shut them out of competing with doctor anesthesiologists); *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. All., Inc., 123 F.3d 301, 304 (5th Cir. 1997)* (hospital alleging that rival hospital and health plan conspired to monopolize the hospital market); *Novak v. Somerset Hosp., 625 F. App'x 65, 67 (3d Cir. 2015)* (surgeon alleging that hospital terminated his privileges to perform surgery on patients at the hospital); *Brown v. Our Lady of Lourdes Med. Ctr., 767 F. Supp. 618, 620 (D.N.J. 1991)* (cardiothoracic surgeon alleging that hospital denied him medical-staff privileges).

None of those medical-provider shut-out cases addresses the hypothetical-monopolist test. And this is not a medical-provider shut-out case. The Ninth Circuit has recognized that competition between medical providers to be included as in-network providers in health plans is a separate stage of competition than competition between medical providers to attract patients. *St. Luke's, 778 F.3d at 784 n.10* ("This 'two-stage model' of health care competition is 'the accepted model.' In the first stage, providers compete for inclusion in insurance plans. In the second stage, providers seek to attract patients enrolled in the plans.") (citing John J. Miles, 1 Health Care & Antitrust L. § 1:5 (2014); Vistnes, 67 Antitrust L.J. at 674, 681-82); *accord* Gowrisankaran Decl. — ECF No. 272-3 at 14-16 (¶¶ 19-22) (Sutter's expert agreeing these stages of competition are different). With respect to negotiations between medical providers and health plans and the hypothetical-monopolist test, the focus is on the response of health plans, as opposed to patients. *St. Luke's, 778 F.3d at 784* & n.10; *accord* *Advocate Health, 841 F.3d at 471*; *Penn State Hershey, 838 F.3d at 342*.

This is of course not to suggest that the response of patients is irrelevant. *Cf. id. at 343*. For example, "[i]n assessing the impact of dropping a hospital from its network . . ., a [health] plan must consider both how individual employees are likely to react and how the loss might affect the employer's willingness to offer that plan to its employees." Vistnes, 67 Antitrust L.J. at 678; *accord Advocate Health, 841 F.3d at 475*. But the response of health plans may not mirror the response of patients, which is why the Ninth Circuit (and the Third and Seventh Circuits) distinguish between the two. For example, if health plans believe — rightly or wrongly — that their potential customer base would react negatively to their dropping a hospital from their networks, **[*56]** they might respond to the hospital's imposing a SSNIP by paying the price increase. That response might satisfy the hypothetical-monopolist test regardless of whether the belief that drove them to pay the price increase ultimately was inaccurate or misguided in some way. Thus, courts distinguish the responses, and it is the latter response — the response of health plans — that is the focus of the hypothetical-monopolist test here.

1.2 At Summary Judgment, the Plaintiffs Do Not Have to Establish Definitively That Their Candidate Markets Are Relevant Geographic Markets or Exclude All Other Possible Geographic Markets

HN9[] Defining the relevant geographic markets is generally a question for the jury. *Newcal, 513 F.3d at 1045* ("the validity of the 'relevant market' is typically a factual element rather than a legal element") (citing *High Tech. Careers v. San Jose Mercury News, 996 F.2d 987, 990 (9th Cir. 1993))*; *Dooley v. Crab Boat Owners Ass'n, No. C 02-0676 MHP, 2004 U.S. Dist. LEXIS 7117, 2004 WL 902361, at *9 (N.D. Cal. Apr. 26, 2004)* ("The definition of the relevant market — both product and geographic — is generally a question of fact reserved for the jury.") (citing *High Tech. Careers, 996 F.2d at 990*; *Oahu Gas Serv., Inc. v. Pac. Res. Inc., 838 F.2d 360, 363 (9th Cir. 1988))*.

The plaintiffs bear the ultimate burden of defining the relevant geographic markets. *St. Luke's, 778 F.3d at 784* (citing *Conn. Nat'l Bank, 418 U.S. at 669-70*). On a motion for summary judgment, "[i]f the [plaintiff]'s **[*57]** evidence cannot sustain a jury verdict on the issue of market definition, summary judgment is appropriate." *Rebel Oil, 51 F.3d at 1435*.

On a summary-judgment motion, the court must view the evidence and draw all inferences with respect to defining the relevant geographic market in the light most favorable to the non-moving party. *Rebel Oil, 51 F.3d at 1435* (citing *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986))*; *County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1159 & n.9 (9th Cir. 2001)* (citing *Anderson, 477 U.S. at 250*). "While the [plaintiff] bear[s] the burden of demonstrating a relevant market at trial, [the moving party] has the burden on summary judgment of demonstrating that there is no genuine issue of material fact." *Hynix Semiconductor Inc. v. Rambus Inc., No. CV-00-20905 RMW, 2008 U.S. Dist. LEXIS 123822, 2008 WL 73689, at *9 (N.D. Cal. Jan. 5, 2008)*. If there is a dispute of material fact regarding the proper geographic markets, summary judgment must be denied.

At summary judgment, the plaintiffs do not need to establish definitively that their Candidate Markets are relevant geographic markets for antitrust purposes. It is enough to raise a dispute of material fact about whether their Candidate Markets could be relevant geographic markets to overcome a summary-judgment motion. In that vein, at summary judgment, the plaintiffs do not need to exclude definitively all other possible relevant geographic markets. The fact that the plaintiffs might not have **[*58]** foreclosed all other possible geographic-market definitions does not mean that they have failed to raise a dispute of material fact regarding their Candidate Markets and does not, without more, entitle Sutter to summary judgment.[197]

1.3 At Summary Judgment, There Is No Per Se Requirement for the Plaintiffs to Present Expert Testimony or an Econometric Analysis in Support of Their Candidate Markets

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[197] The court expresses no opinion here as to whether the plaintiffs must exclude other possible geographic markets to prevail at trial. It holds only that the plaintiffs need not do so at summary judgment.

Sutter argues that "courts routinely hold that 'construction of the relevant market and a showing of monopoly power must be based on expert testimony,'" citing an Eleventh Circuit case, *Bailey v. Allgas, Inc., 284 F.3d 1237, 1246 (11th Cir. 2002)*.[198] Sutter has not identified any court in the Ninth Circuit that has held that a plaintiff must base its market definition on expert testimony to withstand summary judgment.[199] *Cf. AFMS LLC v. United Parcel Serv., Inc., 696 F. App'x 293, 294 (9th Cir. 2017)* (Nguyen, J., concurring in the result) ("AFMS was not required, as the district court suggested, to provide expert testimony regarding the relevant market.") (citing *United States v. Pabst Brewing Co., 384 U.S. 546, 549, 86 S. Ct. 1665, 16 L. Ed. 2d 765 (1966)* ("Certainly the failure of the Government to prove by an army of expert witnesses what constitutes a relevant 'economic' or 'geographic' market is not an adequate ground on which to dismiss a [*Clayton Act § 7*] case.")); *see also Hynix Semiconductor Inc. v. Rambus Inc., No. CV-00-20905 RMW, 2008 U.S. Dist. LEXIS 123822, 2008 WL 73689, at *10 n.13 (N.D. Cal. Jan. 5, 2008)* (describing **[*59]** the Eleventh Circuit as having "gone farther" than the Ninth Circuit in holding that construction of the relevant market must be based on expert testimony).

To the contrary, in *St. Luke's*, for example, the Ninth Circuit focused on testimony from health-industry participants — about how health plans had to include Nampa-based primary-care physicians ("PCPs") in their network in order for their health-insurance products to be marketable to Nampa residents — to affirm the trial-court finding that Nampa was a geographic market. *See St. Luke's, 778 F.3d at 785* ("Evidence was presented that insurers generally need local PCPs to market a health care plan, and that this is true in particular in the Nampa market. For example, Blue Cross of Idaho has PCPs in every zip code in which it has customers, and the executive director of the Idaho Physicians Network testified that it could not market a health care network in Nampa that did not include Nampa PCPs.");[200] *accord Penn State Hershey, 838 F.3d at 345-46* (similarly focusing on testimony from health plans about which hospitals they needed to include in network in order for their health-insurance products to be marketable, as opposed to expert testimony, to define a geographic market); *see also* ***[*60]*** Areeda & Hovenkamp ¶ 538 ("The profitability of a hypothetical increase in the price of a hypothetical monopolist of product A depends, of course, on the reactions of customers and of other suppliers. To predict those reactions and their impact on the hypothetical monopolist's profitability, we look to[, among other things,] testimony by customers or alternative suppliers of how they would respond to the hypothetical price increase."). To take another counterexample, in a case from this district involving antitrust claims relating to crab fishing, the court held on a motion for summary judgment that (non-expert) declarations by the plaintiff fisherman and a third-party seafood buyer that consumers prefer San Francisco crab to other crab were sufficient to raise a genuine dispute of material fact as to whether the relevant geographic market for the crab product market should be defined as being the San Francisco Bay Area. *Dooley, 2004 U.S. Dist. LEXIS 7117, 2004 WL 902361, at *10*.[201]

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[198] Def. MSJ Reply — ECF No. 436 at 15 (internal brackets omitted); Hr'g Tr. — ECF No. 611 at 48 (Sutter arguing that "the case law is clear that a plaintiff must have expert testimony to support its antitrust markets").

[199] Hr'g Tr. — ECF No. 611 at 137. Sutter points to *Hammer v. Clear Channel Communications (In re Live Concert Antitrust Litigation), 863 F. Supp. 2d 966 (C.D. Cal. 2012)* (cited by Def. MSJ Reply — ECF No. 436 at 17; Hr'g Tr. — ECF No. 611 at 139), but that case is inapposite. In that case, the plaintiffs relied solely on their expert to provide an evidentiary basis for their product (not geographic) market definition. *See Live Concert, 863 F. Supp. 2d at 1000* ("Plaintiffs do not argue . . . that there is an adequate evidentiary basis in the record, absent [their expert's] testimony, for a jury to find that Plaintiffs have defined an economically significant product market."). The court excluded the plaintiffs' expert, and then granted the defendants partial summary judgment because the plaintiffs offered no evidence besides their expert in support of their market definition. *Id.* But that case does not stand for the principle that plaintiffs must always base their market definition on expert testimony if — unlike the *Live Concert* plaintiffs — the plaintiffs also have non-expert evidence that supports their market definition.

[200] The Ninth Circuit cited expert testimony for the general precept that patients are insensitive to physicians' raising their prices because they pay only a small percentage of their physicians' prices out of pocket. *St. Luke's, 778 F.3d at 785*. In applying the hypothetical-monopolist test to determine how health plans would react to a price increase, however, it cited the testimony of industry participants, not experts. *Id.*

[201] Additionally, even where parties rely on expert opinion to support their market definitions, there is no requirement that the expert conduct an econometric analysis, as opposed to basing the expert opinion on other facts. *In re Apple iPod iTunes Antitrust Litig., No. 05-CV-0037 YGR, 2014 U.S. Dist. LEXIS 136437, 2014 WL 4809288, at *7 (N.D. Cal. Sept. 26, 2014)*

In the absence of any Ninth Circuit authority holding that a geographic-market definition must be based on expert testimony, the court does not adopt that rule here. *Cf.* Lantec, Inc. v. Novell, Inc., 146 F. Supp. 2d 1140, 1148 (D. Utah 2001) (**HN10**[] "The absence of expert testimony on the issue of **[*61]** relevant market and like issues is not, per se, fatal to a plaintiff's antitrust claims. In other words, expert testimony is not required, but in its absence a plaintiff must show by other evidence sufficient facts from which a jury could infer market share, market power, relevant market, monopolization, dangerous probability of monopolization, and the like.") (citing Gen. Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795, 806 (8th Cir. 1987)), *aff'd*, 306 F.3d 1003 (10th Cir. 2002); *accord* Areeda & Hovenkamp ¶ 531f ("Courts have disagreed about whether expert testimony is necessary to establish a relevant market. We do not believe a categorical rule is necessary.").[202]

2. Selecting Initial Candidate Markets for the Hypothetical-Monopolist Test

The parties agree that the hypothetical-monopolist test is the "well-established test," and neither argues that any other test should be used here to define the relevant geographic markets.[203] The parties also agree that the hypothetical-monopolist test begins by selecting at an initial "candidate" geographic market.[204]

The parties disagree about the initial candidate markets. The plaintiffs argue that their HSAbased Candidate Markets are appropriate initial candidate markets.[205] Sutter argues that HSAs are not appropriate initial candidate markets.[206] Sutter **[*62]** does not propose appropriate initial candidate markets, other than to suggest "a wide variety of other markets, counties or regions, or just looking at maps."[207] Sutter does not offer a methodology for determining whether a given geographic market is an appropriate initial candidate market.

As noted above, **HN11**[] defining the relevant markets is typically a question of fact. Absent a showing that the plaintiffs may not use HSA-based markets as initial candidate markets as a matter of law — a showing that Sutter has not made here[208] — the question of what initial candidate markets to use in the hypothetical-monopolist test to define the relevant geographic market is a question of fact. On a summary-judgment motion, all inferences must be drawn in the non-moving party's favor, and thus at this juncture, the court adopts the plaintiffs' approach of using

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(denying defendant's motion to exclude an expert opinion on market definition that was based on "internal Apple documents, employee testimony, and discovery responses, third-party information such as contemporaneous financial analysis and press coverage . . ., and his own experience," and holding that the defendant's argument that an expert opinion on market definitions must be based on an econometric analysis "lacks legal support").

[202] The court does not suggest that non-expert declarations are sufficient in all instances to raise a genuine dispute of material fact regarding geographic market-definitions on a summary-judgment motion. *Cf.* Morgan, Strand, Wheeler & Biggs, 924 F.2d at 1490 (defining geographic markets can be a "highly technical economic question"). But it also is not the case that non-expert evidence is per se insufficient to raise a genuine dispute of material fact.

[203] Def. MSJ - ECF No. 272 at 14-15; Pls. MSJ Opp'n - ECF No. 494 at 25; Hr'g Tr. - ECF No. 611 at 125-26.

[204] Hr'g Tr. - ECF No. 622 at 7-8; *see* Advocate Health, 841 F.3d at 473 ("[T]he hypothetical monopolist test is an iterative analysis. The analyst proposes a candidate market, simulates a monopolization of that market, then adjusts the candidate market and reruns the simulation as necessary.").

[205] *See* Pls. Mot. to Exclude Chipty Opp'n - ECF No. 479 at 11; Hr'g Tr. - ECF No. 622 at 7-8.

[206] Hr'g Tr. - ECF No. 622 at 8-9.

[207] *Id.* at 8.

[208] Sutter argues that the plaintiffs are starting with initial candidate markets "that we've now pretty much all agreed were not created with antitrust geographic markets in mind[.]" *Id.* at 8; *see also* Def. MSJ - ECF No. 272 at 7-8 ("HSAs were not constructed for antitrust purposes or with hospital competition in mind."). But Sutter has not identified *any* proposed initial candidate markets that were constructed with antitrust geographic markets in mind. Other courts have defined geographic markets in terms of cities, counties, etc., which were no more created with antitrust geographic markets in mind than were HSAs.

their HSA-based Candidate Markets as initial candidate markets for the purposes of the hypothetical-monopolist test.[209]

3. The Candidate Tying Markets

In six of the seven Candidate Tying Markets (the Antioch, Auburn, Crescent City, **[*63]** Jackson, Lakeport, and Tracy HSAs), there is only one non-Kaiser hospital (Sutter Delta, Sutter Auburn, Sutter Coast, Sutter Amador, Sutter Lakeside, and Sutter Tracy, respectively). Using the Candidate Tying Markets as initial candidate markets, the hypothetical-monopolist test for each candidate market is this: if the Sutter hospital in that candidate market imposed a SSNIP, would health plans respond by (1) paying the Sutter hospital's price increases (thereby keeping it in network) or (2) refusing to pay the Sutter hospital's price increases (thereby rendering it out of network) and instead buying from other hospitals?[210]

In the seventh Candidate Tying Market, the combined Berkeley-Oakland HSA, there are Sutter hospitals (the Sutter Alta Bates campuses) and one non-Sutter, non-Kaiser hospital (Alameda County Medical Center). Using the combined Berkeley-Oakland HSA as an initial candidate market, the hypothetical-monopolist test reduces to the following: if a single firm controlled Sutter Alta Bates and Alameda County Medical Center and imposed a SSNIP at those hospitals, would health plans respond by (1) paying the price increases (thereby keeping the hospitals in network) **[*64]** or (2) refusing to pay the price increases (thereby rendering the hospitals out of network) and instead buying from other hospitals? If health plans would pay the hospitals' price increases, the proposed candidate markets are geographic markets for antitrust purposes.

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[209] It is worth noting that Sutter is not complaining that that the plaintiffs' Candidate Markets are too broad. An initial candidate market might pass the hypothetical-monopolist test despite being too broad. (For example, an initial candidate market of the entire United States would pass the hypothetical-monopolist test because if a hypothetical monopolist controlled every hospital in the United States and imposed a SSNIP, health plans would respond by paying it instead of buying hospital services only from hospitals outside the market (i.e., hospitals in other countries). But this would not exclude the possibility that that candidate market is too broad to be a properly defined relevant geographic market.) Instead, Sutter is complaining that the plaintiffs' initial candidate markets are too narrow. *See* Def. MSJ - ECF No. 272 at 22-23 (arguing that geographic markets should be larger than HSAs), 26 ("the proffered HSAs are too narrow to constitute relevant geographic markets"). The hypothetical-monopolist test accounts for the scenario where initial candidate markets are too narrow: if the candidate market is too narrow and buyers thus would turn to alternate sellers outside of the candidate market, broaden the candidate market to include those alternate sellers and rerun the test. *Advocate Health, 841 F.3d at 468*; *accord* *St. Luke's, 778 F.3d at 784*. If buyers would not turn to alternate sellers outside of the candidate market, that does not mean that the initial candidate market was too narrow. Indeed, it may mean the opposite.

Sutter cites *Little Rock Cardiology, 591 F.3d 591*, in which the Eighth Circuit cautioned against plaintiffs delineating arbitrarily narrow geographic markets. Def. MSJ Reply - ECF No. 436 at 10-11. As discussed above, *Little Rock Cardiology* was a medical-provider shut-out case, which does not present its issues in the same context as this case. *See supra* note 196. The *Little Rock Cardiology* court looked to the response of patients (not health plans) and did not address the hypothetical-monopolist test (which accounts for the scenario where initial candidate markets are too narrow).

Sutter also claims that the asserted geographic markets in the Third Circuit's *Penn State Hershey* case and the Seventh Circuit's *Advocate Health* case spanned eleven and nine HSAs, respectively, to suggest that HSA-based markets are too narrow to be relevant geographic markets for antitrust purposes. Def. MSJ - ECF No. 272 at 22. Sutter conspicuously does not address the Ninth Circuit's *St. Luke's* case and does not say whether the geographic market there — the city of Nampa, Idaho — supports its theory that geographic markets should be broader than a single HSA. *See id.*

[210] As discussed above, the parties agree to exclude Kaiser hospitals for the purposes of this summary-judgment motion. *See supra* note 50. In any event, it is not clear that including Kaiser hospitals would substantially change the outcome. The hypothetical-monopolist test requires one to assume that a single firm becomes the only seller in the candidate market and imposed a SSNIP, so if the Kaiser hospital were included, the hypothetical-monopolist test would require one to assume that the SSNIPimposing hypothetical monopolist controlled the Kaiser hospital, in addition to the Sutter hospital.

The Blue Shield Redirection Analysis, the application of the Knox-Keene Act, and other evidence from health plans and from Sutter raise disputes of material fact about whether, if hypothetical-monopolist hospitals in the Candidate Tying Markets imposed a SSNIP, health plans would respond by paying the price increases. They thus raise disputes of material fact as to whether the hypothetical-monopolist test is satisfied and, therefore, whether the plaintiffs' Candidate Tying Markets are geographic markets for antitrust purposes.[211]

3.1.1 Blue Shield redirection analysis

Blue Shield's Director of Provider Contracting for Northern California testified that Blue Shield conducts redirection analyses when its agreements with Sutter come up for renewal, specifically to assess "okay, if Sutter's out of network, what can be redirected elsewhere, what are their alternatives, what our cost implications are."[212] The Blue Shield Redirection **[*65]** Analysis conducted in 2014 estimated that if Sutter were to go out of network, [TEXT REDACTED BY THE COURT] percent of Blue Shield enrollees that use the Sutter hospitals in the Candidate Tying Markets would not be willing to use other hospitals.[213] A former Blue Shield Senior Vice President said in a sworn declaration that "providing broad geographic coverage for members is important. In addition, certain Sutter hospitals and physician groups are 'must have' providers because particular Blue Shield customers insist that they be included in the network."[214] The former Senior Vice President further attested that Sutter's "leveraging of its market position in multiple counties (where they are dominant) to demand higher rates across the board has forced Blue Shield to accept Sutter's significantly higher pricing."[215]

This raises a dispute of material fact about whether, if a hypothetical monopolist that controlled all of the hospitals in each of the respective Candidate Tying Markets (i.e., the Sutter hospitals) imposed a SSNIP, health plans like Blue Shield would pay those price increases (rather than refusing to pay and losing those hospitals from their networks, and thereby running the risk **[*66]** that a significant percentage of enrollees might in turn stop buying their health-insurance products because they no longer offered their hospitals-of-choice as in-network providers). And if there is a dispute of material fact about whether buyers (i.e., health plans like Blue Shield) would pay a hypothetical monopolist's price increases, then there is a dispute of material fact about whether the hypothetical-monopolist test is satisfied and thus whether the Candidate Tying Markets are geographic markets for antitrust purposes.

Sutter argues that there was "nothing scientific" about the Blue Shield Redirection Analysis and that it was a "back-of-the-envelope product" that was "not the result of the sort of economic rigor that a court would expect to see [from an expert witness]."[216] Sutter argues that the Blue Shield network-management team "provided the hospital redirection numbers, adjusting them if the team thought they were 'too much' or 'not enough'" and "[w]hen determining how many patients would move from one hospital to another, Blue Shield was 'just looking at assumptions,' not 'any numbers,' admission patterns, or data, and there 'was no testing' of the assumptions on which it **[*67]** relied."[217] Sutter argues that the Blue Shield Redirection Analysis does not accurately describe how Blue Shield enrollees would in fact react to Sutter's hospitals going out of network and that one of Blue Shield's customers criticized the Redirection Analysis as "relying on 'assumptions in some regions [that] did not make

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[211] Because this non-expert evidence raises disputes of material fact with respect to the Candidate Tying Markets, the court does not address whether Dr. Chipty's report also raises disputes of material fact. The court denies as moot Sutter's motion to exclude Dr. Chipty's opinions regarding the Candidate Tying Markets.

[212] Barnes Dep. - ECF Nos. 469-2 at 12 (under seal), 493 at 12 (redacted version) (p. 426).

[213] Blue Shield Redirection Analysis - ECF Nos. 469-2 at 62-63 (under seal), 493 at 62-63 (redacted version) (BSC_SutterSub00037814).

[214] Joyner Decl. - ECF No. 497 at 8 (¶ 21).

[215] *Id.* at 19 (¶¶ 58-59) (internal brackets and some internal quotation marks omitted).

[216] Def. MSJ Reply - ECF No. 436 at 14; Def. Mot. to Exclude Chipty - ECF No. 503 at 9.

[217] Def. Mot. to Exclude Chipty - ECF No. 503 at 14 (citations omitted).

sense'" and as being "in need of reworking."[218] Sutter argues that "far from being an unbiased, scientific exercise, the Redirection Analysis was 'one of the levers' Blue Shield used to determine the plan designs it wanted to sell."[219] Sutter argues that more Blue Shield enrollees might be willing to be redirected to other non-Sutter hospitals than the Redirection Analysis estimated.[220]

Sutter's arguments attacking the accuracy or reliability of the Redirection Analysis are misplaced on this narrow motion for summary judgment. As discussed above, the hypothetical-monopolist test focuses not on how patients would respond to a hypothetical-monopolist hospital's imposing a SSNIP but on how health plans would respond. *St. Luke's, 778 F.3d at 784 & n.10*; *accord* *Advocate Health, 841 F.3d at 471*; *Penn State Hershey, 838 F.3d at 342*. The hypothetical-monopolist test thus does not solely turn on whether [TEXT REDACTED BY THE COURT] percent of Blue Shield enrollees who **[*68]** use the Sutter hospitals could not be redirected to other hospitals (as the Blue Shield Redirection Analysis estimated). What the test might turn on is whether Blue Shield concluded that [TEXT REDACTED BY THE COURT] percent of its enrollees could not be redirected, and thus would respond by paying a price increase to keep those hospitals in network. Blue Shield conducted these redirection analyses to determine the repercussions of its terminating its agreement with Sutter. Sutter's arguments — that the Blue Shield Redirection Analysis's estimates were unscientific, based on unverifiable assumptions, contradicted by other analyses, or just plain wrong — do not demonstrate an absence of material fact about whether Blue Shield concluded from those estimates that it could not afford to terminate its agreement with Sutter and thus would pay a price increase rather than lose Sutter hospitals from its network.

Sutter also argues that the Redirection Analysis conflicts with Blue Shield's real-world experience with narrower provider networks and Blue Shield's representations to California regulators about what substitute hospitals were available.[221] Sutter cites to the district-court decision in **[*69]** *Advocate Health* and argues that there, "the district court 'shared some of defendants' concerns about the credibility of the insurers' testimony, which may indeed be self-serving,' but set those concerns aside because that 'there [wa]s no inconsistency in the insurers' testimony,"[222] whereas here, by contrast, "the inconsistency of Blue Shield's own positions regarding substitutable hospitals is overwhelming, and the record as a whole contradicts the redirection analysis."[223]

This argument is misplaced on this narrow motion for summary judgment. *Advocate Health* was before the court on a preliminary-injunction motion, where the court had to weigh the evidence to determine the likelihood of the plaintiff's success on the merits. This is a summary-judgment motion, where the court does not weigh evidence and instead draws all inferences in the non-moving party's favor. Contradictions in Blue Shield's positions at most raise disputes of fact. They do not provide a basis for discounting the Blue Shield Redirection Analysis, much less for granting Sutter summary judgment.

For each of the Candidate Tying Markets, the Blue Shield Redirection Analysis raises disputes of material fact as to whether **[*70]** the hypothetical-monopolist test is satisfied, and thus, whether the Candidate Tying Markets are geographic markets for antitrust purposes.

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[218] *Id.* at 14-15 (citations omitted).

[219] *Id.* (citations omitted).

[220] *See id.* at 15 (citations omitted).

[221] Def. Mot. to Exclude Chipty - ECF No. 409-3 at 15-17 (under seal), 503 at 15-17 (redacted version) (citations omitted); Def. MSJ Reply - ECF No. 436 at 14.

[222] Def. Mot. to Exclude Chipty - ECF No. 503 at 24 (internal brackets omitted) (quoting *FTC v. Advocate Health Care, No. 15 C 11473, 2017 U.S. Dist. LEXIS 37707, 2017 WL 1022015, at *5 (N.D. Ill. Mar. 16, 2017))*.

[223] *Id.*

3.1.2 Knox-Keene Act

A former Blue Shield Senior Vice President stated in a sworn declaration that if a Blue Shield enrollee "liv[es] in a rural area of Northern California, and the only hospital within 30 minutes or 15 miles of his residence or workplace was a Sutter hospital, the [Knox-Keene Act] mandates that Sutter's hospital be included in the network."[224]

Sutter's expert Dr. Gowrisankaran stated that for the patients discharged from Sutter Delta, Sutter Auburn, Sutter Coast, Sutter Amador, and Sutter Lakeside, 49 to 100 percent of them do not live within a 30-minute drive of another non-Kaiser hospital. Additionally, the DMHC sent Blue Shield notices that it effectively had to keep Sutter Delta, Sutter Coast, Sutter Amador, and Sutter Lakeside in network for certain hospital services because there were no other alternative hospitals available that complied with Knox-Keene Act requirements. This raises a dispute of material fact as to whether, if a hypothetical monopolist that controlled all of the hospitals in the Antioch, Auburn, Crescent City, **[*71]** Jackson, and Lakeport HSAs (i.e., Sutter Delta, Sutter Auburn, Sutter Coast, Sutter Amador, and Sutter Lakeside) imposed a SSNIP, health plans would pay those price increases (rather than refusing to pay and losing those hospitals from their networks, and thereby losing a significant portion of that potential-enrollee customer base because they would no longer have Knox-Keene Act compliant hospitals to offer). And if there is a dispute of material fact about whether buyers (i.e., health plans) would pay a hypothetical monopolist's price increases, then there is a dispute of material fact about whether the hypothetical-monopolist test is satisfied and thus whether the Antioch, Auburn, Crescent City, Jackson, and Lakeport HSAs are geographic markets for antitrust purposes.

Sutter argues that the Knox-Keene Act 30-minute regulations are only "presumptively reasonable standards" and that "health plans can comply with California's reasonable accessibility requirements after taking into account a range of other factors, including whether the community is rural or urban."[225] Again, Sutter's argument is misplaced on this narrow motion for summary judgment. Whether health plans might have exceptions **[*72]** to the Knox-Keene Act 30-minute requirement that might be applicable in certain situations does not demonstrate an absence of material fact about whether health plans understood that the Knox-Keene Act generally would bar them from being able to sell health-insurance products to a significant percentage of their customer bases.

Sutter also argues that several of its hospitals are within a 30-minute drive of a non-Sutter hospital.[226] But the Knox-Keene Act does not require health plans to offer in-network hospitals within a 30-minute drive of other hospitals; it requires them to offer in-network hospitals within a 30-minute drive of their enrollees. The fact that a non-Sutter hospital may be within a 30-minute drive of a Sutter hospital does not mean that the non-Sutter hospital is within a 30-minute drive of the enrollees who currently use that Sutter hospital.[227]

For the Antioch, Auburn, Crescent City, Jackson, and Lakeport HSAs, the application of the Knox-Keene Act raises a dispute of material fact as to whether the hypothetical-monopolist test is satisfied, and thus, whether the Antioch, Auburn, Crescent City, Jackson, and Lakeport HSAs are geographic markets for antitrust **[*73]** purposes.

3.1.3 Other evidence

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[224] Joyner Decl. - ECF No. 497 at 7 (¶ 20).

[225] Def. MSJ Reply - ECF No. 436 at 16.

[226] Def. MSJ - ECF No. 272 at 23-24; Def. MSJ Reply - ECF No. 436 at 16; *see also, e.g.*, Gowrisankaran Decl. Ex. 7 - ECF No. 272-3 at 67 (stating that there are four hospitals within a 30-minute drive of Sutter Delta).

[227] For example, that there might be a non-Sutter hospital 30 minutes east of a particular Sutter hospital does not mean that the non-Sutter hospital is within a 30-minute drive of the enrollees who currently use that Sutter hospital, such as enrollees who live to the west of the Sutter hospital.

According to the UnitedHealthcare Email, UnitedHealthcare's Director of Provider Services for Northern California believed that Sutter had monopolies in a number of submarkets, including Auburn, Amador, Tracy, Antioch, Berkeley, Oakland, and Clearlake, and that it was "not feasible" to present a health-maintenance-organization or fee-for-service insurance network that did not include Sutter.[228] This raises a dispute of material fact as to whether, if a hypothetical monopolist that controlled all hospitals in the Antioch, Auburn, Jackson, Lakeport, Tracy, and combined Berkeley-Oakland HSAs (i.e., Sutter Delta, Sutter Auburn, Sutter Amador, Sutter Lakeside, Sutter Tracy, and Sutter Alta Bates) imposed a SSNIP, health plans like UnitedHealthcare would pay those price increases (rather than refusing to pay and losing those hospitals from their networks).

Aetna's Vice President for Network Management in Northern California testified that "there are some rural hospitals where Sutter hospitals are really it for a given area," including Sutter Alta Bates, Sutter Amador, Sutter Auburn, Sutter Lakeside, and Sutter Coast, and that such hospitals were "really the must-have **[*74]** from a marketability or a member perception standpoint."[229] This raises a dispute of material fact as to whether, if a hypothetical monopolist that controlled all hospitals in the Auburn, Crescent City, Jackson, Lakeport, and combined Berkeley-Oakland HSAs (i.e., Sutter Auburn, Sutter Coast, Sutter Amador, Sutter Lakeside, and Sutter Alta Bates) were to impose a SSNIP, health plans like Aetna would pay those price increases, rather than refusing to pay and losing those hospitals from their networks.

The Sutter Model Amendment designated Sutter Amador, Sutter Coast, and Sutter Lakeside as "rural hospitals," which Sutter's Chief Contracting Officer testified meant a hospital "that in all practical reality was the hospital, the local hospital in that community, typically a more rural community[that d]oesn't have other hospitals in the local vicinity."[230] The Sutter Blue Cross Amendment similarly designated Sutter Amador, Sutter Coast, and Sutter Lakeside as "Rural Hospitals," defined as a designation for a hospital "which acts as the sole practical resource for acute care and emergency care within the rural community it serves, and the next closest facility is at least 30 miles away[.]"[231] Anthem's former Director of Network Development for Northern **[*75]** California and Vice President of Provider Engagement and Contracting for California agreed that these hospitals were "essentially the only game in town" in their rural areas.[232] This raises a dispute of material fact as to whether, if a hypothetical monopolist that controlled all hospitals in the Crescent City, Jackson, and Lakeport HSAs (i.e., Sutter Coast, Sutter Amador, and Sutter Lakeside) imposed a SSNIP, health plans would pay those price increases (rather than refusing to pay and losing those hospitals from their networks).

Sutter argues that "[o]ffhand comments that certain Sutter hospitals are 'monopolies' or 'must have hospitals' say nothing of the actual boundaries of a market, which could just as readily be a multi-county area or a two-block radius of the hospital as an HSA."[233] But on a summary-judgment motion, that this evidence might also support other geographic-market definitions does not demonstrate an absence of material fact about the plaintiffs' Candidate Markets. ***HN12***[] The Supreme Court has recognized that "[a]n element of 'fuzziness would seem inherent in any attempt to delineate the relevant geographical market,'" *Conn. Nat'l Bank, 418 U.S. at 669*, and thus the boundaries of a relevant geographic market **[*76]** "need not . . . be defined with scientific precision," *id.*, or "by metes and bounds as a surveyor would lay off a plot of ground," *Pabst Brewing Co., 384 U.S. at 549*. As Sutter's expert Dr. Gowrisankaran testified, "[a] market analysis does not always yield only one market definition that is accurate. It might yield a couple of different market definitions that could each be plausible."[234] That the plaintiffs'

[228] UnitedHealthcare Email - ECF No. 311-20 at 2 (under seal) (UHC-00134453).

[229] Welsh Dep. - ECF No. 311-5 at 7-8 (under seal) (pp. 196-97).

[230] Brendt Dep. - ECF Nos. 313-3 at 86, 91-92, 99-100, 102, 104 (under seal), 494-17 at 86, 91-92, 99-100, 102, 104 (redacted version) (pp. 184, 189-90, 197-98, 200, 202); Sutter Model Amendment - ECF Nos. 313-3 at 8, 34, 36 (under seal), 494-17 at 8, 34, 36 (redacted version) (DEF007581579, DEF007581605, DEF007581607).

[231] Sutter Blue Cross Amendment - ECF Nos. 311-10 at 8, 37, 39, 41, 43 (under seal), 494-5 at 8, 37, 39, 41, 43 (redacted version) (DEF000097801, DEF000097830, DEF000097832, DEF000097834, DEF000097836).

[232] Ramseier Dep. - ECF No. 311-9 at 6 (under seal) (p. 139).

[233] Def. Mot. to Exclude Chipty Reply - ECF No. 467 at 11.

evidence might not foreclose all other possible geographic-market definitions does not mean that it fails to raise a dispute of material fact in support of the plaintiffs' Candidate Markets and does not entitle Sutter to summary judgment.[235]

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There are disputes of material fact about whether the plaintiffs can establish that the Candidate Tying Markets are geographic markets for antitrust purposes. The court denies Sutter's motion for summary judgment with respect to the Candidate Tying Markets.

4. The Candidate Tied Markets

HN13[] Courts have recognized that a hypothetical monopolist's ability to impose a SSNIP of five percent may satisfy the hypothetical-monopolist test. *Penn State Hershey, 838 F.3d at 338 nn.1-2* (citing U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizonal Merger Guidelines* § 4.1.2 (2010); *St. Luke's, 778 F.3d at 784 n.9*)). The plaintiffs' expert Dr. Chipty **[*77]** conducted diversion analyses for the Candidate Tied Markets (the Modesto, Sacramento, San Francisco, and Santa Rosa HSAs) and estimated that a hypothetical monopolist that controlled all of the hospitals in each such market could profitably impose a SSNIP of between seven and twenty percent at the Sutter hospital in the market. This raises a dispute of material fact as to whether the hypothetical-monopolist test is satisfied for the Candidate Tied Markets and thus, whether they are relevant geographic markets for antitrust purposes.

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[234] Gowrisankaran Dep. - ECF No. 311-4 at 14 (under seal).

[235] In his deposition testimony, Dr. Gowrisankaran raised the prospect of whether, in the context of a product market of hospitals selling inpatient hospital services to health plans, geographic markets can be defined as a set of sellers in a geographic region — i.e., that the market can be defined by listing what hospitals are part of the market and what hospitals are outside of it — rather than by trying to draw precise "metes and bounds" on a map. Dr. Gowrisankaran testified that the courts in *Advocate Health* defined their geographic market solely by specifying which hospitals were inside the market and which hospitals were outside and did not define the precise boundaries of the market. Gowrisankaran Dep. - ECF No. 311-4 at 34-35 (pp. 237-38) (under seal) ("[W]hat the courts accepted in this case was not the geographic markets that I've outlined there in the shape files. . . . Rather what they accepted is that, or what they stipulated was that the following hospitals are in the geographic market. . . . There w[ere] no precise geographic boundaries for which — which residents lived inside the market. There were precise boundaries for — there are precise definitions of which hospitals were inside the market."). As Dr. Gowrisankaran explained, "what really needs to happen in an antitrust setting is — is understanding what are the sets of potential competitors and the likely set of potential competitors and using that as the basis for a market analysis. A market analysis does not always yield only one market definition that is accurate. It might yield a couple of different market definitions that could each be plausible. And what these — what these sentences [that relevant markets need not have precise metes and bounds] are pointing out is that what's important here is not saying well, we want to have an airtight definition of a market, but rather that it's the process of market analysis that identifies likely potential competitors to any firm[.]" *Id.* at 14 (p. 110). Taking into account the "the commercial realities of the industry," *Brown Shoe, 370 U.S. at 336-37* (internal quotation marks omitted) — including the fact that in a market between hospitals and health plans, both the seller and the buyer are stationary and cannot move — Dr. Gowrisankaran's testimony raises the question of whether it is sufficient to define the market by listing which sellers are in the market and which sellers are out, as opposed to trying to engage in "metes and bounds" line-drawing on a map in the spaces between hospitals. *Cf. St. Luke's, 778 F.3d at 784* (markets, ultimately, are just "groups of sellers"); Areeda & Hovenkamp ¶ 530a ("To define a market is to identify those producers providing customers of a defendant firm (or firms) with alternative sources for the defendant's product or service."). Under that framework, a geographic market of the Crescent City HSA and Sutter's hypothetical two-block radius around the Sutter Coast hospital would be functionally equivalent: each would clearly and concretely define which sellers are in the market (Sutter Coast) and which sellers are not (hospitals other than Sutter Coast). The court expresses no opinion here on this approach, other than to say that these questions further demonstrate why, at this juncture, Sutter has not established that there are no disputes of material fact and that it is entitled to judgment as a matter of law.

Sutter moves to exclude Dr. Chipty's opinions with respect to the plaintiffs proposed geographic markets, including the Candidate Tied Markets, under *Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*.[236]

HN14[] "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts **[*78]** of the case." *Fed. R. Evid. 702*. "Under *Daubert*, the trial court must act as a 'gatekeeper' to exclude junk science that does not meet *Federal Rule of Evidence 702*'s reliability standards by making a preliminary determination that the expert's testimony is reliable." *Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011)* (citing *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 145, 147-49, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999))*. "*Daubert* does not require a court to admit or to exclude evidence based on its persuasiveness; rather it requires a court to admit or exclude evidence based on its scientific reliability and relevance." *Id.* (citing *Daubert, 509 U.S. at 589-90*). "Thus, an expert's 'inference or assertion must be derived by the scientific method' to be admissible." *Id.* (citing *Daubert, 509 U.S. at 590*). "A trial court has broad latitude not only in determining whether an expert's testimony is reliable, but also in deciding how to determine the testimony's reliability." *Id.* (citing *Kumho Tire, 526 U.S. at 152*).

Sutter does not dispute that Dr. Chipty has the knowledge, skill, experience, training, or education to render an expert opinion.[237] Instead, Sutter raises two main objections why Dr. Chipty's report is unreliable with respect to the Candidate Tied Markets.

First, Sutter argues that Dr. Chipty created a "brand new methodology" to analyze the Candidate Tied Markets that has never been used in any prior antitrust case and that (so Sutter argues) **[*79]** was not subject to peer review and publication.[238] The Ninth Circuit recently reversed a district-court decision excluding expert reports for placing undue weight on arguments akin to those that Sutter makes here. The Ninth Circuit explained:

> [T]he district court was wrong to put so much weight on the fact that the experts' opinions were not developed independently of litigation and had not been published. While independent research into the topic at issue is helpful to establish reliability, its absence does not mean the experts' methods were unreliable. Where "the proffered expert testimony is not based on independent research," the experts can instead present "other objective, verifiable evidence that the testimony is based on 'scientifically valid principles.'" To be sure, 'one means of showing that the testimony is based on scientifically valid principles is by proof that the research and analysis supporting the proffered conclusions have been subjected to normal scientific scrutiny through peer review and publication.' However, expert testimony may still be reliable and admissible without peer review and publication.

Wendell v. GlaxoSmithKline LLC, 858 F.3d 1227, 1235 (9th Cir. 2017) (citations and internal brackets omitted). Dr. Chipty's report **[*80]** explains the formulas that she used and cites the articles and sources that support her opinion. Further, she testified that "my sense from reading the materials written — including by the testifying expert in [the *Advocate Health*] case — I believe this type of approach has been used recently in the *Advocate [Health]* matter."[239] To the extent that Sutter believes that Dr. Chipty's formulas are incorrect or that she failed to consider important facts, it can challenge her on cross-examination. *Cf. id. at 1237* (***HN15***[] "Where, as here, the experts' opinions are not the 'junk science' *Rule 702* was meant to exclude, the interests of justice favor leaving difficult issues in the hands of the jury and relying on the safeguards of the adversary system — 'vigorous cross-

[236] Def. Mot. to Exclude Chipty - ECF Nos. 409-3 (under seal), 503 (redacted version).

[237] *See* Hr'g Tr. - ECF No. 611 at 31.

[238] *Id.* at 29; Def. Mot. to Exclude Chipty - ECF No. 503 at 28-29.

[239] Chipty Dep. - ECF No. 479-2 at 82 (under seal) (p. 81).

examination, presentation of contrary evidence, and careful instruction on the burden of proof' — to 'attack shaky but admissible evidence.'") (citations and internal brackets omitted); *In re Se. Milk Antitrust Litig., 739 F.3d 262, 281 (6th Cir. 2014)* (reversing district-court decision excluding expert opinion on hypothetical-monopolist test and holding that "[i]ncluding some facts while admitting others goes to the accuracy of the conclusions, not to the reliability of the testimony") (citations and internal quotation **[*81]** marks omitted).

Second, Sutter argues that Dr. Chipty did not use her diversion analysis for the Candidate Tying Markets, and her failure to use a common methodology for the Candidate Tied and Tying Markets renders her opinions unreliable. The court disagrees. That a hospital in a given region may have so few competitors that there are no other hospitals where its patients can be diverted — and hence a diversion analysis cannot be applied — does not render unreliable a diversion analysis for hospitals that have closer competitors.

The court denies Sutter's motion to exclude Dr. Chipty's opinions with respect to the Candidate Tying Markets.

* * *

There are disputes of material fact about whether the plaintiffs can establish that the Candidate Tied Markets are geographic markets for antitrust purposes. Sutter's motion for summary judgment with respect to the Candidate Tied Markets is denied.

CONCLUSION

The court grants summary judgment with respect to the Davis HSA Candidate Tying Market and otherwise denies Sutter's motion for summary judgment.

Because Dr. Chipty's opinions about the Candidate Tying Markets and Dr. Gowrisankaran's opinions generally do not affect the outcome of Sutter's summary-judgment **[*82]** motion, the court denies as moot Sutter's motion to exclude Dr. Chipty's opinion with respect to the Candidate Tying Markets and the plaintiffs' motion to exclude Dr. Gowrisankaran. The court denies Sutter's motion to exclude Dr. Chipty's opinions with respect to the Candidate Tied Markets.

IT IS SO ORDERED.

Dated: April 12, 2019

/s/ Laurel Beeler

LAUREL BEELER

United States Magistrate Judge

Wi-LAN Inc. v. LG Elecs., Inc.

United States District Court for the Southern District of California

April 12, 2019, Decided; April 12, 2019, Filed

Case No.: 18-cv-01577-H-BGS

Reporter

382 F. Supp. 3d 1012 *; 2019 U.S. Dist. LEXIS 63654 **; 2019-1 Trade Cas. (CCH) P80,729; 2019 WL 1586761

WI-LAN INC.; WI-LAN USA, INC.; and WI-LAN LABS, INC., Plaintiffs, v. LG ELECTRONICS, INC.; LG ELECTRONICS U.S.A., INC; and LG ELECTRONICS MOBILECOMM U.S.A., INC., Defendants.

Subsequent History: Later proceeding at *Wi-Lan Inc. v. Lg Elecs., 2019 U.S. Dist. LEXIS 160231, 2019 WL 4188469 (S.D. Cal., May 23, 2019)*

Partial summary judgment denied by *Wi-LAN Inc. v. LG Elecs., Inc., 2019 U.S. Dist. LEXIS 89217, 2019 WL 2270434 (S.D. Cal., May 28, 2019)*

Motion denied by *Wi-LAN Inc. v. LG Elecs., Inc., 2019 U.S. Dist. LEXIS 165980, 2019 WL 4688799 (S.D. Cal., Sept. 25, 2019)*

Prior History: *Wi-Lan Inc. v. LG Elecs., Inc., 2018 U.S. Dist. LEXIS 228294, 2018 WL 9516050 (S.D. Cal., Dec. 4, 2018)*

Core Terms

counterclaim, allegations, monopolization, antitrust, patent, unenforceability, technologies, argues, inequitable conduct, specific intent, Sherman Act, failure to disclose, relevant market, references, pleadings, anticompetitive conduct, motion to dismiss, patents-in-suit, infectious, disclose, inventor, reasonable inference, patent application, monopoly power, bifurcate, markets, notice, material information, misrepresentation, deceive

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Judges: MARILYN L. HUFF, United States District Judge.

Opinion by: MARILYN L. HUFF

Opinion

[*1018] ORDER:

(1) DENYING PLAINTIFFS' *RULE 12(c)* MOTION TO DISMISS DEFENDANTS' ANTITRUST AND UNFAIR COMPETITION COUNTERCLAIMS; AND

[Doc. No. 56.]

(2) GRANTING PLAINTIFFS' *RULE 12(c)* MOTION TO DISMISS DEFENDANTS' UNENFORCEABILITY COUNTERCLAIM

[Doc. No. 61.]

On February 1, 2019, Plaintiffs Wi-LAN Inc., Wi-LAN USA, Inc., and Wi-LAN Labs, Inc. filed a motion for judgment on the pleadings pursuant to *Federal Rule of Civil Procedure 12(c)* to dismiss Defendants LG Electronics, Inc., LG Electronics U.S.A., Inc., and LG Electronics Mobilecomm U.S.A., Inc.'s antitrust and unfair competition counterclaims. (Doc. No. 56.) On February 22, 2019, LG filed its response in opposition to Wi-LAN's motion related to its antitrust and unfair competition counterclaims. (Doc. No. 60.) On March 1, 2019, Wi-LAN filed its reply. (Doc. No. 62.)

On February 27, 2019, Plaintiffs filed a motion for judgment on the pleadings pursuant to *Federal Rule of Civil Procedure 12(c)* to dismiss LG's infectious unenforceability counterclaim. (Doc. No. 61.) On March 25, 2019, LG filed its response in opposition to Wi-LAN's motion related to its infectious **[**3]** unenforceability counterclaim. (Doc. No. 74.) On April 1, 2019, Wi-LAN filed its reply. (Doc. No. 75.)

On April 3, 2019, the Court took Wi-LAN's motion to dismiss LG's antitrust and unfair competition counterclaims under submission. (Doc. No. 76.) On April 8, 2019, the Court held a hearing on Wi-LAN's **[*1019]** motion to dismiss LG's infectious unenforceability counterclaim. Victor M. Felix and Christopher M. First appeared for Wi-LAN. Richard D. Harris appeared for LG. For the reasons below, the Court denies Wi-LAN's motion to dismiss LG's antitrust and unfair competition counterclaims, and the Court grants Wi-LAN's motion to dismiss LG's infectious unenforceability counterclaim.

Background

On July 11, 2018, Wi-LAN filed a complaint for patent infringement against LG, alleging infringement of U.S. Patent Nos. 8,787,924, 8,867,351, 9,226,320, and 9,497,743. (Doc. No. 1.) Specifically, Wi-LAN alleges that LG's wireless communication products that are compliant with the 3rd Generation Partnership Project 4G LTE standard directly infringe the patents-in-suit. (Id. ¶¶ 37, 40, 53, 66, 79.)

On October 10, 2018, LG filed an answer to Wi-LAN's complaint along with counterclaims for: (1) declaratory judgments of non-infringement and invalidity of the patents-in-suit; **[**4]** (2) declaratory judgment of unenforceability for failure to disclose to standard setting organizations; (3) declaratory judgment of unenforceability of the '351 patent; (4) declaratory judgment that LG is entitled to license the patents-in-suit on FRAND/RAND terms and conditions; (5) breach of contract; (6) monopolization and attempted monopolization in violation of *section 2 of the Sherman Act*; and (7) unfair business practices under *California Business and Profession Code § 17200 et seq.* (Doc. No. 17.) On November 13, 2018, the Court issued a scheduling order in the action. (Doc. No. 36.) By the present motions, Wi-LAN moves pursuant to *Federal Rule of Civil Procedure 12(c)* for judgment on the pleadings to dismiss: (1) LG's counterclaim for monopolization in violation of *section 2* of the Sherman Act; (2) LG's counterclaim for attempted monopolization in violation of *section 2* of the Sherman Act; (3) LG's counterclaim for unfair business practices under *California Business and Profession Code § 17200 et seq.*; and (4) LG's counterclaim for unenforceability of the '351 patent. (Doc. Nos. 56-1, 61-1.)

Discussion

I. Legal Standards for a *Rule 12(c)* Motion for Judgment on the Pleadings

In patent cases, a motion for judgment on the pleadings pursuant to *Federal Rule of Civil Procedure 12(c)* is governed by the "the procedural law of the regional circuit." *Amdocs (Israel) Ltd. v. Openet Telecom, Inc., 841 F.3d 1288, 1293 (Fed. Cir. 2016)*. Under *Federal Rule of Civil Procedure 12(c)*, "[a]fter the pleadings are closed—but early enough not to delay **[**5]** trial—a party may move for judgment on the pleadings." "'Judgment on the pleadings is properly granted when[, accepting all factual allegations in the complaint as true,] there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law.'" *Chavez v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012)*. The Ninth Circuit has explained that the standard for deciding a *Rule 12(c)* motion "is 'functionally identical'" to the standard for deciding a motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*. *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1055 n.4 (9th Cir. 2011)* (quoting Dworkin v. Hustler Magazine Inc., *867 F.2d 1188, 1192 (9th Cir. 1989))*; accord *Chavez, 683 F.3d at 1108*.

A complaint will survive a *Rule 12(b)(6)* motion to dismiss if it contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads **[*1020]** factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" Id. (quoting *Twombly, 550 U.S. at 555*). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Id. (quoting *Twombly, 550 U.S. at 557*). Accordingly, dismissal for failure to state a claim is proper where the claim "lacks a cognizable **[**6]** legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008)*.

In reviewing a *Rule 12(b)(6)* motion to dismiss, a district court must accept as true all facts alleged in the complaint, and draw all reasonable inferences in favor of the plaintiff. See *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am., 768 F.3d 938, 945 (9th Cir. 2014)*. But, a court need not accept "legal conclusions" as true. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. In addition, "[a]lthough the complaint's factual allegations generally must be treated as true in evaluating a motion for judgment on the pleading, courts may consider documents incorporated into the complaint by reference, and matters properly subject to judicial notice." *Lee v. City of San Diego, No. 18CV0159 W (BLM), 2019 U.S. Dist. LEXIS 2725, 2019 WL 117775, at *3 (S.D. Cal. Jan. 7, 2019)* (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007))*; see *Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 998 (9th Cir. 2018)*; *Coto Settlement v. Eisenberg, 593 F.3d 1031, 1038 (9th Cir. 2010)*.

II. Analysis of LG's Counterclaims

A. LG's Counterclaim for Monopolization under *Section 2* of the Sherman Act

In its answer and counterclaims, LG alleges a counterclaim for monopolization in violation of *Section 2 of the Sherman Act*. (Doc. No. 17, Counterclaims ¶¶ 284-339.) Wi-LAN argues that this counterclaim should be dismissed because LG has failed to adequately allege a claim for monopolization. (Doc. No. 56-1 at 4-14.)

Section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize **[**7]** any part of the trade or commerce . . . shall be deemed guilty of a felony." *15 U.S.C. § 2*. To state a claim for monopolization in violation of *Section 2* of the Sherman Act, a plaintiff must allege that the defendant: "(1) possessed monopoly power in the relevant market, (2) willfully acquired or maintained that power through exclusionary conduct and (3) caused antitrust injury." *MetroNet Services Corp. v. Quest Corp., 383 F.3d 1124, 1130 (9th Cir. 2004)*; accord *Somers v. Apple, Inc., 729 F.3d 953, 963 (9th Cir. 2013)*. The Court addresses each of these elements in turn below.

i. Monopoly Power

Wi-LAN argues that LG has failed to plausibly plead that Wi-LAN has monopoly power. (Doc. No. 56-1 at 4-5.) "In order to state a valid claim under the Sherman Act, a plaintiff must allege that the defendant has market power within a 'relevant market.'" *Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1044 (9th Cir. 2008)*. "That is, the plaintiff must allege both that a 'relevant market' exists and that the defendant has power within that market." Id. "Because the validity of the 'relevant market' is typically a factual element rather than a legal element, alleged **[*1021]** markets may survive scrutiny under *Rule 12(b)(6)*." *Apple Inc. v. Samsung Elecs. Co., No. 11-CV-01846, 2012 U.S. Dist. LEXIS 67102, 2012 WL 1672493, at *4 (N.D. Cal. May 14, 2012)* (citing *Newcal, 513 F.3d at 1045*). "Thus, an antitrust complaint survives a *Rule 12(b)(6)* motion that attacks the definition of the relevant market unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect." **[**8]** Id. (citing *Newcal, 513 F.3d at 1045*).

In its counterclaims, LG alleges that the relevant markets for purposes of its monopolization claim "are the various markets for technologies that—before the IEEE 802.16 standard and the 3GPP LTE standard were implemented—were competing to perform each of the various functions covered by each of Wi-LAN's purported essential patents for the IEEE 802.16 standard and the 3GPP LTE standard (collectively, the relevant 'Wireless Technologies Markets')."[1] (Doc. No. 17, Counterclaims ¶ 306.) LG further alleges: "WI-LAN holds monopoly power in the relevant Wireless Technologies Markets, assuming that the Patents-in-Suit are—as Wi-LAN claims—essential to the IEEE 802.16 and 3GPP LTE standards, valid, and enforceable." (Id. ¶ 309.)

LG explains in its allegations that:

> If Wi-LAN in fact has patents covering technologies that have been incorporated into the relevant standards, it has the power to raise prices and exclude competition with respect to each of the technologies covered by its patents and incorporated in the relevant standards. . . . Barriers to entry into these markets are high because, among other reasons, the poststandardization **[**9]** lock-in effect means that other technologies are no longer viable substitutes for the technologies the standards specify to perform functions included in the standards.

(Id. ¶ 308.) LG alleges that: "by asserting the Patents-in-Suit, Wi-LAN can (and has) extracted royalties or other licensing terms for those patents that greatly exceed what it could have obtained before the IEEE and 3GPP standardized the technologies that Wi-LAN claims are covered by the Patents-in-Suit." (Id. ¶ 309.)

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[1] Wi-LAN notes that this allegation is contradicted elsewhere in LG's monopolization counterclaim when LG's alleges that the patents-in-suit are not infringed by products having components designed based upon the IEEE 802.16 standard or the 3GPP LTE standard. (Doc. No. 56-1 at 4-5 (citing Doc. No. 17, Counterclaims ¶ 285).) But this inconsistent allegation is of no consequence because *Federal Rule of Civil Procedure 8* allows parties to plead inconsistent factual allegations in the alternative. See *Fed. R. Civ. P. 8(d)(2)* ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient."); *Molsbergen v. United States, 757 F.2d 1016, 1018 (9th Cir. 1985)* ("[T]he Federal Rules of Civil Procedure . . . explicitly authorize litigants to present alternative and inconsistent pleadings."); *Cellars v. Pac. Coast Packaging, Inc., 189 F.R.D. 575, 578 (N.D. Cal. 1999)* ("A party may plead alternative theories of liability, even if those theories are inconsistent or independently sufficient. Further, a party may allege inconsistent factual allegations."); *Dong Ah Tire & Rubber Co. v. Glasforms, Inc., No. C 06-3359 JF (RS), 2009 U.S. Dist. LEXIS 24089, 2009 WL 667171, at *4 (N.D. Cal. Mar. 10, 2009)* (same).

These allegations are sufficient to plead that Wi-LAN had monopoly power within the relevant market. See *Apple, 2012 U.S. Dist. LEXIS 67102, 2012 WL 1672493, at *5-6* (finding the plaintiff had adequately alleged that the defendant possessed monopoly power in the relevant market where: (1) the complaint defined the relevant market as "the various markets for technologies that—before the standard was implemented—were competing to perform each of the various functions **[*1022]** covered by each of [defendant]'s purported essential patents for UMTS;" (2) plaintiff alleged that defendant "has obtained 'the power to raise prices and exclude competition' in the relevant [market];" and (3) plaintiff alleged that "it has been locked-in to the technology standard"); *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 315 (3d Cir. 2007)* (finding the plaintiff **[**10]** had adequately alleged that the defendant possessed monopoly power in the relevant market where: (1) "[t]he [c]omplaint defined the relevant market as the market for [defendant's] proprietary WCDMA technology, a technology essential to the implementation of the UMTS standard;" (2) the complaint alleged "adherents to the UMTS standard have become locked in;" and (3) the complaint alleged the defendant "had the power to extract supracompetitive prices").

ii. Anticompetitive Conduct

Wi-LAN argues that LG has failed to plausibly plead antitrust conduct. (Doc. No. 56-1 at 6-12.) In response, LG argues that it has sufficiently pled anticompetitive conduct by Wi-LAN under its failure to disclose IPR theory, its false FRAND theory, and its sham litigation theory. (Doc. No. 60 at 10-13.)

a. Failure to Disclose IPR Theory

In order to establish anticompetitive conduct based a failure to disclose intellectual property rights theory, a plaintiff "must show that the patent holder's failure to disclose its intellectual property rights induced the SSO to set the standard incorporating the essential patent." *Apple Inc. v. Samsung Elecs. Co., No. 11-CV-01846-LHK, 2011 U.S. Dist. LEXIS 120416, 2011 WL 4948567, at *5 (N.D. Cal. Oct. 18, 2011)* (citing *Rambus Inc. v. FTC, 522 F.3d 456, 466, 380 U.S. App. D.C. 431 (D.C. Cir. 2008)*). "In other words, [the plaintiff] must **[**11]** allege that there was an alternative technology that the SSO was considering during the standard setting process and that the SSO would have adopted an alternative standard had it known of the patent holder's intellectual property rights." Id.

Further, because allegations of anticompetitive conduct based on a failure to disclose intellectual property rights theory sound in fraud, a plaintiff must satisfy the heightened pleading requirements of *Federal Rule of Civil Procedure 9(b)*. See id. Under *Rule 9(b)*, a plaintiff must plead fraud with particularity. "Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)*. *Rule 9(b)* is satisfied if the allegations of fraud are "specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007)*.

Wi-LAN agues that LG's allegations that the SSOs could have chosen a different technology instead of the standards adopted are insufficient. (Doc. No. 56-1 at 10-11.) The Court disagrees. In its counterclaims, LG alleges: "Wi-LAN's non-disclosure excluded viable alternative technologies from the relevant Wireless Technologies Markets. Had **[**12]** Wi-LAN properly disclosed the existence of its IPR, the IEEE and 3GPP would have decided to standardize alternative technologies to perform the relevant functions." (Doc. No. 17, Counterclaims ¶ 315.) LG then alleges in detail for each of the patents-in-suit the specific alternative technology that the SSOs could have adopted. (Id.) These allegations are sufficient to allege that there was an alternative technology and that the SSO would have adopted an alternative standard even under *Rule 9(b)*'s heightened pleading standard. See *Apple, 2012 U.S. Dist. LEXIS 67102, 2012 WL 1672493, at *8*.

Wi-LAN also argues that it cannot be liable under ***antitrust law*** for the alleged **[*1023]** actions of the prior owners of the patents-in-suit. (Doc. No. 56-1 at 11-12.) Wi-LAN explains that LG's claims are based on the conduct of prior owners of the patents-in-suit, not Wi-LAN, and, therefore, Wi-LAN cannot be held liable for this prior conduct. (Id.) But a review of LG's counterclaims shows that this is not correct. In the counterclaims, LG alleges specific conduct and specific representations made by Wi-LAN to the SSOs, not just representations by the prior patent owners. (See, e.g., Doc. No. 17, Counterclaims ¶¶ 115, 127, 188, 267-69.) In sum, LG has adequately alleged antitrust **[**13]** conduct by Wi-LAN based on a failure to disclose intellectual property rights theory in support of its monopolization claim.

b. Fraudulent FRAND Declarations Theory

"Courts have recognized that fraudulent FRAND declarations that are used to induce SSOs to adopt standards essential patents can be monopoly conduct for the purposes of establishing a *Section 2* claim." *Apple, 2011 U.S. Dist. LEXIS 120416, 2011 WL 4948567, at *4* (citing *Broadcom, 501 F.3d at 310-11, 314)*. Allegations of anticompetitive conduct based a fraudulent FRAND declaration theory also must satisfy *Rule 9(b)*'s heightened pleading standard. See *Apple, 2011 U.S. Dist. LEXIS 120416, 2011 WL 4948567, at *4*.

Wi-LAN argues that LG's allegations are insufficient because LG has failed to specifically identify what statements it claims were misrepresentations. (Doc. No. 56-1 at 12.) In its counterclaims, LG alleges specific facts providing the who, what, when, where and which patents of the alleged false FRAND declarations. (Doc. No. 17, Counterclaims ¶¶ 267-73.) These allegations are sufficient to satisfy *Rule 9(b)*.

Wi-LAN also argues that LG's allegations regarding Wi-LAN's subjective intent are insufficient. (Doc. No. 56-1 at 12.) In its counterclaims, LG alleges: "Wi-LAN's failure to inform the IEEE, ETSI, and 3GPP that, contrary to its undertakings, it in fact would not meet its commitments under its **[**14]** FRAND declarations was intentional and made with deceptive intent in order to induce the IEEE and 3GPP to include in the IEEE 802.16 and 3GPP LTE standards technologies that Wi-LAN claims are covered by the Patents-in-Suit." (Doc. No. 17, Counterclaims ¶ 318.) These allegations are sufficient to allege intent. See *Fed. R. Civ. P. 9(b)* ("[I]ntent . . . may be alleged generally.").

Finally, Wi-LAN argues that LG's allegations in support of this antitrust theory conflict with LG's allegations regarding its failure to disclose intellectual property rights theory. (Doc. No. 56-1 at 12.) But *Rule 8* allows parties to plead inconsistent factual allegations in the alternative. See *Fed. R. Civ. P. 8(d)(2)* ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient."); *Molsbergen, 757 F.2d at 1018*; *Cellars, 189 F.R.D. at 578*. As such, LG may permissibly plead its alternative theories of antitrust liability. See *Apple, 2012 U.S. Dist. LEXIS 67102, 2012 WL 1672493, at *7-8 (N.D. Cal. May 14, 2012)* (permitting plaintiff to allege both a false FRAND theory of anticompetitive conduct and a failure to disclose IPR theory of anticompetitive conduct). In sum, LG has adequately alleged antitrust **[**15]** conduct by Wi-LAN based on a false FRAND declaration theory in support of its monopolization claim.[2]

[*1024] iii. Antitrust Injury

Wi-LAN argues that LG has failed to adequately allege an antitrust injury. (Doc. No. 56-1 at 13-14.) In order for a plaintiff to properly plead that it has suffered an antitrust injury, "it must allege injury to competition." *Apple, 2011 U.S. Dist. LEXIS 120416, 2011 WL 4948567, at *6*; see also *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California, 190 F.3d 1051, 1055 (9th Cir. 1999)* (A plaintiff may only pursue an antitrust action if it can show "'antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.").

In its counterclaims, LG alleges:

> Wi-LAN's conduct more broadly has and continues to threaten unlawfully to exclude other LG competitors from, and increase royalties and other costs associated with, the manufacture and sale of downstream wireless communications devices that implement the IEEE 802.16 and 3GPP LTE standards and chill competition to

[2] Wi-LAN also argues that LG has failed to properly plead sham litigation as part of its antitrust conduct allegations in support of its monopolization counterclaim. (Doc. No. 56-1 at 6-10.) Because LG's allegations of deceptive conduct before the SSOs are sufficient to allege antitrust conduct in support of its monopolization counterclaim, the Court declines to address these additional allegations at this time.

> develop and sell innovative new IEEE 802.16 and/or 3GPP LTE-compliant products, resulting in increased prices and decreased quality and innovation in downstream product markets and complementary innovation markets.

(Doc. No. 17, Counterclaims ¶ 333.) These allegations **[**16]** are sufficient to allege antitrust injury. See *Apple, 2011 U.S. Dist. LEXIS 120416, 2011 WL 4948567, at *6* (finding similar allegations sufficient to "plead harm to competition"). In sum, LG has adequately alleged a claim for monopolization in violation of *Section 2* of the Sherman Act, and the Court declines to dismiss LG's counterclaim for monopolization.

B. LG's Counterclaim for Attempted Monopolization under *Section 2* of the Sherman Act

In its answer and counterclaims, LG alleges a counterclaim for attempted monopolization in violation of *Section 2* of the Sherman Act. (Doc. No. 17, Counterclaims ¶¶ 340-44.) In order to state a claim for attempted monopolization in violation of the Sherman Act, the plaintiff must allege facts demonstrating the following four elements: "(1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving 'monopoly power'; and (4) causal antitrust injury." *Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995)* (citing *McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 (9th Cir. 1988))*.

Wi-LAN argues that LG's attempted monopolization counterclaim should be dismissed because this counterclaim suffers from the same pleading defects as LG's counterclaim for monopolization. (Doc. No. 56-1 at 14.) But LG has adequately alleged a claim for monopolization **[**17]** in violation of *section 2* of the Sherman Act. See supra. As such, the Court rejects this argument.

Wi-LAN also argues that LG has failed to adequately allege specific intent in support of its counterclaim for attempted monopolization. (Doc. No. 56-1 at 14-15.) In order to state a claim for attempted monopolization, a plaintiff must allege "specific intent to control prices or destroy competition." *Ernest W. Hahn, Inc. v. Codding, 615 F.2d 830, 845 (9th Cir. 1980)*; accord *Rebel Oil, 51 F.3d at 1433*. The Ninth Circuit has explained that "(specific intent) can be satisfied 'by inference drawn **[*1025]** from proof of predatory or anticompetitive conduct which constitutes an unreasonable restraint of trade.'" *Ernest W. Hahn, 615 F.2d at 845*; see *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 926 (9th Cir. 1980)* ("Specific intent to monopolize will normally be proved by inference from conduct.").

LG's counterclaims contain sufficient allegations of anticompetitive conduct by Wi-LAN. See supra. Further, LG alleges: "Wi-LAN has willfully engaged in the anticompetitive conduct described above with the specific intent to acquire and maintain market power in a relevant antitrust market—namely, the relevant Wireless Technologies Market—and destroy competition therein." (Doc. No. 17, Counterclaims ¶ 341.) These allegations combined are sufficient to infer the specific intent necessary to support LG's **[**18]** counterclaim for attempted monopolization. See *Hunt-Wesson, 627 F.2d at 926* (holding that plaintiff had adequately alleged a claim for attempted monopolization where plaintiff "alleged that [defendant] engaged in acts resulting in anticompetitive effects, 'with the specific intent to eliminate plaintiff and others as competitors" and "described in detail the allegedly anticompetitive acts"). In sum, the Court declines to dismiss LG's counterclaim for attempted monopolization in violation of *Section 2* of the Sherman Act.

C. LG's Counterclaim for Unfair Business Practices Under *California Business & Professions Code § 17200 et seq.*

In its answer and counterclaims, LG alleges a counterclaim for unfair business practices under *California Business & Professions Code § 17200 et seq.* (Doc. No. 17, Counterclaims ¶¶ 345-49.) Wi-LAN argues that because LG's antitrust allegations fail, LG's counterclaim for unfair business practices also fails to state a claim. (Doc. 56-1 at 15.)

The California Supreme Court has explained that the "unfair" prong of *section 17200* "means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-*

Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999). Thus, a plaintiff that adequately **[**19]** alleges a claim for violation of the Sherman Act also adequately alleges a claim for violation of California's UCL under the "unfair" prong. See, e.g., *Apple, 2012 U.S. Dist. LEXIS 67102, 2012 WL 1672493, at *8* ("Because Apple has adequately alleged a violation of *Section 2* of the Sherman Act, Apple has also stated a claim that Samsung's conduct violates the California UCL."); *Toranto v. Jaffurs, 297 F. Supp. 3d 1073, 1100 (S.D. Cal. 2018)*.

Here, LG has properly alleged counterclaims for monopolization and attempted monopolization in violation of *Section 2* of the Sherman Act. See supra. As such, LG has adequately alleged a counterclaim for unfair business practices under *Section 17200*, and the Court declines to dismiss that counterclaim. See *Apple, 2012 U.S. Dist. LEXIS 67102, 2012 WL 1672493, at *8*.

D. Wi-Lan's Motion for Severance of LG's Antitrust Counterclaims

Wi-LAN argue that if the Court declines to dismiss LG's antitrust counterclaims, the Court should bifurcate and stay those counterclaims to conserve judicial economy and reduce jury confusion. (Doc. No. 56-1 at 16.) In response, LG argues that the Court should deny Wi-LAN's bifurcation request because, among other reasons, the **[*1026]** request is premature at this stage of the litigation. (Doc. No. 60 at 17.)

Federal Rule of Civil Procedure 42(b) provides:

> For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate **[**20]** issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

"Courts have broad discretion under *Federal Rule of Civil Procedure 42(b)* to bifurcate and stay counterclaims." *Fitbit, Inc. v. Aliphcom, No. 5:15-CV-04073-EJD, 2016 U.S. Dist. LEXIS 69993, 2016 WL 7888033, at *1 (N.D. Cal. May 27, 2016)*; see *Jinro Am. Inc. v. Secure Investments, Inc., 266 F.3d 993, 998 (9th Cir.)*, opinion amended on denial of reh'g, *272 F.3d 1289 (9th Cir. 2001)*. "Bifurcation of patent and antitrust claims is not mandatory, but is common." *Masimo Corp. v. Philips Elecs. N. Am. Corp., 742 F. Supp. 2d 492, 496 (D. Del. 2010)*

Nevertheless, the Court agrees with LG that Wi-LAN's motion for bifurcation is premature. This case is in its initial stages: fact discovery has just begun, the Court has not held a claim construction hearing, expert discovery has not begun, and the trial date is a year away. As such, the Court, exercising its sound discretion, declines to bifurcate and stay LG's antitrust counterclaims at this time. See Actividentity Corp. v. Intercede Grp. PLC, No. C 08-4577 VRW, 2009 WL 10691373, at *2 (N.D. Cal. Dec. 30, 2009) ("The decision whether separate trials are appropriate may 'be better informed after all discovery is taken and the expert reports are disclosed.'"); *Netflix, Inc. v. Blockbuster, Inc., No. C06-02361 WHA, 2006 U.S. Dist. LEXIS 63154, 2006 WL 2458717, at *10 (N.D. Cal. Aug. 22, 2006)*. The Court denies Wi-LAN's motion to bifurcate LG's antitrust counterclaims without prejudice **[**21]** to Wi-LAN renewing its motion to bifurcate at a later stage in these proceedings.

E. LG's Counterclaim for Unenforceability of the '351 Patent

In its answer and counterclaims, LG alleges a counterclaim for unenforceability of the '351 patent. (Doc. No. 17, Counterclaims ¶¶ 190-260.) Specifically, LG alleges that one or more persons involved in the prosecution of the '351 patent's parent patent, U.S. Patent No. 7,333,435, committed inequitable conduct during the prosecution of the '435 patent. (Id. ¶¶ 191-92, 241-55.) LG further alleges that because the '351 patent claims priority and/or is related to the '435 patent, the '351 patent is unenforceable under the doctrine of infectious unenforceability. (Id. ¶¶ 193, 256-60.) Wi-LAN argues that the Court should dismiss LG's infectious unenforceability counterclaim because LG has failed to properly allege inequitable conduct during the prosecution of the '435 patent. (Doc. No. 61-1 at 1-2.)

i. Legal Standards for Pleading Inequitable Conduct

"Inequitable conduct is an equitable defense to patent infringement that, if proved, bars enforcement of a patent." *Therasense, Inc. v. Becton, Dickinson & Co., 649 F.3d 1276, 1285 (Fed. Cir. 2011)* (en banc). A finding of inequitable conduct as to "any single claim renders the entire patent unenforceable." *Id. at 1288*.

The elements of a claim for "inequitable conduct are: (1) an individual associated with **[**22]** the filing and prosecution of a patent application made an affirmative misrepresentation of a material fact, failed to disclose material information, or submitted false material information; and (2) the individual did so with a specific intent to deceive the PTO." *Exergen Corp. v. Wal-Mart Stores, Inc., 575 F.3d 1312, 1327 (Fed. Cir. 2009)*. The Federal Circuit has **[*1027]** explained a claim for inequitable conduct requires a finding of both materiality and intent to deceive. *Therasense, 649 F.3d at 1287*. They are separate requirements, and a "a district court may not infer intent solely from materiality." *Id. at 1290*.

In addition, the Federal Circuit has explained that to meet the standard for materiality, the misrepresentation or omission must be "but-for material." *Id. at 1291*. A misrepresentation or omission is but-for material "[i]f the PTO would not have allowed a claim had it been aware" of the undisclosed information or the falsity of the representation. Id. Further, in order to establish inequitable conduct, "the specific intent to deceive must be 'the single most reasonable inference able to be drawn from the evidence.'" *Id. at 1290*. "[W]hen there are multiple reasonable inferences that may be drawn, intent to deceive cannot be found." *Id. at 1290-91*.

An inequitable conduct counterclaim must be pled with "particularity" under *Federal Rule of Civil Procedure 9(b)*. *Exergen, 575 F.3d at 1326*. *Rule 9(b)* **[**23]** provides: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Therefore, a claim of inequitable conduct must be pled with particularity, i.e., it must be pleaded in detail. *Exergen, 575 F.3d at 1327*. Specifically, the counterclaim "must identify the specific who, what, when, where, and how of the material misrepresentation or omission committed before the PTO. *Id. at 1328*.

> Moreover, although "knowledge" and "intent" may be averred generally, a pleading of inequitable conduct under *Rule 9(b)* must include sufficient allegations of underlying facts from which a court may reasonably infer that a specific individual (1) knew of the withheld material information or of the falsity of the material misrepresentation, and (2) withheld or misrepresented this information with a specific intent to deceive the PTO.

Id. at 1328-29. "A reasonable inference is one that is plausible and that flows logically from the facts alleged, including any objective indications of candor and good faith." *Id. at 1329 n.5*.

ii. Failure to Disclose

Wi-LAN argues that LG's allegations of withholding of material information that LG uses to support its infectious unenforceability counterclaim are false and contradicted by a review of the prosecution history. (Doc. No. 61-1 at 1, 8-9.) In order to properly state a claim for unenforceability due to inequitable conduct, LG must allege, among other requirements, that "an individual associated with the filing and prosecution of a patent application made an affirmative misrepresentation of a material fact, **[**24]** failed to disclose material information, or submitted false material information." *Exergen, 575 F.3d at 1327*.

Here, LG alleges that during the prosecution of the '435 patent, the named inventor and his counsel failed to disclose the International Search Report at issue, the Emanuel reference (U.S. Patent Pub. No. 2002/032788), Emanuel's foreign counterparts, a First Examination Report, and a Second Examination Report. (Doc. No. 17, Counterclaims ¶ 241.)

Wi-LAN argues that a review of the prosecution history for the '435 patent shows that the International Search Report at issue was indeed disclosed to the PTO. (Doc. No. 61-1 at 5-6, 9.) The Court agrees. "When considering a motion for judgment on the pleadings, [a] court may consider facts that 'are contained in materials of which the court may take judicial notice.'" *Heliotrope Gen., Inc. v. Ford Motor Co., 189 F.3d 971, 981 (9th Cir. 1999)*. "Judicial notice is appropriate for records and 'reports of administrative bodies.'" **[*1028]** *United States v. 14.02 Acres of*

Land More or Less in Fresno Cty., *547 F.3d 943, 955 (9th Cir. 2008)*. This includes documents issued by the PTO, such as a patent's prosecution history. See *NetFuel, Inc. v. Cisco Sys. Inc., No. 5:18-CV-02352-EJD, 2018 U.S. Dist. LEXIS 159412, 2018 WL 4510737, at *2 n.1 (N.D. Cal. Sept. 18, 2018)*; *IPS Grp., Inc. v. Duncan Sols., Inc., No. 15-CV-1526-CAB (MDD), 2016 U.S. Dist. LEXIS 190168, 2016 WL 9023432, at *1 (S.D. Cal. Mar. 18, 2016)*; *Audionics Sys., Inc. v. AAMP of Fla., Inc., No. CV1210763MMMJEMX, 2013 WL 12129652, at *2 (C.D. Cal. Nov. 19, 2013)*; *Coinstar, Inc. v. Coinbank Automated Sys., Inc., 998 F. Supp. 1109, 1114 (N.D. Cal. 1998)*. As such, the Court takes judicial notice of **[**25]** the '435 patent's prosecution history.[3]

A review of the prosecution history for the '435 patent reflects that the inventor and his counsel did disclose the International Search Report to the PTO, and the search report identifies the Emanuel reference and Emanuel's foreign counterparts. (Doc. No. 61-2, Ex. A at 38-39, 111, 114-16.) Indeed, LG's own allegations acknowledge that the named inventor and his counsel submitted a copy of the International Search Report to the PTO, and the PTO issued an "acceptance of application" form indicating that the International Search Report was included in the file. (Doc. No. 17, Counterclaims ¶¶ 215, 217.) Thus, both the prosecution history, and LG's own allegations contradict LG's assertion that the International Search Report was not disclosed to the PTO.

In response, LG argues that this is not fatal to its counterclaim because the counterclaim is also based on the inventor's failure to disclose the Emanuel reference itself along with Emanuel's foreign counterparts and two examination reports. (Doc. No. 74 at 8-11.) But a review of the prosecution history shows that the inventor and his counsel disclosed the International Search Report to the PTO, and the search report **[**26]** specifically identified the Emanuel reference as a published U.S. patent application, listed the relevant portions of the Emanuel reference, and stated what claims in the application for which it is relevant. (Doc. No. 61-2, Ex. A at 114.)

LG argues that under the PTO's Manual of Patent Examining Procedure ("MPEP") rules, the mere submission of a search report is insufficient to satisfy an applicant's duty to disclose in a national stage application. (Doc. No. 74 at 8-9.) In making this argument, LG specifically relies on MPEP § 609.03 and 1893.03(g). (Id.) MPEP § 609.03 provides: "The examiner will consider the documents cited in the international search report in a PCT national stage application when the Form PCT/DO/EO/903 indicates that both the international search report and the copies of the documents are present in the national stage file." MPEP § 609.03; accord MPEP § 1893.03(g). LG notes that in the "notice of acceptance of application" form (the Form PCT/DO/EO/903) for the '435 patent, the PTO examiner only noted that **[*1029]** a copy of the international search report itself was present. (Doc. No. 74 at 10.)

LG is correct. In the Form PCT/DO/EO/903 at issue, the PTO examiner only notes that the international search report is present in the file. (Doc. No. 61-2, **[**27]** Ex. A at 38-39.) The form does not mention any copies of references being present. (Id.) Nevertheless, a further review of *section 609.03* reveals that the listing of the Emanuel in the international search report was still sufficient to disclose that reference for consideration by the PTO.

MPEP § 609.03 provides a list of three scenarios "regarding references listed in the search report of the international application." MPEP § 609.03. The third scenario concerns references listed in an international search report that will not be considered by the PTO absent further action by the applicant. MPEP § 609.03 ¶ 6.55. *Section 609.03* instructs the examiner, when appropriate to notify the applicant that: "The listing of references in the PCT international search report is not considered to be an information disclosure statement (IDS) complying with *37 CFR 1.98*. *37 CFR 1.98(a)(2)* requires a legible copy of [certain references]. . . . Therefore, the references cited in the

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[3] In addition, the Court notes that it may also consider the '435 patent's prosecution history in ruling on LG's *Rule 12(c)* motion under the "incorporation by reference doctrine" because LG's counterclaim allegations extensively reference and rely on the prosecution history as the basis for LG's unenforceability counterclaim. See *Coto Settlement, 593 F.3d at 1038* ("We have extended the doctrine of incorporation by reference to consider documents in situations where the complaint necessarily relies upon a document or the contents of the document are alleged in a complaint, the document's authenticity is not in question and there are no disputed issues as to the document's relevance."); *United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)* ("Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim.").

international search report have not been considered."[4] Id. But *section 609.03* explains that this third scenario does not apply if the missing reference is a "U.S. Patent [or] U.S. patent application publication[]." This make sense because *37 C.F.R. § 1.98* does not require applicants to provide copies of U.S. patents or U.S. patent applications to **[**28]** the PTO. See *37 C.F.R. § 1.98(a)(2)* (listing the types of references that require the submission of "a legible copy"). The international search report at issue specifically identifies the Emanuel reference as a published U.S. patent application. (Doc. No. 61-2, Ex. A at 114.)

The first and second scenarios listed in *section 609.03* pertain to situations "where copies of [the] references are not required under *37 CFR 1.98*," such as for U.S patent application publications like the Emanuel reference. MPEP § 609.03 ¶¶ 6.53, 6.54. In both of these scenarios, *section 609.03* explains that the reference will be considered. See id. Thus, the submission of the international search report listing the Emanuel reference as a published U.S. patent application should have been sufficient to disclose that reference to the PTO and for the PTO to consider it under *section 609.03*.

In response, at the hearing, LG noted that the examiner did not list Emanuel as one of the references considered on the PTO-892 form for the '435 patent. (See Doc. No. 61-2, Ex. A at 29.) But this is of no consequence because *section 609.03* explains that if a reference is properly disclosed through an international search report "[t]here is no requirement that the examiner list the documents on a PTO-892 form." MPEP § 609.03.

LG also noted **[**29]** that its inequitable conduct counterclaim is also based on the inventor and his counsel's failure to disclose Emanuel's foreign counterparts and two examination reports. But LG has failed to adequately allege or explain how these additional references would not be cumulative of the Emanuel reference itself. (See Doc. No. 17, Counterclaims ¶¶ 247-51.) See *37 C.F.R. § 1.56(b)* ("[I]nformation is material to patentability [only] when it is not cumulative to information already of record or being made of record in the application."); **[*1030]** *Baxter Int'l, Inc. v. McGaw, Inc., 149 F.3d 1321, 1328 (Fed. Cir. 1998)* ("[A] patentee need not cite an otherwise material reference to the PTO if that reference is merely cumulative or is less material than other references already before the examiner.") *Halliburton Co. v. Schlumberger Tech. Corp., 925 F.2d 1435, 1443 (Fed. Cir. 1991)* (a patentee "ha[s] no obligation to disclose cumulative references"). In sum, in light of a review of the prosecution history, which is both judicially noticeable and incorporated by reference, LG has failed to adequately allege the "failure to disclose material information" element in support of its inequitable conduct allegations.

iii. Specific Intent

Further, LG has failed to adequately allege intent in support of its inequitable conduct allegations. In order to properly allege "intent" to support **[**30]** of an inequitable conduct claim, the pleading must contain "sufficient allegations of underlying facts from which a court may reasonably infer that a specific individual . . . withheld or misrepresented th[e] information with a specific intent to deceive the PTO." *Exergen, 575 F.3d at 1328-29*. "A reasonable inference is one that is plausible and that flows logically from the facts alleged, including any objective indications of candor and good faith." *Id. at 1329 n.5*.

Here, a review of the prosecution history shows that the inventor and his counsel disclosed the International Search Report, which included a description of the Emanuel reference (a published U.S. patent application), to the PTO. (Doc. No. 61-2, Ex. A at 38-39, 111, 114-16.) The inventor was not required to submit a separate copy of the Emanuel reference under *37 C.F.R. § 1.98* in order for the reference to be considered by the examiner. See *37 C.F.R. § 1.98*; MPEP § 609.03. And the examiner never notified the inventor and his counsel that the Emanuel reference would not be considered or that they needed to submit an information disclose statement even though *section 609.03* provides examiners with express notification language to use in that circumstance. See MPEP § 609.03 ¶ 6.55. It cannot be reasonably inferred from these facts that **[**31]** the inventor and his counsel withheld the Emanuel reference from the PTO with a specific intent to deceive to the PTO. As such, LG has failed to adequately allege the specific intent element in support of its inequitable conduct allegations.

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[4] The Court notes that a review of the prosecution history does not show that the examiner ever provided the inventor of the '435 patent with this specific notice under MPEP § 609.03 ¶ 6.55. (See generally Doc. No. 61-2, Ex. A.)

iv. Conclusion

In sum, LG has failed to properly state a counterclaim for unenforceability of the '351 patent, and the Court dismisses LG's counterclaim for a declaratory judgment of unenforceability of the '351 patent due to infectious unenforceability. Further, because the defects in counterclaim cannot be cured through amendment of the pleadings, particularly in light of the contents of the judicially noticeable prosecution history of the '435 patent, the Court dismisses LG's unenforceability counterclaim with prejudice. See *Telesaurus VPC, LLC v. Power, 623 F.3d 998, 1003 (9th Cir. 2010)* ("'A district court may deny a plaintiff leave to amend if it determines that 'allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency,' or if the plaintiff had several opportunities to amend its complaint and repeatedly failed to cure deficiencies." (internal quotation marks and citations omitted)).

Conclusion

For the reasons above, the Court denies Wi-LAN's *Rule 12(c)* motion to dismiss LG's antitrust and unfair competition **[**32]** counterclaims, and the Court grants Wi-LAN's *Rule 12(c)* motion to dismiss LG's infectious unenforceability counterclaim. The Court dismisses LG's counterclaim for a declaratory judgment of unenforceability of the '351 patent due to infectious unenforceability with prejudice. The action will **[*1031]** proceed on the remaining claims and counterclaims.

IT IS SO ORDERED.

DATED: April 12, 2019

/s/ Marilyn L. Huff

MARILYN L. HUFF, District Judge

UNITED STATES DISTRICT COURT

LexisNexis

In re Pre-Filled Propane Tank Antirust Litig.

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

April 15, 2019, Decided; April 15, 2019, Filed

MDL No. 2567; Master Case No. 14-02567-MD-W-GAF

Reporter

2019 U.S. Dist. LEXIS 246572 *

IN RE: PRE-FILLED PROPANE TANK ANTIRUST LITIGATION; INDIRECT PURCHASER ACTIONS

Prior History: *In re Pre-Filled Propane Tank Antitrust Litig., 2014 U.S. Dist. LEXIS 156139 (J.P.M.L., Oct. 31, 2014)*

Core Terms

Purchaser, Indirect, Propane, conspiracy, state-law, en banc, allegations, Pleadings, tanks, amended complaint, pled, class period, quotations, subclass, statute of limitations, injunctive relief, antitrust, prices, fill, federal court, lack standing, supra-competitive, motion for judgment, class member, face of the complaint, alleged conspiracy, causal connection, motion to dismiss, violations, damages

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For Sean Venezia, CAN 14-03141, MOW 14-968 |, Michael S. Harvey, CAN 14-03141, MOW 14-968 |, Gregory **[*2]** Ludvigsen, CAN 14-03141, MOW 14-968 |, Arthur Hull, CAN 14-03141, MOW 14-968 |, Alan Rockwell, CAN 14-03141, MOW 14-968 |, Plaintiffs: Brooks Elliott Harlow, LEAD ATTORNEY, Lukas Nace Gutierrez & Sachs, Mclean, VA USA; Robert Taylor-Manning, LEAD ATTORNEY, Mercer Island, WA USA.

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For THOMAS R. CLARK, CAS 14-01775, WDMO 14-969 |, Bryce Mander, CAS 14-01775, WDMO 14-969 |, Plaintiffs: Betsy Carol Manifold, Rachele R Rickert, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Francis M. Gregorek, LEAD ATTORNEY, Wolf, Haldenstein, Adler, Freeman & Herz, LLP, San Diego, CA USA; Fred Taylor Isquith, LEAD ATTORNEY, Wolf, Haldenstein, Adler, Freeman & Herz, New York, NY USA.

For Alex Chernavsky, CAC 14-06781; MOW 14-967 |, Plaintiff: Joshua C Ezrin, Theodore H Chase, William M Audet, LEAD ATTORNEYS, Audet and Partners LLP, San Francisco, CA USA.

Robert Orr, 16cv809, Missouri Western |, Plaintiff, Pro se.

For Eric Blum, 16cv809, Missouri Western |, Paul Toomey, 16cv809, Missouri Western |, William Vincent, 16cv809, Missouri **[*3]** Western |, Steven Lutrell, 16cv809, Missouri Western |, Ken Cramer, 16cv809, Missouri Western |, Kevin Dougherty, 16cv809, Missouri Western |, James Ristow, 16cv809, Missouri Western |, Daniel Kelleher, 16cv809, Missouri Western |, Richard Pedrick, 16cv809, Missouri Western |, Dallas May, Jr., 16cv809, Missouri Western |, Tom Roberts, 16cv809, Missouri Western |, John Gilbert, 16cv809, Missouri Western |, Mark Stevens, 16cv809, Missouri Western |, Richard Paradowski, 16cv809, Missouri Western |, Hanz De Perio, 16cv809, Missouri Western |, Josh Bartholow, 16cv809, Missouri Western |, Joseph M Haala, 16cv809, Missouri Western |, Scott Zuehlke, 16cv809, Missouri Western |, Wesley H McCullough, 16cv809, Missouri Western |, Richard Sanchez, 16cv809, Missouri Western |, MaryLou Breed, 16cv809, Missouri Western |, Jerry Marshall, 16cv809, Missouri Western |, Plaintiffs: Barrett J. Vahle, Norman Eli Siegel, LEAD ATTORNEYS, Stueve Siegel Hanson, LLP - KCMO, Kansas City, MO USA.

David McNally, 16cv809, Missouri Western |, Plaintiff, Pro se.

For Troy Winters, Added per Amended Complaint, Doc 198 |, Thomas Gane, Added per Amended Complaint, Doc 198 |, Gary Snow, Added per Amended Complaint, Doc **[*4]** 198 |, Allan Disbrow, Added per Amended Complaint, Doc 198 |, Plaintiffs: Barrett J. Vahle, LEAD ATTORNEY, Stueve Siegel Hanson, LLP - KCMO, Kansas City, MO USA; John DeStefano, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Phoenix, AZ USA.

For Nicholas Pulli, Added per Amended Complaint, Doc 198 |, Plaintiff: Barrett J. Vahle, Norman Eli Siegel, LEAD ATTORNEYS, Stueve Siegel Hanson, LLP - KCMO, Kansas City, MO USA; John DeStefano, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Phoenix, AZ USA.

For Speed Stop 32, Inc., Yocum Oil Company, Inc., Johnson Auto Electric, Inc., Morgan-Larson, LLC, Plaintiffs: Christina M Black, LEAD ATTORNEY, State of Washington Attorney General's Office, Seattle, WA USA; Richard F. Lombardo, Shaffer Lombardo Shurin, Kansas City, MO USA.

For Ferrellgas Partners, L.P., a limited partnership |, Ferrellgas, L.P., a limited partnership | doing business as | Blue Rhino |, Defendants: Brendan McShane, LEAD ATTORNEY, Latham & Watkins, LLP, San Francisco, CA USA.

For 7-Eleven, Inc., interested party: Clayton G Kuhn, LEAD ATTORNEY, St. Louis, MO USA.

For Dollar General Corporation, Intervenor: Christopher Helt, LEAD ATTORNEY, Lewis Rice LLC-KCMO, Kansas City, MO USA. **[*5]**

Judges: GARY A. FENNER, UNITED STATES DISTRICT JUDGE.

Opinion by: GARY A. FENNER

Opinion

ORDER

Now before the Court is the Indirect Purchaser Plaintiffs' Motion for Order Determining Jurisdiction on Remand. (Doc. # 306). Defendants UGI Corporation; AmeriGas Partners, LP; AmeriGas Propane, Inc.; and AmeriGas Propane, LP[1] Ferrellgas Partners, LP; and Ferrellgas, LP[2] (collectively, "Defendants") have submitted their briefing

[1] UGI Corporation; AmeriGas Partners, LP; AmeriGas Propane, Inc.; and AmeriGas Propane, LP will be collectively referred to as "AmeriGas."

[2] Ferrellgas Partners, L.P. and Ferrellgas, L.P. will be collectively referred to as "Ferrellgas." Ferrellgas does business under the name Blue Rhino.

on the jurisdictional issue. (Docs. ## 315, 317). Also before the Court is Defendant AmeriGas's Motion for Judgment on the Pleadings. (Doc. # 309). Defendant Ferrellgas has filed a Motion to Join Defendant AmeriGas's Motion. (Doc. # 311).[3] Indirect Purchaser Plaintiffs oppose Defendants' Motion for Judgement on the Pleadings. (Doc. # 316). For the reasons provided below, the Court finds that it has jurisdiction over Indirect Purchaser Plaintiffs' state-law claims. Further, for the reasons provided below, Defendants' Motion for Judgment on the Pleadings is DENIED.

DISCUSSION

I. BACKGROUND

Defendants are the leading distributors of pre-filled propane exchange tanks. (Doc. # 198, ¶ 1). Beginning in 2006, Defendants entered into co-packing agreements wherein each company agreed to refurbish and refill propane **[*6]** tanks for the other company. (*Id.* at ¶ 40). Before 2008, the tanks were filled with seventeen pounds of propane. (*Id.* at ¶ 4). However, propane costs spiked in 2008. (*Id.*). In the summer of 2008, Defendants reduced the fill level of the tanks from seventeen to fifteen pounds of propane per tank while maintaining the same price per tank. (*Id.* at ¶¶ 4-6).

In 2009, a group of plaintiffs filed suit against Ferrellgas and AmeriGas alleging that they had acted in concert to reduce the amount of propane contained within the tanks and thus, artificially increase the price of the tanks.[4] (Case No. 09-02086-MD-W-GAF, Doc. # 79, ¶¶ 1-4). The *In re Propane I* plaintiffs alleged that the actions of Ferrellgas and AmeriGas were in violation of *Section 1* of the *Sherman Act* and state antitrust and consumer protection laws. (*Id.*). On December 8, 2009, the plaintiffs moved for preliminary approval of settlement agreements. (*Id.*, Doc. # 37). The settlement agreements were granted final approval on October 6, 2010. (*Id.*, Doc. # 166).

On March 27, 2014, the Federal Trade Commission (the "FTC") issued a complaint against Defendants (the "FTC Action") alleging that Defendants had restrained price competition because **[*7]** of their 2008 decision to decrease the fill level of the propane tanks. (Doc. # 198, ¶¶ 167-68). The FTC Action resulted in Consent Orders wherein Defendants agreed to cease and desist from any conspiracy between them to raise, fix, stabilize, or maintain prices of the tanks through any means. (*See* Docs. ## 211-1, 211-2 (collectively "FTC Consent Orders"), p. 4). Defendants also agreed to refrain from communicating competitively sensitive information to any competitor with some limited exceptions for propane refilling agreements. (*Id.*).

Shortly thereafter, the present lawsuit was filed. (*See* Docket Sheet). Lawsuits were filed on behalf of Direct Purchaser Plaintiffs of the propane (Doc. # 102) and Indirect Purchaser Plaintiffs. (Doc # 105). Both Plaintiff groups alleged that the 2008 reduction in fill level was due to improper collusion between Defendants who conspired to force sellers of propane to accept the fill reduction and agreed not to compete with one another. (Docs. ## 102, ¶¶ 4-9; 198, ¶¶ 4-9). Plaintiffs alleged that these actions were a violation of *Section 1* of the *Sherman Act* and state antitrust laws. (*See id.*).

The first complaint in the present action (the "*Ortiz* Complaint") was filed on **[*8]** May 30, 2014, which included allegations that Defendants' 2008 conduct violated *Section 1* of the *Sherman Act* and state-antitrust laws, including the laws of Maine, Vermont, and Wisconsin. (Case No. 14-00917-CV-W-GAF, Doc. # 1). The *Ortiz* Complaint was consolidated with a number of other similar actions into a multidistrict litigation and transferred to this Court on October 16, 2014. (Doc. # 1). Indirect Purchaser Plaintiffs filed a Consolidated Class Action Complaint on January 29, 2015. (Doc. # 105). Defendants jointly moved to dismiss both the Direct Purchaser Plaintiffs' and Indirect Purchaser Plaintiffs' complaints. (Docs. ## 135, 137).

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[3] For the reasons stated in its Motion, Defendant Ferrellgas's Motion to Join is GRANTED.

[4] This 2009 case will be referred to as *In re Propane I*.

On July 2, 2015, this Court granted in part Defendants' Motion to Dismiss. *In re: Pre-Filled Propane Tank Antitrust Litig., 14-02567-MD-W-GAF, 2015 U.S. Dist. LEXIS 193932, 2015 WL 12791756, at *1 (W.D. Mo. July 2, 2015)*, *reversed by* *860 F.3d 1059 (8th Cir. 2017)*. This Court determined that all Plaintiffs' antitrust claims were barred by the four-year federal antitrust statute of limitations. *2015 U.S. Dist. LEXIS 193932, [WL] at *9-10*. However, this Court determined that the Indirect Purchaser Plaintiffs' injunctive relief claim, as a claim in equity, was not governed by the statute of limitations and was instead governed by the doctrine of laches. *2015 U.S. Dist. LEXIS 193932, [WL] at *11*. This Court concluded that Defendants failed to meet their burden under the doctrine of laches because they failed to establish the **[*9]** existence of prejudice. *Id.* As such, the Court granted Defendants' Motion to Dismiss the Direct Purchaser Plaintiffs' complaint in its entirety. *Id.* The Court granted Defendants' Motion to Dismiss on the Indirect Purchase Plaintiffs' federal and antitrust claims, Counts II and III respectively. *Id.* The Court denied the Motion as to Count I, injunctive relief for a violation of Section I of the Sherman Act, of the Indirect Purchaser Plaintiffs' Amended Complaint. *2015 U.S. Dist. LEXIS 193932, [WL] at *11*.

The Eighth Circuit, sitting en banc, reversed the Court's dismissal of the Direct Purchaser Plaintiffs' complaint. *In re Pre-Filled Propane Tank Antitrust Litig, 860 F.3d 1059, 1062 (8th Cir. 2017)* (en banc), *cert denied 138 S.Ct. 647 (Jan. 8, 2018)* [hereinafter *Propane En Banc*]. The Eighth Circuit reversed due to its conclusion that the statute of limitations did not bar the claims. *Id. at 1071*. The Eighth Circuit stated: "Under *Klehr*, 'each sale to the plaintiff[s]' in a price-fixing conspiracy 'starts the statutory period running again.'" *Id. at 1068* (quoting *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)*). After that determination, the Eighth Circuit, evaluating the sufficiency of the Amended Complaint, stated: "The allegations that the conspiracy continued into the class period are sufficient." *Id. at 1069*. In analyzing the sufficiency of the allegations, the court provided the following discussion[5]:

> The allegations that the conspiracy **[*10]** continued into the class period are sufficient. Plaintiffs plead that "Defendants' anticompetitive conduct lasted at least from July 21, 2008 through January 9, 2015" and "as a result of the [ir] anticompetitive conduct . . . Defendants have charged Plaintiffs and members of the proposed Class supracompetitive prices for Filled Propane Exchange Tanks throughout the Class Period." Amended Complaint, at ¶¶ 120-21. See *id.* at ¶¶ 122-23. Despite the settlement agreement with indirect purchasers in 2010, they plead that "Defendants maintained their illegally agreed-upon fill levels rather than resuming competition, preserving the unlawfully inflated prices that their conspiracy had produced." *Id.* at ¶ 108. See *id.* at ¶ 124. Plaintiffs also plead that "[t]hrough at least the end of 2010, Defendants regularly communicated to assure compliance with the conspiracy," "monitor[ing] the market to ensure that neither cheated on their anticompetitive agreement by offering a price reduction or competing for one another's customers or geographic markets." *Id.* at ¶ 92. See id. at ¶ 125. More specifically, they plead that in 2008, AmeriGas's Director of National Accounts Ken Janish told Blue Rhino's **[*11]** President Tod Brown that "it would follow closely behind Blue Rhino if it successfully implemented its fill reduction, and that it would not sell both 15-pound and 17-pound tanks" and "Janish had similar conversations with employees of Blue Rhino on numerous occasions from at least as early as 2007 until at least late 2010." *Id.* at ¶ 60. Additionally, "during calls and meetings with AmeriGas executives occurring at least as late as 2010, Janish repeatedly dismissed concerns that Blue Rhino might undercut AmeriGas on price or fill levels with words to the effect of, 'I talked to Blue Rhino, and that's not going to happen.'" *Id.* at ¶ 13. See *id.* at ¶ 62.
>
> Some of these allegations are "naked assertion[s] devoid of further factual enhancement," *Iqbal, 556 U.S. at 678, 129 S.Ct. 1937* (internal quotation marks omitted), that do not "raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555, 127 S.Ct. 1955*. *See, e.g.*, Amended Complaint, at ¶¶ 120, 125. Others, however, list relevant individuals, acts, and conversations, providing "factual content" to support "the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678, 129 S.Ct. 1937*. *See, e.g.*, Amended Complaint, at ¶¶ 13, 60, 92. Defendants argue these allegations are "impermissibly vague **[*12]** and conclusory." But Plaintiffs "need not provide specific facts in support of their allegations."

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[5] Due to the varying interpretations and selected quotes provided by the parties in their briefing, the Court deems it appropriate to quote the at-issue language from *Propane En Banc* in its entirety to avoid ambiguity.

> Schaaf v. Residential Funding Corp., 517 F.3d 544, 549 (8th Cir. 2008) (emphasis added), *citing* Erickson v. Pardus, 551 U.S. 89, 93, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam). Rather, they need only provide "sufficient factual information to provide the 'grounds' on which the claim rests, and to raise a right to relief above a speculative level." *Id., quoting* Twombly, 550 U.S. at 555, 555 n.3, 127 S.Ct. 1955. "[C]onstru[ing] the complaint liberally in the light most favorable to" Plaintiffs, Eckert v. Titan Tire Corp., 514 F.3d 801, 806 (8th Cir. 2008), these allegations "plausibly give rise to an entitlement to relief." Iqbal, 556 U.S. at 679, 129 S.Ct. 1937.

Id. at 1069-70. Based on the discussion of the Direct Purchaser Plaintiffs' Amended Complaint, the Eighth Circuit emphasized that "the issue is whether the amended complaint alleges that the conspiracy continued when the sales took place." Id. at 1070. The court concluded: "The amended complaint alleges sufficient factual matter, accepted as true to show a continuing violation to restart the statute of limitations, and, therefore, to state a claim to relief that is plausible on its face." Id. at 1071 (quotation omitted). Thus, the Direct Purchaser Plaintiffs' claims were remanded to this Court and are currently pending.

Before the issuance of *Propane En Banc*, Indirect Purchaser Plaintiffs moved for leave to amend their complaint **[*13]** to add three new subclasses asserting damages: 1) a six-year statue-of-limitations subclass, for violations of Maine, Vermont, and Wisconsin law; and 2) a new-purchaser subclass, for violations of Kansas ***antitrust law***; and 3) a new-purchaser subclass for laws of "*Illinois Brick* repealer states." (*See* Doc. # 173-1, Count III, Count IV, Count V). The Indirect Purchaser Plaintiffs also proposed another federal-disgorgement claim. (*Id.* at Count II). This Court ruled that the amendments to add the federal-disgorgement claim and the new-purchaser subclasses would be futile because the claims were time-barred. (Doc. # 197, p. 12). Conversely, the Court did allow the Indirect Purchaser Plaintiffs to add the six-year statute of limitations subclass. (*Id.*). As such, the *Ortiz* Amended Complaint, filed on October 16, 2015, retained the federal-injunctive claim and added the six-year statute of limitations subclass's state-law claim. (Doc. # 198, Count I, Count II). Thus, only Plaintiffs' state-law claims under the laws of Maine, Vermont, and Wisconsin remained in addition to the federal injunctive-relief claim. (Doc. # 198, Count II).

Defendants then moved for Judgment on the Pleadings on Indirect **[*14]** Purchaser Plaintiffs' Amended Complaint. (Doc. # 210). The Court granted Defendants' Motion as to Count I of the complaint. In re Pre-Filled Propane Antitrust Litig., No. 14-02567-MD-W-GAF, 2016 U.S. Dist. LEXIS 194545, 2016 WL 6963059, at *11 (W.D. Mo. Jan. 13, 2016) [hereinafter *Ortiz I*]. The Court found that Indirect Purchaser Plaintiffs lacked standing to assert Count I because the alleged injury was not redressable by court order as the relief sought was cumulative of the FTC Action. 2016 U.S. Dist. LEXIS 194545, [WL] at *5-6. However, the Court denied Defendants' Motion as to Count II, which alleged violations of state antitrust laws. 2016 U.S. Dist. LEXIS 194545, [WL] at *11. The Court found that this Count was not barred by the statute of limitations and that Indirect Purchaser Plaintiffs had standing to assert their claims. *Id.* Regarding standing, the Court determined that Indirect Purchaser Plaintiffs had sufficiently alleged they suffered an actual injury because they alleged they had purchased propane at a supra-competitive price. 2016 U.S. Dist. LEXIS 194545, [WL] at *8. The Court also found that Plaintiffs demonstrated a causal connection between the actual injury and the alleged wrongdoing of the Defendants. 2016 U.S. Dist. LEXIS 194545, [WL] at *8. The Court rejected Defendants' argument that because the alleged conduct occurred in 2008, Indirect Purchaser Plaintiffs failed to demonstrate a causal connection to their injury. *Id.* In determining that **[*15]** the

Indirect Purchaser Plaintiffs plausibly established a causal connection to their injury, the Court stated: "Taking the pleadings as true, there are no facts that would indicate the injury is the result of some other party or factor as opposed to the actions of Defendants." *Id.* After this decision, only Count II of the Amended Complaint remained.

Meanwhile, on July 21, 2016, an additional complaint by another group of indirect purchasers,[6] was filed. (16-00809-CV-MD-GAF, Doc. # 1). The *Orr* Complaint, which was consolidated into the same multidistrict litigation proceeding as *Ortiz*, included a federal injunctive-relief claim, a federal-disgorgement claim, the new-purchaser

[6] This case will be referred to as *Orr*.

subclasses the *Ortiz* Plaintiffs tried to add to their Complaint, and a six-year statute of limitations subclass damages claim. (*Id.*).

Defendants then moved for Summary Judgment for the remaining *Ortiz* claims. (Doc. # 232). The Court granted that motion by finding that the state-law claims were barred by statute of limitations and, in the alternative, the named Plaintiffs lacked standing to assert claims under the laws of Maine, Vermont, and Wisconsin. *In re Pre-Filled Tank Antitrust Litig., No. 14-0256-MDW-GAF, 2016 U.S. Dist. LEXIS 167724, 2016 WL 6963058, at *5 (W.D. Mo. Sept. 2, 2016)* [hereinafter *Ortiz II*]. The Court likewise dismissed the remaining **[*16]** state-law claims of the *Orr* Plaintiffs. (Doc. # 245). Both the *Ortiz* and *Orr* Plaintiffs appealed to the Eighth Circuit. (Doc. # 249; Case No. 16-00809-MD-WGAF, Doc. # 11). The Eighth Circuit consolidated the *Ortiz* and *Orr* appeals. (Case No. 16-00809-MD-W-GAF, Doc. # 13).

On appeal, the Eighth Circuit affirmed the Court's dismissal of Indirect Purchaser Plaintiffs' federal injunctive claims. *In re Pre-Filled Propane Tank Antitrust Litig., 893 F.3d 1047, 1051 (8th Cir. 2018)* [hereinafter *Ortiz III*]. In analyzing whether Indirect Purchaser Plaintiffs had standing to seek injunctive relief, the Eighth Circuit focused on whether Indirect Purchaser Plaintiffs sufficiently pled the need for injunctive relief as non-cumulative of the FTC Action. *See id. at 1056*. The court stated: "The indirect purchasers . . . must adequately plead that Defendants are, post-January 2015, conspiring to charge supra-competitive prices, resulting in some cognizable danger of recurrent violation of the FTC orders." *Id.* The Eighth Circuit then summarized its discussion of the facts pled in *Propane En Banc*, reiterating that some of the Indirect Purchaser Plaintiffs' claims echoed those found insufficient to plausibly support the factual assertion of a conspiracy in the previous case. *Id. at 1056-57*. In comparing the facts **[*17]** pled in both cases, the court stated the Indirect Purchaser Plaintiffs' "complaints contain allegations detailing events *in 2008 and through 2010* like those found sufficient in *Propane En Banc* to plead that the conspiracy continued into the class period." *Id. at 1057* (emphasis in original) (internal quotations omitted). The Eighth Circuit explained that those assertions were insufficient to support "the reasonable inference that the defendant is liable for the misconduct alleged, that Defendants are conspiring to charge supra-competitive prices and are engaging in recurrent violations of the *January 7, 2015* consent orders. The indirect purchasers have not even adequately pleaded that Defendants are currently charging supra-competitive prices, let alone a conspiracy." *Id.* (emphasis in original) (internal quotation marks and citations omitted).

The court emphasized that the FTC Action was not at issue in *Propane En Banc* because the direct purchasers sought monetary damages rather than injunctive relief. *Id.* The Eighth Circuit concluded that because Indirect Purchaser Plaintiffs failed to plead actual injury, they lacked standing to pursue their injunctive relief claims. *Id.* After affirming the Court's **[*18]** dismissal of the federal-injunctive-relief claims, the Eighth Circuit remanded the case to this Court to consider the threshold issue of "whether the state-law-damages claims should remain in federal court." *Id. at 1059-60*. The Eighth Circuit further instructed: "This court remands to the district court to analyze under *[28 U.S.C.] § 1367(c)* whether it should exercise supplemental jurisdiction over state-law claims." *Id. at 1060*.

II. LEGAL STANDARD

After the pleadings have closed, any party may move to have the Court enter judgment on the pleadings. *Fed. R. Civ. P. 12(c)*. "A motion for judgment on the pleadings should be granted when, accepting all facts pled by the nonmoving party as true and drawing all reasonable inferences from the facts in favor of the nonmoving party, the movant has clearly established that no material issue of fact remains and that the movant is entitled to judgment as a matter of law." *Schnuck*

Mkts., Inc. v. First Data Merch. Servs. Corp., 852 F.3d 732, 737 (8th Cir. 2017). Generally, a *Rule 12(c)* motion for judgment on the pleadings is reviewed under the same standard as a *Rule 12(b)(6)* motion to dismiss. *Ginsburg v. InBev NV/SA, 623 F.3d 1229, 1233 n.3 (8th Cir. 2010)*. Therefore, conclusory statements lacking any factual support should be ignored. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Instead, the Court may only consider properly pled facts and determine whether the complaint states "a claim for relief that is plausible on **[*19]** its face." *Id.*

III. ANALYSIS

A. Jurisdiction

"Federal Courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)*. Federal courts "possess only that power authorized by Constitution and statute." *Id.* "The Constitution extends the judicial power of the federal courts to controversies 'between Citizens of different States.'" *Eckerberg v. Inter-State Studio & Pub. Co., 860 F.3d 1079, 1084 (8th Cir. 2017)* (quoting *U.S. Const. art. III § 2*). "Congress enacted legislation to give federal courts original jurisdiction of all civil actions between citizens of different states." *Id.* (internal quotations omitted). The burden of establishing jurisdiction is on the party asserting jurisdiction. *Kokkonen, 511 U.S. at 377*. Further, "parties may not expand the limited jurisdiction of the federal courts by waiver or consent[.]" *4:20 Commc'ns, Inc. v. Paradigm Co., 336 F.3d 775, 778 (8th Cir. 2003)*.

Indirect Purchaser Plaintiffs assert that the Court need not determine if it will retain supplemental jurisdiction over the remaining state-law claims because it has original jurisdiction pursuant to the Class Action Fairness Act ("CAFA"). "CAFA grants broad federal jurisdiction over class actions and establishes narrow exceptions to such jurisdiction." *Westerfied v. Indep. Processing, LLC, 621 F.3d 819, 822 (8th Cir. 2010)*. CAFA is codified, in part, at *28 U.S.C. § 1332*, the statutory provision that grants federal courts original jurisdiction on the basis of diversity of citizenship. Under CAFA, "federal **[*20]** courts have jurisdiction over class actions in which the amount in controversy exceeds $5,000,000 in the aggregate; there is minimal (as opposed to complete) diversity among the parties, i.e., any class member and any defendant are citizens of different states; and there are at least 100 members in the class." *Westerfield v. Indep. Processing, LLC, 621 F.3d 819, 822 (8th Cir. 2010)* (citing *28 U.S.C. § 1332(d)*).

Both Defendants assert that the Court can exercise supplemental jurisdiction over the remaining state-law claims. (Docs. ## 315, p. 1; 317, p. 2). Defendant Ferrellgas contends that Indirect Purchaser Plaintiffs cannot assert jurisdiction based on CAFA because it was not pleaded in their operative complaints. (Doc. # 317, pp. 10-12). However, "[t]he general rule is that where a basis for federal court jurisdiction appears clearly from an examination of the face of the complaint, the court may sustain the suit even if the plaintiff has not relied upon that basis." *Raus v. Bhd. Ry. Carmen of U.S. & Can., 663 F.2d 791, 796 (8th Cir. 1981)*. As such, despite Indirect Purchaser Plaintiffs not pleading jurisdiction based on CAFA (Doc. # 198, ¶ 11), the Court will examine the Complaint in its entirety to determine if jurisdiction clearly exists.

First, the face of the complaint shows that there are more than 100 class members. (*See id.* at ¶¶ 2-3, **[*21]** 99-101, 108 (alleging claims on behalf of thousands of class members)). Next, minimal diversity is apparent because this case was pleaded on behalf of a nationwide class and multi-state subclasses (*Id.* at ¶¶ 99-101) and brought against defendants from particular states. (*See id.* at ¶¶ 21 (Defendant AmeriGas is a citizen of Pennsylvania and Delaware); 18-19 (Defendant Ferrellgas is citizen of Kansas and Delaware)). Finally, the face of the complaint shows that the amount in controversy exceeds $5,000,000. (*See id.* at ¶¶ 10 ("[C]onsumers were and continue to be cheated out of hundreds, if not thousands if not millions of pounds of propane[.]"); 91-92 (explaining that "Plaintiffs and other class members were deprived of approximately two pounds of propane in each tank they purchased" and "Plaintiffs and class members paid more and continue to pay more for propane than they would have paid in a competitive market"). From the face of the complaint, Plaintiffs have pled that there are more than 100 class members, minimal diversity exists, and the amount in controversy exceeds $5,000,000. Because the statutory requirements of CAFA are satisfied, jurisdiction pursuant to *28 U.S.C. § 1332(d)(2)* is apparent from **[*22]** the face of the Complaint. Therefore, the Court has original jurisdiction over Indirect Purchaser Plaintiffs' statelaw claims.

B. Defendants' Motion for Judgment on the Pleadings

Defendants' challenge to the sufficiency of Indirect Purchaser Plaintiffs' pleading primarily rests on the argument that Indirect Purchaser Plaintiffs have failed to plead that an ongoing conspiracy occurred after 2010. (Docs. ## 309, pp. 1-2; 311, pp. 1-2). Defendants assert that *Ortiz III* shows the Eighth Circuit found that Indirect Purchaser Plaintiffs had only pled the existence of a conspiracy through late 2010. (Docs. ## 309, pp. 4-5; 311, pp. 5-6). Defendants then identify that Indirect Purchaser Plaintiffs in this case are seeking damages for purchases that occurred after the *Propane I* settlements in 2011. (Docs. ## 309, pp. 5-6; 311, pp. 4-5). As such, Defendants argue that because the purchases occurred after the conspiracy had ended, Indirect Purchaser Plaintiffs have not suffered an injury. (Docs. ## 309, pp. 8-10; 311, pp. 7-8). Because of the alleged lack of injury, Defendants contend that Indirect Purchaser Plaintiffs lack standing to bring their state-law claims. (Docs. ## 309, p. 10; 311, p. **[*23]** 8).

In *Ortiz I*, the Court found that sales at supra-competitive prices are injuries in fact, and the Indirect Purchaser Plaintiffs had also sufficiently plead a causal connection between the injury and the complained-of action of Defendants. *Ortiz I, 2016 U.S. Dist. LEXIS 194545, 2016 WL 6963059, at *8*. Lastly, the Court determined that the Indirect Purchaser Plaintiffs had satisfied the redressability requirement. Because all three requirements were satisfied, the Court found that the Indirect Purchaser Plaintiffs had standing to pursue their state-law claims.

Defendants urge the Court to reach the opposite conclusion because the Eighth Circuit's holdings in *Propane En Banc* and *Ortiz III* establish that Indirect Purchaser Plaintiffs have only alleged an ongoing conspiracy through late 2010. (Docs. ## 309, pp. 4-5; 311, pp. 5-6). First, it is important to note that the lack of standing that warranted the dismissal of Count I was due to the injunctive relief sought by Indirect Purchaser Plaintiffs. *See* *Ortiz III, 893 F.3d at 1057*; *Ortiz I, 2016 U.S. Dist. LEXIS 194545, 2016 WL 6963059, at *5-6*. For their state-law claims, Indirect Purchaser Plaintiffs seek monetary damages as well as injunctive relief. The Eighth Circuit's ruling in *Ortiz III* governs the conclusion that Indirect Purchaser Plaintiffs lack standing to pursue injunctive **[*24]** relief in their state-law claims for the same reasons they lacked standing to pursue their now-dismissed federal claim.

The remaining issue before the Court is whether the Eighth Circuit's rulings in *Propane En Banc* and *Ortiz III* compel the conclusion that Indirect Purchaser Plaintiffs lack standing to pursue monetary damages for their state-law claims. The Court rejects Defendants' assertion that the Eighth Circuit conclusively found that Indirect Purchaser Plaintiffs only pled a conspiracy as of 2010. In *Propane En Banc*, the Court identified provisions of the Amended Complaint that show acts "through at least the end of 2010," were sufficient to "plausibly give rise to an entitlement to relief." *860 F.3d at 1069-70* (internal quotations and alterations omitted). Nowhere in the opinion did the Eighth Circuit state that the Plaintiffs had only plausibly pled a conspiracy through the end of 2010. While it is true that the class period of the Direct Purchaser Plaintiffs, which began July 21, 2008, is different from the indirect purchasers, which began December 1, 2009 as to AmeriGas and October 14, 2011 as to Ferrellgas, there is no indication from *Ortiz III* that the Eighth Circuit limited the timeframe **[*25]** of the alleged conspiracy to end before those class periods.

This conclusion is reinforced by the Eighth Circuit's direction "to consider the impact of *Propane En Banc* on the timeliness of the state-law claims." *Ortiz III, 893 F.3d at 1060*. Defendants do not assert timeliness arguments related to the statute of limitations in their current Motion, but the Eighth Circuit's discussion of timeliness in *Propane En Banc* is nonetheless instructive to the current analysis. The Eighth Circuit determined that "each sale to the plaintiffs in a price-fixing conspiracy starts the statutory period running again." *Propane En Banc, 860 F.3d at 1068* (internal quotations and alteration omitted). The court analyzed whether the Direct Purchaser Plaintiffs alleged: "(1) a price-fixing conspiracy; (2) that brings about a series of unlawfully high priced sales during the class period; and (3) sales to the plaintiffs during the class period." *Id.* (internal quotations and alterations omitted). The Eighth Circuit concluded that the plaintiffs sufficiently pled all three requirements, thus resolving the issue of "whether the amended complaint alleges that the conspiracy continued when the sales took place" in favor of the plaintiffs. *Id. at 1070*. As such, the Eighth Circuit's analysis **[*26]** in *Propane En Banc* does not compel a conclusion that Indirect Purchaser Plaintiffs only alleged a conspiracy through late 2010. Rather, its conclusion shows that the Direct Purchaser Plaintiffs did allege a conspiracy into the class period and they suffered an actual injury by purchasing propane tanks at supra-competitive prices.

Additionally, Defendants misconstrue *Ortiz III* to support their argument that the Eighth Circuit found that Indirect Purchaser Plaintiffs only alleged a conspiracy until late 2010. As previously stated, the analysis in *Ortiz III* was to determine whether the Indirect Purchaser Plaintiffs sufficiently pled a threat of recurring harm, such that Count I was not cumulative of the FTC Action. *Ortiz III, 893 F.3d at 1056*. Defendants identify the quote, "[o]ther allegations, however, sufficiently list[ed] relevant individuals, acts, and conversations in 2008 and 2010 to plead that the conspiracy continued into the class period," *id. at 1058* (quotations omitted), as proof that the Eighth Circuit only found a conspiracy sufficiently alleged as of late 2010. (Docs. ## 309, p. 10; 311, p. 6). However, the emphasis of this sentence is not that the relevant allegations occurred in 2008 and 2010, but rather that **[*27]** these allegations sufficiently pled "that the conspiracy continued into the class period." *Ortiz III, 893 F.3d at 1057* (quotation omitted). While these allegations were found insufficient to support the claim that Indirect Purchaser Plaintiffs were in danger of recurrent violations of the FTC Action, this does not necessarily lead to the conclusion that Indirect Purchaser Plaintiffs have failed to plausibly allege injury for Count II. Therefore, the Court concludes that the Eighth Circuit's holding in *Ortiz III* does not compel a conclusion that the Indirect Purchaser Plaintiffs only alleged a conspiracy into late 2010.

In *Ortiz I*, this Court already analyzed the issue of whether Indirect Purchaser Plaintiffs have standing to assert their state-law claims. *2016 U.S. Dist. LEXIS 194545, 2016 WL 6963059, at *7*. The rulings of the Eighth Circuit in *Propane En Banc* and *Ortiz III* do not show cause for the previous analysis to be altered. As such, the Court finds, based off its previous ruling in *Ortiz I*, that Indirect Purchaser Plaintiffs have established all three of the requirements of standing: injury in fact; causal connection between the injury and the conduct complained of; and redressability. *See* *2016 U.S. Dist. LEXIS 194545, [WL] at *8*. As standing is a constitutionally mandated requirement, Indirect **[*28]** Purchaser Plaintiffs must have standing to sue at every stage in the case. *See* *Preiser v. Newkirk, 422 U.S. 395, 401, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1975)* ("[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed."). However, at this stage in the proceedings, Indirect Purchaser Plaintiffs have demonstrated standing to bring their state-law claims.

As to the *Orr* Plaintiffs, The Eighth Circuit's ruling in *Ortiz III* affirms the Court's dismissal of Count I and Count II, as both are federal-injunctive-relief claims. For the reasons provided above regarding the *Ortiz* Plaintiffs, the Court retains jurisdiction over the remaining state-law claims in the *Orr* case. Further, given the procedural posture of *Orr* and *Ortiz*, the Court believes that the Eighth Circuit's discussion of standing and timeliness of state-law claims in both *Propane En Banc* and *Ortiz III* apply with equal force to both cases. As such, the Court finds that the *Orr* Plaintiffs have demonstrated standing to bring Count III and Count IV, their state antitrust claims.

CONCLUSION

CAFA grants the Court jurisdiction over Indirect Purchaser Plaintiffs' state-law claims. Additionally, the Eighth Circuit's rulings in *Propane En Banc* and *Ortiz III* do not support the **[*29]** conclusion that Indirect Purchaser Plaintiffs only pled a conspiracy as of 2010. As such, Indirect Purchaser Plaintiffs have standing to pursue their state antitrust claims. Accordingly, for these reasons and those provided above, Defendants' Motion for Judgment on the Pleadings is DENIED.

IT IS SO ORDERED.

/s/ Gary A. Fenner

GARY A. FENNER, JUDGE

UNITED STATES DISTRICT COURT

DATED: April 15, 2019

Akers v. Md. State Educ. Ass'n

United States District Court for the District of Maryland

April 18, 2019, Decided; April 18, 2019, Filed

Civil Action No. RDB-18-1797

Reporter

376 F. Supp. 3d 563 *; 2019 U.S. Dist. LEXIS 65910 **; 169 Lab. Cas. (CCH) P11,163

RUTH AKERS, et al., Plaintiffs, v. MARYLAND STATE EDUCATION ASSOCIATION, et al., Defendants.

Subsequent History: Motion denied by, As moot *Akers v. Md. State Educ. Ass'n, 2020 U.S. App. LEXIS 24430 (4th Cir., Aug. 3, 2020)*

Affirmed by *Akers v. Md. State Educ. Ass'n, 2021 U.S. App. LEXIS 6851, 2021 WL 852086 (4th Cir. Md., Mar. 8, 2021)*

Core Terms

Plaintiffs', Teachers', moot, motion to dismiss, disclosure, injunctive, contact information, affiliates, collected, subject matter jurisdiction, allegations, good-faith, state-law, dismissal without prejudice, refund claim, agency fee, declaratory, employees, supplemental jurisdiction, exclusive representation, declaratory relief, antitrust claim, cause of action, bargaining, implicated, antitrust, negotiate, refunding, rights

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Collective Bargaining & Labor Relations > Labor & Employment Law > Collective Bargaining & Labor Relations

HN1[] **Labor & Employment, Collective Bargaining & Labor Relations**

States and public-sector unions may no longer extract agency fees from nonconsenting employees.

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

HN2[] **Defenses, Demurrers & Objections, Motions to Dismiss**

In ruling on a motion to dismiss, a court accepts as true all well-pleaded facts in a complaint and construes them in the light most favorable to the plaintiff.

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

Constitutional Law > The Judiciary > Case or Controversy

Evidence > Burdens of Proof > Preponderance of Evidence

Civil Procedure > Preliminary Considerations > Jurisdiction > Subject Matter Jurisdiction

Constitutional Law > The Judiciary > Case or Controversy > Mootness

HN3[] Defenses, Demurrers & Objections, Motions to Dismiss

A motion to dismiss under *Fed. R. Civ. P. 12(b)(1)* for lack of subject matter jurisdiction challenges a court's authority to hear the matter brought by a complaint. Under Article III of the United States Constitution, the judicial power of the United States extends only to cases and controversies. A case becomes moot—and therefore no longer a case or controversy for purposes of Article III—when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute is no longer embedded in any actual controversy about the plaintiff's particular legal rights. Accordingly, a court's subject matter jurisdiction depends on the existence of an actual case or controversy. Under *Fed. R. Civ. P. 12(b)(1)*, the plaintiff bears the burden of proving, by a preponderance of the evidence, the existence of subject matter jurisdiction.

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

Civil Procedure > Preliminary Considerations > Jurisdiction > Subject Matter Jurisdiction

HN4[] Defenses, Demurrers & Objections, Motions to Dismiss

A challenge to jurisdiction under *Fed. R. Civ. P. 12(b)(1)* may proceed either as a facial challenge, asserting that the allegations in the complaint are insufficient to establish subject matter jurisdiction, or a factual challenge, asserting that the jurisdictional allegations of the complaint are not true. In a facial challenge, a court will grant a motion to dismiss for lack of subject matter jurisdiction where a claim fails to allege facts upon which the court may base jurisdiction. Where the challenge is factual, however, the district court is entitled to decide disputed issues of fact with respect to subject matter jurisdiction. The court, therefore, may regard the pleadings as mere evidence on the issue and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.

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

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

HN5[] Motions to Dismiss, Failure to State Claim

Under *Fed. R. Civ. P. 8(a)(2)*, a complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. *Fed. R. Civ. P. 12(b)(6)* procedure authorizes the dismissal of a complaint if it fails to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. The purpose of *Fed. R. Civ. P. 12(b)(6)* is to test the sufficiency of a complaint and not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.

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

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

HN6[] Motions to Dismiss, Failure to State Claim

To survive a motion under *Fed. R. Civ. P. 12(b)(6)*, a complaint must contain facts sufficient to state a claim to relief that is plausible on its face. Under the plausibility standard, a complaint must contain more than labels and conclusions or a formulaic recitation of the elements of a cause of action. A complaint need not include detailed factual allegations. A complaint must, however, set forth enough factual matter taken as true to suggest a cognizable cause of action, even if the actual proof of those facts is improbable and recovery is very remote and unlikely. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice to plead a claim.

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

HN7[] Motions to Dismiss, Failure to State Claim

In reviewing a *Fed. R. Civ. P. 12(b)(6)* motion, a court must accept as true all of the factual allegations contained in the complaint and must draw all reasonable inferences from those facts in favor of the plaintiff. Legal conclusions drawn from those facts, however, are not afforded such deference.

Civil Procedure > ... > Justiciability > Mootness > Voluntary Cessation Exception

Constitutional Law > ... > Case or Controversy > Mootness > Conduct Capable of Repetition

HN8[] Mootness, Voluntary Cessation Exception

The voluntary cessation doctrine refers to situations that do not deprive a federal court of its power to hear and determine a case, even when a defendant has voluntarily ceased the challenged practice, because the allegedly wrongful behavior could reasonably be expected to recur.

Civil Rights Law > Protection of Rights > Section 1983 Actions

HN9[] Protection of Rights, Section 1983 Actions

The good-faith defense refers to a protection from liability under *42 U.S.C.S. § 1983* by private citizens who have relied in good faith on then-existing laws that were presumptively valid.

Antitrust & Trade Law > Sherman Act > Claims

HN10[] Sherman Act, Claims

To plausibly allege an antitrust claim, a plaintiff must first plead an agreement to restrain trade. A plaintiff must plausibly allege: (1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade. Importantly, the complaint must contain sufficient factual allegations regarding each defendant; a plaintiff in a *15 U.S.C.S. § 1* case cannot assemble some collection of defendants and then make vague, nonspecific allegations against all of them as a group.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Affirmative Defenses

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

HN11[] **Defenses, Demurrers & Objections, Affirmative Defenses**

An affirmative defense can be considered by the court on a motion to dismiss if the face of the complaint includes all necessary facts for the defense to prevail.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

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

HN12[] **Judges, Discretionary Powers**

Pursuant to *28 U.S.C.S. § 1367(c)(3)*, the court has the discretion to decline to exercise supplemental jurisdiction if the court has dismissed all claims over which it has original jurisdiction. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a superfooted reading of applicable law. If the federal law claims are dismissed before trial the state claims should be dismissed as well.

Counsel: **[**1]** For Ruth Akers, on behalf of herself and all others similarly situated, Plaintiff: Jonathan F Mitchell, PRO HAC VICE, Mitchell Law PLLC, Austin, TX; Shannon Conway, Talcott Franklin, PRO HAC VICE, Talcott Franklin PC, Dallas, TX; Rada Machin, The Machin Law Firm, LLC, Rockville, MD.

For Sharon Moesel, Plaintiff: Rada Machin, The Machin Law Firm, LLC, Rockville, MD.

For Maryland State Education Association, Teachers Association of Baltimore County, as representative of the class of all chapters and affiliates of the Maryland State Education Association, National Education Association, Defendants: Adam Bellotti, Bruce R Lerner, Bredhoff & Kaiser, PLLC, Washington, DC; Jacob Karabell, John M. West, Leon Dayan, PRO HAC VICE, Bredhoff and Kaiser PLLC, Washington, DC; Kristy K Anderson, Maryland State Education Association Inc, Annapolis, MD; Lubna A Alam, PRO HAC VICE, National Education Association, Washington, DC.

For Baltimore County Public Schools, as representative of the class of all school districts in Maryland, Defendant: Edmund J O Meally, LEAD ATTORNEY, Pessin Katz Law PA, Towson, MD; Margaret-Ann Frances Howie, Baltimore County Public Schools, Towson, MD.

For Larry Hogan, in his official **[**2]** capacity as governor of Maryland, Brian E. Frosh, in his official capacity as Attorney General of Maryland, Elizabeth Molina Morgan, each in their official capacities as members of the Maryland Public School Labor Relations Board, Robert I. Chanin, each in their official capacities as members of the Maryland Public School Labor Relations Board, John A. Hayden, III, each in their official capacities as members of the Maryland Public School Labor Relations Board, Donald W. Harmon, each in their official capacities as members of the Maryland Public School Labor Relations Board, Ronald S. Boozer, each in their official capacities as members of the Maryland Public School Labor Relations Board, Teachers Association of Anne Arundel County, Inc., Defendants: Adam Dean Snyder, Office of the Attorney General, Division of Opinions & Advice, Baltimore, MD; Ryan Robert Dietrich, Office of the Attorney General of Maryland, Baltimore, MD.

Judges: Richard D. Bennett, United States District Judge.

Opinion by: Richard D. Bennett

Opinion

[*566] MEMORANDUM OPINION

Plaintiffs Ruth Akers ("Ms. Akers") and Sharon Moesel ("Ms. Moesel") (collectively, "Plaintiffs") bring this putative class action against the following Defendants: Maryland State **[**3]** Education Association ("MSEA"), a labor union; Teachers' Association of Baltimore County and Teachers' Association of Anne Arundel County, local union chapters affiliated with MSEA, sued as representatives of the class of all chapters and affiliates of MSEA; National Education Association ("NEA"), a labor union affiliated with MSEA; Verletta White, interim superintendent of the Board of Education of Baltimore County, and George Arlotto, superintendent of Anne Arundel County, sued in their official capacities as representatives of the class of all superintendents of Maryland school districts; Larry Hogan, as Governor of Maryland, in his official capacity; Brian Frosh, Attorney **[*567]** General of Maryland, in his official capacity; and Elizabeth Molina Morgan, Robert I. Chanin, John A. Hayden III, Donald W. Harmon, and Ronald S. Boozer, members of the Maryland Public School Labor Relations Board, in their official capacities. (Am. Compl., ECF No. 59.) Plaintiffs are public school teachers who were not members of the teachers' union but were required to pay representation fees to the union as a condition of employment. (*Id.*) Plaintiffs allege violations of their constitutionally-protected rights **[**4]** and various state-law torts, and they seek injunctive and declaratory relief under *42 U.S.C. § 1983* and *28 U.S.C. § 2201*. (*Id.*)

Currently pending before this Court are State-Defendants'[1] Motion to Dismiss Amended Complaint (ECF No. 74) and Motion to Dismiss Amended Complaint of Defendants Maryland State Education Association, Teachers' Association of Baltimore County, Teachers' Association of Anne Arundel County, and National Education Association [(collectively, "the Union Defendants")] (ECF No. 75). Shortly after the filing of this action, the United States Supreme Court issued its opinion in *Janus v. Am. Fed'n of State, Cty, and Mun. Emps., Council 31, __ U.S. __, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018)*, holding that ***HN1***[] "[s]tates and public-sector unions may no longer extract agency fees from nonconsenting employees." *138 S. Ct. at 2459*. Plaintiffs' claims for injunctive and declaratory relief are now moot. Furthermore, consistent with many other courts, this Court holds that collection of fees in good-faith reliance on then-valid law bars the Plaintiffs' refund claims. Accordingly, for the reasons that follow, both Motions to Dismiss (ECF Nos. 74, 75) are GRANTED.

BACKGROUND

HN2[] In ruling on a motion to dismiss, this Court "accept[s] as true all well-pleaded facts in a complaint and construe[s] them in the light most favorable to the plaintiff." *Wikimedia Found. v. Nat'l Sec. Agency, 857 F.3d 193, 208 (4th Cir. 2017)* (citing **[**5]** *SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 422 (4th Cir. 2015))*. This dispute involves the payment of compulsory union dues. Ms. Akers is a public-school teacher who works for the Baltimore County Public Schools, and Ms. Moesel teaches at Annapolis High School in the Anne Arundel County Public Schools. (Am. Compl. ¶¶ 14, 18; ECF No. 59.) Ms. Akers does not approve of the MSEA or its affiliates and refused to become a member, but she was required to pay "representation fees" (also referred to as "agency fees")[2] to the MSEA as a condition of her employment. (*Id.* at ¶ 15-16, 26.) Ms. Moesel was an active member of MSEA and the Teachers Association of Anne Arundel County until she was expelled in May 2017,[3] but the union continued taking representation fees from her pay without her consent. (*Id.* at ¶¶ 19-20.) The MSEA was authorized under *Md. Code. Education §§ 6-407(c)-(f)* **[*568]** to extract these fees from non-union members as a condition of

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[1] State-Defendants are identified as Defendants Governor Larry Hogan, Attorney General Brian E. Frosh, and the members of the Maryland Public School Labor Relations Board (Elizabeth Molina Morgan, Robert I. Chanin, John A. Hayden III, Donald W. Harmon, and Ronald S. Boozer). (Mot. 1, ECF No. 74.)

[2] These fees were intended to compensate the union for its efforts on behalf of non-members in the collective-bargaining process since the union represents all public-school employees, not just members. *See* *Md. Code Ann., Education §§ 6-407(b)(1)*, *6-407(c)*, *6-504(b)*, *6-509(b)*.

[3] Ms. Moesel alleges that she was expelled for actively opposing the union's efforts to eliminate her salary bonuses. (Am. Compl. ¶¶ 39-41.)

their employment. (*Id.* at ¶ 23.) Plaintiffs assert that by taking these fees from public-school employees, Defendants committed the torts of conversion, trover, detinue, and trespass to chattels. (*Id.* at ¶ 25.)

Plaintiffs also allege that under the recently-enacted[4] Maryland House Bill 811 ("HB 811"), public-school employers are required to provide **[**6]** the MSEA and its affiliates with the name, home address, home telephone numbers, and personal cell-phone numbers of each newly-hired school employee, regardless of whether the employee consents to the disclosure. (*Id.* at ¶¶ 28-32.) Additionally, Ms. Moesel alleges that public-school teachers should not be forced to accept the union as their exclusive bargaining representative and that forcing a non-union teacher to accept union-negotiated terms of employment violates anti-trust laws as well as their *First Amendment* right of freedom of association. (*Id.* at ¶¶ 43-48.)

Ms. Akers initially filed the purported class-action Complaint (ECF No. 1) on June 18, 2018. A Motion for Preliminary Injunction (ECF No. 13) was filed on June 29, 2018, seeking to prevent the enforcement of certain provisions in HB 811 from taking effect on July 1, 2018. Plaintiffs later agreed to withdraw the motion on the basis that HB 811 had already taken effect. (*See* ECF No. 105.) Plaintiffs filed the operative Amended Complaint on September 7, 2018,[5] adding Ms. Moesel as a Plaintiff and adding Verletta White and George Arlotto as Defendants. (ECF No. 59.) Both Verletta White and George Arlotto filed Motions to Dismiss (ECF Nos. 80, **[**7]** 83), to which Plaintiffs did not respond and later agreed could be granted. (ECF No. 105.) The Amended Complaint contains the following requests: (1) a declaration under the *Declaratory Judgment Act*, *28 U.S.C. § 2201*, that the requirement for non-union members to pay representation fees is unconstitutional; (2) all representation fees that have been collected must be refunded under *42 U.S.C. § 1983*; (3) a declaration that the compelled disclosure of personal information under HB 811 is unconstitutional; (4) a declaration that the union's exclusive representation in the bargaining process is unconstitutional and a claim against MSEA and its local affiliates that exclusive representation violates federal ***antitrust law***; and (5) State-law tort claims of conversion, trover, detinue, and trespass to chattels, invoking supplemental jurisdiction.

The State-Defendants and the Union Defendants filed motions to dismiss under *Federal Rules of Civil Procedure 12(b)(1)* and *(6)* for lack of subject matter jurisdiction and failure to state a claim. (ECF Nos. 74, 75.) For the following reasons, Defendants' motions shall be GRANTED. Specifically, Plaintiffs' constitutional challenges to the representation fee provision shall be DISMISSED AS MOOT, and the request for a refund **[**8]** of fees under *42 U.S.C. § 1983* shall be DISMISSED WITH PREJUDICE as barred by Defendants' good-faith defense. Further, the remaining claims shall be DISMISSED WITHOUT PREJUDICE: the challenge to exclusive representation is foreclosed by United States Supreme Court precedent; Plaintiffs have failed to sufficiently plead that their constitutional right of association and freedom of speech have been implicated by the disclosure of their contact information to the union under HB 811; Ms. **[*569]** Moesel fails to allege a plausible antitrust claim; and with the dismissal of the federal claims, this Court declines to exercise supplemental jurisdiction over the remaining state-law claims.

STANDARDS OF REVIEW

I. Subject Matter Jurisdiction

HN3[] A motion to dismiss under *Rule 12(b)(1) of the Federal Rules of Civil Procedure* for lack of subject matter jurisdiction challenges a court's authority to hear the matter brought by a complaint. *See* *Davis v. Thompson, 367 F.Supp.2d 792, 799 (D. Md. 2005)*. Under Article III of the United States Constitution, the judicial power of the United States extends only to "cases" and "controversies." *Already, LLC v. Nike, Inc., 568 U.S. 85, 90, 133 S. Ct. 721, 184 L. Ed. 2d 553 (2013)*. "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for

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[4] HB 811 was enacted on July 1, 2018. (Am. Compl. ¶ 31, ECF No. 59.)

[5] Earlier-filed motions to dismiss the original Complaint were subsequently denied as moot. (ECF No. 105.)

purposes of Article III—'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" Id. at 91 (quoting Murphy v. Hunt, 455 U.S. 478, 481, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (1982)). "No matter how vehemently **[**9]** the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiff's particular legal rights.'" *Id.* (quoting Alvarez v. Smith, 558 U.S. 87, 92, 130 S. Ct. 576, 175 L. Ed. 2d 447 (2009)).

Accordingly, a court's subject matter jurisdiction depends on the existence of an actual case or controversy. S.C. Coast Conservation League v. U.S. Army Corps. of Eng'rs, 789 F.3d 475, 482 (4th Cir. 2015). Under Rule 12(b)(1), the plaintiff bears the burden of proving, by a preponderance of the evidence, the existence of subject matter jurisdiction. Demetres v. East West Constr., Inc., 776 F.3d 271, 272 (4th Cir. 2015); Lovern v. Edwards, 190 F.3d 648, 654 (4th Cir. 1999).

HN4[] A challenge to jurisdiction under Rule 12(b)(1) may proceed either as a facial challenge, asserting that the allegations in the complaint are insufficient to establish subject matter jurisdiction, or a factual challenge, asserting "that the jurisdictional allegations of the complaint [are] not true." Kerns v. United States, 585 F.3d 187, 192 (4th Cir. 2009) (citation omitted). In a facial challenge, a court will grant a motion to dismiss for lack of subject matter jurisdiction "where a claim fails to allege facts upon which the court may base jurisdiction." Davis, 367 F. Supp. 2d at 799. Where the challenge is factual, however, "the district court is entitled to decide disputed issues of fact with respect to subject matter jurisdiction." Kerns, 585 F.3d at 192. The court, therefore, "may regard the pleadings as mere evidence **[**10]** on the issue and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." Velasco v. Gov't of Indonesia, 370 F.3d 392, 398 (4th Cir. 2004); *see also* Cunningham v. Gen. Dynamics Info. Tech., Inc., 888 F.3d 640, 650 (4th Cir. 2018).

II. Failure to State a Claim

HN5[] Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 12(b)(6) procedure authorizes the dismissal of a complaint if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The purpose of Rule 12(b)(6) is "to test the sufficiency of a complaint and not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." Presley v. City of Charlottesville, 464 F.3d 480, 483 **[*570]** (4th Cir. 2006); *see also* Goines v. Valley Cmty. Servs. Bd., 822 F.3d 159, 165-66 (4th Cir. 2016).

HN6[] To survive a motion under Fed. R. Civ. P. 12(b)(6), a complaint must contain facts sufficient to "state a claim to relief that is plausible on its face." Bell Atl., Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 684, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Under the plausibility standard, a complaint must contain "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." Twombly, 550 U.S. at 555; *see* Painter's Mill Grille, LLC v. Brown, 716 F.3d 342, 350 (4th Cir. 2013). A complaint need not include "detailed factual allegations." Twombly, 550 U.S. at 555; Iqbal, 556 U.S. at 678. A complaint must, however, set forth "enough factual matter (taken as true) to suggest" a cognizable cause of action, "even if . . . [the] actual proof of those facts is improbable and . . . recovery is very remote and unlikely." Twombly, 550 U.S. at 556 (internal quotations **[**11]** omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to plead a claim. Iqbal, 556 U.S. at 678; *see* A Society Without a Name v. Virginia, 655 F.3d 342, 346 (4th. Cir. 2011).

HN7[] In reviewing a Rule 12(b)(6) motion, a court "must accept as true all of the factual allegations contained in the complaint" and must "draw all reasonable inferences [from those facts] in favor of the plaintiff." E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 440 (4th Cir. 2011) (citations omitted); Hall v. DirectTV, LLC, 846 F.3d 757, 765 (4th Cir. 2017). Legal conclusions drawn from those facts, however, are not afforded such deference. Iqbal, 556 U.S. at 678.

ANALYSIS

In 1977, the United States Supreme Court issued a decision upholding the constitutionality of representation fees paid to unions. *Abood v. Detroit Bd. of Ed., 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977)*. In *Abood*, the Court concluded that, although compulsory agency fees impinge employees' *First Amendment* rights to some extent, the mandatory fees were nevertheless justified by the State's compelling interest in "labor peace"; i.e., the logistical and managerial benefits that accrue when an employer negotiates only with one exclusive representative. *431 U.S. at 232-37*. This is the very behavior about which the Plaintiffs complain. However, shortly after the filing of this lawsuit, on June 27, 2018, the United States Supreme Court decided *Janus v. Am. Fed'n of State, Cty, and Mun. Emps., Council 31, U.S. , 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018)*, which expressly overturned *Abood*, holding that "States and public-sector unions may no longer **[**12]** extract agency fees from nonconsenting employees." *138 S. Ct. at 2459*. *Janus* reaffirmed that labor peace is a compelling state interest, but it overruled *Abood's* holding that labor peace justifies requiring non-union members to pay agency fees. *Id. at 2465-66*.

Maryland and other states that had allowed unions to charge representation fees under *Abood's* guidance, recognized that the law of the land had changed and responded accordingly. Regardless, Plaintiffs seek declaratory and injunctive relief, stating that Defendants' voluntary cessation of unconstitutional actions does not moot their lawsuit. In addition, Plaintiffs also request this Court to order repayment of all representation fees that had been previously **[*571]** collected. Plaintiffs also seek relief related to HB 811's requirement for disclosure of contact information, and Ms. Moesel challenges the principle of exclusive representation by the union. Each of these claims shall be addressed in turn.

I. Constitutional Claims are Moot

Plaintiffs' claims for declaratory and injunctive relief are moot. On the same day that *Janus* was decided, the Teachers' Association of Baltimore County and the Teachers' Association of Anne Arundel County contacted the Boards of Education **[**13]** of Baltimore County and Anne Arundel County, respectively, to notify them of the *Janus* decision and to instruct them immediately to cease deducting representation fees from their employees' paychecks. (*See* Galante Decl. ¶ 16, Ex. A, ECF No. 47-1; Jones Decl. ¶ 16, Ex. B, ECF No. 75-6.) The two Boards complied with that instruction. (Galante Decl. ¶ 17; Jones Decl. ¶ 17.) The Teachers' Association of Baltimore County and the Teachers' Association of Anne Arundel County have not subsequently received any representation fees. (*Id.*)

Further, the Maryland State Education Association ("MSEA") sent letters to every representation-fee payer, including Plaintiffs, explaining the *Janus* decision, informing the feepayers that no further representation fees would be deducted from their paychecks, and informing them that MSEA would promptly be refunding to them any fees that might have been pre-paid for the period after June 27, 2018. (Helfman Decl. ¶ 7, Ex. A., ECF No. 47-2.) Refund checks were issued for all such pre-collected fees. (*Id.* at ¶ 9.) Based upon these actions, combined with the declaration that they will not be resuming the deduction of representation fees from employees' paychecks, **[**14]** the Union Defendants assert that Plaintiffs' request for declaratory and injunctive relief is moot. (Defs.' Mot. Mem. 5, ECF No. 75-1.) The Union Defendants also assert a good-faith defense to liability for refunding fees collected prior to the *Janus* decision. (*Id.* at 11.) The State-Defendants also move to dismiss as moot the injunctive and declaratory relief claims in light of the decision in *Janus*. (Defs.' Mot. Mem. 4, ECF No. 74.)

Plaintiffs argue that their claims for prospective relief are not moot based on the voluntary cessation doctrine. (Pls.' Resp. 1, ECF No. 87.)[6] They also argue that the "good-faith defense" does not warrant dismissal of the refund claims at this stage of the litigation. (*Id.* at 14.)[7]

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[6] ***HN8***[] The voluntary cessation doctrine refers to situations that do not deprive a federal court of its power to hear and determine a case, even when a defendant has voluntarily ceased the challenged practice, because the allegedly wrongful behavior could reasonably be expected to recur. *See* *Porter v. Clarke, 852 F.3d 358, 360 (4th Cir. 2017)* (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 190, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000))*.

Since the *Janus* decision, multiple courts have had an opportunity to address similar claims and arguments in their jurisdictions and have uniformly held that plaintiffs' prospective claims were rendered moot under similar circumstances, and the good-faith defense bars refund claims. *See, e.g.*, *Lee v. Ohio Educ. Ass'n., 366 F. Supp. 3d 980, 2019 U.S. Dist. LEXIS 49403, 2019 WL 1323622, at *1 (N.D. Ohio Mar. 25, 2019)* ("[T]he Court joins an ever-growing number of courts that have found that causes of action seeking to enjoin collection of fair-share **[*572]** fees and recoup damages based on prior collection of those fees **[**15]** must be dismissed in light of *Janus* . . . ."); *Carey v. Inslee, 364 F. Supp. 3d 1220, 2019 U.S. Dist. LEXIS 38742, 2019 WL 1115259, at *1 (W.D. Wash. Mar. 11, 2019)*(holding that the requests for prospective injunctive and declaratory relief were moot, and agency fees were collected in good-faith reliance on then-valid law); *Cook v. Brown, 364 F. Supp. 3d 1184, Case No. 6:18-cv-01085-AA, 2019 U.S. Dist. LEXIS 32217, 2019 WL 982384 (D. Or. Feb. 28, 2019)* (same); *Mooney v. Illinois Educ. Ass'n, 372 F. Supp. 3d 690, Case No. 1:18-cv-1439, 2019 U.S. Dist. LEXIS 62955, 2019 WL 1575186, at *2 (C.D. Ill. Apr. 11, 2019)* (recognizing the growing consensus concluding that fees collected prior to *Janus* may not be recovered).

The Court of Appeals for the Fourth Circuit has not yet had an opportunity to weigh in, nor have other district courts in this Circuit. However, this Court agrees with the reasoning in these decisions and incorporates it herein. In sum, Plaintiffs' request for injunctive relief is moot because the union's communications are reliable evidence of a permanent shift in policy and the challenged conduct cannot be reasonably expected to recur, and declaratory relief is moot because there is no immediate legal controversy. Further, this Court shall dismiss with prejudice Plaintiffs' claim for a refund of the representation fees that had been paid prior to the *Janus* decision. The collection of those fees was authorized by state statute and pursuant to Supreme Court precedent, and the good-faith defense bars Plaintiffs' claim. **[**16]** *See* *Williams v. Johnson, 386 F. Supp. 280, 288-89 (D. Md. 1974)*.

Accordingly, the declaratory and injunctive claims shall be dismissed as moot. The refund claims shall be dismissed with prejudice because Defendants may assert the good-faith defense, having complied with and relied upon presumptively-valid state law and controlling Supreme Court precedent.

II. HB 811 Claim

Defendants also move to dismiss Plaintiffs' claim that the disclosure of their contact information to the union without their consent violates their *First Amendment* rights. (Defs.' Mot. Mem. 24, ECF No. 75-1; Defs.' Mot. Mem. 13, ECF No. 74-1.) Defendants assert that the disclosure of Plaintiffs' contact information by their employer to the union that is statutorily obligated to represent them does not implicate Plaintiffs' *First Amendment* rights. (Defs.' Mot. Mem. 14, ECF No. 74-1.) Defendants add that no expressive speech is involved in the disclosure, and Plaintiffs' associational choices are not implicated. (*Id.* at 19-20.)

HB 811 requires public school employers to provide their employees' contact information to the unions that represent them. (*See* HB 811, ECF No. 59-3.) This requirement does not reveal any expressive activity on the part of either the employer or the employees whose contact information is provided **[**17]** to the union. Unlike the disclosure in *NAACP v. State of Alabama*, cited by Plaintiffs, the disclosure at issue here does not reveal an affiliation with a union to the State's Attorney General. *357 U.S. 449, 463, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958)*. Nor is the disclosure at issue like that in *Brown v. Socialist Workers '74 Campaign Committee*, cited by Plaintiffs, in which contributors to a minor political party were required to be disclosed for public inspection, thus subjecting them to the reasonable probability of threats, harassment or reprisals. *459 U.S. 87, 101-102, 103 S. Ct. 416, 74 L. Ed. 2d 250 (1982)*. Further the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit have upheld the provision of personal contact information to union **[*573]** representatives in related contexts. *See*

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[7] ***HN9***[] The good-faith defense refers to a protection from liability under *42 U.S.C. § 1983* by private citizens who have relied in good faith on then-existing laws that were presumptively valid. *See* *Wyatt v. Cole, 504 U.S. 158, 168, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992)*.

NLRB v. Wyman-Gordon Co., 394 U.S. 759, 767, 89 S. Ct. 1426, 22 L. Ed. 2d 709 (1969); NLRB v. J. P. Stevens & Co., 409 F.2d 1207, 1209 (4th Cir. 1969).

The disclosure of all employees contact information to the union does not implicate an association with the union, it does not reveal any affiliation, nor does it prevent employees' anonymous speech or the employees' right to decline joining the union. Indeed, Plaintiffs' allegations are clear that "all" employees contact information is provided, regardless of union membership or political views. (Am. Compl. ¶¶ 29-33, ECF No. 59.) Plaintiffs do not argue that the union should be prevented from contacting **[**18]** them, but rather they assert their desire to protect their privacy by potentially redirecting work email or by setting up virtual contact information. (Pls.' Resp. 15-16, ECF No. 89.) Accordingly, the Plaintiffs have failed to sufficiently plead that their constitutional right of association and freedom of speech have been implicated by the disclosure of their contact information to the union. Therefore, this claim shall be dismissed without prejudice.

III. Exclusive Representation

Plaintiff, Ms. Moesel, also challenges the principle of exclusive representations, asserting that she has a constitutional right to reject union representation and to negotiate her own salary and other terms of employment. (Am. Compl. ¶¶ 44-45, ECF No. 59.) However, Plaintiffs have agreed with Defendants that this claim is foreclosed by Supreme Court precedent in *Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271, 104 S. Ct. 1058, 79 L. Ed. 2d 299 (1984)*. (Pls.' Resp. 19-20, ECF No. 89.) Plaintiffs agree that this claim should be dismissed without prejudice to them seeking to reopen the challenge if the Supreme Court grants certiorari in *Bierman v. Dayton, 900 F.3d 570 (8th Cir. 2018)*.[8] (*Id.* at 20-21.) Accordingly, this Court shall dismiss this claim without prejudice.

Plaintiff Ms. Moesel, however, continues to argue that she has an antitrust **[**19]** claim against the Union Defendants. (Pls.' Resp. 40, ECF No. 87.) Ms. Moesel alleges that the unions have violated federal antitrust laws by negotiating and entering into collective bargaining agreements. (Am. Compl. ¶¶ 46-47, ECF No. 59.) Although not stated, presumably this claim is based on Section 1 of the Sherman Act, 15 U.S.C. § 1.

HN10[] To plausibly allege an antitrust claim, a plaintiff "must first plead an agreement to restrain trade." *SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 424 (4th Cir. 2015)* (citing *Twombly, 550 U.S. at 556*); *see also* *Dickson v. Microsoft Corp., 309 F.3d 193, 202 (4th Cir. 2002)* (stating that a plaintiff must plausibly allege "(1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade."). Importantly, the complaint must contain sufficient factual allegations regarding each defendant; "[a] plaintiff in a *§ 1* case cannot assemble some collection of defendants and then make vague, nonspecific allegations against all of them as a group." *SD3, 801 F.3d at 422*. Ms. Moesel makes only a conclusory assertion that "[c]ollective-bargaining agreements that command uniform salaries for teachers regardless of subject matter are anti-competitive," and that "compelling entry-level teachers to accept **[*574]** exceedingly low salaries negotiated by a bargaining unit that they do not belong to—and by forbidding entry-level teachers **[**20]** to negotiate better deals with the school district" is a "pernicious and anti-competitive feature of collective bargaining." (Am. Compl. ¶¶ 46-47, ECF No. 59.) She adds that "[t]here is no basis in any federal labor statute for exempting public-employee unions from the antitrust laws." (*Id.* at ¶ 48.)

Plaintiff does not address her failure to plead the requisite elements of an antitrust claim, and simply argues that the Union Defendants' affirmative defenses are not relevant to defeat a motion to dismiss. However,**HN11**[] an affirmative defense can be considered by this Court on a motion to dismiss "if the face of the complaint includes all necessary facts for the defense to prevail." *Leichling v. Honeywell Int'l, Inc., 842 F.3d 848, 850-51 (4th Cir. 2016)* (citing *Goodman v. Praxair, Inc., 494 F.3d 458, 464 (4th Cir. 2007))*. Defendants assert the state-action exception,[9]

[8] Following *Knight*, every Circuit court to address the constitutionality of exclusive bargaining arrangements has concluded that these provisions do not violate the *First Amendment*. *Mentele v. Inslee, 916 F.3d 783, 787 (9th Cir. 2019)* (citing cases). *Bierman*, an Eight Circuit case, awaits a decision on the petition for certiorari filed in December 2018.

the *Noerr-Pennington*[10] exception, and the statutory labor exception set forth in *Section 6 of the Clayton Act*, *15 U.S.C. § 17*. This Court does not find it necessary to analyze these defenses at this time because Plaintiff has failed to plead a plausible antitrust cause of action. Therefore, Ms. Moesel's antitrust claim shall be dismissed without prejudice.

IV. State Law Claims

Plaintiffs are also suing the Maryland State Education Association and its local affiliates "under the **[**21]** state-law torts of conversion, trover, detinue, trespass to chattels, and any other state-law cause of action that offers relief for this unlawful seizure of [their] personal property." (Compl. ¶ 51, ECF No. 59.) Plaintiffs invoke the supplemental jurisdiction of this Court over these pendent state-law claims pursuant to *28 U.S.C. § 1367*. However, ***HN12***[] pursuant to *28 U.S.C. § 1367(c)(3)*, this Court has the discretion to decline to exercise supplemental jurisdiction if the court "has dismissed all claims over which it has original jurisdiction . . . ."

In *United Mine Workers of America v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*, the Supreme Court cautioned that "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a superfooted reading of applicable law." The *Gibbs* Court went on to say that "if the federal law claims are dismissed before trial . . . the state claims should be dismissed as well." *Id.* With no federal claims remaining in this case, this Court declines, pursuant to *28 U.S.C. § 1367(c)(3)*, to exercise supplemental jurisdiction over the state-law claims.

Therefore, Plaintiffs' state-law claims shall be dismissed without prejudice.

CONCLUSION

For the foregoing reasons:

[*575] 1. State-Defendants' Motion to Dismiss Amended Complaint **[**22]** (ECF No. 74) is GRANTED.
2. Motion to Dismiss Amended Complaint of Defendants Maryland State Education Association, Teachers' Association of Baltimore County, Teachers' Association of Anne Arundel County, and National Education Association (ECF No. 75) is GRANTED.
3. Plaintiffs' declaratory and injunctive claims are DISMISSED AS MOOT.
4. Plaintiffs' claim for a refund of fees under *42 U.S.C. § 1983* is DISMISSED WITH PREJUDICE.
5. All remaining claims in Plaintiffs' Amended Complaint (ECF No. 59) are DISMISSED WITHOUT PREJUDICE.
6. A separate order follows.

Dated: April 18, 2019.

/s/ Richard D. Bennett

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[9] Federal ***antitrust law*** does not impose a burden on the States' power to subordinate market competition to other values deemed fundamental by the State. *See* *N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 135 S. Ct. 1101, 1109, 191 L. Ed. 2d 35 (2015)*; *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 40, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)*; *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*.

[10] Referring to the Supreme Court's decisions in *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)* and *Mine Workers v. Pennington, 381 U.S. 657, 670, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*, establishing that because the *First Amendment* guarantees the right to petition government for a redress of grievances, the *Sherman Act* does not extend to "a concerted effort to influence public officials regardless of intent or purpose."

United States District Judge

[EDITOR'S NOTE: The following court-provided text does not appear at this cite in F. Supp. 3d]

[*none] ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 18th day of April 2019, ORDERED that:

1. State-Defendants' Motion to Dismiss Amended Complaint (ECF No. 74) is GRANTED.
2. Motion to Dismiss Amended Complaint of Defendants Maryland State Education Association, Teachers' Association of Baltimore County, Teachers' Association of Anne Arundel County, and National Education Association (ECF No. 75) is GRANTED.
3. Plaintiffs' declaratory and injunctive claims are DISMISSED AS MOOT.
4. Plaintiffs' claim for a refund of fees under *42 U.S.C. § 1983* is DISMISSED WITH PREJUDICE.
5. All **[**23]** remaining claims in Plaintiffs' Amended Complaint (ECF No. 59) are DISMISSED WITHOUT PREJUDICE.
6. The Clerk of this Court shall transmit a copy of this Memorandum Order to Counsel of record.
7. The Clerk of Court shall CLOSE this case.

/s/ Richard D. Bennett

United States District Judge

Med Vets, Inc. v. Vip Petcare Holdings, Inc.

United States District Court for the Northern District of California

April 22, 2019, Decided; April 22, 2019, Filed

Case No. 18-cv-02054-MMC

Reporter

2019 U.S. Dist. LEXIS 68099 *; 2019-1 Trade Cas. (CCH) P80,754; 2019 WL 1767335

MED VETS INC., et al., Plaintiffs, v. VIP PETCARE HOLDINGS, INC., et al., Defendants.

Subsequent History: Affirmed by *Med Vets, Inc. v. VIP Petcare Holdings, Inc., 2020 U.S. App. LEXIS 20357 (9th Cir. Cal., June 29, 2020)*

Prior History: *Med Vets, Inc. v. VIP Petcare Holdings, Inc., 2018 U.S. Dist. LEXIS 202666 (N.D. Cal., Nov. 28, 2018)*

Core Terms

products, retailers, relevant market, market power, medications, plaintiffs', pet, manufacturers, wholesale, amended complaint, distributors, veterinary, allegations, quotation, merger, amend, motion to dismiss, Clayton Act, prescription, secondary, commerce, factual allegations, Sherman Act, parasiticides, competitors, markets, output, circumstantially, defendants', unmeasured

Counsel: **[*1]** For Med Vets, Inc. Med Vets is a license wholesale distributor of veterinary pharmaceutical products, mostly those requiring a prescription from a veterinarian to be lawfully purchased by a customer., Bay Medical Solutions, Inc. Bay Medical is a wholesale distributor of OTC pet medications., Plaintiffs: Daniel Jay Mogin, LEAD ATTORNEY, MoginRubin LLP, San Diego, CA; Jennifer Oliver, LEAD ATTORNEY, MorginRubin LLP, San Diego, CA; Jonathan L. Rubin, LEAD ATTORNEY, PRO HAC VICE, MoginRubin LLP, Washington, D.C; Jennifer Marie Oliver, Jodie Michele Williams, Moginrubin LLP, San Diego, CA.

For VIP Petcare Holdings, Inc. VIP Petcare Holdings, Inc. operates veterinarian clinic locations and mobile clinics., PetIQ, Inc. PetIQ, Inc. is a wholesale distributor of OTC pet medications and manufactures and distributes a line of generic versions of well known pet medications and products., Defendants: David Edward Dahlquist, LEAD ATTORNEY, PRO HAC VICE, Winston and Strawn, Chicago, IL; Dana Lynn Cook-Milligan, Jeanifer Ellen Parsigian, Winston and Strawn LLP, San Francisco, CA.

Judges: MAXINE M. CHESNEY, United States District Judge.

Opinion by: MAXINE M. CHESNEY

Opinion

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' [*2] FIRST AMENDED COMPLAINT

Re: Dkt. No. 51

Before the Court is the "Motion to Dismiss Plaintiffs' First Amended Complaint," filed January 15, 2019, pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, by defendants VIP Petcare Holdings, Inc. ("VIP") and PetIQ, Inc. ("PetIQ"). On January 29, 2019, plaintiffs Med Vets Inc. ("Med Vets") and Bay Medical Solutions Inc. ("Bay Medical") filed opposition, to which defendants, on February 5, 2019, replied.

Having read and considered the papers filed in support of and in opposition to the motion, the Court rules as follows.[1]

BACKGROUND

Plaintiffs are wholesale distributors who specialize in the distribution of pet products, namely, prescription medications and certain over-the-counter ("OTC") medications. Plaintiffs have access to such products despite a policy whereby major animal-health manufacturers claim to limit the sale thereof to veterinary practices and pharmacies. In particular, a "secondary distribution system" exists, whereby plaintiffs and other wholesale distributors obtain these ostensibly restricted items and resell them to retailers. (See First Am. Compl., filed Dec. 14, 2018 ("FAC"), ¶ 6.)[2]

VIP "operates veterinary clinics" and "has served as an important independent wholesale **[*3]** source for distributors." (See id. ¶ 3.) PetIQ is a wholesale distributor of OTC pet products "to virtually every significant retailer in the U.S." (See id.)[3] On January 17, 2018, PetIQ acquired VIP.

According to plaintiffs, defendants "are using VIP's veterinarian status to acquire large quantities" of the above-referenced products "for the purpose of re-selling . . . them to PetIQ for sale to retailers" (see id.), thereby "remov[ing] an independent competitor, VIP, from the market" (see id. ¶ 1) and "foreclosing competition from other wholesaler/distributors" such as themselves (see id. ¶ 3).

Based on the above, plaintiffs bring the instant action, which has proceeded as follows.

On April 4, 2018, plaintiffs filed their initial complaint, challenging the above-described merger, and asserting claims under the Clayton Act and Sherman Act. In said pleading, plaintiffs identified two "relevant . . . product markets," namely, "the wholesale markets for prescription and restricted pet parasiticides for distribution to non-veterinary retailers (the secondary distribution system for prescription and restricted OTC pet parasiticides, respectively)." (See Compl., filed Apr. 4, 2018, ¶ 29.)

[*4] On June 1, 2018, defendants moved to dismiss the complaint. Thereafter, on August 3, 2018, the Court granted the motion, finding plaintiffs had not "pled a plausible market" (see Tr. of Proceedings for Aug. 3, 2018, at 44:20), and, in light of plaintiffs' request for sixty days to conduct additional investigation, gave plaintiffs leave to file, by October 5, 2018, an amended complaint.

On October 3, 2018, plaintiffs, rather than filing an amended complaint, filed a "Motion for Limited Expedited Discovery," whereby plaintiffs sought to obtain "a copy of defendants' Notification and Report Form[] submitted to the DOJ/FTC [Department of Justice/Federal Trade Commission] Pre-Merger Notification Office" prior to the merger (see Mot. for Ltd. Expedited Disc., filed Oct. 3, 2018, at 6:22-23), which notification, plaintiffs asserted, would provide relevant market information not otherwise available to plaintiffs (see id. at 11:26-28 (stating "HSR Notification and Report Form" requires defendants to identify their competitors and product markets, estimate market concentration, and explain anticipated competitive effects of merger)). In connection with said motion,

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[1] By order filed February 26, 2019, the Court took the motion under submission.

[2] Unless otherwise noted, the court, like the parties, uses the term "retailers" to refer to non-veterinary retailers.

[3] PetIQ also manufactures and distributes a line of generic pet medications and products (see FAC ¶ 18), an aspect of its business that is not at issue in the instant case.

plaintiffs attached a proposed **[*5]** First Amended Complaint ("PFAC"), in which they defined the "relevant . . . markets" in essentially the same terms as in their original complaint. (See PFAC, filed Oct. 3, 2018, ¶ 32.)

On October 26, 2018, in response to defendant's opposition, plaintiffs filed a reply accompanied by a "Restated" proposed First Amended Complaint ("RPFAC") (see RPFAC, filed Oct. 26, 2018), in which plaintiffs defined the relevant markets by reference to services provided, rather than by the above-referenced products themselves. In particular, plaintiffs identified the "relevant . . . markets" as "the distributing and wholesaling services involved in distributing prescription and restricted pet parasiticides." (See id. ¶ 32.)

By order filed November 28, 2018, the Court denied plaintiffs' motion for expedited discovery, and extended to December 14, 2018, the deadline to file an amended complaint, whether "with or without modification of the most recently proposed version." (See Order Den. Pls.' Mot., filed Nov. 28, 2018, at 5:16-17.)

On December 14, 2018, plaintiffs filed a third document titled First Amended Complaint, this time focusing on the distribution channel, omitting the limitation to pet parasiticides, **[*6]** and identifying a single "relevant . . . market," namely, "the wholesale distribution to non-veterinary retailers of unmeasured veterinary wellness and medication products." (See FAC ¶ 24.)[4]

By the instant motion, defendants seek an order dismissing the FAC with prejudice.

LEGAL STANDARD

Dismissal under *Rule 12(b)(6) of the Federal Rules of Civil Procedure* "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." See *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. *Rule 8(a)(2)*, however, "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" See *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Fed. R. Civ. P. 8(a)(2)*). Consequently, "a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations." See id. Nonetheless, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." See id. (internal quotation, citation, and alteration omitted).

In analyzing a motion to dismiss, a district court must accept as true all material allegations in the complaint and construe them in the light most favorable to the nonmoving party. See *NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986)*. "To survive a motion to dismiss, a complaint **[*7]** must contain sufficient factual material, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 570*). "Factual allegations must be enough to raise a right to relief above the speculative level[.]" *Twombly, 550 U.S. at 555*. Courts "are not bound to accept as true a legal conclusion couched as a factual allegation." See *Iqbal, 556 U.S. at 678* (internal quotation and citation omitted).

Generally, a district court, in ruling on a *Rule 12(b)(6)* motion, may not consider any material beyond the complaint. See *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990)*. Documents whose contents are alleged in the complaint, and whose authenticity no party questions, but which are not physically attached to the pleading, however, may be considered. See *Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)*. In addition, the Court may consider matters that are subject to judicial notice. See *Mack v. South Bay Beer Distribs., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986)*. Notably, a court "need not . . . accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." See *In re Gilead Sci. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)* (internal quotation and citation omitted).

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[4] As discussed below, plaintiffs use the term "unmeasured" to refer to products that are carried by retailers, but for which sales to consumers are "not tracked" by "retail measurement firms." (See FAC ¶ 4.)

DISCUSSION

Plaintiffs challenge defendants' merger on the theory its effect "may be substantially to lessen competition or tend to create a monopoly." (See FAC ¶ 1.) In particular, plaintiffs bring three claims, namely: (1) "Unlawful Merger," in violation of *Section 7* of **[*8]** the *Clayton Act* (see id. at 13:26); (2) "Monopolization," in violation of *Section 2* of the *Sherman Act* (see id. at 14:9); and (3) "Attempted Monopolization," in violation of *Section 2* of the Sherman Act (see id. at 14:20).

Section 7 of the Clayton Act prohibits persons "engaged in commerce or in any activity affecting commerce" from acquiring "the whole or any part of the stock or other share capital . . . of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce . . ., the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." See *15 U.S.C. § 18*. *Section 2* of the Sherman Act makes it a felony to "monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the several States." See *15 U.S.C. § 2*.

Where, as here, plaintiffs bring claims under *Section 7* of the Clayton Act and *Section 2* of the Sherman Act, they must allege a relevant market in which defendants have market power. See *United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957)* (holding, for claim under Clayton Act *§ 7*, "determination of the relevant market is a necessary predicate"); *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1044 (9th Cir. 2008)* (holding, "[i]n order to state a valid claim under the Sherman Act, a plaintiff must allege . . . both that a 'relevant **[*9]** market' exists" and that the defendant has power within that market"); see also *United States v. Continental Can Co., 378 U.S. 441, 458, 84 S. Ct. 1738, 12 L. Ed. 2d 953 (1964)* (holding Clayton Act *§ 7* is "design[ed] to prevent undue concentration"; noting "[m]arket shares are the primary indicia of market power"); *Golden Gate Pharm. Servs., Inc. v. Pfizer, Inc., 433 Fed. App'x 598, 598 (9th Cir. 2011)* (holding, in case with claims under both Clayton Act and Sherman Act, "[i]n order to state an antitrust claim, a plaintiff must identify a relevant market within which the defendant has market power").

Defendants challenge all three claims against them on the basis that plaintiffs have failed to allege "market power in a relevant market." (See Defs.' Mot. to Dism. Pls.' FAC at 8:22.)

A. Relevant Market

Although "the validity of the 'relevant market' is typically a factual element rather than a legal element," see *Newcal Indus., 513 F.3d at 1045*, "[a] complaint may be dismissed under *Rule 12(b)(6)* if the complaint's 'relevant market' definition is facially unsustainable," see id. "First and foremost, the relevant market must be a product market." See id. (emphasis in original) (explaining "consumers do not define the boundaries of the market; the products or producers do").[5] The product market "must encompass the product at issue as well as all economic substitutes for the product," see id.; see also *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)* (holding "[t]he **[*10]** outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it").

Here, as noted above, plaintiffs, in the instant complaint, allege a single market, namely, "the wholesale distribution to non-veterinary retailers of unmeasured veterinary wellness and medication products." (See FAC ¶¶ 1, 24.)[6] According to plaintiffs, "[m]easured products are those that are tracked by retail measurement services" (see id. ¶

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[5] ***Antitrust law*** also requires allegation of "a geographic market." See *Newcal Indus., 513 F.3d at 1045 n.4*. As defendants do not dispute plaintiffs' alleged geographic market, namely, "the United States" (see FAC ¶ 25), the Court does not address such issue further herein.

[6] Although defendants contend "the end user pet owner[] is the appropriate customer" (see Mot. to Dism. at 11:1), the Court, for purposes of the instant analysis, assumes the appropriate customer is, as plaintiffs contend, the non-veterinarian retailer.

2), and "[u]nmeasured products are available in retail stores . . ., but sales of these products are not tracked" by such services (see id.).[7] As also noted above, however, a relevant market is defined by the products themselves or their producers. See *Newcal Indus., 513 F.3d at 1045*. A market definition based on whether one or more business entities find it economically advantageous to collect and publish certain types of sales data is facially unsustainable.

Moreover, the FAC, absent some other modifier or means of delineation, provides no meaningful way to otherwise identify a product market. First, as to "veterinary wellness and medication products," one cannot determine what **[*11]** types of products are encompassed by the term "wellness," which plaintiffs do not define and which could include products ranging from pet food and exercise equipment to training aids. Similarly, as to "medication," although, as plaintiffs allege, the FTC identified, in a 2015 report, four categories of "pet medications,"[8] it did not, contrary to plaintiffs' allegation, identify those products as "unmeasured." (See FAC ¶ 26.) Indeed, the FTC did not even limit pet medications to those four categories or define them in the same way as plaintiffs. (Compare id. (describing four categories as follows: "Parasiticides, Vaccines, Antibiotics, and Analgesics") with Defs.' Req. for Jud. Not., filed Jan. 15, 2019 ("RJN"), Ex. 2 (FTC report) at 17 (noting "[m]ost of the pet medications available to U.S. consumers can be classified into four areas: (1) parasiticides (e.g., flea/tick/heartworm); (2) vaccines; (3) anti-infectives (e.g., antibiotics); and (4) anti-inflammatory (e.g., non-steroidal anti-inflammatory drugs, 'NSAIDs')" (emphasis added)); see also id. at 1 n.2 (noting "[t]his report does not purport to identify any relevant product market for ***antitrust law*** enforcement purposes").[9]

Further, elsewhere in the FAC, plaintiffs allege "two product categories comprise the relevant product market" (see FAC ¶ 33), namely, "Rx in Retail" and "'direct purchasing from animal health suppliers' for delivery to retailers" (see id.). Even assuming the first such category corresponds to prescription products, the second has no meaningful boundaries.

In addition, apart from the above-referenced deficiencies in plaintiffs' product definition, plaintiffs define the market too narrowly with respect to its participants, whether actual or potential. See *Newcal Indus., 513 F.3d at 1045* (holding relevant market "must include the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business") (internal quotation and citation omitted). In particular, plaintiffs allege the secondary distribution system is the "only mechanism through which retailers can obtain unmeasured veterinary wellness and medication products." (See FAC ¶ 24.) The FAC does not, however, include any factual allegations to support such conclusory assertion. Further, as set forth below, plaintiffs' exclusion of veterinarians and manufacturers conflicts with various allegations in **[*13]** their FAC, as well as with allegations in their prior pleadings and statements in the FTC report on which plaintiffs have relied.

First, as to veterinarians, given that, in the FAC, plaintiffs identify VIP, which operates veterinary clinics, as a pre-merger "horizontal competitor" in the market (see id. ¶ 11) and as having "competed with both PetIQ and plaintiffs" (see id. ¶ 17), it is not tenable to exclude veterinarians from the alleged market. See, e.g., *United States v. Topco, 405 U.S. 596, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)* (referring to "competitors at the same level of the market" as "horizontal").

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[7] The Court finds it unnecessary to address herein defendants' contention that, contrary to plaintiffs' allegations, "measured" and "unmeasured" are not used in connection with "products," but, rather, with "accounts" (see Mot. to Dism. at 12-13), i.e., retailers, who, according to defendants, "themselves determine whether or not to share sales data with measurement firms" (see id. at 13:3-4).

[8] While it appears plaintiffs use "veterinary" and "pet" interchangeably (see, e.g., FAC ¶¶ 1, 21), the two terms ordinarily are not interchangeable, the former encompassing a wide variety of animals not ordinarily kept as "pets," and, consequently, plaintiffs' use of both terms introduces into plaintiffs' market definition an additional measure of ambiguity.

[9] Defendants' unopposed Request for Judicial Notice is hereby GRANTED as to the above-cited report, as well as each of the other documents attached thereto, namely: (1) a copy of "PetIQ's June 19-20, 2018 Jefferies Consumer Conference presentation" (see RJN at 1:5-6 & Ex. 1); and (2) a copy of "PetIQ's May 15, 2018 Quarter 1 earnings call transcript" (see id. **[*12]** at 1:10-11 & Ex. 3).

Next, plaintiffs' exclusion of manufacturers conflicts with factual allegations in each of the prior iterations of their complaint, specifically, allegations that retailers also obtain pet medications from manufacturers and their approved distributors. (See Compl. ¶ 3 (alleging "retail outlet[s]" are "supplied" both "directly by a manufacturer or its distributor" and "by the 'secondary distribution system'"); PFAC ¶ 3 (same); RPFAC ¶ 3 (same)); see also *Royal Primo Corp. v. Whitewater West Indus., Ltd., 2016 U.S. Dist. LEXIS 57529, 2016 WL 1718196, at *3 (N.D. Cal. Apr. 29, 2016)* (holding court "may look to prior pleadings in determining the plausibility of an amended complaint"). Further, the exclusion of manufacturers is inconsistent with other allegations in the FAC and with **[*14]** the FTC report. (See FAC ¶ 30 (alleging Bayer, a "major veterinary pharmaceutical manufacturer, . . . support[s] the sales of its pet medications by retailers, pharmacies, and on-line merchants"); see also RJN Ex. 2 (FTC report) at 4 (stating "some manufacturers . . . supply . . . non-veterinary retailers"); id. at 20 (noting "[s]ome stakeholders report that . . . large retail pharmacies and stores have been able to purchase pet medications directly from the manufacturers").

In sum, for all of the above reasons, the Court finds plaintiffs' proposed market is not facially sustainable and, consequently, the FAC is subject to dismissal. See *Newcal Indus., 513 F.3d at 1045*; see also *Hicks v. PGA Tour, Inc., 897 F.3d 1109, 1123 (9th Cir. 2018)* (affirming dismissal of antitrust complaint where proposed markets were "facially unsustainable") (internal quotation and citation omitted).

B. Market Power

As noted above, in addition to alleging a relevant market, plaintiffs must also 9 allege defendants have market power in such market. "Market power is the power to force a purchaser to do something that he would not do in a competitive market." *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 464, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (explaining market power "has been defined as the ability of a single seller to raise price and restrict output") (internal quotations and citations omitted). **[*15]** "A failure to allege power in the relevant market is a sufficient ground to dismiss an antitrust complaint." *Rick-Mik Enterprises, Inc. v. Equilon Enterprises LLC, 532 F.3d 963, 972 (9th Cir. 2008)*.

"Market power may be demonstrated through either of two types of proof": (1) "direct evidence of the injurious exercise of market power"; or (2) "circumstantial evidence pertaining to the structure of the market." See *Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995)*. Direct evidence includes "evidence of restricted output and supracompetitive prices." See id.; see also *Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1448 (9th Cir. 1988)* (holding "proof of actual detrimental effects such as a reduction of output can obviate the need for elaborate market analysis"; noting "the finding of actual harm to competition suffices") (internal quotation and alterations omitted). To show market power circumstantially, a plaintiff must: "(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and . . . that existing competitors lack the capacity to increase their output in the short run." See *Rebel Oil, 51 F.3d at 1434*; see also *Eastman Kodak, 504 U.S. at 464* (defining market power as "the ability of a single seller to raise price and restrict output"; holding "[t]he existence of such power ordinarily is inferred from the seller's possession of a predominant **[*16]** share of the market") (internal quotation and citation omitted). Here, even assuming, arguendo, plaintiffs have alleged a plausible market, plaintiffs, as set forth below, have failed to allege facts sufficient to show, either directly or circumstantially, that defendants possess the requisite market power.

Plaintiffs allege PetIQ, as a result of the merger, "has come to dominate the secondary distribution market and forced other secondary distributors to exit by virtue of its acquired market power." (See FAC ¶ 11.) To the extent plaintiffs rely on direct evidence, such reliance is unavailing. Plaintiffs have not alleged any output restriction or supracompetitive pricing; indeed, as to price, plaintiffs do not allege any increase at all. Nor have plaintiffs alleged any other "actual harm" to competition, see *Oltz, 861 F.2d at 1448*; other than plaintiff Bay Medical, the FAC identifies no wholesale distributor as having been "foreclosed from the market" (see FAC ¶ 32),[10] and, in any event, such "foreclosure" appears to be limited to a single product, "Frontline Plus" (see id.).

Plaintiffs' effort to show market power circumstantially likewise fails. Plaintiffs allege defendants "claim[] to **[*17]** control over 90%" of the alleged market (see id. ¶ 3; see also ¶ 37),[11] an allegation that is based on a PetIQ presentation slide, which, plaintiffs allege, shows "PetIQ now claims to distribute . . . 90% of 'direct purchasing from animal health suppliers' for delivery to retailers" (see id. ¶ 33). Plaintiffs have submitted, however, only a portion of the slide (see id. at 11:1-15), whereas a review of the entire slide, titled "Significant Improvements in Our Supply Chain," makes clear the 90% figure pertains to the source of PetIQ's own supply of products for distribution, not its share of the alleged wholesale market. (See RJN Ex. 3 at 12; see also id. Ex. 1 at 12 (reporting "roughly 90% of our distribution business is through a direct relationship with the animal health manufacturers").) Plaintiffs' reliance on said exhibit is, consequently, misplaced. See *In re Gilead Sci. Sec. Litig., 536 F.3d at 1055*; see also *Roth v. Garcia Marquez, 942 F.2d 617, 625 n.1 (9th Cir. 1991)* (holding, "when the allegations of the complaint are refuted by an attached document, the Court need not accept the allegations as being true").

Next, relying on a different slide, plaintiffs allege PetIQ "claims to distribute a '95% Share of Rx in Retail.'" (See FAC ¶ 33.) Such allegation, although an accurate characterization **[*18]** of the slide's content, does not correspond to the alleged market, which encompasses "unmeasured pet wellness and medication products," a different, and much broader, array of products than prescription products. Notably, plaintiffs have not provided any figures corresponding to PetIQ's share of ostensibly restricted OTC products or its share of prescription and such restricted OTC products combined, nor provided any figures as to what share of the market either defendant possessed prior to the merger. See, e.g., *Continental Can, 378 U.S. at 460* (analyzing market power of acquiring firm by reference to market shares possessed, prior to merger, by acquirer and acquiree; finding violation of Clayton Act *§ 7*, where acquisition both "added significantly to [acquirer's] position" and "reduced from five to four the most significant competitors").[12]

Lastly, with respect to the two parts of the final element required for a circumstantial showing of market power, "barriers to entry and barriers to expansion," see *Rebel Oil, 51 F.3d at 1439*, plaintiffs' allegations are wholly conclusory as to the former and absent as to the latter. As to barriers to entry, plaintiffs allege that "[o]ffering . . . distribution services [in the secondary market] **[*19]** requires veterinary licensing and other regulatory authorizations and appropriate relationships with manufacturers and retailers." (See FAC ¶ 39.) In connection therewith, however, plaintiffs provide no factual elaboration. Plaintiffs do not, for example, include any allegation as to the degree of difficulty involved in obtaining such authorization, nor do they explain their assertion that it would be "practically impossible" to cultivate the above-referenced business relationships. (See id.) In any event, given plaintiffs' failure to include any allegation bearing on barriers to expansion, the requisite showing has not been made. See *Rebel Oil, 51 F.3d at 1434*.

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[10] Plaintiffs allege the other wholesale distributors include, along with plaintiffs, "Southeastern Veterinary Exports, Lambert Vet Supply, Rainbow Vet Supply, Pet Vet Supplies, and other distributors not known to plaintiffs" (see FAC ¶ 37), and then allege, in conclusory and imprecise fashion, such entities "are being foreclosed from the retail customer base and have been or may be forced to exit the market" (see id.) (emphasis added).

[11] Plaintiffs also allege the merger "establishes a single distributor for several competing veterinary pharmaceutical manufacturers" (see FAC ¶¶ 12, 38), but do not identify those manufacturers or provide factual support for said allegation.

[12] Plaintiffs' effort to connect the 95% figure, which pertains solely to prescription products, with their alleged market (see Opp'n at 17:21-18:1) (contending "nearly all of the unmeasured products flowing through the secondary distribution channel are prescription" products) is not consistent with their contention that Frontline Plus, an OTC product, "contributes significantly to defendants' dominance over the relevant market" (see id. at 18 n.7), nor is it supported by their citations to the FAC (see, e.g., FAC ¶ 2 (alleging "[m]ost or all of the products served by the relevant market in this case are preventative medications, . . ., both prescription and non-prescription")).

In light of the foregoing, the Court finds the FAC is subject to dismissal for failure to allege market power in a relevant market. See *Rick-Mik Enters., 532 F.3d at 972*.[13]

C. Leave to Amend

In their opposition, plaintiffs, without providing any additional facts they could allege, request another opportunity to amend.

As discussed above, however, the operative pleading, notwithstanding its title, is in fact the fourth iteration of plaintiffs' complaint, over the course of which filings plaintiffs have repeatedly changed their definition of the relevant market. Last August, at the hearing **[*20]** on defendants' first motion to dismiss, plaintiffs asked the Court for sixty days to amend their complaint. At this point, having been granted not only the requested sixty days, but an additional extension as well, the instant complaint fares no better than its predecessors, and, as noted, plaintiffs have not identified any factual allegations that could be added to cure the above-described deficiencies. In short, it appears plaintiffs have pleaded all the facts they have, and those facts are not sufficient to support their claims. Under such circumstances, the Court finds further leave to amend would be futile. See *Dougherty v. City of Covina, 654 F.3d 892, 901 (9th Cir. 2011)* (finding leave to amend would be futile where plaintiff failed to allege facts sufficient to state claim and did not identify any additional facts that could be pled); see also *Simon v. Value Behavioral Health, Inc., 208 F.3d 1073, 1084 (9th Cir. 2000)* (affirming denial of leave to amend antitrust complaint; explaining "[a]lthough it is theoretically possible for [plaintiff] to allege more specific facts, his failure to do so after the district court had given him three opportunities to amend his original complaint and had discussed with him the substantive problems with his claims suggests the futility of further amendment"), overruled on other **[*21]** grounds by *Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir. 2007)* (en banc).

CONCLUSION

For the reasons stated above, defendants' Motion to Dismiss is hereby GRANTED and the FAC is DISMISSED without further leave to amend.

The Clerk is directed to close the file.

IT IS SO ORDERED.

Dated: April 22, 2019

/s/ Maxine M. Chesney

MAXINE M. CHESNEY

United States District Judge

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[13] Given the above findings as to plaintiffs' failure to allege a relevant market and market power, the Court does not reach defendants' additional arguments in support of dismissal.

Fireworks Lady & Co., LLC v. Firstrans Int'l Co.

United States District Court for the Central District of California

April 23, 2019, Decided; April 23, 2019, Filed

Case No.: CV 18-10776-CJC (MRWx)

Reporter

2019 U.S. Dist. LEXIS 130887 *

FIREWORKS LADY & CO., LLC, Plaintiff, v. FIRSTRANS INTERNATIONAL CO., Defendant.

Subsequent History: Dismissed by, in part, Dismissed by, Without prejudice, in part *Fireworks Lady & Co., LLC v. Firstrans Int'l Co., 2019 U.S. Dist. LEXIS 209935, 2019 WL 6448943 (C.D. Cal., Aug. 8, 2019)*

Core Terms

fireworks, shipping, tying arrangement, tying product, tied product, allegations, transport, motion to dismiss, products

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For Firstrans International Company, Defendant: Diana M Feinstein, Gibson Dunn and Crutcher LLP, Los Angeles, CA USA; Joseph R Rose, Gibson Dunn and Crutcher LLP, San Francisco, CA USA; Joshua Lipton, PRO HAC VICE, Gibson Dunn and Crutcher LLP, Washington, DC USA; Richard Parker, Gibson Dunn and Crutcher LLP, Washington, DC USA.

Judges: CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE.

Opinion by: CORMAC J. CARNEY

Opinion

ORDER GRANTING MOTION TO DISMISS [Dkt. 32]

I. INTRODUCTION & BACKGROUND

On December 31, 2018, Plaintiff Fireworks Lady & Co., LLC ("Fireworks Lady") filed this putative class action against Defendant Firstrans International Co. ("Firstrans"), an American company that transports fireworks from the People's Republic of China ("PRC") to the United States. (Dkt. 1 [Complaint, hereinafter **[*2]** "Compl."].) Plaintiff, a Florida fireworks merchant, purchases its fireworks from unidentified manufacturers in the PRC. (Dkt. 37 at 6-7.) Those manufacturers then contract with nonparty Shanghai Huayang International Logistics Co. ("Huayang") to ship the fireworks to the United States. (*Id.*) The PRC requires any company that ships fireworks to obtain a special permit in light of the safety hazards involved. According to Plaintiff, Huayang is the only company legally permitted to conduct inland transport of fireworks from the PRC manufacturers' warehouses to the PRC seaports. (Compl. ¶¶ 22-23.) Huayang purportedly requires its customers to then use Defendant Firstrans to ship the fireworks from the PRC seaports to the United States. (*Id.* ¶ 2.)

Plaintiff alleges that Firstrans violated federal ***antitrust law*** by unlawfully tying the purchase of PRC fireworks to its shipping services, enabling it to charge "grossly supracompetitive shipping prices." (*Id.* ¶¶ 2, 48.) On behalf of itself and all entities who relied on Firstrans to ship fireworks from the PRC to the United States, Plaintiff seeks damages and injunctive relief pursuant to *Section 1* of the Sherman Act, *15 U.S.C. § 1*, and *Section 4* of the Clayton Act, *15 U.S.C. § 15*. (*Id.* ***[*3]*** ¶ 39.) Before the Court is Firstrans's motion to dismiss Plaintiff's Complaint pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. (Dkt. 32 [hereinafter "Mot."].) For the following reasons, the motion is **GRANTED**.[1]

II. LEGAL STANDARD

A motion to dismiss under *Rule 12(b)(6)* tests the legal sufficiency of the claims asserted in the complaint. The issue on a motion to dismiss for failure to state a claim is not whether the claimant will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997)*. *Rule 12(b)(6)* is read in conjunction with *Rule 8(a)*, which requires only a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. When evaluating a *Rule 12(b)(6)* motion, the district court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994)*. The district court may also consider additional facts in materials that the district court may take judicial notice, *Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994)*, as well as "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading," *Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)*, *overruled in part on other grounds by* *Galbraith v. Cty. of Santa Clara, 307 F.3d 1119 (9th Cir. 2002)*.

However, "the tenet that a court must accept as true all of **[*4]** the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*; *see also* *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (stating that while a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, courts "are not bound to accept as true a legal conclusion couched as a factual allegation" (citations and quotes omitted)). Dismissal of a complaint for failure to state a claim is not proper where a plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." *Twombly, 550 U.S. at 570*. In keeping with this liberal pleading standard, the district court should grant the plaintiff leave to amend if the complaint can possibly be cured by additional factual allegations. *Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995)*.

III. ANALYSIS

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . ." *15 U.S.C. § 1*. To establish liability under *Section 1*, a plaintiff must prove (1) the existence of an agreement, and (2) that the agreement was an unreasonable restraint of trade. *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1178 (9th Cir. 2016)*. Plaintiff asserts that Firstrans restrained trade by unlawfully "tying" the sale of PRC fireworks to the purchase of Firstrans's shipping services. **[*5]**

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[1] Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* *Fed. R. Civ. P. 78*; *Local Rule 7-15*. Accordingly, the hearing set for April 29, 2019, at 1:30 p.m. is hereby vacated and off calendar.

In a tying arrangement, a "seller conditions the sale of one product (the tying product) on the buyer's purchase of a second product (the tied product)." *Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 912 (9th Cir. 2008)*. "Tying arrangements are forbidden on the theory that, if the seller has market power over the tying product, the seller can leverage this market power through tying arrangements to exclude other sellers of the tied product." *Id.* To establish *Section 1* liability based on a tying arrangement, a plaintiff must allege "(1) that the defendant tied together the sale of two distinct products or services, (2) that the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product, and (3) that the tying arrangement affects a 'not insubstantial volume of commerce' in the tied product market." *Id. at 913* (quoting *Paladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1159 (9th Cir. 2003))*.

Firstrans moves to dismiss on the ground that Plaintiff has not pled the first element of a tying arrangement: a tie between two distinct products or services. To establish a tie between "distinct products or services," a plaintiff must allege facts that show "a sufficient demand for the purchase of the tied product separate from the tying product." *Rick-Mik Enters. Inc. v. Equilon Enters., LLC, 532 F.3d 963, 974 (9th Cir. 2008)*. Plaintiff argues that there are several **[*6]** tying arrangements at issue here. The Court addresses each one in turn.

Plaintiff at times alleges that Firstrans conditioned the sale of fireworks (tying product) on the purchase of Firstrans's shipping services (tied product). (Compl. ¶ 52.) This theory fails for two reasons. First, Plaintiff fails to plausibly allege that U.S. customers want to purchase the shipment or transport of fireworks without also purchasing the fireworks themselves. *See* *Rick-Mik Enters., 532 F.3d at 974* (stating that a plaintiff must allege "a sufficient demand for the purchase of the tied product separate from the tying product"). Second, Plaintiff never alleges that Firstrans sells fireworks—only that it arranges for their transport from the PRC seaports to the United States. (*See* Compl. ¶ 12 ["Firstrans specializes in arranging the shipment of fireworks from the PRC to the U.S."].) Accordingly, even if the fireworks and their shipment are "distinct products or services," Plaintiff has failed to offer any facts indicating that Firstrans has conditioned the sale of one on the purchase of the other.[2] Firstrans seemingly has no involvement in the sale of the tying product.

Plaintiff next asserts in its moving papers that the various segments **[*7]** of Firstrans's shipping process constitute separate and distinct products and services. (*See* Dkt. 37 [Pl.'s Opp'n] at 9 [dividing Firstrans's shipping process into "freight forwarding, in-land river transport, ware-housing and storage, specialized local trucking, and marine cargo handling"].) This theory likewise fails. The fact that a shipping company controls the discrete segments of its shipping process does not indicate the presence of distinct products or services. Under Plaintiff's theory, any shipping company would potentially face antirust liability whenever it transports a product through multiple modes of transportation or uses a storage facility in the course of delivering its goods. Further, the Complaint contains no allegation that suggests that demand for one segment of Firstrans's shipping process is separate from demand for the other segments. Nor does it allege that Firstrans conditions the sale of one aspect of its shipping services on the purchase of another.

Plaintiff has failed to allege any facts that plausibly suggest Firstrans has engaged in an unlawful tying arrangement. Plaintiff offers no other basis for asserting antitrust liability. Accordingly, Firstrans's **[*8]** motion to dismiss is **GRANTED**. Because it is unclear whether the deficiencies in the Complaint could be cured by amendment, the Complaint is **DISMISSED WITH FOURTEEN DAYS' LEAVE TO AMEND**.

IV. CONCLUSION

For the foregoing reasons, Firstrans's motion is **GRANTED**. Plaintiff's Complaint is **DISMISSED WITH FOURTEEN DAYS' LEAVE TO AMEND**.

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[2] At other points in the Complaint, Plaintiff alleges a tie between "the acceptance of fireworks imported" and "the shipping services provided by [Firstrans]." (Compl. ¶ 48.) The "acceptance of fireworks" is not a product or service. It is an action on the part of U.S. customers. In any event, customers do not purchase Firstrans's shipment of fireworks without also "accepting" the fireworks themselves.

DATED: April 23, 2019

/s/ Cormac J. Carney

CORMAC J. CARNEY

UNITED STATES DISTRICT JUDGE

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ECB United States v. Savencia

United States District Court for the Southern District of Florida

April 24, 2019, Decided; April 24, 2019, Entered on Docket

Case No. 1:18-cv-24755-UU

Reporter

2019 U.S. Dist. LEXIS 229344 *; 2019 WL 8267072

ECB USA, INC., et al., Plaintiffs, v. SAVENCIA, S.A., et al., Defendants.

Core Terms

forum selection clause, forum-selection, parties, misrepresentations, encompassed, district court, contractual, fraudulent, factors, cases, signatory, Foods, Defendants', allegations, Antitrust, venue, do business, subsidiary, nonparty, license

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Judges: URSULA UNGARO, UNITED STATES DISTRICT JUDGE.

Opinion by: URSULA UNGARO

Opinion

ORDER

THIS CAUSE comes before the Court upon Defendants' Zausner Food Corp. ("Zausner") and ZNHC, Inc.'s ("ZNHC") Motion to Transfer Venue to the United States District Court for the District of Delaware (the "Motion"). D.E. 5. The Court has considered the pertinent portions of the record and is otherwise fully advised in the premises.

I. Factual Background

The following facts are taken from Plaintiff's complaint. D.E. 1.

A. Parties

Plaintiffs ECB **[*2]** USA ("ECB"), and Atlantic Ventures Corp. ("AV"), are Florida corporations doing business in Miami-Dade County Florida. D.E. 1 ¶¶ 2-3. Defendant Savencia S.A., is a French corporation. *Id.* ¶ 5. Defendant

Zausner Foods Corp., is a Delaware corporation doing business in Miami-Dade County Florida. Zausner is a corporation within the Savencia group and is fully controlled by Savencia. D.E. 1 ¶ 5, 11. ZNHC is a Delaware corporation doing business in Miami-Dade County and a wholly-owned subsidiary of Zausner. Nonparty Schratter Foods Incorporated ("SFI") is a Delaware corporation doing business in Miami-Dade Florida, and at the time of the Stock Purchase Agreement, was a subsidiary of ZNHC, and ultimately a subsidiary of Savencia. *Id.* ¶ 4.

B. Purchase of SFI & Stock Purchase Agreement

On December 6, 2014, Zausner and ZNHC entered into a Stock Purchase Agreement (the "SPA") to sell SFI to ECB and nonparty Voss Enterprises, Inc.[1] D.E. 1-1. In the SPA, ZNHC made numerous representations and warranties, such as:

> To the knowledge of [ZNHC], Schratter Foods has all necessary governmental licenses and permits to operate the Business as it is presently being operated and has passed all inspections ancillary **[*3]** to the operation of the business in the various jurisdictions where Schratter foods has been and is conducting its business.

D.E. 1 ¶ 30. Although not a party to the SPA, SFI relied heavily on sales of Savencia's goods for its profitability. D.E. 1 ¶ 65. According to Plaintiffs, the SPA required Savencia to price its products sold to SFI after closing of the SPA, at pre-determined rates that would enable SFI to have a ten percent profit margin on the distribution of such products. *Id.* ¶ 66.

The SPA also contained a forum-selection clause, stating:

> Any action or proceeding in connection with this Agreement shall be brought in a court of record of the State of Delaware in and the City of Wilmington or in the United States District Court in such county, the Buyer and the Seller consenting to the exclusive jurisdiction thereof.

D.E. 1 at 102 (Section XIII.5 "Applicable Law and Attorneys' Fees").

According to Plaintiffs, Defendants made numerous misrepresentations and engaged in fraudulent conduct relating to the value of SFI before, during, and after the execution of the SPA. After discovering that many of Defendants' representations in the SPA were false and that SFI was not as valuable **[*4]** as was represented, Plaintiffs brought suit, arguing that they did not receive the benefit of the SPA.

II. Procedural Background

On October 24, 2018, Plaintiffs filed this action in the Eleventh Judicial Circuit in and for Miami-Dade County. D.E. 1. In their complaint, Plaintiffs bring Six Counts: (1) breach of contract against ZNHC; (2) fraud in the inducement against Savencia and ZNHC arising out of misrepresentations made during the negotiation of the SPA; (3) fraud against Savencia and ZNHC arising out of misrepresentations made during the negotiation of the SPA; (4) violations of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") arising out of Savencia and ZNHC's frauds and unconscionable business practices; (5) guaranty liability against Zausner, alleging that Zausner, as ZNHC's guarantor under the SPA, is liable for ZNHC's breach of contract and non-performance; and (6) violation of the Florida Antitrust Act of 1980 arising out of Savencia's alleged increase in price of goods sold to SFI post-SPA, in violation of the SPA. D.E. 1. On November 14, 2018 Defendants ZNHC and Zausner removed the instant Complaint to this Court. D.E. 1

Defendants Zausner and ZNHC subsequently **[*5]** moved to transfer venue under *28 U.S.C. § 1404(a)*, arguing that the mandatory forum selection clause in the SPA requires that suits "in connection with" the SPA be brought in Delaware. D.E. 5. The Motion is fully briefed and ripe for disposition.

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[1] ECB and Voss Enterprises assigned portions of their equity in SFI to AV, then owned by ECB and VEI in the same proportions as their prior direct ownership of SFI. D.E. 1 at 19 n.1; *see* D.E.1 at 125.

III. Legal Standard

28 U.S.C. § 1404 states, in relevant part: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." § 1404(a). "Although a forum-selection clause does not render venue in a court 'wrong' or 'improper' within the meaning of § 1406(a) or Rule 12(b)(3), the clause may be enforced through a motion to transfer under § 1404(a)." *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas, 571 U.S. 49, 59 (2013)*. 28 U.S.C. Section 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." *Id.* "Unlike § 1406(a), § 1404(a) does not condition transfer on the initial forum's being 'wrong.' And it permits transfer to any district where venue is also proper (i.e., "where [the case] might have been brought") or to any **[*6]** other district to which the parties have agreed by contract or stipulation." *Atl. Marine Const. Co., 571 U.S. at 59*. "Section 1404(a) therefore provides a mechanism for enforcement of forum-selection clauses that point to a particular federal district." *Id.* "A valid forum-selection clause is given controlling weight in all but the most exceptional cases." *Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 33, 108 S. Ct. 2239, 2246, 101 L. Ed. 2d 22 (1988)* (Kennedy, J., concurring).

IV. Discussion

A. The Forum Selection Clause is Valid

The forum selection clause at issue, provides:

> Any action or proceeding in connection with this Agreement shall be brought in a court of record of the State of Delaware in and the City of Wilmington or in the United States District Court in such county, the Buyer and the Seller consenting to the exclusive jurisdiction thereof.

D.E. 1 at 102 (Section XIII.5 "Applicable Law and Attorneys' Fees").

In the instant Motion, Defendants move to transfer the action pursuant to 28 U.S.C. § 1404(a) to the United States District Court for the District of Delaware, arguing that the forum selection clause is valid, and that the action before this Court is a "proceeding in connection with this Agreement" under the forum-selection clause. D.E. 5. "The validity of a forum selection clause is determined under the usual rules governing the enforcement **[*7]** of contracts in general." *P & S Bus. Machines, Inc. v. Canon USA, Inc., 331 F.3d 804, 807 (11th Cir. 2003)*. "Forum selection clauses are presumptively valid, and the burden of proving their unreasonableness is a heavy one." *See Marco Forwarding Co. v. Cont'l Cas. Co., 430 F. Supp. 2d 1289, 1293 (S.D. Fla. 2005)*. Plaintiffs do not challenge the validity of the forum selection clause, arguing instead that this action is not encompassed by the forum selection clause and that its enforcement would be unreasonable. *P & S Bus. Machines, Inc., 331 F.3d at 807* ("The burden is on the party opposing the enforcement of the forum selection clause to show that the contractual forum is sufficiently inconvenient to justify retention of the dispute."). Thus, the Court agrees that the forum-selection clause is valid and turns to Defendants' arguments against its enforcement.

B. The Forum Selection Clause Encompasses All Claims

Plaintiffs argue that their claims are "outside the scope of the contract, so . . . the forum selection clause is not applicable." D.E. 15 at 3. Specifically, Plaintiffs argue that the majority of their claims are not "in connection with" the SPA because they allege fraud, violation of the Florida Antitrust Claim of 1980, and violations of the FDUTPA, which arise not out of the SPA, but out of "egregious pre-contractual fraud committed by both signatories and non-signatories to the **[*8]** SPA." D.E. 15 at 5.

In support, Plaintiffs rely almost exclusively on *Newco Energy Acquisitions Holdings, LLC v. Shulgen, No. 12-81249-CIV, 2013 U.S. Dist. LEXIS 195631, 2013 WL 12149763, at *3 (S.D. Fla. Mar. 28, 2013)*. In *Newco*, the plaintiff alleged "fairly lengthy fraudulent pre-contractual conduct," and the forum selection clause only encompassed claims "in connection with" the contract. *Id.* The court found that "the phrase 'in connection with' encompasse[d] fewer situations than a broad 'in any way related to' clause" and therefore given the plaintiff's significant allegations of fraudulent pre-contractual conduct, the court found that those claims were not encompassed by the forum selection clause. *See also* Armco, Inc. v. N. Atlantic Ins. Co. Ltd., 68 F.Supp.2d 330 (S.D.N.Y.1999) (holding that allegations of fraudulent scheme before execution of SPA were not encompassed by forum-selection clause).[2]

There are numerous problems with Plaintiffs' argument. First, neither *Newco* nor *Armco* are binding precedent. Second, Newco's interpretation of forum selection clauses, that those referencing **[*9]** actions "in connection with" a contract encompass fewer situations than more broadly worded forum selection clauses, is not echoed in the law in this circuit; particularly where the forum selection clause, as in this case, references "[a]ny action or proceeding." For example, in *Ricoh*, the Eleventh Circuit held that the plaintiff's fraud and antitrust claims were subject to the forum selection clause because the language of the forum selection clause read "any case or controversy arising under or in connection with this agreement" and the transfer of entire cases, including fraud claims, "promotes a more orderly and efficient disposition of the case . . . [and] encourage[s] commercial reliance on forum selection clauses and thus keep[s] intact the usefulness of these agreements." 810 F.2d at 1070 (emphasis added). This interpretation is borne out in cases throughout this circuit. *See* Am. Residential Equities, LLC v. Del Mar Datatrac, Inc., No. 08-20014-CIV, 2008 U.S. Dist. LEXIS 128560, 2008 WL 11333097, at *3 (S.D. Fla. Mar. 13, 2008) (Ungaro, J.) ("Clauses referencing 'any lawsuit regarding this agreement' have been broadly construed to include extra-contractual claims.") (citation omitted); *see also* Pods, Inc. v. Paysource, Inc., No. 8:05-CV-1764-T-27EAJ, 2006 U.S. Dist. LEXIS 31838, 2006 WL 1382099, at *2 (M.D. Fla. May 19, 2006) ("Broadly construing the forum selection clause in the Agreement, the reference to "any lawsuit" is sufficiently broad as to apply to Plaintiff's claims **[*10]** in this lawsuit.") (emphasis added); Picken v. Minuteman Press Intl., Inc., 854 F. Supp. 909 (N.D.Ga.1993) (holding that franchisee's claims for fraud were covered by forum selection clause applying to "any litigation commenced by either party hereunder."); Vernon v. Stabach, No. 13-62378-CIV, 2014 U.S. Dist. LEXIS 63055, 2014 WL 1806861, at *4 (S.D. Fla. May 7, 2014) ("A federal court should construe forum selection clauses broadly."). Accordingly, given that this forum selection clause encompasses "any action in connection with [the SPA]" the Court finds that it encompasses all of Plaintiffs' claims, requiring transfer to Delaware.

Third, even if, as *Newco* suggests, this forum selection clause were somehow more limited in scope, Plaintiffs' claims are all encompassed by the forum selection clause because they are overwhelmingly "in connection with"

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[2] Plaintiffs also rely on *Newco*'s narrow interpretation of forum selection clauses to briefly argue that the forum selection clause is merely permissive. D.E. 15 at 4. This is important because the Eleventh Circuit "enforce[es] only those clauses that unambiguously designate the forum in which the parties must enforce their rights under the contract." Florida Polk County v. Prison Health Servs., Inc., 170 F.3d 1081, 1084 n. 8 (11th Cir.1999). "A mandatory clause designates a specific forum as the exclusive forum in which to litigate the dispute. A permissive clause merely consents . . . to jurisdiction in the designated forum and does not foreclose litigation in an alternative forum. Cardoso v. Coelho, 596 F. App'x 884, 885-86 (11th Cir. 2015). "An action is only subject to dismissal based on a forum selection clause if the import of the language of the clause as a whole is to provide a particular court or courts with "exclusive jurisdiction," although the clause need not include the word "exclusive." Wai v. Rainbow Holdings, 315 F. Supp. 2d 1261, 1270 (S.D. Fla. 2004). Here, the Court agrees with Defendants that the forum selection clause is plainly mandatory because it provides for exclusive jurisdiction in Delaware or Wilmington and provides no alternative forum for suit. *See* D.E. 1 at 102 (Section XIII.5 "Applicable Law and Attorneys' Fees") (any action "shall be brought in a court of record of the State of Delaware in and the City of Wilmington or in the United States District Court in such county, the Buyer and the Seller consenting to the exclusive jurisdiction thereof.") (emphasis added). In addition, the forum selection clauses uses the word "shall," which the Eleventh Circuit has held is an indicator that the clause is mandatory. *See* Slater v. Energy Servs. Grp. Int'l, Inc., 634 F.3d 1326, 1330-31 (11th Cir. 2011) (holding "that the forum designation in the clause is not permissive, but mandatory," because the clause stated "all claims or causes of action relating to or arising from this Agreement shall be brought in a court in the City of Richmond, Virginia," and "the use of the term 'shall' is one of requirement.") (emphasis added); Walker v. Hallmark Bank & Tr., Ltd., 707 F. Supp. 2d 1322, 1325 n.1 (S.D. Fla. 2010) (concluding forum selection clause was mandatory "based on the use of the terms 'shall' and 'exclusive.'") (emphasis added); *see also* Snapper, Inc. v. Redan, 171 F.3d 1249, 1260-1262 n. 24 (11th Cir.1999) (stating that a selection clause is mandatory when "it dictates an exclusive forum for litigation under the contract" and finding forum selection clause stating that an action "may be brought in the courts of the State of Georgia or the United States District Court, Northern District of Georgia, Atlanta Division, all as Creditor may elect" to be permissive) (emphasis added).

the SPA. As an initial matter, two of these claims are literally connected to the SPA: Count One's breach of contract claim and Count Five's Guaranty liability claim.[3] As to the remaining fraud and antitrust claims, the Court agrees with Defendants that Plaintiffs drastically mischaracterize these claims in response to Defendants' Motion as allegations of "a wide ranging conspiracy to defraud," D.E. 15 at 6, in an attempt to avoid the forum selection clause. This they cannot do. *See* *Stiles v. Bankers Healthcare Grp., Inc., 637 F. App'x 556, 559 (11th Cir. 2016)* ("While Plaintiffs contend that **[*11]** the loan agreement itself is void due to Defendant's allegedly fraudulent conduct, they do not argue that these general allegations of fraud render the forum-selection clause unenforceable . . . a plaintiff seeking to avoid enforcement of a forum-selection clause based on fraud must show that the choice clause itself was included in the contract due to fraud, not simply that there is a dispute regarding fraud arising from the transaction.") (quotations omitted).

In reality, each misrepresentation upon which Plaintiffs' fraud claims rely is the obverse of a representation or warranty in the SPA. For example, in Count Two, Plaintiffs bring a claim for fraudulent inducement based on the alleged misrepresentations contained in paragraphs 1 through 71 of the complaint. D.E. 1 ¶¶ 79-84. Almost half of these paragraphs reflect the following structure:

> **In the SPA, ZNHC made the following representations**, warranties, commitments and assurances, *inter alia*:
>
> To the knowledge of the [ZNHC], Schratter Foods has all necessary governmental licenses and permits to operate the Business as it is presently being operated and has passed all inspections ancillary to the operation of **[*12]** the Business in the various jurisdictions where Shcratter Foods has been and is conducting its Business . . . **this representation was false**.

Id. at 30-31 (emphasis added); *see also id.* at ¶¶ 32-39, 42, 43, 44, 45, 47, 48.

The Complaint also contains seven pages of alleged misrepresentations "upon which ECB USA relied in entering into the SPA" D.E. 1 ¶ 63(a)-(hh). Each of these misrepresentations relates to a term of the SPA, for example, "Savencia and ZNHC misrepresented the condition of SFI's subsidiaries, as required under Exhibit "A" Sect. III.6 [the SPA]." D.E. 1 ¶ 63(f). Even the fraudulent misconduct that is alleged to have occurred *after* the SPA is framed in terms of its violation of the SPA: "Savencia and its affiliated entities charged SFI prices that were not only in violation of the pricing policies set forth in the SPA but that were up to three times higher than the prices previously charged to SFI when SFI was under the control of Savencia/ZNHC." D.E. 1 ¶ 67.

As Defendants put it:

> it is manifestly clear from the allegations in the Complaint that all of Plaintiffs' Fraud-Based Claims here did in fact arise "in connection with" the transaction established and evidenced in the SPA. Plaintiffs' **[*13]** fraud-based allegations are identical to their contractual allegations, detailing the same violations, referencing the same representations and warranties, and arising from the same contractual relationship.

D.E. 20 at 5. And as this Court previously put it: "[a]s for the fraud in the inducement and negligent misrepresentation claims, because these claims arose out of the contract, they are governed by the parties' agreement concerning venue." *Am. Residential Equities, LLC, No. 08-20014-CIV, 2008 U.S. Dist. LEXIS 128560, 2008 WL 11333097, at *2* (emphasis added); *Ricoh, 779 F.2d. at 650* ("It is difficult to imagine a commercial case where contractual issues could not and would not be intertwined with claims in tort or criminal or ***antitrust law***.").

Accordingly, the Court finds that this action constitutes "any action or proceeding in connection with [the SPA]," and pursuant to the forum selection clause is subject to the exclusive jurisdiction of the United States District Court for the District of Delaware or a court in the State of Delaware. *Stiles, 637 F. App'x at 561* ("the forum-selection clause clearly applies to Plaintiffs' fraud and negligence claims, which claims are based on the same core facts and

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[3] Plaintiffs do not dispute that these claims are subject to the forum selection clause, but argue that these two claims should not be transferred to Delaware because "public interest factors" justify maintaining this action in this Court. As discussed in more detail *infra*, the public interest factors do not justify maintaining suit in this Court. *See infra* pp. 11-12.

essentially the same legal argument as the TILA claims."); *see* *Digital Envoy, Inc. v. Google, Inc., 319 F. Supp. 2d 1377, 1380 (N.D. Ga. 2004)* ("Digital Envoy contends that this action is not governed by the **[*14]** forum selection clause because the tort claims it asserts are independent of the license agreement and would exist even if there were no agreement between the parties. This argument is misguided. While Digital Envoy might assert the same claims against Google in the absence of a contractual agreement between the parties, the fact remains that in this instance, there is an agreement; and one of the central issues in this case—if not the central issue in this case—is whether that agreement extends to Google's current use of Digital Envoy's technology. Moreover, the forum selection clause in the license agreement is not limited . . . to claims that are dependent upon the agreement or to those that allege breach of the agreement. Rather, it encompasses '[a]ny lawsuit regarding this Agreement.' Digital Envoy's claims in this case clearly 'regard' the license agreement, as they regard alleged activities that may or may not be covered by the agreement and, indeed, they will almost certainly fail if Google's use of its technology is found to be within the scope of the agreement."); *Picken, 854 F. Supp. at 911* ("the mere allegation of fraud in the complaint should not determine the enforceability of a forum selection **[*15]** clause. Plaintiffs allege fraud in the inducement. This type of fraud attacks the underlying transaction as having been deceitful. It does not attack the language of the contract itself. This is to be distinguished from fraud in factum in which a party is tricked into assenting without understanding the significance of his action. Plaintiffs are not arguing that they did not understand what the contract itself stated. They are alleging only that Defendant made various misrepresentations as to profitability, services to be provided, and the general viability of the Kennesaw franchise."); *Smith v. Prof'l Claims, Inc., 19 F. Supp. 2d 1276, 1282 (M.D. Ala. 1998)* ("[Plaintiffs]" asserted claims for fraud, misrepresentation, and deceptive trade practices. The crux of their complaint is that the products and services which they received were not the same ones that had been represented to them before the purchase. The plaintiffs attack the underlying transaction as fraudulent. This court adopts the rationale of *Picken* and finds that the forum selection clause covers the tort claims in this case."); *Stephens v. Entre Computer Centers, Inc., 696 F. Supp. 636, 638 (N.D. Ga. 1988)* ("Plaintiffs' tort claims are that defendants' fraudulent misrepresentations caused them to enter the agreement in the first instance, and then to invest significant funds **[*16]** to continue operating the computer center after the business was not as successful as they had anticipated. All these claims arise either "directly or indirectly from the business relationship evidenced by the contract," and are therefore subject to the forum selection clause.").

C. No Public Interest Factors Prohibit Transfer

Plaintiffs spend much of their response arguing that a variety of public and private interest factors preclude this Court from transferring the case. *See* *Motorola Mobility, Inc. v. Microsoft Corp., 804 F.Supp.2d 1271, 1275-76 (S.D. Fla. 2011)*. But, much of this analysis only applies in the absence of a forum selection clause. As the Supreme Court has explained:

> a court evaluating a defendant's *§ 1404(a)* motion to transfer based on a forum-selection clause **should not consider arguments about the parties' private interests**. When parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation. A court accordingly must deem the private-interest factors to weigh entirely in favor of the preselected forum.

Atl. Marine Const. Co., 571 U.S. 49, 64, 134 S. Ct. 568, 187 L. Ed. 2d 487 (emphasis added). "A district court may consider arguments about public-interest factors only . . . Because those factors **[*17]** will rarely defeat a transfer motion, the practical result is that forum-selection clauses should control except in unusual cases." *Id.* Accordingly, the Court does not consider any private factors in ruling on whether to transfer this case pursuant to *§ 1404(a)*.

A brief review of the public-interest factors reveals that this case is not the "unusual case" the Supreme Court had in mind. "Public-interest factors may include the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; [and] the interest in having the trial of a diversity case in a forum that is at home with the law." *Id.* at 63 n.6. (quotations and internal quotation marks omitted). Plaintiffs additionally argue that their choice of forum is to be accorded significant deference and that there are related cases in Florida state court.

Administrative difficulties flowing from court congestion militates in favor of transfer as this Court is currently without four judges and faces a record case volume. This is not a "localized controversy" based in Florida. To be sure, the SPA was executed here, there are two related cases in Florida state court, and Plaintiffs are **[*18]** Florida companies. However, Defendants are either Delaware companies or French companies and a substantial portion of the action involves Savencia and its dealings in France. Further, only one of the related state court cases involves the defendants in this case and Plaintiffs have not explained what efficiencies would be realized by proceeding in this Court as opposed to federal court in Delaware. As to Plaintiff's choice of forum, the Supreme Court has expressly stated that where there is a binding forum selection clause, "the plaintiff's choice of forum merits no weight." *Atl. Marine Const. Co., 571 U.S. 49, 63*. Lastly, the Court agrees with Plaintiffs that there is some interest in having a trial in Florida where a Plaintiff asserts FDUTPA and Florida Antitrust claims. However, this Court is not a Florida state court and "Federal courts today, however, are often called upon to apply state laws, especially on common legal issues such as breach of contract, misrepresentation, fraud, indemnification and punitive damages. . . ." *Thayer/Patricof Educ. Funding, L.L.C. v. Pryor Res., Inc., 196 F. Supp. 2d 21, 35 (D.D.C. 2002)*; *see also Coker v. Bank of America, 984 F. Supp. 757, 766 (S.D.N.Y.1997)* ("[T]he fact that the law of another jurisdiction governs the outcome of the case is a factor accorded little weight on a motion to transfer . . . especially in an instance such as this **[*19]** where no complex questions of foreign law are involved.") (ellipses in original).

Accordingly, the Court is not persuaded that any public interest factors suggest that the Court should disregard the parties' bargained-for forum selection clause, particularly given the Supreme Court's emphasis on the importance of enforcing forum selection clauses and upholding the parties' contractual expectations:

> [w]hen parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations. A forum-selection clause, after all, may have figured centrally in the parties' negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. **In all but the most unusual cases, therefore, "the interest of justice" is served by holding parties to their bargain**.

Atl. Marine Const. Co., 571 U.S. 49, 66. Accordingly, the Court will hold the parties to their bargain and transfer the case to the United States District Court for the District of Delaware.

D. The Forum Selection Clause Binds Savencia

The final issue the Court must resolve is whether Savencia, **[*20]** a non-signatory to the SPA, can be bound by its forum selection clause. In order to bind a non-party to a forum selection clause, that party "must be closely related to the dispute such that it becomes foreseeable that [it] will be bound." *Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1299 (11th Cir.1998)*; *see also* *Manetti—Farrow, Inc. v. Gucci America, Inc., 858 F.2d 509, 514 n. 5 (9th Cir.1988)* ("[A] range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses."). "A third party is bound by a forum-selection clause where the party's rights are 'completely derivative of those of the [signing party]—and thus 'directly related to, if not predicated upon' the interests of the [signing party].'" *Stiles, 637 F. App'x at 562* (quoting *Lipcon, 148 F.3d at 1299*.

Here, Plaintiffs have not alleged any facts or provided any legal argumentation as to Savencia that is in any way distinct from the claims against the signatory parties or the SPA. To the contrary, Plaintiffs allege that Savencia is the parent company of signatory Zausner and that it had a duty under the SPA to sell its products to SFI at a certain price. *See* D.E. ¶ 66 (As a customer of SFI, Savencia was bound by certain contractual provisions in the SPA . . . ."). Accordingly, the Court concludes that Savencia's rights and obligations are directly related to **[*21]** the interests of its signatory subsidiaries and Savencia is therefore so closely related to the dispute that it is "foreseeable that it will be bound" by the forum selection clause. *See* *Smith v. Prof'l Claims, Inc., 19 F. Supp. 2d 1276, 1282 (M.D. Ala. 1998)* ("Ms. Burke was not a signatory to the agreements . . . Ms. Burke has not alleged any facts or theories for relief other than those asserted by Ms. Smith. She was a joint venturer with Ms. Smith in this endeavor. As such, she was so closely related to the dispute that she is bound by the forum selection clause."); *Gonzalez v. Watermark Realty Inc., No. 09-60265-CIV, 571 U.S. 49, 2010 WL 1299740, at *4 (S.D. Fla. Mar. 30, 2010)* ("Here, it is foreseeable that Prudential and its agent Ms. Castro would be bound by the Sales Contract. Ms. Castro's participation was integral to the transaction. She even signed the Sales Contract, albeit on behalf of Mr. Noreiga, but such action betrays a likelihood that the document will apply to her."); *Stephens v. Entre Computer Centers, Inc., 696 F. Supp. 636, 639-40 (N.D. Ga. 1988)* ("the Court finds that the instant clause applies to all the parties to this action whether or not they signed the contract. As discussed, all the claims arise directly or indirectly from the franchise agreement; that single document . . . connects all the plaintiffs with all the defendants."); *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 203 (3d Cir. 1983)* (enforcing forum selection clause against nonparty whose "only significant status in the **[*22]** case is as [signatory]'s parent."); *Stiles, 637 F. App'x at 562 (11th Cir. 2016)* ("[A]ssuming that [non signatory Plaintiff] has some viable claim against Defendant under TILA, any such claim is predicated on the same facts as her husband's claims. Therefore, her claims are derivative of and directly related to her husband's, and she is bound by the forum-selection clause.") (emphasis added); *Friedman v. World Transportation, Inc., 636 F.Supp. 685, 691 (N.D.Ill.1986)* (explaining that plaintiff "cannot escape his resulting contractual obligations under the forum clause simply because he happened to join additional parties who did not sign that contract."); *cf. Cooper v. Meridian Yachts, Ltd., 575 F.3d 1151, 1170 (11th Cir. 2009)* ("Here, the Vulcan appellants' third-party claims arise out of an independent right of indemnity and contribution and do not derive from the agreement. Thus, even in the absence of the agreement, Vulcan manager and Vulcan employer would still have a viable third-party action against De Vries based on their underlying liability to Cooper.").

V. Conclusion

For the reasons discussed *supra*, it is

ORDERED AND ADJUDGED that Defendants' Motion to Change Venue, D.E. 5, is GRANTED. It is further

ORDERED AND ADJUDGED that the Clerk of Court is DIRECTED TO TRANSFER this action the United States District Court for the District of Delaware. It is further

ORDERED **[*23]** AND ADJUDGED that the following transfer to the proper jurisdiction, the Clerk of Court SHALL administratively close this case on this Court's docket. All future hearings are CANCELLED and all pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 24th day of April, 2019.

/s/ Ursula Ungaro

URSULA UNGARO

UNITED STATES DISTRICT JUDGE

BookXchange FL, LLC v. Book Runners, LLC

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

April 25, 2019, Decided; April 25, 2019, Filed

Case No. 19 CV 506

Reporter
2019 U.S. Dist. LEXIS 70360 *; 2019-1 Trade Cas. (CCH) P80,751; 2019 WL 1863656

BOOKXCHANGE FL, LLC, Plaintiff, v. BOOK RUNNERS, LLC, TOBIAS KAPLAN, and ANDREW MCCOTTER, Defendants.

Subsequent History: Motion denied by, in part, in part, As moot, Motion granted by *BookXchange FL, LLC v. Book Runners, LLC, 2020 U.S. Dist. LEXIS 223611 (N.D. Ill., Nov. 30, 2020)*

Motion granted by, in part, Motion denied by, in part *BookXchange FL, LLC v. Book Runners, LLC, 2020 U.S. Dist. LEXIS 223083 (N.D. Ill., Nov. 30, 2020)*

Core Terms

orders, consumer fraud, shipping, Box, Buy, alleges, particularity, Antitrust, motion to dismiss, deceptive, inventory, sellers, amount in controversy, false statement, fraud claim, Sherman Act, consumer, restraint of trade, conspiracy, practices, suspicion, punitive damages, conspire, ratio, plaintiff's claim, common law fraud, attorney's fees, fraudulent, injunction, diversity

Counsel: **[*1]** For BookXchange FL, LLC, a Nevada Limited Liability Company, Plaintiff: Michael R. Friedman, Greenberg Traurig LLP, Chicago, IL; Robert P. Greenspoon, Flachsbart & Greenspoon, LLC, Chicago, IL; Cameron Matthew Nelson, Greenberg Traurig, LLP., Chicago, IL.

For Book Runners, LLC, an Illinois Limited Liability Company, Tobias Kaplan, Andrew McCotter, Defendants: Mark Edward Wilson, LEAD ATTORNEY, FisherBroyles, LLP, Chicago, IL.

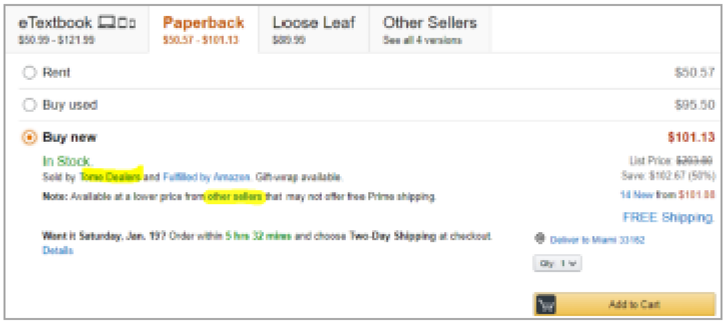
Judges: Robert W. Gettleman, United States District Judge.

Opinion by: Robert W. Gettleman

Opinion

MEMORANDUM OPINION AND ORDER

Amazon.com is an online market that allows multiple sellers to offer the same product. When multiple sellers offer the same product, they compete to be listed in the "Buy Box"—a box on the product's page from which customers add items to their online shopping cart:



In the example above, a seller would rather be in Tome Dealers's shoes—the winner of the Buy Box—than be lumped with a list of "other sellers." When a customer clicks "Add to Cart" without browsing the list of other sellers, the customer adds a product sold by the Buy Box winner. A seller thus increases its chances of selling a given product by winning that product's Buy Box. The seller cannot win, however, **[*2]** unless it has the product in stock and prices it competitively.

Plaintiff BookXchange FL, LLC ("BookXchange") and defendant Book Runners, LLC ("Book Runners") are rival textbook sellers on Amazon, and they compete for the Buy Box. Plaintiff alleges that Book Runners manipulates the Buy Box using fraudulent transactions. Book Runners allegedly orders books from plaintiff using false shipping addresses and false payment information. The scheme "locks up" plaintiff's inventory: if the shipping address is false, the book cannot be delivered; if the payment information is false, Amazon places the book on hold for days. Both methods temporarily reduce plaintiff's inventory. During that time, if a customer tries buy a textbook and plaintiff apparently (but falsely) does not have the book in stock, plaintiff cannot win the Buy Box. By ousting plaintiff, Book Runners eliminates a competitor and enjoys a greater chance of winning the Buy Box for itself, thus increasing its chance of making a sale.

That is, at least, what plaintiff alleges in its first amended complaint, which purports to state five claims: (1) conspiracy to restrain trade, in violation of the *Sherman Antitrust Act of 1890, 15 U.S.C. § 1*; (2) **[*3]** conspiracy to restrain trade, in violation of the *Illinois Antitrust Act, 740 ILCS 10/3(2)*; (3) fraud at common law; (4) fraud and deceptive practices, in violation of the *Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et seq.* ("Consumer Fraud Act"); and (5) breach of the parties' prior settlement agreement, in which Book Runners agreed not to manipulate the Buy Box. Book Runners moves to dismiss the case under *Fed. R. Civ. P. 12(b)(1)* for lack of subject matter jurisdiction and moves to dismiss the complaint under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim, except that Book Runners does not challenge the claim that it breached the settlement agreement.

The motion to dismiss for lack of subject matter jurisdiction is denied. The amount in controversy here has four components: (1) lost profits; (2) pre-litigation attorney's fees; (3) injunctive relief; and (4) punitive damages. Because it does not appear to a legal certainty that the sum of these four components is $75,000 or less, and because the parties are citizens of different states, this court has diversity jurisdiction under *28 U.S.C. § 1332*.

The motion to dismiss for failure to state a claim, however, is granted without prejudice. Plaintiff's federal and state antitrust claims fail because **[*4]** the complaint alleges that Book Runners conspired to restrain trade with defendants Tobias Kaplan and Andrew McCotter—Book Runners' own co-founders and members. A conspiracy among parties with identical economic interests does not violate the antitrust laws.

As for plaintiff's common law fraud and Consumer Fraud Act claims, they have not been pleaded with the particularity demanded by *Fed. R. Civ. P. 9(b)*. Nor does plaintiff fall under *Rule 9(b)*'s exception. That exception applies only when the plaintiff lacks access to the facts underlying the fraud and explains the grounds for its suspicion. Plaintiff's own pleadings suggest that it has access to enough sales and shipping information to allege the fraudulent orders with particularity. And although plaintiff might lack access to facts underlying its other theory of fraud—that Book Runners places orders with the intent to cancel them—plaintiff's explanation for its suspicion is inadequate. If pleaded with particularity, however, the common law fraud and Consumer Fraud Act claims would likely avoid dismissal. Plaintiff is therefore granted leave to file a second amended complaint.

DIVERSITY JURISDICTION

The court has jurisdiction over this case if it arises under **[*5]** federal law, *28 U.S.C. § 1331*, or if it involves citizens of diverse states and the amount in controversy exceeds $75,000, *28 U.S.C. § 1332*. Because plaintiff alleges that Book Runners violated a federal law—the Sherman Act—this court has federal question jurisdiction. Book Runners argues, however, that plaintiff fails to state a claim under the Sherman Act—and argues that the court, if it agrees, should, (1) find that it lacks diversity jurisdiction because the amount in controversy does not exceed $75,000, and (2) decline to exercise supplemental jurisdiction over plaintiff's state law claims, *28 U.S.C. § 1367(c)(3)*.

The court agrees that plaintiff fails to state a claim under the Sherman Act, but finds that the amount in controversy exceeds $75,000. The proponent of federal jurisdiction need establish only by "a preponderance of the evidence facts that suggest the jurisdictional amount has been satisfied." *Carroll v. Stryker Corp., 658 F.3d 675, 680 (7th Cir. 2011)*. Once those facts have been established by the proponent of federal jurisdiction, "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-89, 58 S. Ct. 586, 82 L. Ed. 845 (1938)*. This jurisdictional inquiry allows the court to go beyond the complaint. *Apex Digital, Inc. v. Sears, Roebuck & Co., 572 F.3d 440, 443-44 (7th Cir. 2009)*.

The amount in controversy here has four components: **[*6]** (1) lost profits; (2) pre-litigation attorney's fees; (3) injunctive relief; and (4) punitive damages. The last component, punitive damages, is key—Illinois law allows punitive damages for common law torts and for violations of the Consumer Fraud Act, *Kirkpatrick v. Strosberg, 385 Ill. App. 3d 119. 132-33, 894 N.E.2d 781, 323 Ill. Dec. 755 (Ill. App. 2008)*, and allows "single-digit ratio[s] between punitive and compensatory damages." *International Union of Operating Engineers, Local 150 v. Lowe Excavating Co., 225 Ill. 2d 456, 483-84, 870 N.E.2d 303, 312 Ill. Dec. 238 (2006)*, quoting *State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408, 424-25, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003)*. "[P]articularly egregious conduct" can warrant ratios that are even higher. *International Union, 225 Ill. 2d 456 at 486* (reversing a punitive damages award at a 75 to 1 ratio, and commenting that a $50,000 award at "a double-digit ratio of approximately 11 to 1, would be reasonable and constitutional," given that the defendant's "conduct was minimally reprehensible . . . ."); see also, e.g., *Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672, 678 (7th Cir. 2003)* (affirming, in a diversity suit governed by Illinois law, punitive damages of $186,000 and compensatory damages of $5,000 for each plaintiff—a ratio of 37.2 to 1—when the defendant hotel had misled its guests about bedbugs and had refused to fumigate the building).

Even if Book Runners' conduct was only "minimally reprehensible," and thus warranted punitive damages at a ratio of 11 to 1, *International Union, 225 Ill. 2d 456 at 486*, plaintiff would need to allege compensatory damages exceeding just $6,250 (one-twelfth of $75,000) to satisfy the **[*7]** amount in controversy requirement. With that target amount in mind, the court assumes, for determining jurisdiction (as does Book Runners, begrudgingly), that plaintiff lost, at most, $1,828.09 in profits. What remains is the difference between $6,250 and $1,828.09—$4,421.91. That amount must be exceeded by the sum of two categories of damages: (1) plaintiff's pre-litigation attorney's fees, and (2) the value of an injunction barring Book Runners from ordering plaintiff's books.

Lost profits	$1,828.09
Attorney's fees + injunction	$**4,421.91**
Compensatory damages	$6,250.00
Punitive damages (11 to 1 ratio)	$68,750.00
Amount in controversy	$75,000.00

Figure 2: Amount in controversy computation

The complaint's allegations suggest that plaintiff's pre-litigation attorney's fees, plus the value of an injunction, would exceed $4,421.91. Although Book Runners persuasively argues that the value of an injunction might well be zero—it has a record of placing hundreds of legitimate and presumably profitable orders with plaintiff—Book Runners concedes that, "[p]erhaps BookXchange incurred a few thousand dollars in attorney's fees before filing the complaint . . . ." $4,422 is all plaintiff needs to satisfy the **[*8]** jurisdictional amount. Plaintiff's claims, of course, may have no merit—and if so, plaintiff may never recover any fees—but "[d]istrict courts should not get bogged down . . . in evaluating claims on the merits to determine if jurisdiction exists." *Carroll, 658 F.3d at 681*.

Because it does not appear to a legal certainty that the amount in controversy is $75,000 or less, and because the parties are citizens of different states, this court has diversity jurisdiction under *28 U.S.C. § 1332* and cannot relinquish jurisdiction over plaintiff's state law claims. *Quackenbush v. Allstate Insurance Co., 517 U.S. 706, 716, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996)* ("[F]ederal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress."). Book Runners' motion to dismiss for lack of subject matter jurisdiction—which, properly construed, is a motion for this court to decline supplemental jurisdiction if it dismisses plaintiff's Sherman Act claim—is therefore denied.

DISCUSSION

Book Runners' next challenge is to the legal sufficiency of plaintiff's complaint. Book Runners moves to dismiss plaintiff's claims for: (1) conspiracy to restrain trade under the Sherman Act and the Illinois Antitrust Act; (2) fraud at common law; and (3) fraud and deceptive practices under the Illinois Consumer Fraud and Deceptive **[*9]** Practices Act. To survive the motion to dismiss, the complaint must allege facts that state a "plausible" claim. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*, citing *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim is plausible if the court, taking the alleged facts as true, can reasonably infer that the defendant is liable. Id.

1 Sherman Antitrust Act and Illinois Antitrust Act

Book Runners first moves to dismiss plaintiff's claim that Book Runners violated *section 1 of the Sherman Act*. Plaintiff alleges that Book Runners conspired to restrain trade with defendants Tobias Kaplan and Andrew McCotter—co-founders and members of Book Runners. Kaplan, McCotter, and Book Runners, however, are the same economic actors and have the same economic interests. A conspiracy among them does not violate the Sherman Act.

Under the Sherman Act, economic actors can conspire to restrain trade only when their economic interests are independent. When independent economic actors so conspire, they "deprive the marketplace of independent centers of decisionmaking that competition assumes and demands." *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. Economic actors do not, however, conspire to restrain trade when they have "a complete unity of interest." *Id. at 771*. Because Book Runners is a legal entity composed of its members—Kaplan and McCotter—the three **[*10]** of them are economic actors with a unity of interest. They cannot conspire to restrain trade.

In opposing dismissal, plaintiff does not argue otherwise. Instead, plaintiff raises an alternative theory that does no better: Book Runners conspired with unnamed software developers that supplied the tools Book Runners needed for its anticompetitive scheme. This alternative theory has many problems. First, plaintiff does not identify who these software developers are or how their programs furthered Book Runners' scheme; second, developers who supply automated pricing programs do not compete in the textbook market. The theory's most basic problem, however, is that its underlying facts appear nowhere in plaintiff's complaint, and facts outside of the complaint cannot be considered on a motion to dismiss for failure to state a claim. *Powe v. Chicago, 664 F.2d 639, 642 (7th Cir. 1981)*.

Plaintiff thus fails to state a claim under the Sherman Act. That, in turn, dooms its claim under the Illinois Antitrust Act, *740 ILCS 10 et seq.* Both the federal Sherman Act, *15 U.S.C. § 1*, and the Illinois Antitrust Act, *740 ILCS 10/3(2)*, forbid conspiracies to restrain trade—and Illinois courts "use the construction of federal ***antitrust law*** by federal courts to guide their construction of those state antitrust **[*11]** laws that are substantially similar to federal ***antitrust law***." *Illinois v. Panhandle Eastern Pipe Line Co., 935 F.2d 1469, 1480 (7th Cir. 1991)*, citing *740 ILCS 10/11*. The Illinois Antitrust Act claim falls with the Sherman Act claim.

2 Common law fraud

Next, Book Runners moves to dismiss plaintiff's claim for common law fraud. A fraud claim has five elements: (1) the defendant made a false statement of a material fact; (2) the defendant knew the statement was false; (3) the defendant intended for the statement to induce the plaintiff to act; (4) the plaintiff relied on the truth of the statement; and (5) the plaintiff was damaged by relying on the statement. *Connick v. Suzuki Motor Co., 174 Ill. 2d 482, 496, 675 N.E.2d 584, 221 Ill. Dec. 389 (Ill. 1996)*. The complaint alleges that when Book Runners ordered plaintiff's books on Amazon, Book Runners gave Amazon false shipping addresses and false payment information. Book Runners argues that the fraud allegations: (1) have not been pleaded with the particularity required by *Fed. R. Civ. P. 9(b)*; (2) raise no inference of a false statement; and (3) raise no inference that plaintiff relied on the truth of a false statement.

2.1 Particularity

For the most part, the fraud claim fails because plaintiff has not stated the fraud's circumstances with particularity. *Fed. R. Civ. P. 9(b)*. Plaintiff identifies six "fake purchases" made by Book Runners—and, for each purchase, **[*12]** lists the date, order number, title, order quantity, unit price, and total order amount—but does not identify: the false statements on which those purchases relied; who made the false statements; and which purchases used false shipping addresses and which used false payment information. Those details are mandatory. See, e.g., *Rocha v. Rudd, 826 F.3d 905, 911 (7th Cir. 2016)* (affirming the dismissal of a fraud claim under *Rule 9(b)* because the plaintiff "fail[ed] to provide the specific names, dates, times, or content of the misrepresentations or omissions that give rise to the alleged fraud.").

True enough, *Rule 9(b)*'s heightened pleading requirements are relaxed when the plaintiff lacks access to the facts underlying the fraud and explains the grounds for its suspicion. *Pirelli Armstrong Tire Corp. Retiree Medical Benefits Trust v. Walgreen Co., 631 F.3d 436, 443 (7th Cir. 2011)*. That plaintiff lacks access to the underlying facts, however, is implausible. Attached to plaintiff's complaint is a declaration from one of its employees, Zachary Langstein. Langstein, who analyzes Amazon sales data: (1) states that Book Runners "appear[s] to have used false shipping addresses"; (2) gives an example of an order that "was shipped but returned as 'Undeliverable'"; and (3) attaches an exhibit showing the allegedly false shipping address. If plaintiff can supply such **[*13]** details for one order, it can do so for other orders. The declaration shows that plaintiff has access to the facts underlying Book Runners' alleged fraud from the shipping and payment information for Book Runners' allegedly fraudulent orders. The exception to *Rule 9(b)*'s heightened pleading requirements thus does not apply, and plaintiff's fraud claim turns on the sole order pleaded with particularity.

Although the order described in Langstein's declaration is alleged with enough particularity to satisfy *Rule 9(b)*, it raises no plausible inference of fraud. That order was placed on October 14, 2018, and listed defendant Andrew McCotter, a member of Book Runners, as recipient. As stated in the complaint, Book Runners' address is 4050 N. Rockwell, Chicago, IL 60618. The order described by Langstein, however, listed an address that did not quite match:

Shipping service	Standard
Ship by	Thu, Oct 25, 2018
Ship to	Andrew McCotter 4050 N ROCKWELL ST UNIT 1 UNIT 1 CHICAGO, IL 60618-3721
Purchase date	Sun, Oct 14, 2018, 12:27 PM PT
Fulfillment	Amazon

Figure 3: Plaintiff's example of a false shipping address (highlights added by plaintiff)

Plaintiff alleges that this order was shipped but returned as "Undeliverable." According to plaintiff, this is an example of Book Runners using "false shipping addresses" to "lock up" plaintiff's inventory. To sustain a fraud claim, however, the false statement must be **[*14]** material—yet, as plaintiff's own complaint alleges, the street address, city, and zip code were all accurate. Although the court could possibly infer that erroneously duplicating "Unit 1" makes the shipping address materially false, that inference would not be plausible.

Fraud also requires intent. If Book Runners intended to lock up plaintiff's inventory by sending packages to false addresses, those addresses were false in ways that apparently were inexplicably subtle. Did Book Runners hope that the Amazon delivery driver would go to 4050 N Rockwell and give up because he could find no building unit labeled "Unit 1 Unit 1"? Perhaps so, but evaluating a claim for plausibility requires the court to use "judicial experience and common sense," *Iqbal, 556 U.S. at 679*, and doing so here makes it implausible to infer an intent to defraud.

Rule 9(b) "screen[s] against spurious fraud claims" by encouraging plaintiffs to conduct "a careful pretrial investigation," *Fidelity National Title Insurance Co. of New York v. Intercounty National Title Insurance Co., 412 F.3d 745, 749 (7th Cir. 2005)*, and a careful pretrial investigation has not been done here. Plaintiff could have provided other examples of Book Runners placing orders using false shipping addresses; it did not do so. Because the only allegedly fraudulent order stated with particularity fails **[*15]** to raise a plausible inference of fraud, the court is left with the fraud's "how"—but without the fraud's "what" or "when." *DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir. 1990)*. Plaintiff's failure to allege those details contravenes *Rule 9(b)* and requires dismissal of its fraud claim.

2.2 False statement

Although plaintiff's *Rule 9(b)* deficiencies are reason enough to dismiss the fraud claim, those deficiencies might be cured in an amended complaint. The court therefore addresses Book Runners' other arguments for dismissal.

Book Runners contends that the complaint fails to allege false payment information. The court disagrees. Paragraph 13 of the complaint alleges that Book Runners, "ensure[s] that Amazon's systems are not able to complete the transaction," by "providing bad information, such as an incorrect credit card number or a wrong address . . . ." If Book Runners used an "incorrect" credit card number, it made a false statement. Even so, argues Book Runners, the credit card numbers "must have been valid or else the orders would not have posted in the first place." That assumption—although reasonable—is neither alleged in the complaint, nor raised in a request for judicial notice. Without that assumption, it is reasonable to infer that orders can **[*16]** post even when placed using incorrect credit card numbers.

2.3 Reliance

Book Runners also argues that that it was not plaintiff that relied on the allegedly false statements—it was Amazon—and the complaint does not allege that Amazon was plaintiff's agent. Although the court agrees that the complaint contains no such allegations of agency, that is not dispositive: "traditional privity [is] not a requirement in fraud actions," *Shannon v. Boise Cascade Corp., 208 Ill. 2d 517, 526, 805 N.E.2d 213, 281 Ill. Dec. 845 (Ill. 2004)*; "[i]t is enough that the statements by the defendant be made with the intention that it reach the plaintiff and influence his action and that it does reach him and that he does rely upon it, to his damage." Id., quoting *St. Joseph*

Hospital v. Corbetta Construction Co., 21 Ill. App. 3d 925, 954, 316 N.E.2d 51 (Ill. App. 1974). Book Runners' allegedly false payment information and false shipping addresses fit that requirement. Book Runners ordered plaintiff's books on Amazon using false information; Amazon marked those books "sold"; plaintiff, relying on Amazon's marking of those books as "sold," did not cancel Book Runners' orders; those orders depleted plaintiff's inventory; plaintiff's depleted inventory made plaintiff ineligible to win the Buy Box. That is reliance.

3 Illinois Consumer Fraud and Deceptive Business Practices Act

Last, Book Runners moves to dismiss **[*17]** plaintiff's claim under the Consumer Fraud Act, which prohibits "unfair or deceptive acts or practices . . . ." *815 ILCS 505/2*. According to Book Runners, plaintiff, (1) has again failed to plead with particularity, and (2) lacks standing to sue.

3.1 Particularity

As discussed, plaintiff must replead its claim for common law fraud because it can likely uncover enough about Book Runners' use of false information to plead the fraud's "who, what, when, where, and how . . . ." *DiLeo, 901 F.2d at 627*. A claim under the Consumer Fraud Act, which sounds in fraud, must likewise meet *Rule 9(b)*'s heightened pleading requirements. See, e.g., *Camasta v. Jos. A. Bank Clothiers, Inc., 761 F.3d 732, 736-37 (7th Cir. 2014)*. Plaintiff's failure to plead with particularity might appear to defeat plaintiff's Consumer Fraud Act claim as surely as it defeats plaintiff's claim for common law fraud.

The Consumer Fraud Act, however, gives plaintiff an additional opportunity to meet *Rule 9(b)*'s particularity requirement. Unlike fraud at common law, the Consumer Fraud Act broadly prohibits "unfair or deceptive acts or practices," *815 ILCS 505/2*; no false statement is required. *Martin v. Heinold Commodities, 163 Ill.2d 33, 49-52, 643 N.E.2d 734, 205 Ill. Dec. 443 (Ill. 1994)*. Book Runners allegedly ties up a competitor's inventory by placing orders with the intent that those orders end up unfulfilled. Placing such orders, even using genuine shipping **[*18]** addresses and payment information, plausibly is unfair or deceptive. Cf. *7 U.S.C. § 6c(a)(5)(C)* (making it a criminal offense to place a bid or offer on a futures contract "with the intent to cancel the bid or offer before execution"). By placing orders using genuine information, Book Runners ties up plaintiff's inventory without leaving a paper trail of false shipping addresses and payment information. That leaves plaintiff unable to identify the orders that Book Runners intended always to cancel, and the orders that Book Runners placed honestly, but later canceled for legitimate reasons.

Plaintiff's inability to identify Book Runners' deceptive orders suggests that plaintiff lacks access to the scheme's underlying facts. Still, plaintiff must then explain the grounds for its suspicion. To do so, plaintiff alleges two facts: (1) although "[t]ypical transaction[s] on Amazon clear and ship within minutes or hours of the original order," six orders placed by Book Runners were "'pending' for a significant length of time"—and were "ultimately canceled"; and (2) while those six orders were pending, Book Runners held "the lead position in the 'Buy Box.'"

As pleaded, these facts raise no plausible inference of suspicion. **[*19]** Why is it suspicious for the six orders to have pended for a "significant" time? How much longer were they pending compared to similar orders? How unusual is it for some orders to pend longer than others—is the distribution of pend times normal, or uniform? If the pend times were unusually long, were innocent explanations possible? The complaint fails to answer these questions. Plaintiff's second fact raises yet more questions that go unanswered: Why is it suspicious for Book Runners to have won the Buy Box while the six orders pended? After all, although plaintiff alleges that Amazon "typically" lists its books in the Buy Box before listing those sold by Book Runners, plaintiff does not allege that for these six orders, Book Runners' scheme caused plaintiff to lose the Buy Box. Without context, plaintiff's two facts fail to explain the grounds for its suspicion. See *Pirelli, 631 F.3d at 444-45* (affirming the dismissal of a price-gouging claim sounding in fraud and rejecting the plaintiff's grounds for suspicion because the drug reimbursement data on which the plaintiff relied were "not placed . . . in context," and "their free-floating nature stymie[d] any meaningful understanding of what the numbers mean[t]"). **[*20]**

At best, plaintiff's allegations may be consistent with a scheme to place deceptive orders—but equally consistent with bad lines of code in Amazon's inventory management system, or with orders mistakenly placed by a bumbling Book Runners employee. Equivocal inferences make for implausible claims. Cf. *Twombly, 550 U.S. at 554* (holding that a complaint failed to state a plausible claim for Sherman Act conspiracy because of "the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market"); *Iqbal, 556 U.S. at 679* ("[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief.") (citation, alteration, and quotation marks omitted). Plaintiff must do more—gather more data, place them in context, and explain why they raise suspicion—to justify falling short of *Rule 9(b)*'s heightened pleading requirements. *Fidelity, 412 F.3d at 749*.

3.2 Standing

Failure to plead with particularity warrants dismissal of plaintiff's Consumer Fraud Act claim. That failure, however, is curable. The court thus considers—and **[*21]** rejects—Book Runners' challenge to plaintiff's standing to sue.

When a business sues under the Consumer Fraud Act, it "must show a nexus between the complained of conduct and consumer protection concerns"; it must satisfy the "consumer nexus test." *Community Bank of Trenton v. Schnuck Markets, Inc., 887 F.3d 803, 822-23 (7th Cir. 2018)*. Not every business dispute satisfies that test. Broken promises, for example, are not actionable, for "[t]hat type of 'misrepresentation' occurs every time a defendant breaches a contract." *Avery v. State Farm Mutual Automobile Insurance Co., 216 Ill. 2d 100, 169-70, 835 N.E.2d 801, 296 Ill. Dec. 448 (Ill. 2005)* (citation and quotation marks omitted). Nor can a business satisfy the consumer nexus test by disguising a breach of contract claim as a consumer fraud claim. See, e.g., *Classic Bus. Corp. v. Equilon Enters., LLC, No. 09 C 7735, 2011 U.S. Dist. LEXIS 7817, 2011 WL 290431, at *4-5 (N.D. Ill. Jan. 27, 2011)* (dismissing a Consumer Fraud Act claim for lack of standing because the defendants' alleged plan "to drive [the plaintiffs] out of business" was "simply a restatement" of the plaintiffs' breach of contract claim).

Plaintiff has standing to sue under the Consumer Fraud Act. Book Runners' scheme plausibly affects consumer prices for textbooks: by deposing a seller from the Buy Box, Book Runners artificially reduces the supply of textbooks, thus causing prices to rise, and consumers to pay above-market prices. See *Walsh Chiropractic, Ltd. v. StrataCare, Inc., 752 F. Supp. 2d 896, 913 (S.D. Ill. 2010)* (recognizing a business's standing to sue under the Consumer Fraud Act **[*22]** when the defendant allegedly helped a healthcare network administrator submit fraudulent claims for discounted healthcare rates, reasoning that "patients of medical providers (i.e. actual consumers at large) may be affected by [the defendant's] alleged fraudulent claims . . . via fee increases needed to cover their providers decreased income"). A successful Consumer Fraud Act action might well "serve the interests of consumers," *Brody v. Finch Univ. of Health Sciences/The Chicago Medical School, 298 Ill. App. 3d 146, 160, 698 N.E.2d 257, 232 Ill. Dec. 419 (Ill. App. 1998)*, by restoring prices to their competitive equilibrium, and by deterring Book Runners—and other textbook sellers—from engaging in inventory lockup schemes. Unlike courts deciding contract disputes disguised as fraud claims, this court need not speculate to infer that the deceptive practices alleged here implicate consumer protection concerns. Plaintiff satisfies the consumer nexus test and has standing to sue under the Consumer Fraud Act.

CONCLUSION

Defendant Book Runners' motion to dismiss for lack of subject-matter jurisdiction (Doc. 9) is denied. Book Runners' motion to dismiss Count I (fraud), Count II (Illinois Consumer Fraud and Deceptive Business Practices Act), Count IV (Sherman Antitrust Act), and Count V (Illinois Antitrust Act) for failure to state **[*23]** a claim (Doc. 12) is granted.

Plaintiff BookXchange is granted leave to file a second amended complaint by May 23, 2019. The hearing previously set for May 1, 2019, is continued to May 30, 2019, at 9:00 a.m.

ENTER: April 25, 2019

/s/ Robert W. Gettleman

Robert W. Gettleman

United States District Judge

[Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.](#)

United States Court of Appeals for the Sixth Circuit

April 25, 2018, Argued; April 25, 2019, Decided; April 25, 2019, Filed

File Name: 19a0078p.06

No. 17-3863

Reporter

922 F.3d 713 *; 2019 U.S. App. LEXIS 12295 **; 2019 FED App. 0078P (6th Cir.) ***; 2019-1 Trade Cas. (CCH) P80,756

THE MEDICAL CENTER AT ELIZABETH PLACE, LLC, Plaintiff-Appellant, v. ATRIUM HEALTH SYSTEM, et al., Defendants-Appellees.

Subsequent History: Rehearing, en banc, denied by *Medical Ctr. at Elizabeth Place, LLC v. Atrium Health Sys., 2019 U.S. App. LEXIS 17239 (6th Cir., June 7, 2019)*

US Supreme Court certiorari denied by *Medical Ctr. at Elizabeth Place, LLC v. Atrium Health Sys., 2019 U.S. LEXIS 6477 (U.S., Oct. 15, 2019)*

Prior History: [1]** Appeal from the United States District Court for the Southern District of Ohio at Dayton. No. 3:12-cv-00026—Walter H. Rice, District Judge.

Medical Ctr. at Elizabeth Place, LLC v. Premier Health Partners, 2017 U.S. Dist. LEXIS 126499 (S.D. Ohio, Aug. 9, 2017)

Core Terms

Defendants', rim, conspiracy, joint venture, patients, procompetitive, summary judgment, anticompetitive, venture's, alleges, concerted action, per se rule, contracts, ancillary, summary judgment motion, district court, horizontal, network, argues, conspiracy claim, rule of reason, healthcare, antitrust, insurers, law of the case, limitations, parties, restraint of trade, single entity, competitor

LexisNexis® Headnotes

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

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

HN1[] **Per Se Rule & Rule of Reason, Per Se Rule Tests**

To be per se illegal under the *Sherman Act*, *15 U.S.C.S. § 1 et seq.*, a defendant's conduct has to be so obviously anticompetitive that it has no plausibly procompetitive features—a high hurdle for plaintiffs claiming restraint of trade. Once they clear it, however, plaintiffs receive a corresponding reward: they need not undergo the often arduous process of showing that the challenged conduct was anticompetitive. As one of the other circuits has described it, the per se rule is the trump card of ***antitrust law***. When an antitrust plaintiff successfully plays it, he need only tally his score.

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

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

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

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

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

HN2[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is warranted if, viewing the facts in the light most favorable to the nonmoving party, no material fact is subject to a genuine dispute. The appellate court will review de novo grants of summary judgment.

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

Civil Procedure > ... > Judges > Inability to Proceed > Successor Judges

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

The appellate court will review for abuse of discretion one judge's decision to reconsider another judge's pre-transfer order.

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

Civil Procedure > ... > Judges > Inability to Proceed > Successor Judges

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

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

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

HN4[] **Standards of Review, Abuse of Discretion**

In the context of an appeal of one judge's decision to reconsider another judge's pre-transfer order, the appellate court can find that the transferee has abused his discretion in disturbing the prior judge's denial of summary judgment only if the appellate court has a definite and firm conviction that the transferee judge has committed a clear error in judgment such as relying upon clearly erroneous factual findings, applying the law improperly, or using an erroneous legal standard. Where the issue is whether the transferee judge improperly applied the law, that is a question that the appellate court will review de novo.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

Antitrust & Trade Law > Sherman Act > Scope

HN5[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Section 1 of the Sherman Act, 15 U.S.C.S. § 1, states that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. 15 U.S.C.S. § 1. Because virtually every agreement between parties has the potential to be considered a restraint of trade, antitrust jurisprudence limits the range of restraints within the reach of ***antitrust law*** to agreements that unreasonably restrain trade. A restraint on trade may be found to be unreasonable per se or under the rule of reason.

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

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

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

HN6[] Per Se Rule Tests, Manifestly Anticompetitive Effects

Although a motion for summary judgment against a per se claim involves underlying facts, the propriety of per se treatment is normally a question of legal characterization that can often be resolved by the judge on a motion for summary judgment. There is a presumption against applying the per se rule unless the restraint falls squarely into a per se category. A plaintiff must satisfy each element of the per se test in its allegations in order to survive pre-trial termination. At the summary judgment phase, the right question to ask regarding per se claims is whether the plaintiff has shown that the challenged restraint is so obviously anticompetitive that it should be condemned as per se illegal. If, in spite of the plaintiff's efforts, the record indicates that the challenged restraint is plausibly procompetitive, then summary judgment for the defendants is appropriate.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

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

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

HN7[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Because joint ventures often have procompetitive efficiencies, when a joint venture is itself challenged as anticompetitive, that claim is reviewed under the rule of reason. But when the conduct of the joint venture is challenged, the relationship of the challenged conduct to the joint venture is analyzed to see if the conduct is reasonably related to the joint venture's procompetitive features (and therefore should be judged under the rule of reason), or is a naked restraint lurking beneath the veneer of a legitimate joint venture (and therefore deserves per se condemnation). A naked restraint, subject to the per se rule, can exist even though it is contained in a joint venture agreement that is, overall, quite competitive. The U.S. Supreme Court has distinguished three categories of restraints: (1) restraints that are core to the joint venture's efficiency enhancing purpose; (2) restraints that are ancillary to the joint venture's efficiency enhancing purpose; and (3) restraints that are nakedly unrelated to the purpose of the joint venture. Only the last of these three justifies per se treatment.

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

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

HN8[] **Price Fixing & Restraints of Trade, Horizontal Market Allocation**

Core activity is activity that is integral to the running of the venture. The U.S. Supreme Court has rejected a per se claim against horizontal price-setting by two competitors on the ground that the price-setting involved the core activity of the joint venture itself.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule

HN9[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Restraints that are ancillary to the legitimate and competitive purposes of the business association fall between core activity and naked restraints. These are restraints by a joint venture that are not integral to the running of the joint venture, but may contribute to the success of a cooperative venture. A restraint is ancillary if it bears a reasonable relationship to the joint venture's success.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule

HN10[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The question of what relationship a challenged restraint must have to a joint venture in order to qualify as ancillary splits the Circuits—the Eleventh Circuit on the one hand, and the Second, Seventh, Eighth, and Ninth Circuits on the other. The Sixth Circuit follows the majority of Circuits and holds that a joint venture's restraint is ancillary and therefore inappropriate for per se categorization when, viewed at the time it was adopted, the restraint may contribute to the success of a cooperative venture. That approach better accords with U.S. Supreme Court guidance.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule

HN11[] Per Se Rule Tests, Manifestly Anticompetitive Effects

The U.S. Supreme Court generally has treated as per se illegal joint efforts by firms to disadvantage a competitor by persuading customers to deny that competitor relationships the competitor needs in the competitive struggle. But in these cases, the practices generally were not justified by plausible arguments that the practices enhanced overall efficiency and made markets more competitive. This is so because plausible arguments that a practice is procompetitive make us unable to conclude the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule

HN12[] Per Se Rule & Rule of Reason, Per Se Rule Tests

Condemning as per se illegal restraints that, while not necessary to achieving a joint venture's efficiency-enhancing purpose nevertheless plausibly relate to that purpose, would run counter to the U.S. Supreme Court's instruction to avoid applying the per se rule to situations where efficiencies are being served. Per se treatment is inappropriate where it cannot be stated with any degree of confidence that the challenged restraint always or almost always tends to restrict competition and decrease output.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

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

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

HN13[] Sherman Act, Claims

The rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition. For a per se claim, however, whether challenged conduct belongs in the per se category is a question of law. And it is a question of law where certain presumptions apply. The plaintiff must satisfy each element of the per se test in its allegations in order to survive pre-trial termination. The U.S. Supreme Court has likewise held that because a plaintiff failed to make a threshold showing that the challenged conduct had the characteristics necessary to justify per se condemnation, rule of reason analysis should apply instead. A plaintiff seeking application of the per se rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects.

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

HN14[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

If the record in a case reveals a plausible way in which the challenged restraints contribute to the procompetitive efficiencies of the joint venture, then the possibility of countervailing procompetitive effects is not remote and per se treatment is improper.

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

HN15[] **Reviewability of Lower Court Decisions, Preservation for Review**

In the context of an appeal, whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right. Under forfeiture doctrine, parties are not limited to the precise arguments they made below.

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

Evidence > Inferences & Presumptions > Presumptions > Particular Presumptions

HN16[] **Regulated Practices, Price Fixing & Restraints of Trade**

The Sixth Circuit has held that in the absence of a showing by the plaintiff that allegedly anticompetitive communication was (1) false and (2) difficult or costly for the plaintiff to counter, that court would apply a presumption that speech has de minimis effect on competition.

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

Evidence > Burdens of Proof > Allocation

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

HN17[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

The Sixth Circuit, as well as the common law, have long recognized that legitimate reasons exist to uphold noncompetition covenants even though by nature they necessarily restrain trade to some degree. It is the plaintiff's burden to show that per se treatment of allegedly anticompetitive conduct is justified. In this context, a plaintiff's failure to produce any on-point precedent is damning, as the court will refuse to apply the per se rule in the absence of judicial experience with the challenged restraint. It is only after considerable experience with certain business relationships that courts classify them as per se violations.

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

HN18[] **Horizontal Refusals to Deal, Boycotts**

There is no rim conspiracy without alleged agreement among the parties at the rim.

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

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

HN19[] **Standards of Review, Abuse of Discretion**

The appellate court will review for abuse of discretion the district court's decision to deny a motion to amend the complaint to add additional claims. The appellate court will overturn the district court's decision only if the appellate court has a definite and firm conviction that the court below committed a clear error in judgment in the conclusion it reached upon a weighing of the relevant factors. The standard for a motion to amend is governed by the general principle that cases should be tried on their merits rather than the technicalities of pleadings, which is in turn moderated by the exception that judges should allow amendment only when doing so does not cause prejudice to the defendants or undue delay.

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Shay Dvoretzky, JONES DAY, Washington, D.C., for Appellees.

ON BRIEF: Richard A. Ripley, Brittany V. Ruyak, RUYAK CHERIAN LLP, Washington, D.C., James A. Dyer, Patrick O'Shaughnessy, SEBALY, SHILLITO + DYER, Dayton, Ohio, for Appellant.

Shay Dvoretzky, Robert Stander, JONES DAY, Washington, D.C., Melinda K. Burton, FARUKI IRELAND COX RHINEHART & DUSING P.L.L., Dayton, Ohio, Thomas Demitrack, JONES DAY, Cleveland, Ohio, for Appellees.

Judges: Before: BATCHELDER, SUTTON, and WHITE, Circuit Judges. BATCHELDER, J., delivered the opinion of the court in which SUTTON, J., joined, and WHITE J., joined in part. SUTTON, J., delivered a separate concurring opinion. WHITE, J., delivered a separate opinion dissenting in part.

Opinion by: ALICE M. BATCHELDER

Opinion

[*718] [*2]** ALICE M. BATCHELDER, Circuit Judge. This is a case about competition among hospitals in Dayton, Ohio. When Medical Center at Elizabeth Place, LLC ("MCEP") opened in 2006, it was an acute care, for-profit hospital owned by 60 physicians and one **[**2]** corporate shareholder. By 2009, MCEP's existence as a physician-owned enterprise came to an end when it sold an ownership interest to Kettering Health Network, a competitor in the Dayton healthcare market. MCEP alleges that it failed because of the anticompetitive actions of Premier Health Partners ("Premier"), a dominant healthcare network in the Dayton area. MCEP alleges that Premier contracted with area physicians and payers (insurers and managed-care plan providers) on the condition that they did not do business with MCEP. Because payers provide patients and physicians provide services, it is difficult to run a viable hospital when one, let alone both, is in short supply.

So, whether by licit or illicit means, Premier won that competition. In this litigation, the parties competed again. This time, MCEP pushed all its chips to the center of the table on one hand of cards: a claim that Premier had engaged in conduct so devoid of benefit to the market as to be per se illegal under the *Sherman Act*. Such claims apply only to a limited range of conduct. *HN1*[] To be per se illegal, a defendant's conduct has to be so obviously anticompetitive that it has no plausibly procompetitive features—a **[**3]** high hurdle for plaintiffs claiming restraint of trade. Once they clear it, however, plaintiffs receive a corresponding reward: they need not undergo the often arduous process of showing that the challenged conduct was anticompetitive. As one of our sister circuits has described it, "[t]he per se rule is the trump card of ***antitrust law***. When an antitrust plaintiff successfully plays it, he need only tally his score." *United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1362-63 (5th Cir. 1980)*.[1]

[*3]** **[*719]** The question before us is whether MCEP successfully played its hand. The district court from which MCEP appeals found that MCEP's per se claim failed because the record showed that Premier's contracts with payers and physicians had plausibly procompetitive features. That holding says nothing about whether Premier's conduct was on balance procompetitive or anticompetitive. This opinion likewise reaches no decision on the ultimate economic merits of Premier's actions because to do so would go beyond our charge. We must address only the question of per se illegality, and as to that, we agree with the district court that MCEP failed to meet the high standard required for per se claims. We **AFFIRM**.

I.

MCEP alleges a conspiracy between the Premier hospitals that implicates, **[**4]** without naming as defendants, payers and physicians in the Dayton area. During the course of this multi-year litigation, various legal issues raised in this case have been ruled on by U.S. District Judge Black, a Sixth Circuit appellate panel, and then, after the matter was remanded and Judge Black recused himself, District Judge Rice, who granted the motion for summary judgment presently before us.

Factual Background

MCEP is an acute-care hospital located in Dayton, Ohio, that opened in September 2006 with 60 physician owners and one corporate shareholder, Regent Surgical Health. Defendants in this case comprise four hospitals—Miami Valley Hospital (owned by MedAmerica Health), Good Samaritan Hospital (owned by Catholic Health Initiatives), Atrium Medical Center (owned by Atrium Health Systems), and Upper Valley Medical Center—as well as a joint operating company, Premier Health Partners ("Premier"), formed through a joint operating agreement among those four hospitals.[2] This joint operating agreement merged some of the hospitals' healthcare functions but allowed them to retain control of others. *Med. Ctr. at Elizabeth Place v. Atrium Health Sys. ("MCEP I"), 817 F.3d 934, 936-37 (6th Cir. 2016)*. Hospital Defendants

In spite **[**5]** of its dominant market position, the record leaves no doubt that Hospital Defendants felt threatened by the possibility of MCEP's presence in the Dayton medical market. Five months before MCEP opened for business, Hospital Defendants held a board meeting at which, "[b]y consensus, the Board supported management's efforts" to oppose MCEP. Executives from Premier told an MCEP shareholder that Hospital Defendants "would do whatever they needed to do in order to stop [MCEP] from opening."

Hospital Defendants' underlying concern appears to have been that MCEP's for-profit, physician-owned model of healthcare would "bankrupt" their hospitals. A letter written by primary care physicians (most of whom were affiliated with Hospital Defendants), addressed to physicians in the Dayton healthcare market, expressed the dynamic they found worrisome:

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[1] The other approach to determining whether a restraint of trade is "unreasonable" is the "rule of reason." *In re Southeastern Milk Antitrust Litigation, 739 F.3d 262, 270 (6th Cir. 2014)*. "If the rule of reason is used, plaintiffs must additionally show that the restraint produced anticompetitive effects within the relevant product and geographic markets, while the per se rule is reserved for restraints that are so clearly unreasonable that their anticompetitive effects within geographic and product markets are inferred." *Id.*

[2] In this opinion, we refer to the four hospitals and the joint operating company collectively as "Hospital Defendants" except where otherwise noted. **[***4]** comprise a dominant healthcare network in the Dayton area, with more than a 55% share of Dayton's inpatient surgical services.

> There is currently widespread opposition among not-for-profit community hospitals across the country toward physician owned inpatients [sic] hospitals such as this. The physician investors are doing so for reasons of profitability. MVH and GSH offer the range of services and the quality of care necessary **[*720]** to enable surgeons to care for their patients. A **[**6]** physician owned specialty hospital will take the better-insured and more profitable patients away from Premier (along with ancillary services), leaving our local hospitals with only the more complex and underinsured patients.

MCEP, for its part, wrote a "Dear Colleague" letter the next month, responding:

- While MCEP's business model will "create a competitive environment to deliver better and more efficient healthcare in Dayton," it will not drive hospitals out of business;
- MCEP "will not turn away patients on the basis of payor classification";
- "Premier generates about $1 billion in revenues and currently has a cash reserve of over $1 billion. As a non-profit, Premier pays no taxes. . . . [MCEP] will have revenues that are a fraction of Premier's, and our physician-owned hospital will pay corporate, personal and property taxes";
- "[C]omprehensive studies have confirmed that physician-run hospitals have fewer medical errors, shorter turnover times, fewer infections and greater cost efficiencies."

[*5]** Citing Hospital Defendants' board-meeting consensus and their letter to physicians, MCEP alleges that Hospital Defendants blocked MCEP from gaining meaningful access to the Dayton market **[**7]** through a series of anticompetitive acts that amounted to a group boycott of MCEP. In its Amended Complaint, MCEP made only a per se claim; MCEP made no claim under the rule of reason. MCEP's Amended Complaint alleges that Hospital Defendants:

- financially coerced commercial health insurers or managed care plan providers (such as Anthem, UnitedHealthcare, Private Healthcare Systems, etc.) "to refuse to permit [MCEP] full access to their respective networks";
- financially coerced commercial health insurers or managed care plans to reimburse MCEP at suppressed rates far below what Hospital Defendants demanded for the same services;
- threatened retributive financial consequences to physicians who affiliated with MCEP, and followed through on threats, "including terminating leases that the physicians had with the Defendants for office space";
- offered payments to physicians "who agreed not to work with or at [MCEP]; and who agreed to divest ownership in the Medical Center";
- financially coerced physicians affiliated with Hospital Defendants from "admitting patients to [MCEP] or referring patients to physicians who treated patients at [MCEP]"; and
- deliberately poached physicians from MCEP **[**8]** who made up a "disproportionately high number of admissions and then prohibited them from admitting patients to [MCEP]."

Beyond these allegations, MCEP claims that, in the course of litigation, it discovered two additional agreements that comprised part of the actionable group boycott.[3] First, MCEP alleges an agreement among the payers, induced by Hospital Defendants, not to offer MCEP a managed care contract. Second, MCEP alleges an **[*721]** agreement among primary care physicians not to do business with physicians who invested in MCEP (Hospital Defendants refer to this as the "physician conspiracy"). Hospital Defendants describe the relationship of these agreements to the original allegation using the metaphor of a hub, spoke, and rim. For these claims, the Hospital Defendants form the hub; the vertical agreements the Hospital Defendants made with **[***6]** payers and physicians to exclude MCEP are the spokes; and the discrete agreements to boycott MCEP, among the payers and among the physicians, are at the rim.

MCEP alleged only the "hub" agreement in its Amended Complaint. Hospital Defendants argue that the "rim conspiracy" claim is a new, *and untimely*, *Sherman Act Section 1* claim. MCEP, for its part, maintains **[**9]** that the additional agreements are simply evidence of the overarching *Section 1* conspiracy alleged in their Amended

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[3] While there is some dispute about exactly when these claims were first brought to Hospital Defendants' attention, there does not appear to be any dispute that the claims were raised (though the Complaint was not amended to reflect the new claims) in MCEP's opposition to Hospital Defendants' initial motion for summary judgment before Judge Black.

Complaint. Regardless of the exact scope of the alleged boycott, MCEP alleges that one existed, that it was orchestrated by Hospital Defendants, and that it prevented MCEP from succeeding as a going concern. MCEP claims that, but for Hospital Defendants' conduct, it would have been able to contract with payers and physicians, which would have, in turn, increased competition in the Dayton healthcare market for consumers of general inpatient surgical services.

Procedural History

This case was before Judge Black in Cincinnati from January 30, 2012, to April 19, 2017. During that time, Judge Black granted Hospital Defendants' motion for summary judgment on the ground that the MCEP's antitrust claim lacked the necessary plurality of actors.

On appeal to this court, a divided panel reversed Judge Black and rejected Hospital Defendants' motion for summary judgment. The panel held that a reasonable juror could find that Premier comprised multiple competing entities and, therefore, could engage in concerted action. *MCEP I, 817 F.3d at 945*. The panel did not address other issues raised before it, such as whether **[**10]** MCEP's additional rim conspiracy claims were untimely. *Id. at 939*.

On remand, Hospital Defendants moved again for summary judgment arguing, among other things, that MCEP's allegation of a per se antitrust violation failed as a matter of law. Hospital Defendants argued that their alleged restraints on trade were plausibly procompetitive which, they argued, is sufficient to defeat a per se antitrust claim. Because MCEP pleaded only a per se claim, if Hospital Defendants had succeeded in this argument, the case would have been dismissed. Judge Black denied Hospital Defendants' renewed motion for summary judgment, rejecting Hospital Defendants' argument on two alternative bases: *first*, the claimed procompetitive effects of the challenged conduct are subject to genuine dispute and are therefore **[***7]** an improper basis for summary judgment, and *second*, Hospital Defendants "failed to evidence that their joint contracting has any efficiency-enhancing purpose to which such an agreement is necessary." *Med. Ctr. at Elizabeth Place v. Premier Health Partners, 2016 U.S. Dist. LEXIS 192269, 2016 WL 9460026, at *5 (S.D. Ohio Oct. 6, 2016)*.

The case was set for trial. But on April 19, 2017, Judge Black recused himself and the case was re-assigned to Judge Rice.[4] Before Judge Rice, Hospital Defendants moved to "Clarify Issues for Trial," which all **[**11]** parties now agree amounted to a motion **[*722]** for reconsideration of Judge Black's October 6, 2016, order denying Hospital Defendants' motion for summary judgment. Less than a week before trial was set to begin, Judge Rice granted Hospital Defendants' motion for summary judgment and dismissed the Amended Complaint with prejudice. Judge Rice declined to apply the "law of the case" doctrine, holding that Judge Black had clearly erred. He found that while Judge Black correctly articulated the standard for a per se claim—that the challenged conduct must have no plausible procompetitive effect—Judge Black failed to acknowledge that the record showed that the Hospital Defendants' challenged restraints had such plausible procompetitive effects. Judge Rice also rejected MCEP's argument that the Amended Complaint implicitly included claims of rim conspiracies among the payers and among the physicians—claims that all agree, if proven, would constitute a per se violation—explaining that those claims were not contained in the Amended Complaint, that MCEP's attempt to "wedge this new claim into the existing allegations" was improper, and that the Hospital "Defendants would be severely prejudiced if MCEP **[**12]** were permitted to amend its Complaint [again] at this late date." MCEP asks us to reverse Judge Rice's decision granting Hospital Defendants' motion for summary judgment and to remand the case for trial.

II.

HN2[] Summary judgment is warranted if, viewing the facts in the light most favorable to the nonmoving party, no material fact is subject to a genuine dispute. **[***8]** *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S.*

[4] Judge Black explained that, as a "Cincinnati duty-stationed Judge," he could not preside over a trial in Dayton.

574, 585-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).[5] We review de novo grants of summary judgment. Expert Masonry, Inc. v. Boone Cty., 440 F.3d 336, 341 (6th Cir. 2006).

The parties dispute what de novo review should entail in this case. MCEP claims that Judge Rice's decision to not apply the "law of the case" doctrine was critical to his decision to grant Hospital Defendants' motion for summary judgment, and therefore we must review Judge Rice's "law of the case" decision de novo. According to MCEP, Judge Rice could reconsider Judge Black's denial of summary judgment only by finding that Judge Black clearly erred. So, MCEP says, if Judge Rice was wrong that Judge Black committed clear error, then we must reverse his "law of the case" judgment. For their part, Hospital Defendants argue that we should simply review de novo Judge Rice's substantive legal conclusions, separate and apart from Judge Rice's "law **[**13]** of the case" conclusion.

Ultimately, the Hospital Defendants have the better of this argument. *First*, ***HN3***[] we review for abuse of discretion Judge Rice's decision to reconsider Judge Black's pre-transfer order. *See* United States v. Todd, 920 F.2d 399, 403 (6th Cir. 1990). MCEP argues that abuse of discretion is not the proper standard of review in **[*723]** a case transferred from one district court to another, in which a pre-transfer ruling of one judge is altered by a post-transfer decision of a different judge. We have foreclosed this argument by holding—in precisely the scenario identified by MCEP—that abuse of discretion remains the proper standard of review. *See Gillig v. Advanced Cardiovascular Sys. Inc., 67 F.3d 586, 590 (6th Cir. 1995)*.[6]

[*9]** *Second*, ***HN4***[] we can find that Judge Rice abused his discretion in disturbing Judge Black's denial of summary judgment only if we have a "definite and firm conviction that [Judge Rice] committed a clear error in judgment" such as "rel[ying] upon clearly erroneous factual findings, appl[ying] the law improperly, or us[ing] an erroneous legal standard." *See* Garner v. Cuyahoga Cty. Juvenile Ct., 554 F.3d 624, 634 (6th Cir. 2009) (citation and quotation marks omitted). Of these potential bases for abuse of discretion, MCEP argues only that Judge Rice improperly applied the law, a question that we review de novo.

III.

MCEP's raises two substantive claims **[**14]** on appeal. *First*, MCEP argues that the district court erred by declining to apply the per se rule to Hospital Defendants' allegedly anticompetitive conduct. *Second*, MCEP argues that the district court erred in rejecting MCEP's "horizontal rim claims" due to untimeliness. Neither argument has merit.

A.

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[5] If a presumption against summary judgment in antitrust cases is ever appropriate, it is not here. This circuit has applied a presumption against summary judgment in antitrust actions only when the case demanded a fact-intensive inquiry under the rule of reason into issues of intent and motive. In re Southeastern Milk Antitrust Litig., 739 F.3d 262, 270 (6th Cir. 2014) (quoting Expert Masonry, Inc. v. Boone Cty., 440 F.3d 336, 341 (6th Cir. 2006)); *but see* In re ATM Antitrust Litigation, 554 F. Supp. 2d 1003, 1010 (N. D. Cal. 2008) (opining that "any presumption against the granting of summary judgment in complex antitrust cases has now disappeared") (citation omitted). Unlike in a rule of reason claim, in a per se claim intent and motive are not critical determinations. *See* Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***, ¶ 1910a (3rd ed. 2011).

[6] MCEP cites Jimkoski v. State Farm Mut. Auto. Ins. Co., 247 F. App'x 654 (6th Cir. 2007), for the proposition that Judge Rice's "law of the case" decision—specifically his finding that Judge Black committed clear error—should be reviewed de novo. This misapplies *Jimkoski.* Read in context, *Jimkoski* simply acknowledged that where a motion for reconsideration concerns summary judgment, we do not review the district court's decision to grant summary judgment for abuse of discretion. Id. at 659. To do so would insulate the district court's merits decision from the proper standard of review—de novo—simply because the motion that the district court ruled on was a motion for reconsideration. That concern is not present in this case because we review for abuse of discretion the decision to grant a motion for reconsideration (here that means we review the "law of the case" decision for abuse of discretion). But we still review de novo the merits of the district court's grant of summary judgment.

Per se claim

HN5[] Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Because virtually every agreement between parties has the potential to be considered a restraint of trade, antitrust jurisprudence limits the range of restraints within the reach of ***antitrust law*** to agreements that *unreasonably* restrain trade. In re Southeastern Milk Antitrust Litig., 739 F.3d 262, 270 (6th Cir. 2014). A restraint on trade may be found to be unreasonable per se or under the "rule of reason." *Id.* As MCEP makes only a per se claim, the question before us is whether Judge Rice erred in granting Hospital Defendants' motion for summary judgment on the grounds that Hospital Defendants' conduct falls outside per se illegality. Judges Black and Rice did not agree in their answer to the underlying question and the prior **[**15]** Sixth Circuit panel declined to address it. **[***10]** MCEP I, 817 F.3d at 939 (explaining that "[t]his appeal looks only at . . . whether defendants' conduct is the result of two or more entities acting in concert").

[*724] **HN6**[] Although a motion for summary judgment against a per se claim involves underlying facts, the propriety of per se treatment "is normally a question of legal characterization that can often be resolved by the judge on a motion . . . for summary judgment." Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield, 373 F.3d 57, 61 (1st Cir. 2004). There is a presumption against applying the per se rule "[u]nless the restraint falls squarely into a *per se* category." Southeastern Milk, 739 F.3d at 271. As explained in *Expert Masonry*, "a *plaintiff* must satisfy each element of the *per se* . . . test[] . . . in its allegations in order to survive pre-trial termination." 440 F.3d at 344 (emphasis added). In *Southeastern Milk*, the court held that, even where a factual dispute exists between the parties over whether a challenged restraint is obviously anticompetitive—and therefore deserving of per se treatment—the defendants producing "evidence that the agreement at issue may have had procompetitive aspects . . . indicate[s] that this situation would not fall into the categories of *per se* unreasonable restraints on trade." 739 F.3d at 274. The court concluded **[**16]** that "[t]herefore, especially at the summary judgment stage, this is not a 'clear cut' case of an obviously anticompetitive trade restraint, and thus the district court was correct to apply the default standard of the rule of reason." *Id.* Hence, at the summary judgment phase, the right question to ask regarding per se claims is whether the plaintiff has shown that the challenged restraint is so obviously anticompetitive that it should be condemned as per se illegal. If, in spite of the plaintiff's efforts, the record indicates that the challenged restraint is plausibly procompetitive, then summary judgment for the defendants is appropriate.

Per se claims against joint ventures

The question before us is further delineated by the fact that the challenged restraints exist within a joint venture, which the Supreme Court has noted "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively." Copperweld Corp v. Indep. Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984). At the same time, joint ventures often superficially resemble horizontal concerted action because they involve horizontal competitors joining together to restrain trade in some way, such as by coordinating prices. **[***11]** *See* Texaco Inc. v. Dagher, 547 U.S. 1, 4, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006) (denying **[**17]** a per se horizontal price fixing claim brought by a plaintiff against a joint venture created by Texaco and Shell Oil that unified their respective gasoline refining and marketing operations in the western United States under two brands).

HN7[] Because joint ventures often have procompetitive efficiencies, when a joint venture is itself challenged as anticompetitive, that claim is reviewed under the rule of reason. Copperweld Corp., 467 U.S. at 768. But when the *conduct* of the joint venture is challenged, the relationship of the challenged conduct to the joint venture is analyzed to see if the conduct is reasonably related to the joint venture's procompetitive features (and therefore should be judged under the rule of reason), or is a naked restraint lurking beneath the veneer of a legitimate joint venture (and therefore deserves per se condemnation). *See* Nat. Collegiate Athletic Assn. v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 113-15, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) (observing that a "naked" restraint, subject to the per se rule, can exist even though it is contained in a joint venture agreement that is, overall, quite competitive). The Supreme Court has distinguished three categories of restraints: (1) restraints that are core to the **[*725]** joint venture's efficiency enhancing purpose; (2) restraints that are ancillary to the joint venture's **[**18]** efficiency enhancing purpose; and (3) restraints that are nakedly unrelated to the purpose of the joint venture. *See Dagher, 547 U.S. at 7-8*. Only the last of these three justifies per se treatment. *Id.*

Core activity

HN8[] Core activity is activity that is "integral to the running" of the venture. *Id. at 7-8*. In *Dagher*, the Supreme Court rejected a per se claim against horizontal price-setting by two competitors on the ground that the price-setting "involve[d] the core activity of the joint venture itself." *Id. at 7*.

Hospital Defendants claim that the challenged panel limitation—but not the other challenged restraints—qualifies as core activity. They argue that because *Dagher* described price setting as a core activity for the joint venture in that case, and because panel limitations are a "pricing term" in Hospital Defendants' contracts with payers, the panel limitations are "core activity."

[*12]** This argument is not persuasive. *Dagher* does not stand for the general proposition that restraints in contracts that are price related are always core activity for joint ventures. *Dagher*'s holding was tailored to the specific joint venture before it. *Id. at 5-6*. This argument may be dismissed simply by noting that the definition of "core activity" provided **[**19]** by *Dagher*, "integral to the running" of the joint venture, *id. at 7-8*, cannot seriously be argued of Hospital Defendants' panel limitations. Hospital Defendants continue to operate as a joint venture today even though the panel limitation clauses have been removed from their contracts with payers.

Joint venture's ancillary restraints

HN9[] Restraints that are "ancillary to the legitimate and competitive purposes of the business association" fall between "core" activity and "naked" restraints. *Id. at 7*. These are restraints by a joint venture that are not "integral to the running" of the joint venture, *id. at 8*, "but may contribute to the success of a cooperative venture." *Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 189 (7th Cir. 1985)*. A restraint is ancillary if it bears a *reasonable* relationship to the joint venture's success. *See Major League Baseball Props., Inc. v. Salvino, 542 F.3d 290, 339-40 (2d Cir. 2008)* (Sotomayor, J., concurring).

Predictably, the parties spill considerable ink contesting what counts as "reasonable." MCEP urges the panel to accept Judge Black's version of the ancillary-restraints doctrine. We decline to do so because Judge Black framed the ancillary-restraints inquiry incorrectly in two ways: by applying too high a standard to determine what qualifies as "reasonable" and by placing an evidentiary burden on Hospital Defendants to **[**20]** meet that standard. Judge Black rejected Hospital Defendants' argument that their restraints bore a reasonable relationship to the joint venture's success, holding that they "failed to evidence that their joint contracting has any efficiency-enhancing purpose to which such an agreement is necessary." Under this standard, only restraints that are *necessary* to a joint venture's efficiency-enhancing purposes qualify as ancillary. Further, Judge Black held that Hospital Defendants must provide "undisputed proof" that the restraint is necessary to prevent a per se claim from proceeding to trial.

Judge Black's sole source of authority for this version of the ancillary-restraints doctrine is a guidance document put out by **[*726]** the Federal Trade Commission and the United States **[***13]** Department of Justice on collaboration among competitors. *See* Dep't of Justice & FTC, *Antitrust Guidelines for Collaborations Among Competitors* § 3.3, at 10-25 (Apr. 2000). But the citation is of dubious relevance to the ancillary-restraints doctrine because the cited section deals with joint ventures only under the rule of reason, not the per se rule.

To bolster Judge Black's approach, MCEP cites *NaBanco v. Visa U.S.A., Inc., 779 F.2d 592, 601 (11th Cir. 1986)*, and *In re Sulfuric Acid Antitrust Litig., 743 F. Supp. 2d 827, 872 (N.D. Ill. 2010)*, for the proposition that an ancillary restraint must be *necessary* to achieve the joint venture's efficiency-enhancing **[**21]** purpose. *NaBanco* supports MCEP's preferred formulation, but *In re Sulfuric Acid* does not. *In re Sulfuric Acid* echoes the ancillary-restraints inquiry articulated by the Seventh Circuit in *Polk Brothers*: "A court must ask whether an agreement promoted enterprise and productivity at the time it was adopted. If it *arguably* did, then the court must apply the Rule of Reason to make a more discriminating assessment." *743 F. Supp. 2d at 872* (quoting *Polk Bros., 776 F.2d at 189*) (emphasis added).

Hospital Defendants, on the other hand, describe the standard as whether there exists a *plausible* procompetitive rationale for the restraint.[7] The Second, Seventh, Eighth, and Ninth Circuits adopt this approach.[8]

Perhaps most destructive to MCEP's argument is then-Judge Sotomayor's concurrence in *MLB Properties, 542 F.3d at 338*. Although MCEP cites that concurrence five times in its briefing, Judge Sotomayor categorically rejected the position MCEP asks this court to adopt. She described ancillary restraints as requiring "a *reasonable* procompetitive justification, related to the efficiency-enhancing purposes of the joint venture." *Id. at 339* (emphasis added). Then, in **[***14]** defining what qualifies as "reasonable," she expressly rejected the formulation that MCEP argues here: "Under **[**22]** the ancillary restraints doctrine, a challenged restraint need not be essential, but rather only reasonably ancillary to the legitimate cooperative aspects of the venture." *Id. at 340 n.11* (citations and internal quotation marks omitted); *see also Polk Bros., 776 F.2d at 189* (explaining that a restraint is ancillary if it *may* promote the success of a joint venture).

HN10[] The question of what relationship a challenged restraint must have to a joint venture in order to qualify as ancillary splits the Circuits—the Eleventh Circuit **[*727]** on the one hand, and the Second, Seventh, Eighth, and Ninth Circuits on the other. We follow the majority of Circuits and hold that a joint venture's restraint is ancillary and therefore inappropriate for per se categorization when, viewed at the time it was adopted, the restraint "may contribute to the success of a cooperative venture." *Polk Bros., 776 F.2d at 189*. That approach better accords with Supreme Court guidance. As the Ninth Circuit in *Paladin Associates* explained:

> ***HN11***[] The Supreme Court generally has treated as per se illegal joint efforts by firms to disadvantage a competitor by persuading customers to deny that competitor relationships the competitor needs in the competitive struggle. But in these cases, the practices generally **[**23]** were not justified by plausible arguments that the practices enhanced overall efficiency and made markets more competitive.

328 F.3d at 1154-55. In a footnote that follows the court elaborated:

> This is so because plausible arguments that a practice is procompetitive make us unable to conclude "the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote."

Id. at 1155 n.8 (quoting *Stationers, 472 U.S. at 294*).

Paladin faithfully applies the Supreme Court's holding in *Stationers.* ***HN12***[] Condemning as per se illegal restraints that, while not necessary to achieving a joint venture's efficiency-enhancing purpose nevertheless plausibly relate to that purpose, would run counter to the Supreme Court's instruction to avoid applying the per se rule to situations where efficiencies are being served. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551*

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[7] Hospital Defendants, at one point, argue that the correct legal standard for determining whether a restraint is ancillary or naked is whether the challenged restraint is "completely unrelated to the purpose of a lawful joint venture." But this mischaracterizes the ancillary-restraints doctrine. "The per se rule would collapse if every claim of economies from restricting competition, however implausible, could be used to move a horizontal agreement not to compete from the per se rule to the Rule of Reason category." *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588, 595 (7th Cir. 1984)*.

[8] *See MLB Properties, 542 F.3d at 338-39* (Sotomayor, J., concurring); *Craftsmen Limo,, Inc. v. Ford Motor Co., 363 F.3d 761, 776 (8th Cir. 2004)* ("When determining whether to apply the rule of reason analysis to non-price advertising restrictions related to product safety, the issue is not whether the restrictions *were* procompetitive, but whether they *could be*."); *Paladin Assocs. v. Mont. Power Co., 328 F.3d 1145, 1154-55 (9th Cir. 2003)* ("When a defendant advances plausible arguments that a practice enhances overall efficiency and makes markets more competitive, per se treatment is inappropriate, and the rule of reason applies."); *Polk Bros., 776 F.2d at 189*.

U.S. 877, 894, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007) (holding that per se treatment is inappropriate where "it cannot be stated with any degree of confidence that [the challenged restraint] 'always or almost always tends to restrict competition and decrease **[***15]** output'") (quoting Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)).

MCEP's second but related argument, which was adopted by Judge Black, is that Hospital Defendants bear the burden of proving that a challenged restraint is procompetitive, and therefore **[**24]** ancillary, because the question of the procompetitiveness of a restraint is "quintessentially one of fact." Judge Black's inclination to defer to the fact finder has an intuitive appeal in the summary judgment context. And it would be correct had MCEP brought a claim under the rule of reason. *See* Perceptron, Inc. v. Sensor Adaptive Machs., Inc., 221 F.3d 913, 919 (6th Cir. 2000) ***HN13***[] ("[T]he rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.") (citation omitted). For a per se claim, however, Judge Black's conclusion is erroneous. Whether challenged conduct belongs in the per se category is a question of law. *See* Ariz. v. Maricopa Cty. Med. Socy., 457 U.S. 332, 337 n.3, 354, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982) (characterizing the per se rule as a "rule of law"); MM Steel, L.P. v. JSW Steel (USA) Inc., 806 F.3d 835, 847 (5th Cir. 2015) ("The decision to analyze the conspiracy under a per se theory of liability is a question of law that we review de novo."). In *Craftsmen Limousine, Inc. v. Ford Motor Co.*, the Eighth Circuit likewise found that whether a given restraint falls within the per se category is a question of law, citing a well-respected treatise on ***antitrust law*** for the proposition that "although a court's determination that the per se rule applies 'might involve many fact questions, the selection of a mode of **[**25]** analysis is entirely a **[*728]** question of law.'" 363 F.3d 761, 772 (8th Cir. 2004) (citing Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***, ¶ 1909b (1998)). And it is a question of law where certain presumptions apply. As we explained in *Expert Masonry*, the "*plaintiff* must satisfy each element of the per se . . . test[] . . . in its allegations in order to survive pre-trial termination." 440 F.3d at 344 (emphasis added). The Supreme Court has likewise held that because a plaintiff failed to make a threshold showing that the challenged conduct had the characteristics necessary to justify per se condemnation, rule of reason analysis should apply instead. Stationers, 472 U.S. at 298 ("A plaintiff seeking application of the *per se* rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects.").

[*16]** ***HN14***[] If the record in this case reveals a plausible way in which the challenged restraints contribute to the procompetitive efficiencies of the joint venture, then "the possibility of countervailing procompetitive effects" is not remote and per se treatment is improper. Id. at 294. What are Premier's procompetitive efficiencies? The joint operating agreement of Hospital Defendants' joint venture, Premier, states **[**26]** the following goals:

> (1) To provide a broad scope and a continuum of health care services with a focus upon community health benefit.
> (2) To improve cost effectiveness and efficiencies in the delivery of health care services.
> (3) To increase the quality of health care services in the greater Miami Valley Region.
> (4) To integrate physicians and other health care providers with the JOC Network.
> (5) To have the capacity to assume and manage financial risk.
> (6) To improve the health status of the greater Miami Valley Region.

We analyze Hospital Defendants' challenged restraints in light of these goals.[9]

MCEP challenges two kinds of conduct on the part of Hospital Defendants. First, MCEP argues that Hospital Defendants restrained trade through "panel limitations," wherein Hospital Defendants stipulated to payers that if they added MCEP to their networks, Hospital Defendants would be able to renegotiate prices. Second, MCEP alleges that Hospital Defendants took direct concerted action against MCEP by cutting off patient referrals to MCEP-affiliated physicians, evicting MCEP-affiliated physicians from office space owned by Hospital Defendants, and agreeing with third parties to refuse to deal with **[**27]** MCEP-affiliated physicians.

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[9] The challenged conduct evaluated in this section is limited to MCEP's claim of illegal concerted action among the Hospital Defendants, not the additional "rim conspiracy" claims. The reason for this is that we conclude in the next section that Judge Rice did not abuse his discretion by ruling that MCEP's effort to plead those claims was untimely.

Panel limitations. Courts have found such restraints of trade supported by procompetitive justifications. *Stop & Shop Supermarket Co v. Blue Cross & Blue Shield, 373 F.3d 57, 62 (1st Cir. 2004)* (finding that closed networks can allow payers to reduce customer premiums because providers will exchange better rates for guaranteed volume). Likewise in **[***17]** *Methodist Health Servs. Corp. v. OSF Healthcare Sys.*, where the Seventh Circuit addressed panel limitations as a mere variant on the accepted restraint of exclusive dealing arrangements:

> **[*729]** But what is more common than exclusive dealing? It is illustrated by requirements contracts, which are common, and legal, and obligate a buyer to purchase all, or a substantial portion of, its requirements of specific goods or services from one supplier. [The Hospital Defendants'] deals with the health insurance companies are a form of requirements contract, for the deals require the companies to limit the network of providers from which they obtain the health care that their insurance contracts obligate them to obtain for their insureds. And an insurance company may get better rates from a hospital in exchange for agreeing to an exclusive contract, as exclusivity will drive a higher volume of business to the hospital. **[**28]**

859 F.3d 408, 410 (7th Cir. 2017).

MCEP claims that Hospital Defendants' argument that panel limitations help ensure volume is a pretext. In support of this claim, MCEP points to evidence showing that Premier's contract with insurer Aetna had a volume-based discount that automatically lowered Premier's rates when billing volume increased past certain benchmarks. Thus, even without panel limitations, Hospital Defendants had financially incentivized insurers to maintain a high volume of patients getting services from Hospital Defendants. To MCEP, this evidence reveals that the only possible purpose of the panel limitation in Hospital Defendants' contract with Aetna was "purely punitive."

We are not persuaded. A panel limitation and a price schedule are two distinct methods directed toward the common goal of keeping patients (customers) coming through the doors. A pricing schedule is a discount that incentivizes payers to keep volume up. A panel limitation, meanwhile, forces payers to confront the risk of renegotiating their contract with Hospital Defendants if they choose to send their insureds (customers) to a competing provider. Moreover, it is plausible that Hospital Defendants would deploy a "belt and suspenders" approach **[**29]** to a matter as crucial for a hospital system as maintaining patient (customer) volume. It is plausible that panel limitations, by lowering the cost of Hospital Defendants' services, contribute to the efficiency-enhancing purposes of the joint venture, specifically improving "cost effectiveness and efficiencies in the delivery of health care services."

[*18]** *Concerted action regarding physicians.* MCEP's claims concerning Hospital Defendants' *direct* concerted action toward physicians can be divided into two categories: (1) threatened loss of patient referrals; and (2) non-compete agreements.

1. Threatened loss of patient referrals[10]

This alleged restraint centers around evidence found in a letter sent by **[*730]** Hospital Defendants to Dayton-area doctors informing them of Hospital Defendants' opposition to MCEP. The letter, signed by 94 primary care physicians, discusses the consequences that MCEP's presence could have on the Dayton healthcare market. The primary concern expressed in the letter was that the profit-driven MCEP "will take the better insured and more

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[10] MCEP also argues that Hospital Defendants waived the right to move for summary judgment on this theory of liability because they failed to argue before Judge Black that their direct concerted action should be viewed under the rule of reason. Likely, MCEP intends to say that Hospital Defendants' *forfeited* the argument.***HN15***[] "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *United States v. Olano, 507 U.S. 725, 733, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)*. Under forfeiture doctrine, "parties are not limited to the precise arguments they made below." *Yee v. Escondido, 503 U.S. 519, 534, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992)*. At worst, MCEP is claiming that Hospital Defendants are making a "new argument to support what has been [their] consistent claim." *Lebron v. Natl'l R.R. Passenger Corp., 513 U.S. 374, 379, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995)*. Hospital Defendants did not forfeit the right to move for summary judgment on MCEP's claim that Hospital Defendants' direct concerted action is per se illegal because Hospital Defendants have consistently argued that MCEP's per se claim does not apply to the challenged conduct.

profitable patients away from Premier" and leave "local hospitals with only the more complex and underinsured patients." At the conclusion **[**30]** of the letter, the physicians wrote:

> We, the primary care network of physicians for Premier, strongly oppose [MCEP]. We believe it will have only negative impacts on our community, our hospitals and our network. We do not support the physicians who invest in these inpatient hospitals. We do look forward, however, to our continued efforts to work with the specialists of our hospital medical staffs and do our part within Premier to continue to improve the delivery of cost-effective, highest quality healthcare to the people of our community.

MCEP claims that doctors who signed the letter "understood [it] to mean that signatories would stop referring patients to anyone who invested in MCEP."

Hospital Defendants argue that the letter, in expressing the opinion of Premier and its affiliated physicians, does not constitute a *restraint*, and therefore cannot qualify as illegal conduct under antitrust laws. They are right. In *Am. Council of Podiatrists v. Am. Bd. of* ***[***19]*** *Podiatric Surgery, Inc.*, we held that, ***HN16***[] in the absence of a showing by the plaintiff that allegedly anticompetitive communication was (1) "false" and (2) "difficult or costly for the plaintiff to counter," we would apply a presumption **[**31]** that speech has "*de minimis* effect on competition." *323 F.3d 366, 370-72 (6th Cir. 2003)*. MCEP's claim fails under both of these prongs. MCEP has not shown that Hospital Defendants' "Dear Physician" letter was untrue, and MCEP countered the "Dear Physician" letter, without any apparent difficulty, with a "Dear Colleague" letter of its own.

2. Non-compete agreements

MCEP claims that Hospital Defendants terminated the leases of multiple MCEP-affiliated doctors who rented space in Hospital Defendants' hospitals. Judge Rice rejected this argument on the grounds that Hospital Defendants have a legitimate interest as a joint venture in preventing free riding by physicians who will reap the benefits of training and convenient office space at their hospitals and "then refer their patients elsewhere or invest in other hospitals." Hospital Defendants had a plausible concern that, without these contracts, physicians who invested in MCEP could rent office space at a Premier-associated hospital, free ride on the reputation and facilities of that hospital, and then refer patients out to MCEP. Preventing such a misalignment of incentives is plausibly related to Hospital Defendants' goal of "integrat[ing] physicians and other health care **[**32]** providers with the JOC Network."

MCEP also alleges that Hospital Defendants' non-compete agreements with physicians in the Dayton area qualify as concerted conduct subject to per se condemnation. Hospital Defendant Good Samaritan purchased the Dayton Heart Hospital in 2008. As characterized by MCEP, a condition of the purchase by Good Samaritan Hospital was that individual owners of Dayton Heart Hospital were paid in **[*731]** full only if they agreed "(i) not to invest in MCEP, and (ii) if they already owned shares, they would divest if MCEP began to offer cardiac services" over the next five years. MCEP cites no case law holding that vertical non-compete contracts entered into by joint ventures qualify as conduct that is anticompetitive per se.[11] ***HN17***[] And this circuit, as well as **[***20]** the common law,[12] have long recognized that "[l]egitimate reasons exist to uphold noncompetition covenants even though by nature they necessarily restrain trade to some degree." *Perceptron, Inc., 221 F.3d at 919* (quoting *Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 265 (7th Cir. 1981))*. It is MCEP's burden to show that per se treatment of allegedly anticompetitive conduct is justified. *Stationers, 472 U.S. at 298*. In this context, MCEP's failure to produce any on-

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[11] Instead MCEP cites to *E. States Retail Lumber Dealers' Assoc. v. United States, 234 U.S. 600, 34 S. Ct. 951, 58 L. Ed. 1490 (1914)*, and *United States v. Coop. Theatres of Ohio, Inc., 845 F.2d 1367, 1373 (6th Cir. 1988)* (per curiam). Neither case concerns joint ventures or the ancillary-restraints doctrine. *Coop. Theatres of Ohio* is inapposite, as it concerns market allocation rather than a group boycott. *845 F.2d at 1368*.

[12] "It must have been obvious from the beginning that the flat ban against such restraints of trade covered more than the rationale of the rule required. The rule might prevent desirable transfers of property. The most valuable asset of a business might be the good will of the public toward its owner. Should he wish to sell the business the owner could not get a price reflecting the asset of good will or the true going concern value of his business unless he could promise the purchaser not to return to compete with the business sold." Robert Bork, *Ancillary Restraints & the Sherman Act*, 15 ABA Section of ***Antitrust Law*** Proceedings 211, 213 (1959) (footnote omitted).

point precedent is damning, as we refuse to apply the per se rule in the absence of **[**33]** judicial experience with the challenged restraint. *See* *Broad. Music, Inc., v. Columbia Broad. Sys. Inc., 441 U.S. 1, 9, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)* (concluding that "it is only after considerable experience with certain business relationships that courts classify them as *per se* violations") (quoting *United States v. Topco Assocs., Inc., 405 U.S. 596, 607-08, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972))*.

MCEP's other arguments in support of its per se claim. First, MCEP argues that we are bound by precedent to find that Hospital Defendants' restraints qualify for per se treatment. To that end, MCEP cites to *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*. *Klor's*, however, did not concern a legitimate joint venture, so its approach to alleged horizontal restraints does not bear on the legal framework established above. *Id. at 208-09*. MCEP also argues that *Com-Tel, Inc. v. DuKane Corp., 669 F.2d 404 (6th Cir. 1982)*, which followed *Klor's* approach, controls. But *Com-Tel*, like *Klor's*, does not contain ancillary-restraints analysis because it does not concern a joint venture.

Second, MCEP argues that we are bound by "law of the case" to find in its favor because, in *MCEP I*, we implicitly rejected a number of the arguments that Hospital Defendants make here. We need not guess at the contours of *MCEP I*'s holding—we said expressly that it concerned "only . . . whether defendants' conduct is the result of two or more entities acting in **[***21]** concert **[**34]** or whether defendants, based on their participation in the joint operating agreement, function as a single entity in the market place." *MCEP I, 817 F.3d at 939*.

B.

Rim Conspiracy claims

MCEP argues that Judge Rice erred in dismissing its *Section 1* claims of **[*732]** concerted action based on "rim" conspiracies—that is, agreements (induced by Hospital Defendants) to boycott MCEP made among the payers as well as independent physicians. The rim conspiracies are distinct from the alleged conspiracy among the Hospital Defendants. MCEP argues that Hospital Defendants orchestrated two additional conspiracies—one among payers to collectively "hold the line" against MCEP by excluding it from their market, the other a "physician conspiracy" in which Hospital Defendants induced Dayton-area physicians to collectively refuse to refer patients to MCEP. As Judge Rice noted, this issue is significant. Hospital Defendants "conceded that, if MCEP could prove that the payers agreed among themselves not to offer MCEP a managed care contract and that Premier orchestrated that agreement, the *per se* rule would apply to that claim." If the district court erred by precluding these rim conspiracy claims, then even if Judge Rice was correct that MCEP **[**35]** has no triable per se claim of concerted action among Hospital Defendants (the "hub" claim), the case would need to be remanded and set for trial on MCEP's rim conspiracy claim.

MCEP argues that the rim conspiracy claims are not new. Instead, MCEP characterizes the rim agreements as additional evidence found through discovery that supports the overarching group boycott claim advanced in the Amended Complaint. MCEP undermines that position, however, by claiming simultaneously that "[t]he payer agreement and physician agreement . . . represent additional horizontal concerted action that *independently* requires imposition of the per se rule whether the jury finds the Defendants to be a single entity or multiple actors."

But MCEP's Amended Complaint includes neither an allegation of an agreement among the payers nor an agreement among the physicians.[13] Instead, the Amended Complaint alleges **[***22]** an agreement among the Hospital Defendants to financially induce payers and physicians to boycott MCEP. ***HN18***[] There is no "rim"

[13] MCEP's counsel acknowledged this fact in the course of a deposition, asserting: "I'll represent to you [to the deponent] that *there was not an allegation of an outer rim in the complaint*, but that MCEP contends that the evidence developed through discovery establishes the existence of an outer rim, meaning an understanding among two or more payers that each had agreed with the defendants not to expand their hospital panel."

conspiracy without alleged *agreement* among the parties at the rim (among the payers and physicians, respectively). *See* *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 436 (6th Cir. 2008)*. Because the Amended Complaint lacks an essential element for **[**36]** MCEP's "rim" conspiracy claims, the Amended Complaint does not include those claims.

Faced with that omission, MCEP claims that Judge Rice erred by not permitting MCEP to submit a Second Amended Complaint to add the rim conspiracy claims. ***HN19***[] We review for abuse of discretion the district court's decision to deny such a motion. *Super Sulky, Inc. v. U.S. Trotting Ass'n, 174 F.3d 733, 740 (6th Cir. 1999)*. We will overturn the district court's decision only if we have a "definite and firm conviction that the court below committed a clear error in judgment in the conclusion it reached upon a weighing of the relevant factors." *Taylor v. United States Parole Comm'n, 734 F.2d 1152, 1155 (6th Cir. 1984)* (citation omitted); *see also* John B. v. Goetz, *531 F.3d 448, 459 (6th Cir. 2008)*. The standard for a motion to amend is governed by the general principle that "cases should be tried on their merits rather than the technicalities of **[*733]** pleadings," which is in turn moderated by the exception that judges should allow amendment only when doing so does not "cause prejudice to the defendants" or undue delay. *Tefft v. Seward, 689 F.2d 637, 639 (6th Cir. 1982)*.

The district court found that Hospital Defendants "would be severely prejudiced if MCEP were permitted to amend its Complaint at this late date" primarily for the reason that a proper adjudication of the rim conspiracy claims would require **[**37]** a new round of discovery that could last well over a year. The district court was unmoved by MCEP's arguments that amending its complaint would not cause prejudice because Hospital Defendants had been "on notice" of the rim conspiracy claims since MCEP filed its Omnibus Opposition to Defendants' Motions for Summary Judgment.

The district court did not abuse its discretion by concluding that its allowing MCEP to amend its complaint for a second time would require a new round of discovery that would cause **[***23]** undue delay and prejudice Hospital Defendants by significantly extending litigation that began in 2012. *Tefft* does not save MCEP on this point. In that case, it was "obvious that the facts as set forth in Tefft's original complaint would support [the new] cause of action . . . as well as [the original cause of action]." *Id. at 639*. That is not the case here, where the facts as set forth in MCEP's Amended Complaint do *not* support MCEP's different rim conspiracy claims. This case is more like *Super Sulky*, where a plaintiff moved to amend his complaint to add an additional *Section 1* theory that was absent from the original complaint, but *had* been raised in response to a motion for summary judgment—in short, **[**38]** the circumstance here. The district court denied that plaintiff's motion to amend and we affirmed. *Super Sulky, 174 F.3d at 740-41*.

Judge Rice did not abuse his discretion when he denied MCEP's motion to amend its complaint.[14]

IV.

Because Judge Rice was correct to find that the challenged restraints do not fall within the circumscribed categories of per se condemnation, we AFFIRM the district court's grant of summary judgment.

Concur by: SUTTON

Concur

[*24]** SUTTON, Circuit Judge, concurring. I join Judge Batchelder's thoughtful opinion in full. I write separately to discuss the law-of-the-case doctrine and to explain why it does not apply to the prior panel's decision.

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[14] MCEP raised two additional claims on appeal—that the district court erred in dismissing Catholic Heath Initiatives and that the case should be remanded to Judge Black rather than Judge Rice. Both arguments are mooted because we affirm the district court's summary judgment in favor of Hospital Defendants.

What we call law of the case has two parts. The first part, known as the "mandate rule," is vertical. A lower court "is bound by the decree [of a higher court] as the law of the case, and must carry it into execution according to the mandate." *In re Sanford Fork & Tool Co., 160 U.S. 247, 255, 16 S. Ct. 291, 40 L. Ed. 414 (1895)*. The rule springs from the hierarchical structure of our judicial system and leaves no room for discretion. If the U.S. Supreme **[*734]** Court resolves an issue in a case and remands the matter to us, we are duty bound to follow the mandate of the superior court. So too at the trial level. If we decide an issue and remand the case, the trial court **[**39]** must carry out its duties in accordance with that mandate. *See* Bryan A. Garner et al., *The Law of Judicial Precedent* 459-60 (2016).

The second part, the part implicated by this case, is horizontal. It "expresses the practice of courts generally to refuse to reopen what has been decided" by an earlier panel of the same court in the same case. *Messenger v. Anderson, 225 U.S. 436, 444, 32 S. Ct. 739, 56 L. Ed. 1152 (1912)* (Holmes, J.). Unlike its upward counterpart, the sideways version of the law of the case is "not a limit to [a court's] power." *Id.* A later panel of an appellate court, like a district court, "has the power to revisit prior decisions of its own or of a coordinate court in any circumstance." *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)*. That is what happened when Judge Rice took over this case, reconsidered Judge Black's opinion, came to a different conclusion, and granted summary judgment to Premier. *See* *supra at 7*; Garner, *supra*, at 474, 487-88.

Today, we sit in essentially the same position as Judge Rice. A prior panel of our court decided that Premier was not a single entity under the *Sherman Act*. *See* *Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys., 817 F.3d 934, 936 (6th Cir. 2016)*. One judge dissented. *Id. at 945* (Griffin, J., dissenting). Now the case has returned.

[*25]** As I see it, the dissent got it right. *Section 1 of the Sherman Act* "does not reach conduct that is wholly unilateral." *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (quotation omitted). Officers and divisions **[**40]** within a single entity cannot collude in a way that violates *§ 1*. Single-entity status depends on economic realities rather than labels. Whether or not they keep their separate corporate identities, participants in a joint venture merge into a single entity if (1) their agreement creates a "complete unity of interest," *id. at 771*, and (2) they receive orders from a single decisionmaking center, *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 194, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)*.

Premier qualified as a single entity.

Complete unity of interest? Check. The hospitals shared profits and losses according to a distribution schedule that did not change based on any one hospital's performance. That means that each hospital in the joint venture benefited when another hospital succeeded even if that other hospital drew patients and profits away.

Single decisionmaking center? Check again. Premier served as the "operator" for all the joint venture's health system activities and had the power to negotiate managed care contracts, fire hospital executives, dictate their budgets, and plot the strategic course each hospital took. *Med. Ctr., 817 F.3d at 950* (Griffin, J., dissenting).

The law-of-the-case doctrine does not prohibit us from reviewing that ruling. And I would suggest we do so in this case save for one reality: **[**41]** It makes no difference to the outcome. Either way, Premier rightfully prevails.

No doubt, it's often said that courts at all levels should be "loathe" to overturn their earlier opinions unless they are "clearly erroneous" and cause a "manifest injustice." *Christianson, 486 U.S. at 817* (quotations omitted). But what does that mean? Surely, a legal ruling does not become more insulated from **[*735]** reversal by a senior court every time the junior court refuses to reconsider a prior ruling. The "clear error" and "manifest injustice" phrases must refer to something else. They instead are a reminder that courts should not lightly reconsider prior rulings in the same case—lest we scramble the expectations of the parties *and* encourage serial efforts to revisit prior rulings. These are, in other words, self-enforced standards, not the **[***26]** standard a senior court uses to review a reconsidered ruling. There is no such thing as upholding an erroneous, but not clearly erroneous, legal ruling in this setting. Accordingly, if a court revisits a prior legal ruling, that does not transform the standard of review from de novo to clear error. *See* Garner, *supra*, at 447.

Dissent by: HELENE N. WHITE

Dissent

[*27]** HELENE N. WHITE, Circuit Judge, dissenting in part. I agree with the majority's **[**42]** conclusion that the rule of reason applies to the alleged conspiracy involving concerted action by the Hospital Defendants. However, I disagree with the majority's determination regarding the rim conspiracy involving the payers.

The majority acknowledges that there is evidence of horizontal concerted action among the payers, orchestrated by Defendants, not to provide MCEP a managed-care contract (i.e., the "rim conspiracy"), and that the per se rule would apply to that conspiracy. The majority nevertheless concludes that MCEP cannot present that evidence to a jury because (1) it constitutes a separate, unpled claim from the conspiracy claim that MCEP pled; and (2) Judge Rice did not abuse his discretion in determining that allowing MCEP to amend its complaint to include this claim would prejudice Defendants. Because the allegations in MCEP's Amended Complaint encompass this rim conspiracy; the evidence was known by Defendants early in the proceedings; this court discussed the evidence of a rim conspiracy in the first appeal; Judge Black relied on the evidence of a rim conspiracy in denying Defendants' summary judgment motions after remand; and Defendants failed to seek the purported **[**43]** necessary additional discovery in a timely fashion, I would reverse the grant of summary judgment and remand for trial. Accordingly, I respectfully dissent.

The majority's recitation of the procedural history of this case omits important details that bear on whether the rim conspiracy should proceed to trial. After Defendants moved for summary judgment on the basis that they were a single entity and thus incapable of conspiring, MCEP affirmatively raised the rim conspiracy, arguing in opposition to Defendants' motion that evidence of concerted action by the payers—what MCEP called "an additional facet to th[e] conspiracy" it pled (R. 139, PID 10136)—meant that the plurality requirement was met and that the alleged conspiracy would still be subject to per se treatment even if Defendants were a single entity. In reply, Defendants did not argue that the rim conspiracy constituted a separate and untimely alleged conspiracy; and they did not argue that they needed additional discovery **[***28]** regarding this concerted action. Rather, they argued only that there was insufficient evidence of the rim conspiracy, forfeiting any timeliness argument.

It was not until the first appeal that Defendants challenged **[**44]** the rim-conspiracy claim as not encompassed within MCEP's Amended Complaint, and therefore untimely. Defendants also argued that they would be prejudiced by adding this new theory to the case, and stressed at oral argument in the first appeal that they would need additional discovery to defend **[*736]** against the allegation of horizontal concerted action by the payers. Despite Defendants' argument, the prior panel expressly considered evidence of the rim conspiracy in its majority opinion:

> Plaintiff has submitted evidence that each insurer knew that the other insurers had included this [panel] limitation in their contracts, as demonstrated by the excerpt below from a Dayton industry publication:
>
> > Premier has threatened to revoke privileges for physicians participating in [plaintiff hospital] and contracts with health plans such as Anthem and UnitedHealth are known to be contingent on excluding [plaintiff hospital] from the network.
>
> In addition to this published account, plaintiff also offered evidence from insurance company emails and defendant hospitals' Board of Directors meetings that, in addition to demonstrating knowledge among the insurers of the restriction on adding new hospitals to their **[**45]** networks in their managed-care contracts with defendant hospitals, the insurance companies regularly monitored each other to ensure that the other insurance companies were complying with the contract restriction on dealing with a new hospital.

Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys., 817 F.3d 934, 941-42 (6th Cir. 2016) (hereafter *MCEP I*) (second and third alterations in original) (internal citation omitted).

After remand, Judge Black issued an order requesting briefing regarding the effects of the opinion in *MCEP I* on Defendants' previously filed summary judgment motions. In their reply brief, Defendants summarily argued, for the first time before the district court, that the horizontal concerted action by the payers was not pled and that adding that theory to the case would prejudice them. Defendants did not request additional discovery on that issue, however.

In denying Defendants' remaining summary judgment motions, to support his conclusion that the per se rule applies to MCEP's antitrust claim, Judge Black discussed and relied on **[***29]** evidence that at the behest of Defendants, the payers joined in an agreement not to deal with MCEP.[1]

After Judge Black denied Defendants' remaining summary judgment motions, and despite this court's **[**46]** and Judge Black's opinions indicating that the rim conspiracy was part of the case and Defendants' representation to this court that they would need additional discovery to defend against that theory, Defendants still did not request additional discovery. Instead, more than seven months later, after Judge Black recused himself and only a couple of months before trial was scheduled to begin, Defendants made the same untimeliness **[*737]** argument to Judge Rice, arguing that they would be prejudiced if the rim conspiracy was included at trial and that they would need 12-18 months of additional discovery. As the majority explains, Judge Rice accepted those arguments, finding that the rim conspiracy was not alleged in the Amended Complaint and that MCEP could not file a Second Amended Complaint because Defendants would be prejudiced by the delay.

Given this chronology, I would reverse the district court's grant of summary judgment and allow the rim conspiracy, which all agree is subject to the per se rule, to proceed to trial. This conclusion is not dependent on whether the law of the case applies, but rather on whether the issue was fairly included in the case. First, MCEP's Amended Complaint expressly **[**47]** alleges a group boycott subject to per se condemnation involving Defendants and the payers. The horizontal concerted action by the payers, orchestrated and monitored by Defendants, can reasonably be construed as part of this single, overarching conspiracy. This conclusion is reinforced by Defendants' failure to argue in their summary judgment briefs before the first appeal that the rim conspiracy was not encompassed within the Amended Complaint; and this **[***30]** court's and Judge Black's express reliance on evidence of the rim conspiracy when discussing the merits of this case.

Second, Defendants' prejudice argument is unavailing in light of their failure to (1) argue prejudice in their initial summary judgment briefing, and (2) seek the discovery they told this court they would need in October 2015, despite the opportunity to do so for months. Rather than seek the discovery they claimed to need, Defendants moved forward with trial preparations before deciding to try their untimeliness argument a third time on a different judge after it failed to persuade either this court or Judge Black.

More fundamentally, the majority's affirmance of the dismissal of the rim conspiracy deprives MCEP of any **[**48]** remedy based on a pleading technicality even though all agree that there is sufficient evidence that Defendants and the payers conspired to exclude MCEP from the market in a way that is per se illegal—i.e., in a way that is "so inherently anticompetitive that [the agreement] is illegal per se without inquiry into the harm it has actually caused." *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (citation omitted). Because "cases should be tried on their merits rather than the technicalities of pleadings," *Tefft v. Seward, 689 F.2d 637, 639 (6th Cir. 1982)*, I would remand the rim conspiracy for trial.

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[1] Because Judge Black construed MCEP's claim as encompassing the rim conspiracy, his conclusion that the per se rule applied to MCEP's claim is reasonable. Further, despite the majority's conclusion "that then-Judge Sotomayor's concurrence in *MLB Properties*" is "[p]erhaps most destructive to" Judge Black's framing of the ancillary-restraints doctrine (Maj. Op. at 13), then-Judge Sotomayor's concurrence in *MLB Properties* stated at several points that the restraint must be "reasonably necessary" to the efficiency-enhancing benefits of the joint venture. *See, e.g.*, *542 F.3d at 338* (explaining that a per se approach may apply to joint ventures where "a particular challenged restraint is not reasonably necessary to achieve any of the efficiency-enhancing benefits of a joint venture and serves only as naked restraint against competition"). Thus, the majority's critique of Judge Black's formulation of the ancillary-restraints doctrine—requiring the restraint to be necessary to an efficiency-enhancing purpose of the joint venture—is not entirely fair given the broader context of his ruling.

Bobcat N. Am., LLC v. Inland Waste Holdings, LLC

Superior Court of Delaware, New Castle

January 23, 2019, Submitted; April 26, 2019, Decided

C.A. No. N17C-06-170 PRW CCLD

Reporter
2019 Del. Super. LEXIS 210 *; 2019 WL 1877400

BOBCAT NORTH AMERICA, LLC, Plaintiff, v. INLAND WASTE HOLDINGS, LLC; RSMDBB HOLDINGS, LLC; BART A. BEGLEY; MONTGOMERY M. DAVISON; and ROBERT A. SMITH, Defendants.INLAND WASTE HOLDINGS, LLC; RSMDBB HOLDINGS, LLC; BART A. BEGLEY; MONTGOMERY M. DAVISON; ROBERT A. SMITH; INLAND SERVICE CORPORATION, LLC; and INLAND SERVICE OF FLORIDA, LLC, Counterclaim Plaintiffs and Intervenors, v. BOBCAT NORTH AMERICA, LLC, Counterclaim Defendant.

Notice: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Subsequent History: Related proceeding at *Bobcat N. Am., LLC v. Inland Waste Holdings, 2020 Del. Super. LEXIS 2735 (Del. Super. Ct., Aug. 17, 2020)*

Partial summary judgment denied by, in part, Partial summary judgment granted by, in part *Bobcat N. Am., LLC v. Inland Waste Holdings, LLC, 2020 Del. Super. LEXIS 2790 (Del. Super. Ct., Sept. 18, 2020)*

Prior History: [*1] Upon Plaintiff/Counterclaim Defendant Bobcat North America, LLC's Motion for Partial Summary Judgment.

Disposition: GRANTED in part; DENIED in part.

Core Terms

email, second sentence, confidentiality, summary judgment, sentence, courts, counterclaims, prevention, immunity, confidential information, defamation, customers, tortious interference, petitioning activity, public information, first sentence, parties, automatically, declaratory, privileged, contracts, summary judgment motion, impracticability, authorization, impossibility, defamatory, defenses, bid, terms of the contract, ordinary meaning

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

HN1[] **Summary Judgment, Entitlement as Matter of Law**

The standard of review on a motion for summary judgment is well-settled. A motion for summary judgment is reviewed by the Delaware Superior Court under *Del. Super. Ct. R. Civ. P. 56(c)*.

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

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

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

The burden is on the moving party to demonstrate its prayer for summary judgment is supported by undisputed facts or an otherwise adequate factual record to support a legal judgment. If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder.

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

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

HN3[] **Entitlement as Matter of Law, Appropriateness**

The Court may grant a motion for summary judgment when: (1) the record establishes that, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact; and (2) in light of the relevant law and those facts, the moving party is legally entitled to judgment. But the Court cannot grant a motion for summary judgment if the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record.

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

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

HN4[] **Entitlement as Matter of Law, Genuine Disputes**

A fact is material for summary judgment purposes if it might affect the outcome of the pled claim under the law governing such a claim. In considering a motion for summary judgment, the Court's principle function is to examine the record to determine whether genuine issues of material fact exist, but not to decide such issues. At bottom, a claim should be disposed of by summary judgment whenever an issue of law is involved and a trial is unnecessary.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem

Contracts Law > Contract Interpretation > Intent

HN5[] **Contract Interpretation, Ambiguities & Contra Proferentem**

Under Delaware law, the proper construction of any contract is purely a question of law. The objective is to give effect to the parties' mutual intent at the time of contracting. Absent ambiguity, contract terms should be accorded with their plain, ordinary meaning. A contract term is not ambiguous merely because the parties dispute its meaning. Ambiguity exists when the disputed term is fairly or reasonably susceptible to more than one meaning.

Contracts Law > Contract Interpretation > Intent

HN6[] **Contract Interpretation, Intent**

Whether a contract's material terms are sufficiently defined is mostly, if not entirely, a question of law. The interpretation of contractual language is a question of law. Construing a contract's language should adhere to what would be understood by an objective, reasonable third party.

Contracts Law > Defenses > Affirmative Defenses

Civil Procedure > Preliminary Considerations > Equity > Relief

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Scope of Declaratory Judgments

HN7[] Contract defenses do not apply to equitable claims, only legal claims. But a declaratory judgment action is not per se equitable. So there is occasion where the Court must determine whether a given declaratory judgment action is one in law or one in equity. That determination turns on factors such as the nature of the underlying claim, other accompanying requested relief, and the essence of the declaration sought. A declaratory judgment is a creature of statute and 'not a purely equitable remedy.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Conditions Precedent

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

HN8[] **Contract Conditions & Provisions, Conditions Precedent**

The general rule concerning a condition precedent is that one has no duty to perform until the condition occurs. And under the "prevention doctrine" a duty to perform is excused if the other promisor party wrongfully prevented the condition from occurring. The key operative language is "wrongfully prevented." Because there is no prevention claim where the contract, in effect, authorizes prevention, the essential inquiry is whether or not the contract allocated the risk of the condition's nonoccurrence. The assumption of risk exception recognizes that "there are some cases in which some sort of prevention or interference is contemplated by the parties as quite proper and within the privileges of the promisor.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Conditions Precedent

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

HN9[] **Contract Conditions & Provisions, Conditions Precedent**

Delaware and other courts have long-recognized the prevention doctrine and its assumption-of-risk exception. Courts have found that contracts may authorize prevention via explicit language such as for any reason, for any reasons whatsoever, regardless of the circumstances giving rise to such condition, or nothing therein requires the agreed-upon condition precedent be consummated.

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

HN10[] **Contracts, Standards of Performance**

The fact that both contracting sides are sophisticated parties experienced in their industry, weighs in favor of finding an assumption of risk in contract terms. But where assumption of risk is found in a contract, courts caution that the specific risk assumed must be distinguished from some "blanket" assumption of risk claimed. For only a specific risk clearly assumed by a party will preclude that party's defensive claim of prevention. And absent clear contractual authorization of prevention, a court will not judicially imply such a term.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Impossibility of Performance

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Impracticability

HN11[] **Standards of Performance, Impossibility of Performance**

Under Delaware law, an impracticability/impossibility defense requires the showing of: (1) the occurrence of an event, the nonoccurrence of which was a basic assumption of the contract; (2) the continued performance is not commercially practicable; and (3) the party claiming impracticability did not expressly or impliedly agree to performance in spite of impracticability that would otherwise justify nonperformance. Where the party has assumed the risk that the "impracticable/impossible" event might occur, the defense does not apply. There can be no invocation of the impossibility defense if the supervening events were 'reasonably foreseeable, and could and should have been anticipated by the parties and provision made therefor within the four corners of the agreement.

Business & Corporate Compliance > ... > Standards of Performance > Impossibility of Performance > Frustration of Purpose

HN12[] **Impossibility of Performance, Frustration of Purpose**

The doctrine of commercial frustration does not apply if at the time of contracting the supervening events were reasonably foreseeable, and could and should have been anticipated by the parties and provision made therefor within the four corners of the agreement.

Contracts Law > Contract Interpretation > Intent

HN13[] **Contract Interpretation, Intent**

The role of a court is to effectuate contracting parties' intent. Absent textual ambiguity, the Court accords the contract's language its plain, ordinary meaning. The Court takes a holistic view, reading the given instrument as a whole, giving effect to all of its terms, and reconciling or harmonizing all of its provisions. The meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan. And the Court must, when construing a contract's terms, avoid absurd, irrational, and illogical results.

Contracts Law > Contract Interpretation

HN14[] **Contracts Law, Contract Interpretation**

Delaware courts traditionally honor the express language of a contract. And contract construction resulting in superfluous verbiage is strongly disfavored. When interpreting contracts, the Court gives meaning to every word in the agreement, and avoids interpretations that would result in superfluous verbiage.

Contracts Law > Contract Interpretation

HN15[] **Contracts Law, Contract Interpretation**

Specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN16[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Noerr-Pennington immunity is rooted in the *First Amendment* to the United State Constitution, *U.S. Const. amend. I*, which insures one's right to petition the government for a redress of grievances. Noerr-Pennington first emerged in the ***antitrust law*** to immunize individual or concerted activity designed to influence legislation that might result in trade restrictions or monopolies as a consequence of legislative activity. The motive for such communication to the government was deemed by the Court to be irrelevant. And Noerr-Pennington immunity has since been extended to administrative and judicial actions.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN17[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

The Noerr-Pennington immunity is not limitless. Noerr-Pennington applies only to petitioning efforts seeking governmental, not private, action. Petitioning activities that employ unlawful means, or consist of false statements to the government, are not protected. Noerr-Pennington immunity is also subject to a "sham litigation" exception. A petitioning activity, although ostensibly directed to influence governmental action, is a "sham" if it is actually designed to interfere with a competitor's business relationships.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN18[] **Noerr-Pennington Doctrine, Sham Exception**

The determination of whether a petitioning activity is a "sham" under Noerr-Pennington follows a two-step inquiry. First, the litigation must be "objectively baseless" that no reasonable litigant could realistically expect success on the merits. If challenged litigation is objectively meritless, the court moves to the second-step inquiry to examine the litigant's subjective motivation to determine if the baseless suit conceals an attempt to interfere with a competitor's business through the use of the governmental process - as opposed to the outcome of that process - as an anticompetitive weapon.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN19[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Noerr-Pennington doctrine is federally based. Florida state courts have not adopted Noerr-Pennington doctrine.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Choice of Law

HN20[] **Federal & State Interrelationships, Choice of Law**

Under Delaware's conflict-of-law jurisprudence, Delaware courts are compelled to apply the foreign law as the state courts of the foreign jurisdiction would.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN21[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Florida appellate courts have not yet recognized any absolute privilege assigned to petitioning activities under the *First Amendment*. *U.S. Const. amend. I*. Instead, the Florida Supreme Court has observed no need to do so given the "qualified privilege" or "conditioned privilege" under Florida common law that provides wholly adequate protection of the *First Amendment* rights of speech, association, and petitioning activities. In doing so, the Florida Supreme Court expressly rejected the "sham" test and made it clear that the right to petition decisions should adopt analogous speech and association precedents developed under Florida common law.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Need for Trial

Evidence > Burdens of Proof > Allocation

Torts > Business Torts > Commercial Interference

Torts > ... > Defenses > Privileges > Qualified Privileges

HN22[] **Entitlement as Matter of Law, Need for Trial**

Under Florida law, tort liability for interference with prospective contractual relationships is generally recognized. An interference can be immunized from liability where the action is undertaken to safeguard or promote one's financial or economic interest, but not to purposefully cause a breach of contract. And the claim's target - i.e., he asserting privilege - will bear the burden to show that the claimed interference is privileged or justified. To be immunized on the basis of privilege, the interfering action must be: (1) taken on a privileged occasion; and (2) the privilege may not be abused. Whether an occasion gives rise to a privilege is a question of law. Whether the privilege was abused is one of fact reserved for trial. Under Florida common law principles anyone who publishes defamatory matter is not liable if the remarks are published upon a conditionally privileged occasion and the privilege is not abused. Where a qualified privilege exists, plaintiffs must prove express malice or malice in fact in order to recover. Express malice, or malice in fact, constitutes an abuse of a qualified privilege leaving the defendant liable.

Torts > ... > Defamation > Defenses > Privileges

HN23[] **Defenses, Privileges**

The law of Florida embraces a broad range of the privileged occasions that have come to be recognized under the common law. Several examples of those privileges occasions that have been recognized are the mutuality of interest between the speaker and listener; discussion of former employee's performance with prospective employers; communications for bona fide commercial purposes to protect the recipient's interest; and statements concerning matters of public concern. Anyone who publishes defamatory matter is not liable if the remarks are published upon a conditionally privileged occasion and the privilege is not abused.

Torts > Intentional Torts > Defamation > Elements

Torts > Intentional Torts > Defamation > Procedural Matters

HN24[] **Defamation, Elements**

Florida law provides that to establish a cause of action for defamation, a plaintiff must show that: (1) the defendant published a false statement about the plaintiff; (2) to a third party; and (3) the falsity of the statement caused injury to the plaintiff. Determining whether a statement if defamatory is primarily a function of the Court. The Court must view the statement in its entirety. If a statement is capable of more than one meaning, it is for the trier of fact to determine whether the language used was actually understood in its defamatory sense.

Torts > ... > Defamation > Defenses > Fair Comment & Opinion

HN25[] **Defenses, Fair Comment & Opinion**

Florida law indeed shields "statements of pure opinion" from defamation liabilities. But "mixed opinion" that, although ostensibly in the form of an opinion, implies the allegation of undisclosed defamatory facts as the basis for the opinion, is actionable.

Torts > ... > Defamation > Defenses > Fair Comment & Opinion

HN26[] **Defenses, Fair Comment & Opinion**

A "pure opinion" differs from a "mixed opinion" in that pure opinion occurs when the defendant makes a comment or opinion based on facts which are set forth in the article or which are otherwise known or available to the reader or listener as a member of the public. Mixed expression of opinion occurs when an opinion or comment is made which is based upon facts regarding the plaintiff or his conduct that have not been stated in the article or assumed to exist by the parties to the communication. Florida courts have consistently found statements to be non-defamatory "pure opinions" when the recipient of the communication knew, or was reasonably expected to know, the facts and situations surrounding the statements.

Torts > ... > Defamation > Defenses > Truth

HN27[] Defenses, Truth

The "substantial truth doctrine" provides a statement does not have to be perfectly accurate if the "gist" or the "sting" of the statement is true. Falsity exists if the publication is substantially and materially false, not just if it is technically false. In addition, a statement is false if it would have a different effect on the reader from what the pleaded truth would have produced. The defense of truth is a question for the factfinder at trial.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN28[] Exemptions & Immunities, Noerr-Pennington Doctrine

While Florida courts characterize Noerr-Pennington as an antitrust doctrine, other courts have recognized it as Constitution-based not limited to antitrust claims. Those courts have applied Noerr-Pennington immunity to wide-ranging tort claims rising under state laws.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN29[] Exemptions & Immunities, Noerr-Pennington Doctrine

In contrast to the Florida state courts' approach, the federal courts of Florida have recognized the applicability of Noerr-Pennington immunity to petitioning activities. In petitioning for adjudicative relief, Noerr-Pennington immunizes litigative activity (e.g., commencement of a suit) and pre-litigative activity (e.g., threats of litigation). Later decisions, however, appear to have taken a more cautious, and perhaps limiting, approach that affords Noerr-Pennington immunity only to pre-litigative activity "necessarily preliminary" to the adjudicative proceedings. Unlike other federal courts that have applied the Noerr-Pennington doctrine to a broad spectrum of state tort claims, Florida federal courts seem to adhere to the doctrine's ***antitrust law*** origin and are less inclined to extend the immunity to activities unrelated to anticompetitive conduce.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN30[] Exemptions & Immunities, Noerr-Pennington Doctrine

Privileged pre-litigation acts that have been recognized by Florida courts under the Noerr-Pennington doctrine share certain commonalities, they: are formalistic (often prepared by attorneys); specify the complained-of conduct and the litigation threatened; and are generally followed by actual lawsuits based on the same subject matter.

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Judges: Paul R. Wallace, Judge.

Opinion by: Paul R. Wallace

Opinion

MEMORANDUM OPINION AND ORDER

WALLACE, J.

I. INTRODUCTION

Plaintiff Bobcat North America, LLC ("Bobcat") brings this action against Defendants Inland Waste Holdings, LLC ("Inland Holdings"), RSMDBB Holdings, LLC ("RSMDBB"), Bart A. Begley ("Begley"), Montgomery M. Davison ("Davison"), and Robert A. Smith ("Smith", together with Begley and Davison, **[*2]** the "Sellers") (Sellers, together with Inland Holdings and RSMDBB, "Inland") for claims arising out of Bobcat's acquisition from Inland of a waste management business consisting of Inland Waste Solutions, LLC ("Inland Solutions"), ABC Leasing Company, LLC ("ABC"), and Inland Service Corporation, LLC ("Inland Service") (together with Inland Solutions and ABC, the "Company"). Bobcat's Complaint is based on Inland's alleged misrepresentation of the Company's financial statement, customer relationships, and assets to inflate the acquisition price. Bobcat brings one count each of fraud, negligent misrepresentation, and breach of contract through which it seeks, *inter alia*, declaratory judgment and indemnification.

Inland answered the Complaint and, together with intervenors Inland Service and Inland Service of Florida, LLC ("Inland Florida") (where necessary, the reference to Inland also includes "Inland Service" and "Inland Florida"[1]) bring against Bobcat counterclaims via two counts of tortious interference, one count of defamation, a breach-of-contract count, and an indemnification claim.

Now before the Court is Bobcat's Motion for Partial Summary Judgment.[2] For the reasons stated below, **[*3]** the Court **GRANTS** Bobcat's Motion, in part, and **DENIES** it, in part.

II. FACTUAL AND PROCEDURAL BACKGROUND

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[1] The Court acknowledges that Inland Service and Inland Florida are intervenors. Given the relationship among each of the Inland-affiliated parties, particularly their direct or indirect control by Begley, Davison, and Smith, the Court uses "Inland" to reference all the relevant Inland-related parties, and identifies the specific party where necessary.

[2] After Bobcat filed its Motion for Partial Summary Judgment in October 2018, it sought and obtained the Court's approval for leave to amend its complaint. Bobcat's leave to amend was unopposed by Inland. Bobcat filed its amended complaint (its second) in November 2018 [cited hereinafter as "Second Am. Compl."]. Bobcat's amended complaint asserts additional facts in connection with Inland's alleged breach of contract and misrepresentation. But those additional factual allegations do not affect Bobcat's current motion or Inland's opposition thereto. So the Court finds it unnecessary for the parties to further amend their respective motion papers. Instead, the Court considers the amended complaint's additional factual allegations and those from Inland's amended answer when deciding this motion for partial summary judgment.

The Court summarizes here only the factual background pertinent to this motion. The Court extracts this background from the undisputed facts found in Bobcat's complaint (and its amendments), Inland's counterclaims (and their amendments), and the parties' motion submissions of affidavits and exhibits.

A. The Parties And Inland's Contemplated Sale of the Company.

Bobcat is a limited liability company with its principle place of business in Sarasota, Florida.[3] George W. Dietrich is Bobcat's Chief Executive Officer. His son, William "Billy" Dietrich, is the President.[4]

The Company, founded in 1953, specializes in residential and commercial waste management systems and services.[5] On December 31, 2012, Begley and Davison each acquired 37.5% of the Company's outstanding equity from Smith, who retained 25% of the equity interest.[6] Begley and Davison financed their combined purchase price of $25,000,000 through a loan from Union Bank, N.A., to be repaid in installments of approximately $400,000 per month from the Company's post-acquisition revenues.[7]

At the time of this 2012 purchase, the Company **[*4]** ran a waste management business in Fort Hood, Texas ("Ft. Hood Business").[8] In 2014, the Company was chosen by Memphis, Tennessee as its waste management contractor.[9] Also in 2014, the Company executed an asset swap agreement with a competitor to obtain the right to service the City of Germantown, Tennessee—a Memphis suburb.[10]

In the Summer of 2015, Inland contemplated the sale of the Company and retained an investment banking firm, Livingstone Partners LLC ("Livingstone"), to help the Company.[11] Later that year, Livingstone complied and Inland issued an Information Memorandum to prospective buyers, including Bobcat.[12] In that Information Memorandum, Inland represented, among other things, that: (1) the Company's model was superior in generating Earnings Before Interest, Tax, Depreciation, and Amortization ("EBITDA"); and (2) the Company had EBITDA margins of 35% from 2011 through 2015.[13]

B. Bobcat's Acquisition of the Company and the UPA.

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[3] Pl. and Countercl. Def.'s Opening Br. in Supp. of its Mot. for Partial Summ. J., at 5 [hereinafter "Pl.'s BL"].

[4] *Id.*, at 5-6. To avoid confusion, this opinion may on occasion refer to either of the Messrs. Deitrich by his first name. No disrespect of familiarity is intended.

[5] Second Am. Compl. ¶¶ 22-23.

[6] *Id.* ¶ 24.

[7] *Id.*

[8] Pl's Br. Ex. A Unit Purchase Agreement [hereinafter "UPA"] § Definition (ffff) "Ft. Hood Business."

[9] Second Am. Compl. ¶ 32.

[10] *Id.* ¶ 35.

[11] Defs.' Answer to Second Am. Compl. And Countercls. Against Countercl. Def. Bobcat [hereinafter "Answer & Countercls."] ¶ 28.

[12] *Id.* ¶ 29.

[13] *Id.* ¶ 30.

After receiving the Information Memorandum, Bobcat contacted Inland, and in January 2016, the parties signed a formal letter of intent and commenced negotiations.[14] The acquisition was finalized on May 18, 2016, when Bobcat and Inland entered into a Unit **[*5]** Purchase Agreement ("UPA"). Through the UPA, Bobcat purchased, at a price of $64,900,000: (a) 100% interest in Inland Solutions from the Sellers; and (b) 100% interest in ABC and Inland Service from Inland Holdings (exclusively owned by the Sellers) (the "Transaction").[15]

At the time of the Transaction, the Company maintained operations in ten states: Arkansas, Delaware, Georgia, Kansas, Mississippi, Missouri, Oklahoma, Tennessee, Texas, and Wisconsin.[16]

As part of the Transaction, the Sellers collectively received 11.9% equity ownership interest (the "Rollover Equity") of Bobcat through RSMDBB. RSMDBB was formed specifically to hold this Rollover Equity.[17] The Rollover Equity was subject to redemption by Bobcat after Closing if Inland failed to meet certain financial performance targets tied to proposed expanded service contracts with Memphis ("Memphis Expansion").[18]

Under the UPA, Bobcat and Inland were bound by covenants to the other concerning their post-closing arrangements[19] including, at issue here, Inland's obligation of confidentiality and non-disparagement.[20]

C. BOBCAT DISCOVERS INLAND'S ALLEGED MISCONDUCT AND MISREPRESENTATION POST-CLOSING.

Shortly after the closing of the Transaction, **[*6]** Bobcat says it discovered Inland's misconduct, misrepresentation, fraud, and mismanagement of the Company.[21] Among other things, Bobcat learned that: (1) the Memphis service contracts operated at a loss of over $1 million;[22] (2) numerous claims had been filed against the Company resulting in liquidated damages of $406,000 for uncured violations that occurred in 2016 alone;[23] and, (3) the Company failed to properly maintain its trucks and equipment.[24] Bobcat found too that the Company was faced with liquidated damages in Delaware and had already lost certain Delaware business via reassignment to a competitor.[25] Further, Bobcat discovered what appeared to be intentional irregularities in the Company's pre-closing booking of ordinary expenses.[26]

D. INLAND FLORIDA AND ITS LOST CONTRACT WITH OKALOOSA.

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[14] *Id.* ¶ 114.

[15] Second Am. Compl. ¶ 1; UPA §§ 1, 3.

[16] *Id.* ¶ 22.

[17] Second Am. Compl. ¶ 15; Answer & Countercls. ¶ 15; UPA § 2.2.

[18] UPA § 6.12(b).

[19] Answer & Countercls. ¶¶ 18-26; UPA § 6.

[20] Answer & Countercls. ¶ 22; UPA § 6.4.

[21] Second Am. Compl. ¶¶ 143-61.

[22] *Id.* ¶ 152.

[23] *Id.* ¶ 150.

[24] *Id.* ¶ 145.

[25] *Id.* ¶ 153.

[26] *Id.* ¶ 155.

In September 2016, while Bobcat was investigating the Company's suspected non-compliance with the UPA, Begley and Davison formed Inland Florida in contemplation of bidding for a waste management contract with the Board of County Commissioners for Okaloosa County, Florida.[27] The Okaloosa Board had earlier published a request for proposals.[28] And, on November 10, 2016, Inland Florida, with Begley **[*7]** and Davison as its founders, submitted a proposal to the Okaloosa Board.[29] Among other complained-of misconduct, Begley and Davison allegedly used UPA-protected confidential information—e.g. pricing, names, addresses, and contract terms and conditions of the Company's customers—to boost Inland Florida's credentials.[30]

Before the Okaloosa Board made its final decision, Billy Dietrich sent its members an email objecting to Inland Florida's use of Bobcat's confidential information.[31] The Okaloosa Board ultimately selected another contractor in February 2017.[32] Four months later, this action ensued. And before the Court now is Bobcat's Motion for Partial Summary Judgment through which seeks to knock out some of Inland's counterclaims.

III. STANDARD OF REVIEW

HN1[] "The standard of review on a motion for summary judgment is well-settled."[33] A motion for summary judgment is reviewed by this Court under *Superior Court Civil Rule 56(c)*, which states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment **[*8]** as a matter of law.[34]

HN2[] The burden is on the moving party to demonstrate its prayer for summary judgment is supported by undisputed facts or an otherwise adequate factual record to support a legal judgment.[35] "If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder."[36]

HN3[] The Court may grant a motion for summary judgment when: "(1) the record establishes that, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact, and (2) in light of the relevant law and those facts, the moving party is legally entitled to judgment."[37] But the Court cannot grant a

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[27] *Id.* ¶ 177.

[28] *Id.* ¶ 174.

[29] *Id.* ¶ 181.

[30] *Id.* ¶¶ 183-84.

[31] *Id.* ¶ 192.

[32] *Id.* ¶¶ 193-94.

[33] *Pazuniak Law Office LLC v. Pi-Net Int'l, Inc., 2017 Del. Super. LEXIS 416, 2017 WL 3701031, at *1 (Del. Super. Ct. Aug. 25, 2017)*.

[34] *Del. Super. Ct. Civ. R. 56(c)*.

[35] *See* *CNH Indus. Am. LLC v. Am. Cas. Co., 2015 Del. Super. LEXIS 304, 2015 WL 3863225, at *1 (Del. Super. Ct. June 8, 2015)*.

[36] *Id.*

motion for summary judgment "[i]f . . . the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record . . . ."[38]

HN4[] A fact is material if it might affect the outcome of the pled claim under the law governing such a claim.[39] In considering a motion for summary judgment, the Court's principle function is to examine the record to determine whether genuine **[*9]** issues of material fact exist, but not to decide such issues.[40]

At bottom, a claim "should be disposed of by summary judgment whenever an issue of law is involved and a trial is unnecessary."[41]

IV. DISCUSSION

Bobcat moves for partial summary judgment asking the Court to: (1) declare that that the Rollover Equity has been redeemed; (2) find Inland's breach of the confidentiality agreement of the UPA; and (3) dismiss Inland's counterclaims for tortious interference with prospective business relationship and defamation based on Billy Dietrich's email to the Okaloosa Board.

A. BOBCAT'S COUNT V—DECLARATORY JUDGMENT ON THE ROLLOVER EQUITY.

In Count V, Bobcat claims that because the Memphis Expansion did not occur, Bobcat is entitled to redeem the Rollover Equity and a repayment of $530,000 from RSMDBB.[42] Bobcat moves now for a declaratory judgment on that count.

Bobcat avers that, pursuant to the UPA's Section 6.12, redemption became "automatic" when Inland failed to deliver the Memphis Expansion. According to Bobcat, the Memphis Expansion is an "exclusive" condition triggering redemption "without regard to cause."[43] Inland all but admits that the Memphis Expansion did not occur; and Inland does not contest **[*10]** Section 6.12's language.[44] But Inland counters with affirmative defenses of prevention of performance and impossibility/impracticability.[45] Inland additionally suggests that the presently incomplete factual

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[37] *Haft v. Haft, 671 A.2d 413, 414-15 (Del. Ch. 1995)* (citing *Burkhart v. Davies, 602 A.2d 56, 58-59 (Del. 1991))*. *See also* *Brooke v. Elihu-Evans, 1996 Del. Super. LEXIS 425, 1996 WL 659491, at *2 (Del. 1996)* ("If the Court finds that no genuine issues of material fact exist, and the moving party has demonstrated his entitlement to judgment as a matter of law, then summary judgment is appropriate.").

[38] *CNH Indus. Am. LLC, 2015 Del. Super. LEXIS 304, 2015 WL 3863225, at *1*.

[39] *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."). *See also* *In re Asbestos Litig., 2006 Del. Super. LEXIS 483, 2006 WL 3492370, at *3 (Del. Super. Ct. Nov. 28, 2006)*; *Farmers Bank of Willards v. Becker, 2011 Del. Super. LEXIS 377, 2011 WL 3925428, at *3 (Del. Super. Ct. Aug. 19, 2011)*.

[40] *Merrill v. Crothall-American Inc., 606 A.2d 96, 99-100 (Del. 1992)* (internal citations omitted).

[41] *Jeffries v. Kent Cty. Vocational Tech. Sch. Dist. Bd. of Educ., 743 A.2d 675, 677 (Del. Super. Ct. 1999)*.

[42] Second Am. Compl. ¶¶ 257-59.

[43] Pl. and Countercl. Def.'s Reply Br. in Supp. of its Mot. for Partial Summ. J., at 16 [hereinafter "Pl.'s Reply"] ("Section 6.12's return of the Rollover Equity and the $530,000 prepayment is conditioned exclusively on the occurrence or nonoccurrence of the Memphis Expansion, without regard to cause, showing the Sellers assumed all risks of non-occurrence.").

[44] Answer & Countercls. ¶ 163.

record—which it says should be further developed through discovery—prevents entry of such a declaration now.[46] The parties' post-argument submissions have further developed their positions on Inland's affirmative defenses.[47]

1. Construction of Section. 6.12 of the UPA.

Section 6.12 of the UPA, titled "Memphis Expansion—Redemption and Memphis Payment", reads in pertinent part:

> (a) Memphis Expansion
> (i) . . . Begley shall have the authority to exclusively negotiate . . . execute . . . Memphis Contract[;]
> (ii) . . . Davison shall manage the Memphis Expansion in the normal course of business, consistent with past practices . . .[48]

Section 6.12 continues: if the Memphis Expansion does not occur, the Rollover Equity "will *automatically and without further deed or action by any party* be cancelled and redeemed by [Bobcat]. . ."[49] In addition, "[Begley and Davison] shall pay to [Bobcat] . . . an inversely proportionate amount of the Base Memphis Payment. . ."[50] The "Base Memphis Payment" is $530,000.[51]

Delaware law governs the UPA.[52] And ***HN5***[] under Delaware law, "[t]he **[*11]** proper construction of any contract is purely a question of law."[53] The objective is to give effect to the parties' mutual intent at the time of contracting.[54] Absent ambiguity, contract terms should be accorded with their plain, ordinary meaning.[55] A contract

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45 Defs. And Countercl. Pls.'s Br. in Opp'n to Pl./Countercl. Def.'s Mot. for Partial Summ. J, at 3, 15-22 [hereinafter "Defs.' Opp'n"].

46 *Id.*, at 22-24.

47 Bobcat says Inland's affirmative defenses are contract defenses that are inapplicable to a declaratory judgment action. Bobcat goes on that even if those defenses are conceptually applicable, Inland assumed the risk under the UPA—namely, the risk that the Memphis Expansion might not occur. *See* Pl.'s Reply, at 12-18. During oral argument on this motion Inland brought up cases never mentioned in its briefing to support its position that contract defenses can be applied to declaratory actions. *See* Official Tr. for Oral Argument held on Jan. 4, 2019, at 41-43, 83 [hereinafter "O.A. Tr."] (D.I. 108); Power Point Presented to the Court by Defendants and Counterclaims Plaintiffs during the Jan. 4, 2019 Hearing, at 12-13 [hereinafter "Defs.' Power Point"] (D.I. 105). The Court allowed Bobcat an opportunity to respond to Inland's newly cited authorities and Bobcat did. *See* Letter to The Honorable Paul R. Wallace from Christopher M. Foulds Regarding Bobcat North America, LLC's Response to the Authorities from the Jan. 4, 2019, Oral Argument [hereinafter "Pl.'s Sur Reply"] (D.I. 107). The Court has now considered both the original and supplemental authorities cited by the parties.

48 UPA § 6.12(a).

49 *Id.* § 6.12(b) (emphasis added).

50 *Id.* § 6.12(c).

51 *Id.* § 10.17 (Definitions(t)).

52 UPA § 10.6 (Laws Governing Agreement; Consent to Jurisdiction; No Jury Trial).

53 *Exelon Generation Acquisitions, LLC v. Deere & Co., 176 A.3d 1262, 1263 (Del. 2017)*. *See also* ***Eagle Force Hldgs., LLC v. Campbell, 187 A.3d 1209, 1212 (Del. 2018)*** (***HN6***[] "Whether [a] contract's material terms are sufficiently defined is mostly, if not entirely, a question of law."); *O'Brien v. Progressive N. Ins. Co., 785 A.2d 281, 286 (Del. 2001)* ("[T]he interpretation of contractual language ... is a question of law.").

54 *Exelon Generation Acquisitions, 176 A.3d at 1263*; *Salamone v. Gorman, 106 A.3d 354, 367-68 (Del. 2014)* (construing a contract's language should adhere to what "would be understood by an objective, reasonable third party.").

55 *Alta Berkeley VI C.V. v. Omneon, Inc., 41 A.3d 381, 385 (Del. 2012)*.

term is not ambiguous merely because the parties dispute its meaning.[56] Ambiguity exists when the disputed term "is fairly or reasonably susceptible to more than one meaning."[57]

Here, the Court finds Section 6.12's language clear and unambiguous and, therefore, accords its terms with their plain and ordinary meaning. That ordinary meaning is: with respect to the Memphis Expansion, "[f]rom and after the Closing," Begley was to exclusively negotiate contracts for the Memphis Expansion, and if a contract is executed, Davison was to manage its operation in the normal course of business.

The deliberately selected word "automatically," and phrase "without further deed or action," unambiguously states that the Rollover Equity is tied to, and *only* to, the Memphis Expansion.

2. Contract Defenses Can Be Applied to a Declaratory Judgment Action.

Turning to Inland's affirmative defenses, the first question answered must be: Are contract defenses—like **[*12]** prevention and impossibility/impracticality—available in a declaratory judgment action? They can be.

HN7[] Contract defenses do not apply to equitable claims, only legal claims. But a declaratory judgment action is not *per se* equitable.[58] So there is occasion where the Court must determine whether a given declaratory judgment action is one in law or one in equity.[59] That determination turns on factors such as the nature of the underlying claim,[60] other accompanying requested relief, and the essence of the declaration sought.[61]

Here, Bobcat's declaratory claim is based solely on a contract provision: the construction and application of Section 6.12. This claim bears little difference, if any, from, for instance, a potential breach-of-contract claim alleging Inland failed to return the Rollover Equity as required by the contract.[62] Bobcat's declaratory judgment claim is legal in

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[56] *Id.*

[57] *Id.*

[58] *Kraft v. WisdomTree Investments, Inc., 145 A.3d 969, 985 (Del. Ch. 2016)* ("A declaratory judgment is a creature of statute and 'not a purely equitable remedy.'") (quoting *Prestancia Mgmt. Group v. Va. Heritage Found., II LLC, 2005 Del. Ch. LEXIS 80, 2005 WL 1364616, at *7 (Del. Ch. May 27, 2005))*.

[59] *Id.* ("Whether a declaratory judgment is legal or equitable in nature depends on the underlying subject matter.").

[60] *Id. E.g., Eluv Holdings (BVI) Ltd. v. Dotomi, LLC, 2013 Del. Ch. LEXIS 75, 2013 WL 1200273, at *5 (Del. Ch. Mar. 26, 2013)* (concluding that declaratory judgment to establish share ownership was based on a claim that was functionally equivalent to breach of contract, therefore, statute of limitations defense was applicable by analogy).

[61] *See e.g., Kraft, 145 A.3d at 985-86* (finding the declaratory action is legal in nature after concluding the underlying claim, based on Delaware constitution and DGCL, is legal in nature); *Eluv, 2013 Del. Ch. LEXIS 75, 2013 WL 1200273, at *5* (applying the statute-of-limitation defense to a declaratory judgment claim by analogy after concluding that the claim is legal in nature); *E. Shore Envtl., Inc. v. Kent County Dep't of Planning, 2002 Del. Ch. LEXIS 15, 2002 WL 244690, at *4 (Del. Ch. Feb. 1, 2002)* (finding equitable jurisdiction to issue declaratory judgment because ultimate remedy being sought was an injunction); *Highlights for Children, Inc. v. Crown, 41 Del. Ch. 244, 193 A.2d 205, 206 (Del. Ch. 1963)* (finding equitable jurisdiction over claim for declaratory judgment that shares were invalid, because "the court must consider what plaintiffs complaint really seeks" beyond the face of the complaint); *Diebold Computer Leasing, Inc. v. Commercial Credit Corp., 267 A.2d 586, 591 (Del. 1970)* (noting that the Court of Chancery has jurisdiction "if there is any underlying basis for equity jurisdiction measured by traditional standards" and finding such a basis existed because "ultimate coercive relief would be injunctive").

[62] *See, e.g., Eluv, 2013 Del. Ch. LEXIS 75, 2013 WL 1200273, at *5*.

nature; Bobcat concedes as much.[63] Therefore, contract defenses, including the prevention and impossibility/impracticality Inland asserts here, are conceptually applicable.

3. Inland's Defense of Prevention of Performance.

Inland's defense of prevention of performance runs as follows: Bobcat's poor performance **[*13]** with Memphis "prevented" Begley from expanding the Memphis contract. But Bobcat says this prevention defense cannot defeat summary judgment here because Inland assumed the risk that the Memphis Expansion might not occur. Inland disagrees, arguing that assumption of risk requires the contract language to be explicit and Section 6.12's is not.

HN8[] The general rule concerning a condition precedent is that one has no duty to perform until the condition occurs.[64] And under the "prevention doctrine" a duty to perform is excused if the other promisor party *wrongfully prevented* the condition from occurring.[65] "The key operative language . . . [is] 'wrongfully prevented.'"[66] Because "there is no prevention claim "where the contract, in effect, authorizes prevention."[67] The essential inquiry is whether or not the contract allocated the risk of the condition's nonoccurrence.[68]

HN9[] Delaware and other courts have long-recognized the prevention doctrine and its assumption-of-risk exception. Courts have found that contracts may authorize prevention via explicit language such as "for any reason,"[69] "for any reasons whatsoever,"[70] "regardless of the circumstances giving rise to such condition,"[71] or "nothing [therein] **[*14]** requires" the agreed-upon condition precedent be consummated.[72]

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[63] Pl.'s Sur Reply, at 3 ("Nor does [Bobcat] dispute that its request for a declaration is based on contract (as it requires the Courts to interpret Section 6.12)."). *See also* O.A. Tr., at 7-8 (admitting that prevention can be a defense "under a certain set of facts not present here, yes.").

[64] *District-Realty Title Ins. Corp. v. Ensmann, 767 F.2d 1018, 1023, 247 U.S. App. D.C. 228 (D.C. Cir. 1985)*.

[65] *A.I.C. Ltd. v. Mapco Petroleum Inc., 711 F. Supp. 1230, 1238 (D. Del. 1989)* (quoting *Mobile Communs. Corp. of America v. MCI Communs. Corp., 1985 Del. Ch. LEXIS 502, 1985 WL 11574, at *4 (Del. Ch. Aug. 27, 1985))*.

[66] *Id. at 1238 n. 24 (D. Del. 1989)*. *See also* *Shear v. NRA, 606 F.2d 1251, 1255, 196 U.S. App. D.C. 344 (D.C. Cir. 1979)* ("This doctrine provides that when a promisor wrongfully prevents a condition from occurring that condition is excused.").

[67] *Shear, 606 F.2d at 1256* *Kraft, 145 A.3d at 985-86* (finding the declaratory action is legal in nature after concluding the underlying claim, based on Delaware constitution and DGCL, is legal in nature) (quoting 3A Corbin on Contracts §767, 545) ("The assumption of risk exception recognizes that "there are some cases in which some sort of prevention or interference is contemplated by the parties as quite proper and within the privileges of the promisor.").

[68] *Dist.-Realty Title Ins., 767 F.2d at 1023-24* (finding that the contract, by stating "the funds would be returned [] if settlement did not occur 'for no reason,' the contract allocated the risk of nonsettlement to the developer of the real estate, and concluding that "there is no prevention.").

[69] *Id.*

[70] *Dixon v. Bernstein, 182 F.2d 104, 104-05, 86 U.S. App. D.C. 336 (D.C. Cir. 1950)* (contract stating real estate buyer reserved the right to withdraw "for any reasons whatsoever.").

[71] *In re Gulf Oil/Cities Serv. Tender Offer Litig., 725 F. Supp. 712, 737 (S.D.N.Y. 1989)* (Under governing Delaware law, the court found that where a contract states "regardless of the circumstances giving rise to such condition (including any action or inaction by the Purchaser or Gulf)," the contract "clearly warns plaintiffs that defendants could exercise this option out regardless of the circumstances and regardless of what actions defendants had taken or not taken[.]").

[72] *A.I.C. Ltd. v. Mapco Petroleum Inc., 711 F. Supp. 1230, 1238-39 (D. Del. 1989)*, *aff'd*, ***888 F.2d 1378 (3d Cir. 1989)*** (Applying Delaware law to a claim arising from a consulting agreement that explicitly provided that "nothing [therein] requires [Mapco] to

Contract language that is less explicit has also been found to authorize prevention by a contracting party or other. Frequently, these contract terms condition the consummation of a transaction upon the approval of the other party,[73] or subject one party to the discretion, satisfaction, or decision of the other party or a third-party.[74]

HN10[] The fact that both contracting sides are sophisticated parties experienced in their industry, weighs in favor of finding an assumption of risk in contract terms.[75] But where assumption of risk is found in a contract, courts caution that the specific risk assumed must be distinguished from some "blanket" assumption of risk claimed.[76] For

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enter into any agreement...to sell any or all of its [assets,]" the court concluded that the claimant "assumed the risk that Mapco would opt not to form the contemplated asset sale transaction.").

[73] *Mobile Communs. Corp. of America v. MCI Communs. Corp., 1985 Del. Ch. LEXIS 502, 1985 WL 11574, at *4 (Del. Ch. Aug. 27, 1985)* (contract provided that "the consummation of the transactions ... shall be subject to...(iii) the approval of the boards of directors of MCCA and MCI." The court concluded that "MCCA knew that board approval was a condition...MCCA assumed the risk that the MCI board would disapprove the transaction.").

[74] *See, e.g., Cont'l Advisors S.A. v. GSV Asset Mgmt., LLC, 2015 U.S. Dist. LEXIS 161080, 2015 WL 7720752, at *3 (N.D. Cal. Nov. 30, 2015)* (Applying Delaware law and finding where the contract stated the defendant broker "is not obligated to compensate" plaintiff advisor if the transaction is not consummated or if defendant unilaterally rejects the offer, the plaintiff "assumed the risk that the condition precedent would not occur for any number of reasons outside of their control."); *Robert Wood Johnson Univ. Hosp. at Hamilton, Inc. v. SMX Capital, Inc., 2013 U.S. Dist. LEXIS 120595, 2013 WL 4510005, at *1-2, (D.N.J. Aug. 26, 2013)* (Under the contract, the parties' rights and obligations to perform were subject to five conditions precedent—three of which required the defendant to receive evidence and certain confirmations "satisfactory to" the defendant; one of which required an interconnection agreement "reasonably acceptable to" the defendant. Accordingly, the court found that the claimant "assumed the risk that the conditions precedent will be prevented."); *Lilly v. Envoy, LLC, 2016 U.S. Dist. LEXIS 176039, 2016 WL 7375271, at *7-8 (W.D. Wash. Dec. 20, 2016)* (Applying Delaware law, and holding that where the Stock Purchase Agreement provided "[buyer] will have the authority and freedom to operate the Business and the Company following the date hereof without limitation under this Agreement," plaintiffs had assumed the risk that defendant-buyer would not run the business in a way that allowed them to fulfill milestone objectives that would otherwise entitled plaintiffs to an earn-out payment); ***Doherty v. American Home Prods. Corp., 216 F.3d 1071 (2d Cir. 2000)*** (Applying Delaware law to a claim for the exercise of stock options brought by at-will employees against the employer company under option plans, the court affirmed that the "[employees] assumed the risk in the Option Plans that their right to exercise their options would be shortened or eliminated by their termination from an action by [employer], and as at-will employees they assumed the risk that they could be terminated without cause...Thus, the prevention doctrine does not apply."). *But cf. Lieber v. Morton-Norwich Prods., Inc.*, 1978 WL 1117, at *2 (S.D.N.Y. Sept. 29, 1978) (Under Delaware law, a stock option agreement required continuous employment with the subsidiary which was terminated by the sale of the subsidiary at the election by the parent company. The court held that the sale of the subsidiary by the defendant parent company did not excuse plaintiffs at-will employees from compliance with the express terms of the options that required them to be employed with the subsidiary for one year.); *Slamecka v. Empire Kosher Poultry, Inc., 290 F. Supp. 2d 934, 938 (N.D. Ill. 2003)* (applying Illinois law's agency principle to a broker-seller relationship with respect to the broker's commission fees (as oppose to Delaware law's approach of treating such relationships as contract law), the court denied the defendant's argument to defeat plaintiffs prevention claim based on plaintiffs assumption of risk, reasoning that Illinois law requires "[t]he commission is earned even though no enforceable contract to purchase is ever formed and no sale is consummated, if, in fact, the failure to contract or consummate is wholly attributable to the seller.").

[75] *See, e.g., Cont'l Advisors, 2015 U.S. Dist. LEXIS 161080, 2015 WL 7720752, at *5* (Applying Delaware law, the court found assumption of risk, in part, based on the reason that "Plaintiffs are apparently savvy financial organizations, capable of facilitating deals of hundreds of millions of dollars."); *Dixon, 182 F.2d at 105* (Noting in a suit by a real estate broker against a buyer arising from the commission fees, "these are dealings between informed parties").

[76] *Shear, 606 F.2d at 1253, 1256* (In a dispute by real estate agent, Shear, against the buyer, NRA, for buyer's disapproval of a sale that resulted in Shear not getting paid for his commission, the court considered NRA's Management Committee's procedure that "the winning bid would...be unanimously recommended by the Management Committee to the Board of Directors." The court concluded that pursuant to the terms of the contract, Shear assumed the risk "that the Board...would withhold approval despite the unanimous recommendations of the Management Committee," but "did not assume the risk that the Management committee would refuse to recommend the contract, or that the Board would be deprived by a subsequently enacted by-law of [the] authority to approve the contract.").

only a specific risk clearly assumed by a party will preclude that party's defensive claim of prevention.[77] And absent clear contractual authorization of prevention (like that just described above), a court won't judicially imply such a term.[78]

Turning to Inland's prevention defense, the Court finds Inland indeed assumed the risk that the Memphis Expansion might not occur. Section 12.6 of the UPA explicitly provides that if the Memphis Expansion **[*15]** does not occur, the Rollover Equity "will *automatically and without further deed or action by any party* be cancelled and redeemed by [Bobcat.]"[79] The ordinary meaning and common understanding of the word "automatically" pertinent here is "in a manner independent of a decision or action"[80] This use of "automatically" in this contract, is reinforced by its next contractual phrase "without further deed or action by any party." And these words and phrases—included in this multimillion-dollar agreement that was forged by sophisticated parties—in all meaningful ways equate to "for any reason whatsoever," and "regardless of the circumstances giving rise to such condition."

In unambiguously and painstakingly drafted language, Section 6.12 confers the automation of the redemption that hinges solely on the nonoccurrence of a predetermined event, here, the Memphis Expansion. By executing the UPA, Inland knowingly consented to the risk that the Memphis Expansion might not occur, and that if it did not occur, the Rollover Equity would automatically be redeemed, without regard to the cause of the nonoccurrence.[81] So Inland's prevention defense is foreclosed by its own knowing assumption **[*16]** of risk.

4. Inland's Defense of Impossibility / Impracticality

Inland also asserts the defense of impracticability/impossibility of performance on the same basis as the prevention doctrine: Bobcat's poor performance made it impossible to expand the business with Memphis.[82]

HN11[] Under Delaware law, an impracticability/impossibility defense requires the showing of "(1) the occurrence of an event, the nonoccurrence of which was a basic assumption of the contract; (2) the continued performance is

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[77] *See, e.g., id.; Haft v. Dart Group Corp., 877 F. Supp. 896, 903 (D. Del. 1995)* (applying prevention doctrine when employer wrongfully dismissed fixed-term contract employee without cause, and holding that the employee cannot be denied of his stock option rights. The court found it "inconceivable" the proposition "that an employee would contract with his employer and assume the risk of losing his stock options if the employer terminated him without cause."); *W & G Seaford Assocs., L.P. v. E. Shore Markets, Inc., 714 F. Supp. 1336, 1341-42 (D. Del. 1989)* (finding assumption of risk inapplicable to the prevention argument because nothing in the agreement "states that either party assumed the risk that the conditions would not occur. Nor can such a term be implied.").

[78] *W & G Seaford Assocs., L.P., 714 F. Supp. at 1341-42* (finding assumption of risk inapplicable to the prevention argument because nothing in the agreement "states that either party assumed the risk that the conditions would not occur. Nor can such a term be implied.").

[79] UPA § 6.12(b) (emphasis added).

[80] *Automatically*, DICTIONARY.COM, http://www.dictionary.com/browse/automatically (last visited Apr. 25, 2019).

[81] Inland continues to argue, of course, that it did not assume the risk that the Memphis Expansion wouldn't occur. Rather, Inland insists "that the parties assumed the expansion would occur," and it could "not expect[] that Bobcat would change Memphis's mind so quickly." Defs.' Power Point at Slides 23; O.A. Tr. at 48-49. According to Inland, only language as explicit as "if the Memphis Expansion does not occur, the [R]ollover [E]quity is redeemed" would do. *See id.* Slides 22-23; O.A. Tr. at 45-46 (assumption-of-risk exception "only applies where the contract contains express language authorizing the prevention of performance.") Not so. Having surveyed a broad range of decisions applying Delaware law, the Court observes that finding a party has contractually assumed a risk (and is, therefore, precluded from asserting prevention) is not always based on some set incantation of express contractual authorization. Courts have found contracted risk assumption based on varying contract language, as well as, reasonable commercial common sense. Thus, Inland's argument attempting to so narrow the application of the assumption-of-risk exception is rejected.

[82] Defs.' Opp'n, at 20-22.

not commercially practicable; and (3) the party claiming impracticability did not expressly or impliedly agree to performance in spite of impracticability that would otherwise justify nonperformance."[83]

Where the party has assumed the risk that the "impracticable/impossible" event might occur, the defense does not apply.[84] There can be no invocation of the impossibility defense if "the supervening events were 'reasonably foreseeable, and could and should have been anticipated by the parties and provision made therefor within the four corners of the agreement.'"[85]

Here, the sophisticated commercial parties, Bobcat and Inland, no doubt foresaw that the Memphis Expansion simply might not occur for any number **[*17]** of reasons or no reason at all. It is the very risk Section 6.12 contractually allocates. Had Inland intended to place any limitation on the "automatic" redemption, it could have done so. Having consented to taking on the potentiality that Memphis would not expand its relationship no matter what, and with no limitation—Inland cannot retroactively avoid the consequence of that now-materialized risk.

Thus, given the simple interpretation of the UPA's unambiguous language, Inland's affirmative defenses of prevention and impracticability/impossibility must be rejected as a matter of law. The Court need not consider Inland's calls for additional discovery or suggestions that material factual disputes exist. The Court **GRANTS** Bobcat's motion for summary judgment on the claim to redeem the Rollover Equity and the recoupment of the $530,000 Base Memphis Payment.

B. Bobcat's Count III—Breach of the Confidentiality and Non-Disclosure Obligations by Inland Under § 6.4(A) Of The Upa.

Bobcat next moves for summary judgment on its claim that Inland breached the confidentiality obligation found in Section 6.4(a) of the UPA. Bobcat says Inland Florida improperly used "confidential information" without authorization in its bid for the waste management contract **[*18]** with the Okaloosa Board.[86] Specially, Bobcat claims that Inland Florida improperly (and misleadingly) used the names, addresses, and other contract information of the Company's customers.[87]

Section 6.4(a) consists of four sentences. They are broken down as follows:

> First sentence: (a) . . . for a period of five (5) years after the Closing Date, [Inland Holding] and each Member shall not . . . disclose to any person any ***confidential information*** concerning the ***Business***, Facilities, Equipment, Material Contracts, ***customers***, Permits or the Company Group.

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[83] *Chase Manhattan Bank v. Iridium Africa Corp., 474 F. Supp. 2d 613, 620 (D. Del. 2007)* (concluding that the defendants are precluded from raising the impracticability defense).

[84] *In re Bicoastal Corp., 600 A.2d 343, 351 (Del. 1991)* (finding that the parties expressly "provided for the contingency that Bicoastal might fail to redeem the junior preferred stock by the mandatory redemption date," and holding that the impossibility doctrine "does not excuse nonperformance where the promisor has indicated an intent to assume the risk.").

[85] *Williams Natural Gas Co. v. Amoco Production Co., 1991 Del. Ch. LEXIS 73, 1991 WL 58387, *13 (Del. Ch. Apr. 16, 1991)* (***HN12***[]) "The doctrine of commercial frustration does not apply if at the time of contracting the supervening events were 'reasonably foreseeable, and could and should have been anticipated by the parties and provision made therefor within the four corners of the agreement.") (quoting *Columbian Nat. Title Ins. Co. v. Twp. Title Servs., Inc., 659 F. Supp. 796, 804 (D. Kan. 1987))*.

[86] Pl.'s Br., at 30-35.

[87] *Id.* at 32.

> Second sentence: [Inland Holding] and each Member[88] ***further agrees*** that [Inland Holding] and such Member will not disclose the ***pricing information, cost structure, customer names or addresses or the terms or conditions***...
> Third sentence: If [Inland Holding] or any Member becomes legally compelled to disclose such confidential information, [Inland Holding] and/or such Member shall provide [Bobcat] with prompt advance written notice . . .
>
> Fourth sentence: "confidential information" means and includes, without limitation, all Trade Rights . . . all customer lists . . . all other information concerning the ***Business*** . . . the Company Group's services, ***clients, customers [*19]*** , acquisition prospects, subcontractors, costs, profits, markets, sales, trade secrets, processes, programs, products, marketing and distribution methods, but ***shall exclude*** any (x) knowledge, data and information that is (i) ***generally known or becomes known to the public*** (other than as a result of a breach of this Agreement) . . .[89]

The first sentence references "confidential information;" the second sentence uses "further agrees," and specifies five categories of information (*namely*, pricing, cost structure, customers' names, addresses, and contracts' terms or conditions); the third sentence describes the procedure of giving notice when disclosure is legally compelled; and the fourth sentence provides a definition of "confidential information" and exemptions therefrom, *e.g.*, "public information."

Bobcat acknowledges the "public information" exception, and concedes that municipal contract information is largely public.[90] According to Bobcat, the "public information" exception only applies to the "confidential information" referenced in the first sentence, and not the specified categories of information described in the second sentence.[91] So then, says Bobcat, because Inland Florida used **[*20]** items listed in the second sentence, Inland Florida disclosed that not subject to Section 6.4(a)'s "public information" exception.[92] In essence, Bobcat urges the Court to read the first and second sentences as creating and imposing two independent, distinct and unrelated confidentiality obligations.[93]

Inland does not dispute that Inland Florida used the Company's customers' names, addresses, and municipal contract information without Bobcat's prior consent.[94] But Inland does contest Bobcat's isolationist reading of Section 6.4(a)'s first two sentences. Inland urges, instead, that the "public information" exception applies to both and its use fell within that exception.[95]

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88 "Member," as referenced in the UPA, is defined as each of Begley, Davison, and Smith. *See* UPA § Preemble.

89 UPA § 6.4(a) (emphasis added).

90 Pl.'s Br., at 31 ("Company's customers are municipalities, making some Company information 'public,' even if not widely known"); O.A. Tr., at 79-81 ("[different] terminology ... in the second sentence because they mean something different"); *id.*, at 84-85 ("I don't dispute that some categories of information from municipalities are public information that can be received through FOIA requests.").

91 *Id.*, at 31-32.

92 *Id.*, at 31-33.

93 *Id.* ¶¶ 30-35.

94 Ex. C to Pl.'s Br., Bart A. Begley's Responses and Objections to Pl. Bobcat's First Set of Requests for Admission [hereinafter "Begley's Responses"] ¶¶ 21-35, 38, 41, 44, 46 (admitting that the City of Augusta, City of Rogers, Outaganie County, City of Dover, and Kent County were not customers of any of Inland Florida, Inland Service, and Inland Holdings). *See also* Ex. D to Pl.'s Br., Montgomery M. Davison's Responses and Objections to Pl. Bobcat's First Set of Requests for Admission [hereinafter "Davison's Responses"] ¶¶ 14-28, 31, 34, 37, 39 (admitting the same).

95 *See e.g.*, Defs.' Opp'n, at 24-29; Begley's Responses ¶¶ 36-44; Davison's Responses in 29-37.

Factually, there is no dispute regarding Inland Florida's use without Bobcat's authorization of information that could "become[] known to the public." But the dispositive question for summary judgment on this claim is narrow and solely one of law: whether Section 6.4(a)'s second sentence imposes a confidentiality obligation unexcepted by the same section's "public information" exception. It does not. As explained below, the second sentence is most naturally read to further describe certain types of protected or "confidential information." In turn, **[*21]** disclosure of that described in the second sentence might—depending on the circumstances—fall under Section 6.4(a)'s "public information" exception.

1. The First and Second Sentences Create Somewhat Distinguishable but Congruous Confidentiality Obligations.

HN13[] "The role of a court is to effectuate [contracting] parties' intent."[96] Absent textual ambiguity, the Court accords the contract's language its plain, ordinary meaning.[97] The Court takes a holistic view, reading the given instrument as a whole, giving effect to all of its terms, and reconciling or harmonizing all of its provisions.[98] "[T]he meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan."[99] And the Court must, when construing a contract's terms, avoid absurd, irrational, and illogical results.[100]

Section 6.4(a) is unambiguous so the Court can accord its terms their plain and ordinary meaning. Section 6.4(a)'s first sentence reads "not. . . disclose to any person any confidential information concerning the Business . . ." The second sentence requires that the Inland entities "not disclose the [five categories of information] **[*22]** to any person, firm, corporation, association or other entity related to the Business." That second sentence uses the conjunctive phrase "further agrees," indicating something that is in addition to what has already been said in the first sentence. ***HN14***[] Delaware courts traditionally honor the express language of a contract. And contract construction resulting in superfluous verbiage is strongly disfavored.[101] Interpreting the second sentence's non-disclosure obligation as fully encompassed within that described in the first sentence would effectively read the second sentence out of Section 6.4(a) all together. The Court will not do so.

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[96] *Martin Marietta Materials, Inc. v. Vulcan Materials Co., 68 A.3d 1208, 1218 (Del. 2012)* (en banc) (citing *Lorillard Tobacco Co. v. Am. Legacy Found., 903 A.2d 728, 739 (Del. 2006))*.

[97] *Lorillard Tobacco, 903 A.2d at 739*. *See also* *Exelon Generation Acquisitions, 176 A.3d at 1263*; *Salamone v. Gorman, 106 A.3d 354, 367-68 (Del. 2014)* (construing a contract's language should adhere to what "would be understood by an objective, reasonable third party.").

[98] *See generally* *E.I. du Pont de Nemours & Co. v. Shell Oil Co., 498 A.2d 1108, 1113 (Del. 1985)* ("In upholding the intentions of the parties, a court must construe the agreement as a whole, giving effect to all provisions therein."); *Martin Marietta Materials, 56 A.3d at 1122-26* (analyzing the language of the Non-Disclosure Agreement holistically by taking into consideration different provisions and noting their relationships with one another); *AFSCME v. State, 2014 WL 1813174, at *7 (Del. Ch. Apr. 30, 2014)*; *Alta Berkeley VI C. V. v. Omneon, Inc., 41 A.3d 381, 385-86 (Del. 2012)*; *Elliott Assocs., L.P. v. Avatex Corp., 715 A.2d 843, 854 (Del. 1998)*.

[99] *E.I. du Pont de Nemours & Co., 498 A.2d at 1113* ("Moreover, the meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan.").

[100] *Osborn v. Kemp, 991 A.2d 1153, 1160-61 (Del. 2010)*.

[101] *Khan v. Del. State Univ., 2017 Del. Super. LEXIS 96, 2017 WL 815257, at *4 (Del. Super. Ct. Feb. 28, 2017)* ("When interpreting contracts, this Court...gives meaning to every word in the agreement[,] and avoids interpretations that would result in superfluous verbiage.") (internal quotation omitted).

As observed before, the UPA was negotiated and prepared by commercially savvy parties. Their deliberately chosen words in the contract language must be given effect. Thus, reading each sentence individually, and the entire Section 6.4(a) holistically, the Court finds that the second sentence does create a confidentiality obligation that is to some degree distinguishable from that of the first sentence. But that does not end the matter.

2. The Confidentiality Obligation Imposed by the Second Sentence is Not Free from the "Public Information" Exception.

Recognizing the difference between the **[*23]** first and second sentences, however, does not mean they are completely isolated and independent. To the contrary, their relationship is that of a general provision and a specific one; between a broad confidentiality obligation and its specific subset.

HN15[] "Specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one."[102]

Here, the Court finds the specific provision (the second sentence) wholly consistent with the general provision (the first sentence), and in essence, is a subset of the general provision. The first sentence's "confidential information" is inclusive of the specified categories of information enumerated in the second sentence.[103]

The second sentence specifically applies to certain categories of persons and information. Under the circumstances where those criteria are met, a claim can be based on the second sentence. The first sentence is a "catch-all" that sets forth a general confidentiality obligation.

Furthermore, the third sentence uses "*such*" confidential information to reference the aforementioned information that immediately precedes "such"—that **[*24]** is, the specific information set out in the second sentence. Given these structural relationships and the plain language of Section 6.4(a), the only reasonable interpretation is that the specific information enumerated in the second sentence further describes, and is exemplary of, some of the "confidential information" referenced more than once elsewhere throughout Section 6.4(a).

It only follows that any exception to the general provision must apply to its subset, *i.e.*, the second sentence's confidentiality obligation is subject to the fourth sentence's "public information" exception to the same extent the first sentence's confidentiality obligation is.

Given this construction, Bobcat's motion can only be granted if Bobcat can show on the present record, that Inland Florida used wholly confidential non-public information in violation of Section 6.4(a). Bobcat hasn't done so.

The present record demonstrates that Inland Florida used names, addresses, or other contact information of certain of the Company's municipal customers. Bobcat concedes that at least some of that information is public.[104] And Bobcat provides no affidavits, exhibits, or evidence that otherwise demonstrates what information (if any) is non-public, thus, protected **[*25]** under the confidentiality agreement.

Rather, Bobcat's sole argument rests on its interpretation of Section 6.4(a)—that the second sentence creates an entirely independent confidentiality obligation that cannot be excepted under the fourth sentence. That

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102 *DCV Holdings, Inc. v. ConAgra, Inc., 889 A.2d 954, 961 (Del. 2005)*.

103 Compare the second sentence's "pricing information, cost structure, customer names, customer addresses and contractual terms," with the first sentence's confidential information that includes "all customer lists...and all other information concerning the Business...and the [Company's] clients, customers...costs, profits, markets, sales..."

104 Pl.'s Br., at 32; O.A. Tr., at 79-81, 84-85.

interpretation just isn't right. Bobcat's motion for summary judgment on Inland's alleged breach of Section 6.4(a) is **DENIED**.[105]

C. COUNTERCLAIM COUNT I (TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS) AND COUNT III (DEFAMATION) WITH RESPECT TO INLAND FLORIDA.

Bobcat next seeks summary judgment on Inland Defendants' counterclaims of tortious interference and defamation. Both counterclaims arise out of Billy Dietrich's email to the Okaloosa Board concerning Inland Florida's bid proposal.[106] Bobcat invokes the *First Amendment*-based *Noerr-Pennington* doctrine, claiming that Billy's email is constitutionally privileged petitioning activity.[107] Alternatively, Bobcat contends that summary judgment is warranted under Florida law.[108]

The parties agree that Florida law governs this substantive claim.[109] Even if there was disagreement, the Court would apply Florida law under Delaware's "most significant relationship" test.[110]

1. Noerr-Pennington *Doctrine Would Likely Not be Applied in a [*26] Florida State Tort Action*.

Bobcat first relies on the Constitution-based *Noerr-Pennington* doctrine, contending that Billy's email is protected petitioning activity. Inland contests that the email does invoke the *Noerr-Pennington* doctrine.

i. Noerr-Pennington *Doctrine Overview*

HN16[] *Noerr-Pennington* immunity is rooted in the *First Amendment to the United State Constitution* which insures one's "right to petition the government for a redress of grievances."[111] *Noerr-Pennington* first emerged in the ***antitrust law*** to immunize individual or concerted activity designed to influence legislation that might result in trade restrictions or monopolies as a consequence of legislative activity.[112] The motive for such communication to

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[105] Inland furthers alternative arguments to oppose summary judgment, including: (1) Section 6.4(a) does not prohibit disclosure of information to the Okaloosa Board; (2) the language of Section 6.4(a) is ambiguous; and (3) Bobcat fails to allege facts supporting damages. Defs.' Opp'n, at 24, 32-34; O.A. Tr., at 57-69. The Court need not address these alternative arguments.

[106] Inland's tortious interference claim also includes another count based on Billy's email to the Ft. Hood workforce. Bobcat's present motion does not seek summary judgment on that count.

[107] Pl.'s Br., at 35-57.

[108] *Id.*, at 48-54.

[109] *See* O.A. Tr., at 18 (Bobcat conceding that "Florida state law is applicable to the actual claims of the defamation and tortious claims[.]"). *See also* Pl.'s Br., at 36 n.13, 37 ("Moreover, Mr. Dietrich's email was privileged under Florida law...was never defamatory in the first place."); Defs.' Opp'n., at 44 ("Bobcat's arguments...under Florida law fail[.]").

[110] *Eureka Res., LLC v. Resources-Appalachia, LLC, 62 A.3d 1233, 1236 (Del. Super. Ct. 2012)* (citing *Travelers Indem. Co. v. Lake, 594 A.2d 38, 47 (Del. 1991)* (adopting the flexible approach of the "most significant relationship" provided in the Restatement (Second) of Conflicts)).

[111] *U.S. Const. Amend. I*.

[112] The *Noerr-Pennington* doctrine is named after the two landmark cases: *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*, and *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*.

the government was deemed by the Court to be irrelevant.[113] And *Noerr-Pennington* immunity has since been extended to administrative and judicial actions.[114]

HN17[] That immunity, however, is not limitless.[115] *Noerr-Pennington* applies only to petitioning efforts seeking governmental, not private, action.[116] Petitioning activities that employ unlawful means,[117] or consist of false statements to the government,[118] are not protected. *Noerr-Pennington* immunity is also subject to a "sham litigation" exception.[119] A petitioning **[*27]** activity, although ostensibly directed to influence governmental action, is a "sham" if it is actually designed to interfere with a competitor's business relationships.[120]

HN18[] The determination of whether a petitioning activity is a "sham" follows a two-step inquiry.[121] First, the litigation must be "objectively baseless" that "no reasonable litigant could realistically expect success on the merits."[122] "[I]f challenged litigation is objectively meritless," the court moves to the second-step inquiry to examine

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[113] *See* Noerr, 365 U.S. at 139 ("The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so."); Pennington, 381 U.S. at 670 ("Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.").

[114] California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972) (holding that *Noerr-Pennington's* protection of the right to petition "governs the approach of citizens or groups of them to administrative agencies and to courts[.]").

[115] Id. at 512-13, 515 (discussing that the *Noerr-Pennington* immunity does not protect "illegal and reprehensive practices" that may corrupt the judicial process, or deter and harass competitors from having "free and unlimited" access to the agencies and courts, such as perjury, use of a fraudulent patent, illegal conspiracy with a licensing authority, misrepresentation, and bribery).

[116] Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988) (citing Noerr, 365 U.S. at 136; Pennington, 381 U.S. at 671).

[117] F.T.C. v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 424-25, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990) (noting that "the ends do not always justify the means," and distinguishing that *Noerr's* "restraint of trade was the intended *consequence* of public action" while the boycott activity was "the *means* by which respondents sought to obtain favorable legislation.").

[118] California Motor Transp., 404 U.S. at 513 ("Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."). *See also* Armstrong Surgical Ctr., Inc. v. Armstrong Cty. Mem 'l Hosp., 185 F.3d 154, 177 (3d Cir. 1999) ("[M]aterial misrepresentations can vitiate *Noerr—Pennington* immunity."), *accord* Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119, 124 (3d Cir. 1999) ("[A] material misrepresentation that affects the very core of a litigant's [] case will preclude *Noerr—Pennington* immunity."); Potters Med. Ctr. v. City Hosp. Ass'n, 800 F.2d 568, 580 (6th Cir. 1986) ("[K]nowingly false submissions or intentional misrepresentations constitute an abuse of government processes."); St. Joseph's Hospital v. Hospital Corp. of America, 795 F.2d 948, 955 (11th Cir. 1986) ("Misrepresentations under these circumstances do not enjoy *Noerr* immunity."); Whelan v. Abell, 48 F.3d 1247, 1254-55, 310 U.S. App. D.C. 396 (D.C. Cir. 1995) (concluding that *Noerr—Pennington* does not protect "knowing misrepresentations to state securities administrators and a federal court"); Harris v. Adkins, 189 W. Va. 465, 432 S.E.2d 549, 552 (W. Va. 1993) ("the right to petition the government [] does not provide an absolute privilege for intentional and reckless falsehoods, but the right is protected by the actual malice standard.").

[119] *See* Noerr, 365 U.S. at 144; California Motor Transp., 404 U.S. at 515.

[120] Noerr, 365 U.S. at 144. *See also* Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1255 (9th Cir. 1982) (noting that the "sham exception" to *Noerr-Pennington* immunity "reflects a judicial recognition that not all activity that appears as an effort to influence government is actually an exercise of the first amendment right to petition. At times this activity, disguised as petitioning, is simply an effort to interfere directly with a competitor.").

[121] Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993).

the "litigant's subjective motivation" to determine if the baseless suit conceals an attempt to interfere with a competitor's business through the "use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon[.]"[123]

ii. Inapplicability of Noerr-Pennington Doctrine to Inland Defendants' Florida Common Law Based Counterclaims.

HN19[] *Noerr-Pennington* doctrine is federally based. Bobcat concedes that Florida state courts have not adopted *Noerr-Pennington* doctrine, but urges that this Court should apply it under the federal Constitution's Supremacy Clause.[124]

HN20[] Under Delaware's **[*28]** conflict-of-law jurisprudence, Delaware courts are compelled to apply the foreign law as the state courts of the foreign jurisdiction would. And Florida law simply has not adopted—in fact, it has somewhat resisted—the *Noerr-Pennington* doctrine.

HN21[] Florida appellate courts have not yet recognized any *absolute* privilege assigned to petitioning activities under the First Amendment.[125] Instead, the Florida Supreme Court has observed no need to do so given the "qualified privilege" or "conditioned privilege" under Florida common law that provides wholly adequate protection of the First Amendment rights of speech, association, and petitioning activities.[126] In doing so, the Florida Supreme Court expressly rejected the "sham" test and made it clear that "the right to petition decisions should adopt analogous speech and association precedents" developed under Florida common law.[127] And so, on Inland Florida's law-based tortious interference and defamation claims, this Court will not (and need not) announce such an unnecessary adoption for Florida state courts, but instead follows first the qualified privilege analysis utilized by them.

2. Inland's Counterclaims for Tortious Interference and [*29] Defamation under Florida Law.

Under Florida law, Bobcat says, Billy's email is conditionally privileged because (i) the communication is to protect Bobcat's legitimate contractual rights, and (ii) is not defamatory.[128] Inland maintains that the email is not privileged, and existing factual disputes preclude summary judgment.[129]

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[122] *Id. at 60*.

[123] *Id. at 60-61* (citing *Noerr, 365 U.S. at 144*; *City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*(emphasis in original)).

[124] *See* Pl.'s Br., at 38-39; O.A. Tr., at 21.

[125] *Fla. Fern Growers Ass'n, Inc. v. Concerned Citizens of Putnam Cty., 616 So. 2d 562, 567 (Fla. Dist. Ct. App. 1993)* ("The original *Noerr—Pennington* line of cases, then, hardly supports the notion argued by appellees that there exists an absolute privilege for petitioning activities.") (emphasis added), *accord* *Turkey Creek, Inc. v. Londono, 567 So. 2d 943, 948 (Fla. Dist. Ct. App. 1990)*, *approved*, *609 So. 2d 14 (Fla. 1992)*.

[126] *See* *Nodar v. Galbreath, 462 So. 2d 803, 809-10 (Fla. 1984)* (finding that a parent's remarks concerning a teacher's performance to the school board were privileged as a matter of law as "statements of a citizen to a political authority."); *Londono v. Turkey Creek, Inc., 609 So.2d 14, 18 (Fla. 1992)* ("We decline to adopt the 'sham' test because we find that the current law in Florida already provides protection for the First Amendment right to petition the government."); *Fla. Fern Growers Ass'n, 616 So.2d at 569* (affirming that Florida Supreme Court in *Londono* equated "the limited immunity from suit accorded under the First Amendment" with the "qualified privilege of Florida's common law.").

[127] *Londono, 609 So.2d at 18*; *Fla. Fern Growers Ass'n, 616 So.2d at 569*.

[128] Pl.'s Br., at 48-55.

i. The Court Cannot Find on the Present Record that Billy's Email is Privileged Communication Immune from Liability for Tortious Interference.

With respect to Inland's tortious interference claim, Bobcat contends that the email is privileged because it asserts Bobcat's right under Section 6.4(a) because Inland breached the confidentiality agreement.[130] Inland contends that no valid contract rights were asserted, and alternatively, factual disputes with respect to Bobcat's malice and employment of improper means preclude summary judgment.[131] Given the record at this point, the Court must agree with Inland.

HN22[] Under Florida law, "[t]ort liability for interference with prospective contractual relationships is generally recognized."[132] An interference can be immunized from liability where the action "is undertaken to safeguard or promote one's financial or economic interest,"[133] but not to purposefully **[*30]** cause a breach of contract.[134] And the claim's target—i.e., he asserting privilege—will bear the burden to show that the claimed interference is privileged or justified.[135]

To be immunized on the basis of privilege, the interfering action must be (1) taken on a privileged occasion, and (2) the privilege may not be abused.[136] Whether an occasion gives rise to a privilege is a question of law.[137] Whether the privilege was abused is one of fact reserved for trial.[138]

Florida law "embraces a broad range of the privileged occasions."[139] But there is an inadequate factual record for the Court to find as a matter of law that Billy's email was communicated on any of the recognized occasions giving

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129 Defs.' Opp'n, at 44-45.

130 Pl.'s Br., at 49-50.

131 Defs.' Opp' n., at 49-51.

132 *Monco Enterprises, Inc. v. Ziebart Corp., 673 So. 2d 491, 492 (Fla. Dist. Ct. App. 1996)*.

133 *See* *Barco Holdings, LLC v. Terminal Inv. Corp., 967 So. 2d 281, 293 (Fla. Dist. Ct. App. 2007)*; *Yoder v. Shell Oil Co., 405 So. 2d 743, 744 (Fla. Dist. Ct. App. 1981)* (holding that the privilege to interfere is not limitless, and the interfering party must "have a financial interest in the business of the third party which is in the nature of an investment."), *rev. denied*, ***412 So. 2d 470 (Fla. 1982)***; ***Knepper v. Genstar Corp., 537 So. 2d 619, 622 (Fla. Dist. Ct. App. 1988)*** ("A statement is qualifiedly privileged if made by one who has a duty or interest in the subject matter to one who has a corresponding duty or interest.").

134 *Yoder, 405 So. 2d at 744*. *See also* *Making Ends Meet, Inc. v. Cusick, 719 So. 2d 926, 928 (Fla. Dist. Ct. App. 1998)* (finding that the interfering "actions were sufficiently egregious to overcome the immunity").

135 *Monco Enterprises, 673 So. 2d at 492*.

136 *Demby v. English, 667 So. 2d 350, 353 (Fla. Dist. Ct. App. 1995)* ("Under Florida commonlaw principles anyone who publishes defamatory matter is not liable if the remarks are published upon a conditionally privileged occasion and the privilege is not abused."); ***Knepper, 537 So. 2d at 622*** ("[W]here a qualified privilege exists, plaintiffs must prove express malice or malice in fact in order to recover. Express malice, or malice in fact, constitutes an abuse of a qualified privilege leaving the defendant liable.").

137 *Nodar, 462 So.2d at 810* ("the question of whether the occasion upon which they were spoken was privileged is a question of law to be decided by the court.") (citing *Abraham v. Baldwin, 52 Fla. 151, 42 So. 591 (1906))*.

138 *Fla. Fern Growers Ass'n, 616 So. 2d at 569-70* ("[F]actual questions remain whether the mode, manner, or purpose of their communication amounted to abuse or forfeiture of the privilege.").

139 The *Nodar* court noted that ***HN23***[] "[t]he law of Florida embraces a broad range of the privileged occasions that have come to be recognized under the common law," and recognized several examples of those privileges occasions, such as the

rise to privilege under Florida's common law. Moreover, even if the Court could find the email was privileged activity, factual issues exist as to whether Bobcat abused such privilege.[140] Thus, Bobcat's motion for summary judgment on this counterclaim must be **DENIED**.

ii. Bobcat's Summary Judgment Motion on Inland's Counterclaim for Defamation Must Also be Denied.

Turning to Inland's counterclaim for defamation, Bobcat again relies on qualified privilege. And the Court again must **[*31]** find that that privilege-based argument fails here.

Bobcat next argues that Billy's email is not defamatory because it is merely an opinion, and to the extent any factual statements are contained, they are substantially true.[141]

HN24[] Florida law provides, "No establish a cause of action for defamation, a plaintiff must show that (1) the defendant published a false statement about the plaintiff, (2) to a third party, and (3) the falsity of the statement caused injury to the plaintiff."[142] Determining whether a statement if defamatory is primarily a function of the Court.[143] The Court must view the statement in its entirety.[144] If a statement is capable of more than one meaning, it is for "the trier of fact [to] determine whether the language used was actually understood in its defamatory sense."[145]

Here, Billy's email is open to multiple meanings or interpretations; though the tone and tenor of it hardly lost on the average reader. The Court simply cannot say that a reasonable reading of the email precludes a finding that it is defamatory. Thus, it must be submitted to more thorough factfinding at trial to determine if the email's language is understood in a defamatory sense.

Turning to Bobcat's argument **[*32]** that the email is an opinion, ***HN25***[] Florida law indeed shields "statements of *pure opinion*" from defamation liabilities.[146] But "mixed opinion" that, "although ostensibly in the form of an opinion, implies the allegation of undisclosed defamatory facts as the basis for the opinion, is actionable."[147]

HN26[] A "pure opinion" differs from a "mixed opinion" in that:

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mutuality of interest between the speaker and listener; discussion of former employee's performance with prospective employers; communications for bona fide commercial purposes to protect the recipient's interest; and statements concerning matters of public concern. *See* *Nodar, 462 So.2d at 809-10* (citation omitted).

[140] *Fla. Fern Growers Ass'n, 616 So. 2d at 569*. *See also* *Demby, 667 So. 2d at 353* ("[A]nyone who publishes defamatory matter is not liable if the remarks are published upon a conditionally privileged occasion and the privilege is not abused.").

[141] Pl.'s Br., at 52-55.

[142] *NITV, L.L.C. v. Baker, 61 So. 3d 1249, 1252 (Fla. Dist. Ct. App. 2011)* (quoting *Razner v. Wellington Reg'l Med. Ctr., Inc., 837 So. 2d 437, 441 (Fla. Dist. Ct. App. 2002))*.

[143] *Smith v. Cuban Am. Nat. Found., 731 So. 2d 702, 704 (Fla. Dist. Ct. App. 1999)* ("The court has a 'prominent function' in determining whether a statement is defamatory, and if a statement is not capable of a defamatory meaning, it should not be submitted to a jury.").

[144] *Id. at 705* ("[A] publication must be considered in its totality...To determine whether a statement is defamatory, it must be considered in the context of the publication.") (internal quotation marks and citations omitted).

[145] *Id.*

[146] *E. Air Lines, Inc. v. Gellert, 438 So. 2d 923, 927 (Fla. Dist. Ct. App. 1983)*.

[147] *Id.* (internal quotations marks omitted).

> "Pure opinion occurs when the defendant makes a comment or opinion based on facts which are set forth in the article or which are otherwise known or available to the reader or listener as a member of the public. Mixed expression of opinion occurs when an opinion or comment is made which is based upon facts regarding the plaintiff or his conduct that have not been stated in the article or assumed to exist by the parties to the communication."[148]

Florida courts have consistently found statements to be non-defamatory "pure opinions" when the recipient of the communication knew, or was reasonably expected to know, the facts and situations surrounding the statements.[149]

In part, Billy's email reads:

> It seems that the company (Inland Services of Florida, LLC) bidding your refuse collection contract is in direct violation of our purchase **[*33]** and sale agreement of 5/31/16 as well as the noncompete agreement that goes hand in hand with that PSA. Bart Begley and Monty Davison sold Inland to us in May of 2016 and have no RIGHT to use the references that would allow them to bid your contract making this a VERY legal, sticky situation if they were awarded this contract. Having said that I wanted you to know where we stand, we will proceed with ANY and ALL legal recourse if those references were used in the Okaloosa Bid. Which I know they were used because it is the only way they would be QUALIFIED!!!! Our attorneys have already been prepped and ready to proceed as we have been monitoring your bid closely.
> Feel free to contact me anytime, thank you and have a great day.[150]

There is no record evidence the Okaloosa Board knew, or could be reasonably expected to have known, the facts or situations surrounding Billy's claims. Nothing in the record suggests the Okaloosa Board was in any way privy to the private transactional arrangements between Bobcat and Inland. Unlike those found to have received statements of "pure opinion," nothing here suggests the Okaloosa Board knew, or could reasonably be expected to know, whether Inland Florida **[*34]** and Begley/Davison violated the UPA. At most, Billy's statements are a mixture of his opinions, what he believes to be facts, his strongly held feelings, and his threats of litigation. The Court can't say here, on this record, that judgment as a matter of law on the defamation counterclaim is warranted.

Bobcat's last attempt to gain summary judgment on the defamation counterclaim is its suggestion that even if the email does contain factual content, those statements are true under Florida's "substantial truth doctrine."[151]

HN27[] The "substantial truth doctrine" provides "a statement does not have to be perfectly accurate if the 'gist' or the 'sting' of the statement is true."[152] Falsity exists if the publication is "substantially and materially false, not just if it is technically false."[153] In addition, a statement is false if it would have a different effect on the reader from what the pleaded truth would have produced.[154] The defense of truth is a question for the factfinder at trial.[155]

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[148] *From v. Tallahassee Democrat, Inc., 400 So. 2d 52, 54 (Fla. Dist. Ct. App. 1981)*, *rev. denied*, ***412 So. 2d 465 (Fla. 1982)***.

[149] *See, e.g., From, 400 So. 2d at 57* (finding the statements published on the tennis column of a local newspaper concerning a local tennis professional to be non-defamatory because the newspaper's audience would be expected to know both the tennis professional's situation and his performance in the local community); *Demby, 667 So. 2d at 355* (finding that the county commissioner who received the statements would be expected to know the claimant's situation in connection with the statements).

[150] Ex. I to Pl.'s Br., February 14, 2017 Email from Mr. William "Billy" Dietrich to Commissioner Ketchel (capitalization in original).

[151] Pl.'s Br., at 52-55.

[152] *Smith, 731 So. 2d at 706*.

[153] *Id. at 707*.

[154] *Id.* (quotation omitted).

Under the substantial truth doctrine, the "gist" of Billy's email is that Inland Florida breached the UPA's confidentiality agreement, and Begley and Davison used the protected references without Bobcat's authorization. **[*35]** As the Court noted before, the alleged breach of the UPA has not been determined, yet the Board could have read the email to mean that the breach was indeed real. Thus, a trial factfinder could find that those statements have a different effect on the reader or that they are not "substantially and materially true."

3. The Same Outcome Under the **Noerr-Pennington** *Doctrine*.

Having concluded the qualified privilege analysis under Florida law, Bobcat's *Noerr-Pennington* arguments nevertheless bear on the question of *Noerr-Pennington* immunity's application to tort claims arising under state law. This question is implicated by the *federal Constitution's Supremacy Clause*.[156] Florida's declination to adopt the *Noerr-Pennington* analysis has not been without criticism.[157] And Florida's application of its recognized qualified privilege to petitioning activities has been seemingly sparse. So, if for nothing more that the sake of completeness, this Court cannot simply ignore Bobcat's attempt to invoke *Noerr-Pennington* immunity.

HN28[] While Florida courts characterize *Noerr-Pennington* as an antitrust doctrine,[158] other courts have recognized it as Constitution-based **[*36]** not limited to antitrust claims.[159] Those courts have applied *Noerr-Pennington* immunity to wideranging tort claims rising under state laws.[160]

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[155] *Glickman v. Potamkin, 454 So. 2d 612, 613 (Fla. Dist. Ct. App. 1984)* ("[T]he affirmative defenses of truth, good motive and qualified privilege present factual questions for resolution by the jury.").

[156] Courts have long faced this question in their attempts to reconcile other courts' decisions and to determine an appropriate approach to resolving disputes. *See, e.g.,* *NOW, Inc. v. Scheidler, 1997 U.S. Dist. LEXIS 14854, 1997 WL 610782, at *30-31 (N.D. Ill. Sept. 23, 1997)* (having noted that "caselaw addressing the question whether the *Noerr-Pennington* doctrine brings *first amendment* principles to bear on state law tort claims," the court declined to apply the state law of tortious interference because doing so would violate the *First Amendment*.); *cf.* *Myers v. Levy, 348 Ill. App. 3d 906, 808 N.E.2d 1139, 1150-52, 283 Ill. Dec. 851 (Ill. App. Ct. 2004)* (noticing that "[t]here is a notable amount of case law addressing the question whether the *Noerr—Pennington* doctrine brings *first amendment* principles to bear on state-law tort claims," the court declined to "expand [the *first amendment*] privilege into an absolute one" to the claims for defamation and false light invasion of privacy.) (quoting *McDonald v. Smith, 472 U.S. 479, 485, 105 S. Ct. 2787, 86 L. Ed. 2d 384 (1985))*.

[157] *Computer Assocs. Int'l, Inc. v. Am. Fundware, Inc., 831 F. Supp. 1516, 1523 (D. Colo. 1993)* (recognizing that *Noerr-Pennington* immunity is a a constitutional, not an antirust, doctrine, and criticizing that *Fla. Fern Growers Ass'n* "ignored principles of federalism and t[ook] the questionable approach . . . [of] view[ing] this as an issue of state law."); *Kinsman v. Winston, 2015 U.S. Dist. LEXIS 194060, 2015 WL 12839267, at *8 (M.D. Fla. Sept. 15, 2015)* (having applied the *Noerr-Pennington* doctrine, the court also conducted the "conditional privilege" analysis and found that the same result would flow).

[158] *Fla. Fern Growers Ass'n, 616 So. 2d at 566-67*.

[159] *See, e.g.,* *Computer Assocs. Int'l, 831 F. Supp. at 1523* ("Thus *Professional Real Estate Investors* and *Claiborne Hardware* [decisions] support the proposition that *Noerr—Pennington* immunity is a constitutional, not an antitrust, doctrine."); *Campbell v. PMI Food Equip. Group, Inc., 509 F.3d 776, 790 (6th Cir. 2007)* (noting that "[a]lthough the *Noerr-Pennington* doctrine was initially recognized in the antitrust field, the federal courts have by analogy applied it to claims brought under both state and federal laws, including common law claims of tortious interference."); *RRR Farms, Ltd. v. Am. Horse Prot. Ass'n, Inc., 957 S.W.2d 121, 128 (Tex. App. 1997)* ("Lower federal and state courts have adopted *Noerr's* deference to the right to petition not only in antitrust cases, but in other cases involving civil liability."), *holding modified by* *Baty v. ProTech Ins. Agency, 63 S.W.3d 841 (Tex. App. 2001)*.

[160] *See, e.g.,* *Computer Assocs. Int'l, 831 F. Supp. at 1523* (claim for unfair competition); *McGuire Oil Co., 958 F.2d at 1561* (unfair trade practices claim); *IGEN Int'l, Inc. v. Roche Diagnostics GmbH, 335 F.3d 303, 312 (4th Cir. 2003)* ("[A]lthough originally developed in the antitrust context, the doctrine has now universally been applied to business torts"); ***Bath Petroleum Storage, Inc. v. Market Hub Partners, L.P., 229 F.3d 1135, 1135 (2d Cir. 2000)*** ("state-law claims such as fraud and tortious interference"); *Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119, 128-29 (3d Cir. 1999)* (tortious interference and unfair

HN29[] In contrast to the Florida state courts' approach, the federal courts of Florida have recognized the applicability of *Noerr-Pennington* immunity to petitioning activities.[161] In petitioning for adjudicative relief, *Noerr-Pennington* immunizes litigative activity (*e.g.*, commencement of a suit) and pre-litigative activity (*e.g.*, threats of litigation).[162] Later decisions, however, appear to have taken a more cautious, and perhaps limiting, approach that affords *Noerr-Pennington* immunity only to pre-litigative activity "necessarily preliminary" to the adjudicative proceedings.[163]

Of note also is the fact that, unlike other federal courts that have applied the *Noerr-Pennington* doctrine to a broad spectrum of state tort claims, Florida federal courts seem to adhere to the doctrine's ***antitrust law*** origin and are less inclined to extend **[*37]** the immunity to activities unrelated to anticompetitive conduce.[164]

The Court notes all of this to aid in the understanding of its constrained application of the *Noerr-Pennington* doctrine here. Bobcat argues that Billy's email is privileged pre-litigation activity that is objectively meritorious and, thus, not a sham.[165] But *HN30*[] privileged pre-litigation acts that have been recognized by Florida courts share certain

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competition claims); ***Proportion-Air, Inc. v. Buzmatics, Inc., 57 F.3d 1085, 1085 (Fed. Cir. 1995)*** (tortious interference and unfair competition claims); *Oregon Nat. Res. Council v. Mohla, 944 F.2d 531, 533 (9th Cir. 1991)* (abuse of process and interference with business relations claims); *Video Int'l Prod. v. Warner-Amex Cable Comms., Inc., 858 F.2d 1075, 1084 (5th Cir. 1988)* (business tort claims); *Hufsmith v. Weaver, 817 F.2d 455, 458-59 (8th Cir. 1987)* (tortious interference with business claims); *Havoco of Am., Ltd. v. Hollobow, 702 F.2d 643, 649 (7th Cir. 1983)* (tortious interference claim); *Campbell v. PMI Food Equip. Group, Inc., 509 F.3d 776, 790 (6th Cir. 2007)* (recognizing "federal courts have by analogy applied *[Noerr-Pennington* doctrine] to claims brought under both state and federal laws, including common law claims of tortious interference"); *Suburban Restoration Co. v. ACMAT Corp., 700 F.2d 98, 102 (2d Cir. 1983)* (claims based on state statute regulating unfair trade practices and common law claims of tortious interference with a business expectancy).

161 *McGuire Oil Co., 958 F.2d at 1561*. *See also* *Silverhorse Racing, LLC v. Ford Motor Co., 2016 U.S. Dist. LEXIS 185749, 2016 WL 7137273, at *3 (M.D. Fla. Apr. 27, 2016)* ("Tit is hard to see any reason why, as an abstract matter, . . . common law torts . . . might not in some of their applications be found to violate the *First Amendment*.") (quoting *Whelan, 48 F.3d at 1254*).

162 *McGuire Oil Co., 958 F.2d at 1560*, *accord* *Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358, 1367 (5th Cir. 1983)*. *See also* *Atico Int'l USA, 2009 U.S. Dist. LEXIS 73540, 2009 WL 2589148, at *3 (S.D. Fla. Aug. 19, 2009)* (holding that *Noerr-Pennington* protects a pre-litigation letter prepared and sent by an intellectual property counsel and threatening litigation).

163 *Orange Lake Country Club v. Reed Hein & Assocs., LLC, 367 F. Supp. 3d 1360, 2019 U.S. Dist. LEXIS 43311, 2019 WL 645214, at *9 (M.D. Fla. Jan. 4, 2019)* (holding that the *Noerr-Pennington* privilege "arises immediately upon the doing of any act required or permitted by law in the due course of the judicial proceeding or as necessarily preliminary thereto," and concluding that, in the context of pre-litigation activity, *Noerr-Pennington* privilege only applies to statements "necessarily preliminary" to judicial proceedings such as pre-suit communications required by statute or by contract as a condition precedent to suit). *See also* *Trent v. Mortg. Elec. Registration Sys., Inc., 618 F. Supp. 2d 1356, 1359 (M.D. Fla. 2007)*, *aff'd*, *288 F. App'x 571 (11th Cir. 2008)* (declining to extend the litigation privilege to "pre-suit communications" where such communications were not required by law).

164 *Marco Island Cable v. Comcast Cablevision of the South, Inc., 2006 U.S. Dist. LEXIS 45116, 2006 WL 1814333, at *10 (M.D. Fla. July 3, 2006)* (extending *Noerr—Pennington* immunity to the *Florida Deceptive and Unfair Trade Practices Act* that mirrors *Federal Sherman Act* that also regulates anticompetitive act). *But Cf.* *Slip-N-Slide Records, Inc. v. TVT Records, LLC, 2007 U.S. Dist. LEXIS 9014, 2007 WL 473273, at *7 (S.D. Fla. Feb. 8, 2007)* (refusing to extend *Noerr—Pennington* immunity to traditionally asserted state tort claims "wholly unrelated to an antitrust claim"); *Cisson v. Claudio & Johnson, LLC, 2017 U.S. Dist. LEXIS 68373, 2017 WL 1857419, at *3 (M.D. Fla. Mar. 2, 2017)* (declining to extend *Noerr-Pennington* doctrine to claims brought under *Florida Consumer Collection Practices Act*); *Roban v. Marinosci Law Grp., 34 F. Supp. 3d 1252, 1255 (S.D. Fla. 2014)* (refusing to apply *Noerr-Pennington* immunity to claims brought under *Federal Debt Collection Practices Act*). *See also* *ClearPlay, Inc. v. Nissim Corp., 2011 U.S. Dist. LEXIS 99154, 2011 WL 3878363, at *7 (S.D. Fla. Sept. 2, 2011)* (noting that "while other Circuits have applied *Noerr—Pennington* immunity to bar not only anti-trust claims but also state tort claims, the Eleventh Circuit has done so only in a very specific context"), *aff'd*, ***496 Fed. Appx. 963 (11th Cir. 2012)***, *cert. denied*, ***570 U.S. 919, 133 S. Ct. 2867, 186 L. Ed. 2d 912 (2013)***; *Slip-N-Slide Records, 2007 U.S. Dist. LEXIS 9014, 2007 WL 473273, at *7* (criticizing that "[f]rankly, the doctrine has likely been extended far beyond what the exercise of judicial restraint should allow").

165 Pl.'s Br., at 42-45.

commonalities, they: are formalistic (often prepared by attorneys); specify the complained-of conduct and the litigation threatened; and are generally followed by actual lawsuits based on the same subject matter.[166] Billy's email lacks much of these—it wasn't prepared by an attorney, has no formalistic elements, and is devoid of any real specificity. On multiple occasions, the email used words and phrases in all capitalized letters, presumably to express threat. Yet it is unclear what litigation is threatened, against whom, and on what specific wrongdoing. A reasonable reader can't even discern whether the litigation is threatened against Okaloosa, Inland Florida, Begley, **[*38]** Davison, or all the above.

Accordingly, the Court concludes on the present record that even under the *Noerr-Pennington* doctrine Bobcat is not due summary judgment on Inland's tortious interference and defamation counterclaims. And so, Bobcat's motion on those counterclaims must be **DENIED**.

V. CONCLUSION

For the reasons discussed, Bobcat's Motion for Partial Summary Judgment is **GRANTED**, in part, and **DENIED**, in part.

IT IS SO ORDERED.

/s/ Paul R. Wallace

Paul R. Wallace, Judge

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[166] *McGuire Oil Co., 958 F.2d at 1560* (the threat is specific as to the statutory basis of the claim, and actual suit was later brought thereunder. The court also held that repeated threats of litigation as a method of creating or maintaining anti-competitive conduct is within the scope of the immunity, and does not fall within the sham exception); *Atico Int'l USA, 2009 U.S. Dist. LEXIS 73540, 2009 WL 2589148, at *3* (pre-litigation letter prepared and sent by intellectual property counsel threatening litigation of patent infringement and such suit was later filed is privileged); *Marco Island Cable, 2006 U.S. Dist. LEXIS 45116, 2006 WL 1814333, at *1* (immunizing letters threatening to enforce the exclusive contract where actual suit is filed); *Silverhorse Racing, 232 F.Supp.3d 1206* (demand letters sent to trademark infringers' business partners requesting them to remove infringing products and stop infringing activity is immunized and is not "sham").

LexisNexis

Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.

Appellate Division, Superior Court of California, Los Angeles

April 29, 2019, Decided; April 29, 2019, Filed

Case No.: SC090481

Reporter

2019 Cal. Super. LEXIS 92933 *

FLAGSHIP THEATRES OF PALM DESERT, LLC dba CINEMAS PALME D'OR, a California Limited Liability Corporation, Plaintiff, v. CENTURY THEATRES, INC., a California Corporation, et. al., Defendants.

Core Terms

billed, antitrust, spent, attorney's fees, timekeepers, Defendants', post-contingency, spoliation, lodestar, movie, preparation, deposition, time spent, clearances, discovery, tasks, pre-contingency, equated, contingency fee agreement, fee request, litigated, damages, motions, cases, full amount, distributors, contingency, multiplier, presenting, inflated

Judges: [*1] LISA HART COLE, Judge of the Superior Court.

Opinion by: LISA HART COLE

Opinion

ORDER ON GRANTING PLAINTIFF'S MOTION FOR ATTORNEYS' FEES IN THE AMOUNT OF $8,041,102

The history of this case is well documented by both counsel in their respective pleadings on Plaintiff's Motion for Attorneys' fees. After 12 years of litigation, which included three motions for summary judgment, two appeals and a five week trial, the jury rendered a verdict of $1,250,000, which when trebled by law,[1] awarded a total judgment for the Plaintiff of $3,750,000. The Cartwright Act further provides for unilateral fee-shifting awarding reasonable attorneys' fees to the prevailing Plaintiff.[2] The general purpose of the one-sided attorneys' fee provision is to insulate treble damages recoveries from expenditures for legal fees thus encouraging private persons to pursue otherwise costly and complex antitrust cases.[3]

There is no dispute that Plaintiff is entitled to attorneys' fees. The focused challenge is to the reasonableness of the amount of attorneys' fees sought ---$21,700,672.98.[4]

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[1] *Cal. Business & Professions Code § 16750(a)*

[2] See, *B&P § 16750(a)*; *Carver v. Chevron U.S.A., Inc., (2004) 119 CA4th 498, 503094*

[3] *See, Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc., (9th Cir. 1982) 676 F.2d 1291, 1312-1313*.

[4] Lodestar of $15,500,480.70 with a 1.4 multiplier, Flagship Reply, 33:11-13

Plaintiff's Position

Plaintiff correctly argues that private enforcement of the Cartwright Act in and of itself serves an important public interest. In order **[*2]** to attract qualified counsel to accept such risky and expensive cases, attorneys' fees are mandatory. "Antitrust plaintiffs are 'entitled to recover a reasonable attorney's fee for every item of service which, at the time rendered, would have been undertaken by a reasonable and prudent lawyer...to protect his client's interest in pursuit of a successful recovery... ."[5] Depending on the facts of each case, an enhancement multiplier is sometimes applied to balance the risk and expense against the important public interest benefit.

Lead counsel, Tom Boeder, is a highly qualified antitrust litigator and one of only a few attorneys in the United States with experience in movie industry antitrust matters and knowledge of circuit dealing disputes.[6] Mr. Boeder explains that he originally took the case on "hourly rate plus disbursements basis,"[7] but as the case dragged on the firm agreed to a contingency fee agreement, the terms of which were not disclosed by Plaintiff in its motion. As revealed by the Defendants, however, a March 7, 2012 contingency fee agreement provides for Perkins Coie to recover the past due/pre-contingency amount of $870,279, plus 40% of any additional money recovered in **[*3]** the lawsuit. The remaining 60% of the recovery, including attorneys' fees, would go to Flagship.[8] Over the 12 years of litigation, Mr. Boeder was ably assisted by several other attorneys and paralegals both in Seattle and Los Angeles, most significantly by Elvira Castillo and Donald Kula.

Plaintiff addresses its lodestar analysis seeking to recover all hours reasonably spent to establish and defend a fee claim.[9] Due to the length of the litigation and the difficulty in accounting for the many timekeepers who worked on the case (some of whom may no longer be employed at the firm) counsel opted to use "timekeeper historical rates, *i.e.*, the rates in place at the time the work was done."[10] According to Mr. Kula, the "Perkins Coie timekeepers used in the lodestar calculation presented in this motion are comparable to, or lower than, the prevailing rates for such services of the kind and quality of the services provided by Perkins Coie to Flagship in this case."[11] Counsel argues that the "lean" staffing approach in this case was designed to be efficient and cost effective by delegating work to lower rate timekeepers, devoting only two partners to the case, and maintaining a core team as consistently **[*4]** as possible throughout the litigation.[12] Finally, Mr. Boeder reviewed the billing and wrote off a total of $163,651.75,[13] in addition to applying historical hourly rather than current hourly rates, in further support of counsels' conservative billing approach.[14] Plaintiff values its lodestar at $15,500,480.70. Plaintiff's billing expert, Kenneth Moscaret, opines that, "Perkins has exercised billing judgment in both the manner in which it has handled, managed, staffed, and billed the current action, but also in submitting the instant fee motion.."[15]

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[5] Flagship Reply, 8:7-9, citing *Theme Propositions, Inc. v. News Am. Mktg. FSI, Inc. (N.D. Cal. 2010) 731 F.Supp2d 937, 941*.

[6] Boeder Declaration and Boeder Qualifications Declaration.

[7] Flagship Mot. for Attys' Fees, 3:14.

[8] Decl. Clement Glynn, Exhibit 2.

[9] *Citing, Serrano v. Unruh (1982) 32 Cal.3d 621, 639, 186 Cal. Rptr. 754, 652 P.2d 985*. *See generally*, Flagship Motion for Attorneys' Fees, 9:11-11:28.

[10] Flagship Motion, 9:20-21.

[11] Kula declaration, 112.

[12] *See*, Flagship Motion, 12:1-13:23.

[13] Specifically, the amounts written off include amounts Mr. Boeder determined to be duplicative or inefficient, all individual time entries of $1,000 or less, and purely administrative tasks.

[14] *See*, Flagship Motion 1:125; Boeder Decl. ¶ 17; Kula Decl. ¶ 12, Exh. A.

[15] Moscaret Decl., 4:3-4

Plaintiff seeks a 1.4 enhancement multiplier to its lodestar for several reasons. In light of the complexity of the case, the challenges posed during the 12 years of litigation and Defendants' aggressive litigation tactics, Plaintiff urges that the public interest benefits for independent theaters and movie goers goes far beyond the Plaintiff's monetary recovery. Mr. Boeder advises that this is one of only two private movie industry antitrust circuit dealing cases that an independent movie theater plaintiff has actively litigated through verdict, and further that *Flagship 1*[16] resulted in an important Cartwright Act jurisprudence. **[*5]** Although *Flagship I* alone is significant, "the most enduring measure of success in this case....are the public interest benefits that pursuit of the litigation by Flagship has generated," which include increased access by independent movie theater goers to desirable first run commercial films.[17] As of 2016, at least three major Hollywood movie studios have publicly announced or implemented a policy of no longer honoring any exhibitor requests for clearance/exclusivity on the movies they distribute. Based on that, Mr. Boeder opines that the results of this case are changing the industry standard. Plaintiff relies on Kenneth Moscaret's expert opinion in support of the reasonableness of both the lodestar and multiplier. Plaintiff values the attorneys' fees, with the 1.4 multiplier, at $21,700,672.98.

Defendants' Position

Defendants take issue with various aspect of Plaintiff's lodestar. The following are Defendants' main criticisms based on counsels' own analysis and that of their billing expert, Clement L. Glynn:

- Block Billing/Modified Block Billing - Perkins Coie regularly "block billed" (or "modified block billed") entries **[*6]** that lump all tasks performed during a given day into a single "block" of time, making it impossible to assess the reasonableness of that time on a per-task basis.[18] Block-billing is generally disfavored[19] and warrants a percentage reduction.
- Inflated hours post 2012 contingency fee agreement - During the first six years of litigation Plaintiff billed 3,000 for approximately $1,200,000 in fees. After counsel and Flagship reached a contingency fee agreement, Plaintiff billed 30,000 hours for approximately $13,600,000 in fees.[20] Defendants attribute this significant increase to lack of reasonable billing supervision and restraint.[21]
- Spoliation of evidence - Counsel billed 2,761 hours, nearly $1,300,000, defending its own spoliation of evidence, which resulted in Plaintiff's loss of two years' worth of evidence/damages at trial and a mutually costly four-year delay in the case.[22]
- Fees for numerous non-lawyers - Counsel seeks to include non-lawyer tasks, such as a jury consultant, as attorney fees.

Defendants correctly argue that the Plaintiff bears the burden of proving the reasonableness of its proffered lodestar. Although Perkins Coie's rates may have been reasonable, the time **[*7]** spent on various tasks allegedly is not.[23] Defendants' urge a further downward adjustment to the lodestar due to Flagship's limited success at trial: "[A] reduction in the fee amount is 'appropriate if the relief, however significant, is limited in comparison to the scope

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[16] *See, Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc. (2011) 198 CA4th 1366, 131 Cal. Rptr. 3d 519*

[17] Boeder Decl. ¶¶ 9, 11, 12.

[18] Century/Cinemark's Opposition to Flagship's Motion, 6:17-7:16

[19] See, California State Bar Committee on Mandatory Fee Arbitration, Detecting Attorney Bill Padding, Arbitration Advisory 2003-01 at 7 (Jan, 29, 2003

[20] *Ibid.*, at 7:17-8:10.

[21] *Ibid.*, at 11:12-14

[22] *Ibid.*, at 8:11-19

[23] *Ibid*, at 11:20-12:12.

of the litigation as a whole'"[24] Defendants' recommend that the court adopt a "holistic approach" and reduce Plaintiff's fee award by "at least" 50%, or $7,395,740.[25] Defendants concludes that a maximum fee of $3,679,870 is appropriate.[26]

Similarly, Defendants dispute that any multiplier is appropriate. This case did not have a wide-ranging effect on the film exhibition industry, independent theaters, or movie goers according to the Defendants.[27] Flagship's attempt to take credit for ending clearances is allegedly misguided because the case was not about clearances but rather about circuit dealing.[28] Further, it is temporally impossible to attribute the 2018 verdict in this case to the 2016 decision by a few distributors to no longer honor clearances.[29] Aside from the lack of evidence to support Plaintiff's claim that this lawsuit is causally related to any policy change in the Coachella Valley or anywhere else, Defendants **[*8]** artfully suggest that, "[i]t is a bridge too far for Flagship to urge that a case not challenging clearances somehow ended all clearances nationwide."[30] Finally, Defendants conclude that the *Flagship I* decision is not significant in light of other more significant State and Federal opinions,[31] and that the case has only been cited once since 2011 for an issue not related to circuit dealing or any antitrust proposition.[32]

<u>*Discussion*</u>

Introduction

Plaintiff's lodestar is patently irreconcilable when comparing the pre-contingency and post-contingency hours and fees. During the first six years of this case, prior to the March 7, 2012 contingency fee agreement, Perkins Coie billed $1,193,442.45 based on 3,000 hours of work utilizing 23 time keepers. During the second six years of this case, Perkins Coie billed $13,598,038, based on 30,000 hours of work utilizing 78 timekeepers. In other words, counsel actually billed 10 times the number of hours and over 11 times the amount of fees in the second half of the litigation. These numbers alone defy any sense **[*9]** of reasonableness. Flagship attributes the extreme differential in hours and fees during the second half of the litigation to Norton Fulbright's entry into the case by, "ratcheting up the tone, tenor and tenaciousness of the litigation."[33] Plaintiff questions what Defendants' billed during the litigation and implies that their own fees would be viewed favorably in comparison.[34] The second half of the litigation

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[24] *Ibid.*, at 26:23-24; Citing *Hensley v. Eckerhart (1983) 461 U.S. 424, 439, 103 S. Ct. 1933, 76 L. Ed. 2d 40*.

[25] Defts.' Opp. 25:23-26:4; Glynn Decl. ¶¶ 1(c), 31, 34, 43.

[26] *Ibid.*, at 35:26

[27] *Ibid.*, at 30:3-30:3-32:4

[28] *Ibid.*, at 31:17 - 32:4; citing *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc. (2011) 198 CA4th 1366, 131 Cal. Rptr. 3d 519*

[29] *Ibid.*, at 31:7-13.

[30] *Ibid.*, at 32:2-4

[31] *Citing, Redwood theatres, Inc. v. Festival Enter., Inc. (1988)200 CA3d 687, 248 Cal. Rptr. 189*

[32] *Ibid.*, 32:5 - 23, *Citing Orange Cnty. Water Dist., v. Sabic Innovative Plastics US, LLC (2017) 14 CA5th 343, 222 Cal. Rptr. 3d 83*.

[33] Flagship Reply, 7:18-20.

[34] The parties engaged in discovery prior to the filing of the motion. There is no evidence that Flagship requested Norton Fulbright's bills or that such request was not honored.

included a second trip to the Court of Appeal over the spoliation issue (*Flagship II*)[35] which Plaintiff's urge was more complicated than *Flagship I*. As for the two years spent litigating the spoliation issue, Plaintiff blames Norton Fulbright's overreaching in seeking terminating sanctions instead of lesser evidentiary and damages sanctions ultimately imposed by the Court of Appeal.[36] Plaintiff and its expert conclude that the time expended was reasonable and necessary, and that any reduction in an antitrust case based on a reduced jury award is improper, merely inviting error.

Objectively, the first half of this case was litigated just as strenuously as the second half, but for the actual trial. During the first six years the parties engaged in written discovery, deposition of **[*10]** all principle players, Defendants' successful motion for summary judgment, a successful appeal of that summary judgment ruling and trial preparation. *Flagship I* was an intricate decision addressing not only the appropriate scope of discovery, but a discussion of all relevant antitrust cases. Plaintiff proudly describes this decision as significant for Cartwright Act jurisprudence and even more significant with respect to the law on circuit dealing: "*Flagship I* is the most detailed analysis of which Plaintiff is aware of the law on circuit dealing claims by any court, state or federal, in the context of private antitrust action."[37] It is disingenuous for Plaintiff to tout the importance of *Flagship I* when discussing its contribution to antitrust jurisprudence and to later minimize the complexity of the appeal when justifying magnified post-contingency fees for the *Flagship II*.

Comparison of time spent pre and post-contingency

The relative time spent on equivalent tasks during the first and second halves of the case shows a tremendous disparity in billing practices. Defendants' expert, Mr. Glynn, presented some glaring comparisons in this regard. For example, Mr. Tabor and Mr. Mason were **[*11]** each deposed during both periods of the case. In 2008, three timekeepers spent approximately 30.6 hours preparing for and presenting Mr. Tabor and Mr. Mason for deposition, which equated to $12,883 in fees. In 2013, seven timekeepers spent roughly 306 hours preparing for and presenting them for second depositions, which equated to $108,212 in fees.[38] In 2008, ten timekeepers spent 768.7 hours on the appeal of the Motion for Summary Judgment, resulting in *Flagship I*, which equated to $343,325 in fees. In 2014, 19 timekeepers spent 1,944 hours on the spoliation appeal, which equated to $958, 862 in fees.[39] In 2008, timekeepers spent 37.8 hours preparing for and taking two Cinemark depositions, an average of 19 hours per deposition, which equated to $17,696 in fees. In 2017, timekeepers spent 428 hours preparing for and taking four short Cinemark deposition, which equated to $246,889 in fees, or an average of 107 hours per deposition.[40] Plaintiff's explanation for what appears to be grossly inflated hours is Norton Fulbright tenacious litigation tactics, such as attacking the Flagship principals personally, and that the broadened scope of discovery required more deposition preparation. While **[*12]** both may be true, the explanation rings hollow in light of the massively disproportionate billing practices between the first and second halves of the litigation.

Spoliation issue

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[35] *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc., No. B257148, 2016 Cal. App. Unpub. LEXIS 3812, 2016 WL 3091192 (Cal .App. May 24, 2016)*

[36] *Ibid.*; Flagship Reply 23:7-24:8.

[37] Flagship Motion for Fees, 4:3-6

[38] Glynn Decl., ¶¶25(a), (d)

[39] Glynn Decl., ¶25(1)

[40] Glynn Decl., ¶25(d)

Whether it is equitable for a Plaintiff to recover fees for its own unintentional spoliation of material evidence has not been addressed by a published opinion.[41] Mr. Glynn opines that the approximately $1.3 million Flagship incurred in, "litigating the spoliation issue should not be awarded, as they were the result of Plaintiff's improper conduct."[42] Defendants' correctly note that the case was set for trial just weeks after the trial court's issuance of terminating sanction, and that the parties had largely prepared for trial.[43] The spoliation issue delayed the trial for four years, which resulted in repeated trial preparation for both sides.

It makes little sense for Defendants to pay all Flagship's fees to correct a mistake created by Flagship itself. Mr. Tabor admittedly, although unintentionally, destroyed nearly two years' worth of email that were critical to the litigation. Email exchanged between the Flagship principals, as well as with the Defendants and other distributors, were the keystone of proving Plaintiff's **[*13]** circuit dealing claims. The destruction of two years' worth of emails was a weighty event worthy of an equally weighty response by any competent attorney. Norton Fulbright cannot be blamed for seeking the sanction most beneficial to their clients, which was then granted by an experienced trial judge. For a second time, Flagship rose from the ashes after their successful appeal, but at a cost. Flagship was precluded from presenting any evidence or seeking any damages from the nearly two year period of the lost emails. This result ultimate impacted the recovery available to Flagship and thus the success of the case.

Plaintiff's success

The result a Plaintiff obtains at trial is significant when evaluating reasonable attorneys' fees. The Supreme Court in *Hensley v. Eckart* holds: "The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.' ....[D]id the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?"[44] Later, the Supreme Court in *Farrar **[*14]** v. Hobby* followed this analysis to its logical extension: "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all."[45] In *Chavez v. City of Los Angeles*, the California Supreme Court, citing *Hensley* and *Farrar* found, '"under state law as well as federal law, a reduced fee award is appropriate when a claimant achieves only limited success.'"[46]

Flagship takes issue with Defendants' reliance on *Hensley* and *Farrar* because both are civil rights and not anti-trust cases: "Because the fee-shifting provision of ***antitrust law***, like the Cartwright Act, are designed to 'encourage the

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[41] Defendant cites to *Burton Ways Hotels, Ltd. V. Four Seasons Hotels, Ltd., (CD. Cal. Jan. 21, 2015) No. CV 11-303-PSG, 2015 U.S. Dist. LEXIS 189845, 2015 WL 13081297* (applying California law, the court did not award fees incurred by counsel in defending its client from the repercussions of the client's negligent spoliation conduct because to do so "would be unjust.") *Fed.R.Civ.Proc 37(e)* ("If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (l)upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice....) addresses the appropriate sanctions for unintentional spoliation of evidence, it does not discuss the propriety of fees expended in defense of a spoliation motion.

[42] Glynn Dec, ¶ 11(b)

[43] Mason Decl., ¶9, citing to Boeder Depo. 245:5-246:9

[44] *Hensley v. Eckart*[44] *(1983) 461 U.S. 424, 434, 103 S. Ct. 1933, 76 L. Ed. 2d 40*

[45] *Farrar v. Hobby (1992) 506 U.S. 103, 115, 113 S. Ct. 566, 121 L. Ed. 2d 494* (citation omitted)

[46] ***Chavez v. City of Los Angeles (2010) 47 Cal.4th 970, 989, 104 Cal. Rptr. 3d 710, 224 P.3d 41***, citing *Sokolow v. County of San Mateo (1989) 213 Cal.App.3d 231, 249, 261 Cal. Rptr. 520*, and *Riverside v. Rivera (1986) 477 U.S. 561, 574, 106 S. Ct. 2686, 91 L. Ed. 2d 466*.

detection and cessation of anticompetitive behavior' and to 'encourag[e] private parties to bring antitrust action,' Flagship should recover its attorney's fees regardless of the amount of damages awarded."[47] Rather, Flagship urges the court to reject the *Hensley* and *Farrar* analysis and rely on *U.S. Football League v. Nat'l Football League*. However, even in that case the Court held: "*That the [Plaintiff] only received nominal damages is relevant in determining the amount of fees allowed and may be a factor used in reducing a fee* ***[*15]*** *award*, but it does not affect the entitlement to an award."[48] The trial court in *Nat'l Football League* did reduce the Plaintiff's attorneys' fee award by 20% due to the nominal recovery, which was undisturbed on appeal.

Flagship asked the jury for a minimum of $9.1 million in damages, which is significantly less than it envisioned before *Flagship II*. The jury awarded $1.25 million - about 14% of Plaintiff's request. Although significantly more than nominal, even the Plaintiff is hard-pressed to consider this reward a monetary success. Plaintiff emphasizes that the monetary award is only one measure of its success. In addition to two successful appeals, Mr. Boeder notes that this is only one of only two private movie industry antitrust circuit dealing cases that an independent movie theater plaintiff has actively litigated through verdict.[49] And as discussed above, Plaintiff urges that the "most enduring measure of success" is the public benefits, including increased access by independent movie theaters to first-run movies and the agreement by three major Hollywood movie studios rejecting clearances.[50]

In contrast, Defendants underrate any result Plaintiff's may have achieved. **[*16]** Over the course of the case, Plaintiff abandoned its claim for unfair competition and interference with prospective economic advantage and pursued circuit dealing exclusively. Plaintiff's initial assertion of a conspiracy theory among dozens of distributors was slowly abandoned as the trial progressed.[51] Defendants' minimize the impact of *Flagship I* on antitrust jurisprudence and give Plaintiff no credit for a few distributors rejection of clearances.

Three distributors did stop honoring clearances 10 years into the litigation. Whether each distributor's individual decision was the result of this litigation is a matter of speculation. Their decision is just as likely to have been based purely on a profit analysis. Similarly, it is impossible to attribute the benefit to the public of increased access to first run films based on this case or to quantify that benefit based on Mr. Boeder's opinion alone. However, *Flagship I* is unique given the dearth of antitrust decisions regarding circuit dealing since the 1948 U.S. Supreme Court decision of *United States v. Paramount Pictures*.[52] *Flagship I* provides a valuable summary of the case law on circuit dealing from 1948 through the 1988 decision **[*17]** in *Redwood Theatres, Inc. v. Festival Enters., Inc.*[53]

Conclusion

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[47] *See*, Flagship Reply, 28:12-28:24; *Citing,* *U.S. Football League v. Nat'l Football League (9th Cir. 1989) 887 F.2d. 408, 412*.

[48] *U.S. Football League v. Nat'l Football League (2d Cir. 1989) 887 F.2d 408, 411-412* (emphasis added).

[49] Boeder Decl., ¶9, citing *Seven Gables Corp. v. Sterling Recreation Org. Co., (W.D. Wash. 1988) 686 F.Supp. 1418*, as the other case, also litigated by Mr. Boeder

[50] Boeder Decl., ¶¶ 11, 12[50] Plaintiff's conspiracy theory provided the basis for the court's ruling admission of hearsay evidence at trial, which was the major issue in Defendants" Motion for New Trial.

[51] Plaintiff's conspiracy theory provided the basis for the court's ruling admission of hearsay evidence at trial, which was the major issue in Defendants" Motion for New Trial.

[52] *United States v. Paramount Pictures (1948) 334 U.S. 131, 68 S. Ct. 915, 92 L. Ed. 1260*

[53] *Redwood Theatres, Inc. v. Festival Enters., Inc. (1988) 200 CA3d 687, 248 Cal. Rptr. 189*

Plaintiff bears the burden of proving the fees it seeks are reasonable.[54] When awarding fees, it is incumbent upon the court to calculate the lodestar by carefully compiling the time spent and reasonable hour rate for each attorney.[55] Once the lodestar is calculated, that figure may be adjusted upward or downward to account for various factors, including the novelty and difficulty of the issues, the skill in presenting them, the risk associated with a contingent fee arrangement and the Plaintiff's success in the litigation.[56] One critical factor is arriving at a reasonable attorney fee is the degree of success obtained by the prevailing party.[57]

It is difficult to overlook the huge disparity of hours, timekeepers and tasks billed between the pre and post-contingency fee period. When Perkins Coie had a client reviewing the bills and bearing the responsibility for paying them, the bills were seemingly reasonable and conservative. After entry of the contingency fee agreement, every second of every timekeeper's breathing moment spent on the case appears to be included. And why not? When a client is reviewing and paying the **[*18]** bills an attorney exerts discipline to warrant that the fees are reasonable, or else the client will complain. The opposite is true when Flagship benefits directly from as many hours Perkins Coie can include in the fee request. Rather than having to pay money to its lawyer, Flagship actually reaps a significant financial reward from an inflated bill.

As was mentioned at the hearing, Plaintiff's billing presentation was exceedingly disappointing, particularly in light of the tremendous respect this court has for Mr. Boeder and his colleagues. Because the post-contingency fee hours appeared bloated by a factor often and the fees by a factor of 11, it was tempting to simply reduce the post contingency fees by 90%. In addition, non-recoverable costs were included as fees[58] and block-billing or modified block-billing was deemed an acceptable practice by both the firm and its expert.[59] Finally, Plaintiff's failure to take any responsibility, either factually or financially, for its role in its own spoliation of evidence is baffling. These issues cast a negative shadow over the legitimacy of the lodestar Plaintiff proposed.

In analyzing the fee request, the pre-contingency fees were used as **[*19]** a benchmark. Plaintiff's billing rate was not challenged by the Defendant and has been accepted without change. The fees initially charged to Flagship are reasonable given the unique nature of the litigation, the complexity of the issues and specialized skill involved in litigating these claims. The full pre-contingency fee request is awarded in each "category" as defined by and based on the figures provided by Perkins Coie.[60] Pre-contingency fees requested for certain tasks, such as deposition preparation or a summary judgment motion, were used as a guide in determining a reasonable amount of post-contingency fees for similar tasks. Due consideration was given to increased billing rates associated with the passage of time. Given the billing presentation, an entry-by-entry review was impossible to determine the reasonable time spent on a task or group of tasks - and fortunately, not required.[61] Consequently, a percentage

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[54] *See, Cntr. For Biologicial Diversity v. Cnty. of San Bernardino (2010) 188 CA4th 603, 615*.

[55] *See, Ketchum v. Moses (2001) 24 Cal.4th 1122, 1131-1132, 104 Cal. Rptr. 2d 377, 17 P.3d 735*, citing *Serrano v. Priest (1977) 20 Cal.3d 25, 48, 141 Cal. Rptr. 315, 569 P.2d 1303*.

[56] *Ibid*, at 132

[57] *Hensley, 461 U.S. at 436*

[58] I.e., $182,832 for Flagship's in-house Jury Consultant; $$78,00 for a Consulting Manager. *See* generally, Boeder Decl., Exh. B; Glynn Decl., Exh. 1

[59] Plaintiff admits that 32% of the their billing entries were block bill, and argues that those billing entries were far from vague. Flagship Reply, 13:7-15.

[60] Decl. Boeder, Exhs. C, D. Exhibit D defines the "phases" of the litigation broken down by time periods.

[61] "The fee applicant (whether a plaintiff or a defendant) must, of course, submit appropriate documentation to meet the burden of establishing entitlement to an award.' But trial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may

reduction on a group of tasks was the only way to determine a reasonable lodestar, while giving full deference to pre-contingency fee requests.

At all times, recognition is given to Plaintiff prevailing in a 12-year, hard-fought litigation which dealt with complex issues **[*20]** at great risk. Perkins Coie has waited six years to see any money and although the jury award was significantly less than hoped, Flagship indeed prevailed. These factors were balanced with billing deficiencies and an apparent lack of billing restraint after March 7, 2012.

Fee Analysis

The following analysis follows Perkins Coie's categories of fees:[62]

1. Case Investigation/Development
    - Requested amount $828,839
    - Amount awarded $369,446
        - Rational: During the first 6 years of the case, Perkins Coie billed $122,080 for this category of work. During the second 6 years of the case, $706,759 was billed. Since there are separate categories for pleadings and discovery, it is unclear exactly what justifies incurring six times the fees for this category during the same number of years. The bills do not provide illumination on this point. The full $122,080 is awarded for the first 6 years. 35% of the remaining requested fees, or $247,366, is awarded for the second 6 years. ($122,080+$247,366=$369,446)
2. Pleadings
    - Requested amount $127,463.00
    - Amount awarded $127,463.00
        - Rational: The number of hours spent appear reasonable given the complexity and uniqueness of the issues involved. The hours spent **[*21]** post-contingency (65.9) do not appear inflated.
3. Discovery
    - Requested amount $5,203,389
    - Amount awarded $3,246,124
        - Rational: During the first 6 years of the case, Perkins Coie billed $438,126. This full amount is awarded. During the second 6 years of the case, $4,765,263 was billed. When comparing similar depositions taken before and after the contingency fee agreement, it is impossible to reconcile the increased hours spent by the many additional timekeepers. I.e. Fees for the Tabor/Mason depos taken in 2008 ($12,883) and 2013 ($108,212)[63]; Fees for two Cinemark depos taken in 2008 ($17,696) and four short Cinemark depos in 2017 ($246,889). In reply, Mr. Boeder explains that the depositions were longer, the case increased in complexity, the examples Defendants' cited were cherry-picked, and the time spent was reasonable and necessary to defend against Defendants' personal attacks.[64] Mr. Boeder's explanation does not adequately explain the significant increase in time spent on preparation for depos that may have taken twice as long but consumed more than twice the number of hours by many multiples. Additionally, the fees requested for discovery included $255,799 related to the spoliation **[*22]** of emails by Mr. Tabor.[65] Only 25% of the $255,799 related to spoliation is awarded, or $63,950, leaving a requested balance of $4,509,464. The breadth of discovery increased after *Flagship I*, but that does not account for the gross time differential spent

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take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time. *Fox v. Vice (2011) 563 U.S. 826,838, 563 U.S. 826, 838, 131 S. Ct. 2205, 180 L. Ed. 2d 45*

[62] Boeder Decl. Exhs. C, D

[63] Glynn Decl., Exh. 6 and 7

[64] Flagship Reply, 19:15-21:14; Boeder Reply Decl. ¶¶ 7-9

[65] Glaynn Decl., Exh. 25, pages 1-24

before and after the contingency agreement. 60% of the remaining requested balance is awarded, or $2,744,048 is awarded. ($438,126+$63,950+$2,744,048=$3,246,124)

4. Motions
  - Amount requested $882,976
  - Amount awarded $340,777

    ○ Rationale: During the first 6 years of the case, Perkins Coie billed $48,823 in this category. This full amount is awarded. During the second 6 years of the case $834,153, was billed. Although Plaintiff created the categories of work performed, none of the declarations or billing sheets provided a break-down of which motions or types of motions are included in this category. Given the billing as presented, it would be difficult, if not impossible, to cull through the billing sheets to ferret out whether the time spent was reasonably. In short, Plaintiff has not met its burden in this category to show that the hours billed are reasonable. What is known is that nearly one-third of the billings are block-billings **[*23]** and that the time spent on pre-contingency fee motions, which include all motions prior to the final preparation for trial before April 2014, is significantly less than time spent on post-contingency motions. Of note, pretrial motions do not include Summary Judgment motions or Motions In Limine, which will be discussed below. 35% of the post-contingency fee request, or $291,954 is awarded. ($48,823+291,954=$340,777)

5. Summary Judgement
  - Amount requested $882,976
  - Amount awarded $494,690

    ○ Rationale: Plaintiff responded to three Summary Judgment Motions. The first motion, and arguably the most complex, involved the scope of discovery which relied on an in-depth analysis of circuit dealing in antitrust cases. The requested fees for this motion are $115,587, and this full amount is awarded. The second MSJ equated to fees of $423,250, more than three time the cost of the first, without any explanation other than that it occurred post-contingency. The reasonable fee for the second MSJ is $169,300. The third MSJ equated to fees of $630,956, more than four times the cost of the first, and one-third more than the second, again without any explanation. In fact, the third MSJ heard before this **[*24]** court, largely overlapped with the first MSJ. The reasonable fee for the third MSJ is $209,803. ($115,587+$l 69,300+$209,803=$494,690)

6. Appeals
  - Amount requested $1,302,188
  - Amount awarded $499,068

    ○ Rationale: *Flagship I* was billed at $340,876, and this full amount is awarded. *Flagship II* was billed at $958,740. The fee differential between these two is irreconcilable. The reasonable fee for *Flagship II* should be 50% of that amount, or $479,370. The spoliation issue is completely attributable to Plaintiff's unintentional conduct. As a result, only one-third of the reasonable appeal costs, $158,192, is awarded for the *Flagship II* appeal. ($340,876+$158,192=$499,068)

7. Settlement/Mediation
  - Amount requested $234,547
  - Amount awarded $121,382

    ○ Rationale: The pre-contingency fee request in this category is $45,939; the post-contingency fee request is $188,607. No explanation is provided for this substantial increase in expenditure for settlement. Specifically, $163,356 was spent in Phase 4, without any justification. 40% of the post contingency fees, or $75,443, is awarded. ($45,939+$75,443=$121,382)

8. Pre-Trial
  - Amount requested $3,098,122
  - Amount Awarded $1,555,795

    ○ Rationale: During **[*25]** the first 6 years of the case, Perkins Coie billed $13,469. This full amount is awarded. Post-contingency but pre-spoliation, when both counsel agree that the case was nearly ready for trial, $948,070 was billed. This means that Plaintiff spent an additional $2,136,583 preparing for trial the second time. Many, if not most of the original Motions In Limine were re-purposed for the trial. Of course, counsel needed to reacquaint themselves with the case after a 4 year delay. Regardless, after careful review, the cumulative post-contingency fees appear inflated by a factor of 50%. This conclusion is based not only the experience in dealing with Flagship's bills in general, but also on this court's experience in reviewing attorney's bills from top firms in Los Angeles. As a result, 50% of the remaining requested fees, or $1,542,326, is awarded. ($13,469+$1,542,326=$1,555,795)

9. Trial
   - Amount requested $1,309,301
   - Amount awarded $916,511

     ○ Rationale: Although the Trial fees excessive, they did not appear as inflated as fees requested in other categories. There were an excessive number of timekeepers and hours claimed, particularly towards the end of the trial. Unfortunately, given the previous **[*26]** billing abuses, it is difficult to ferret out unreasonable from reasonable time spent by performing a line by line analysis.[66] Regardless, the trial was hard- fought with some unexpected turns along the way requiring long days of work. As a result, 70% of the requested amount, or $916,511, is awarded.

10. Post-Trial
   - Amount requested $739,692
   - Amount awarded $369,846

     ○ Rationale: This area became a bit confusing. In Plaintiff's motion, it appears that it was requesting approximately $275,000 for preparation of the instant fee application. In Plaintiff's Reply, Plaintiff attributes $709,000 for the "work expended on Fee Motion,"[67] which is nearly the full amount requested but likely includes time spent on discovery. Preparation of this fee application is indeed time consuming. Even after reviewing the motion, errors were noted and corrected in the reply. Again, given the previous billing abuses and the confusion created by the figures in the reply, 50% of the requested amount, or $369,846, is awarded.

The total award to Flagship for its attorneys' fees is $8,041,102.

Each category was assessed individually with due consideration to the hours expended and the reasonableness of those hours. **[*27]** No multiplier is awarded as none is appropriate given the factors discussed above. In reducing fees in each category by various percentages, the following factors were taken into account: Billing deficiencies such as block or modified block-billing; Non-attorney hours included as attorney fees; the minor "write-off amount[68] of the recorded time given the gross disparity of hours billed between the pre and post contingency fee period; Risk associated with pursuing a unique antitrust claim; Risk of pursuing such claim partly on a contingent fee basis; Professional stamina required to pursue a 12-year litigation; Limited monetary and speculative public interest success of the lawsuit; and, prior experience with the billing practices of top law firms involved in complex litigation.

The court commends all counsel for their vigorous and professional pursuit of success for their clients. It has been an honor presiding over this case.

DATED: April 29, 2019

/s/ Lisa Hart Cole

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[66] However, *See* Glynn decl. ¶¶ 25(n), (o)

[67] Flagship Reply, 33:12. It is assumed that discovery is included in this estimate.

[68] Mr. Boeder wrote off $163,650 from Flagship's initial lodestar of $14,800,000. See, Boeder Decl. ¶17; Flagship Mot. for Attys. Fees at 18:8-26

LISA HART COLE

Judge of the Superior Court

Shandong Lihong Tech. v. Masimo Corp.

Superior Court of California, County of Orange

April 29, 2019, Decided

30-2018-01002779-CU-BT-CJC

Reporter
2019 Cal. Super. LEXIS 42196 *

Shandong Lihong Technology Limited Corp v. Masimo Corporation

Core Terms

unfair, alleges, fraudulent business, cause of action, statute of limitations, demurrer, unfair competition, business practice, fair dealing, good faith, discovery, covenant, customer, notice

Counsel: **[*1]** There are no appearances by any party.

Judges: Deborah Servino, Judge.

Opinion by: Deborah Servino

Opinion

MINUTE ORDER

The Court, having taken the above-entitled matters under submission April 26, 2019, and having fully considered the arguments of all parties, both written and oral, now rules as follows:

NOTICE OF RULING:

Defendant Masimo Corporation's demurrer to Plaintiff Shandong Lihong Technology Limited Corp.'s Second Amended Complaint ("SAC") is sustained with 15 days leave to amend.

A demurrer presents an issue of law regarding the sufficiency of the allegations set forth in the complaint. (*Lambert v. Carneghi (2008) 158 Cal.App.4th 1120, 1126*.) The challenge is limited to the "four corners" of the pleading (which includes exhibits attached and incorporated therein) or from matters outside the pleading which are judicially noticeable under Evidence Code sections 451 or *452*. Although California courts take a liberal view of inartfully drawn complaints, it remains essential that a complaint set forth the actionable facts relied upon with sufficient precision to inform the defendant of what plaintiff is complaining, and what remedies are being sought. (*Leek v. Cooper (2011) 194 Cal.App.4th 399, 413*.)

Fraud/Intentional Misrepresentation (First Cause of Action)

The elements of fraud are "(a) misrepresentation (false representation, concealment, **[*2]** or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Lazar v. Superior Court (1996) 12 Cal.4th 631, 638*.) Every element of fraud must be pleaded with specificity. The particularity requirement for fraud requires the pleading of facts showing how, when, where, to whom, and by what means the representations were made. (*Stansfield v. Starkey (1990) 220 Cal.App.3d 59, 73*.) This is to provide the defendant with notice and to give the court enough information to assess whether there is a foundation for the charge of fraud. (*Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 216*.)

Plaintiff alleges that the fraudulent misrepresentation was that the Distribution Agreement was between Plaintiff and "Masimo International, SARL," when it was actually between Plaintiff and Defendant "Masimo Corporation." (SAC, 47-48.) Masimo International, SARl is a subsidiary, wholly-owned by Defendant. (SAC, ¶ 17.) If the Distribution Agreement was instead with Defendant, Plaintiff alleges it would not have provided its confidential customer and market information "because the relationship between Defendant and Plaintiff is between manufacturer and distributor, where Plaintiff is compensated by sales commission." (SAC, ¶ 27.)

Plaintiff's claim for fraud **[*3]** is not pled with the required specificity for fraud claims. There are no facts alleged showing "how, when, where, to whom, and by what means the representations were tendered." (*Lazar v. Superior Court, supra*, 12 Cal.4th at p. 645.) Contrary to Plaintiff's assertion in its opposition, the allegations in the SAC and the Distribution Agreement (Exh. C to SAC) do not satisfy the specificity requirement.

Furthermore, Plaintiff's claim for fraud appears to be barred by the three-year statute of limitations. (See *Code Civ. Proc., § 338, subd. (d)*.) Plaintiff has not pled facts to support the application of the delayed discovery rule. (*Cansino v. Bank of America (2014) 224 Cal.App.4th 1462, 1472*.) To do so, a plaintiff is required to "specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence," to avail itself of the delayed discovery rule and sufficiently plead a fraud claim. (*McKelvey v. Boeing North Am., Inc. (1999) 74 Cal.App.4th 151, 160*.) Here, Plaintiff alleges the Distribution Agreement was entered into on January 23, 2009, and alleges that it relied upon the Distribution Agreement in numerous instances. (See, e.g., SAC, 50, 52, 58, 92.) But, Plaintiff does not alleged any facts to show that the delayed discovery rule applies. Accordingly, the demurrer as to the first cause of action is sustained **[*4]** with 15 days leave to amend.

Unfair Business Practices (Second Cause of Action)

In the second cause of action, Plaintiff alleges violation of *Business and Professions Code section 17200* (the "UCL"). The UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." A UCL action is equitable in nature and damages cannot be recovered. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 179-180*.) To state a UCL claim, Plaintiff must allege acts or injuries within the terms of *Business and Professions Code section 17200*. It requires a person to have suffered injury in fact and have lost money or property as a result of unfair competition in order to have standing for a UCL cause of action. (*Pfizer Inc. v. Superior Court (2010) 182 Cal.App.4th 622, 630*.)

The UCL does not proscribe specific activities, but broadly prohibits any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. The UCL governs anti-competitive business practices as well as injuries to consumers, and has as a major purpose the preservation of fair business competition. By proscribing "any unlawful business practice," the UCL "borrows" violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable. Because the UCL is written in the disjunctive, **[*5]** it establishes three varieties of unfair competition-acts or practices which are unlawful, or unfair, or fraudulent. In other words, a practice is prohibited as "unfair" or "deceptive" even if not "unlawful" and vice versa. (*Puentes v. Wells Fargo Home Mortgage, Inc. (2008) 160 Cal.App.4th 638, 643-644*.)

Here, it appears that Plaintiff is proceeding under two varieties of unfair competition - fraudulent business act/practice and unfair business act/practice. The alleged fraudulent business act or practice was that Defendant induced Plaintiff to enter into a Distribution Agreement on January 23, 2009 to obtain confidential customer and market information. (SAC, 63-83.) Plaintiff alleges three deceptive acts: (1) acquiring Plaintiff's confidential customer information via the Distribution Agreement in order to take over the market; (2) fraudulently using "Masimo International, SARL" to enter the Distribution Agreement; and (3) forming two new entities to switch the distribution. (SAC, 69-80.) These allegations do not allege a fraudulent business act or practice. To the extent

Plaintiff is proceeding under the fraudulent business act or practice, that portion of the UCL claim is barred by the statute of limitations. The statute of limitations for this claim is four **[*6]** years. (*Bus. & Prof. Code, § 17208*.) On its face, this portion of the UCL claim appears to be time-barred as the alleged fraudulent business act or practice started in 2009.

Plaintiff also alleges that Defendant's misappropriation of the confidential customer information and subsequent switching business to the other two entities under Defendant's control constitute unfair competition. (SAC, 84-88.) Under the unlawful prong, a violation of law may be actionable as unfair competition under the UCL. (*Lueras v. BAC Home Loans Servicing, LP (2013) 221 Cal.App.4th 49, 81*.) "An unfair business practice occurs when that practice offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers... An unfair business practice also means the public policy which is a predicate to the action must be tethered to specific constitutional, statutory or regulatory provisions." (*Ibid*. [internal citations omitted].) The UCL "was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra*, 20 Cal.4th at p. 181 [internal citations and quotations omitted].) While the UCL's scope is broad, it is not unlimited. **[*7]** In order to give businesses fair notice of what they can and cannot do, the California Supreme Court has cautioned that "[c]ourts may not simply impose their own notions of the day as to what is fair or unfair." (*Id. at p. 182*.) For this reason, the California Supreme Court developed a test when the plaintiff is commercial competitor whether the conduct or practice is "unfair." "When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes *section 17200*, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Id. at p. 187*.) In articulating this test, the California Supreme Court was careful to emphasize that harm "to a competitor is not equivalent to [harm] to competition," and that "only the latter is the proper focus of antitrust laws." (*Id. at p. 186*.) "The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." (*Kasky v. Nike, Inc. (2002) 27 Cal.4th 939, 949*; *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra*, 20 Cal.4th at p. 180.)

Here, the SAC's allegations of Defendant's alleged **[*8]** use of Plaintiff's customers' names and addresses and Plaintiff's market information does not constitute an unfair conduct or practice. As previously explained in this court's ruling on the demurrer to the First Amended Complaint, "Plaintiff's allegations, if true, allege unfair acts in a more generalized moral sense. However, they fail to allege an unfair act or practice as set forth in *Cel-Tech*." (1/13/2019 Minute Order.) Plaintiff's allegations merely indicate harm to its commercial interests, rather than harm to competition. Accordingly, the demurrer to the second cause of action is sustained with 15 days leave to amend.

Breach of the Covenant of Good Faith and Fair Dealing (Third Cause of Action)

In the third cause of action, Plaintiff alleges a breach of the covenant of good faith and fair dealing.

Defendant argues that this claim is barred by the statute of limitations. Pursuant to *Code of Civil Procedure section 337*, the statute of limitations for contract-related actions is four years. Defendant contends that because the Distribution Agreement was entered into in 2009, this claim is time-barred. However, Plaintiff appears to be alleging that Defendant unfairly interfered with Plaintiff's right to receive the benefits **[*9]** of the contract with activity in 2015. (SAC, 33-38, 95.) Accordingly, the statute of limitations does not bar this claim on its face.

To state a claim for a breach of the implied covenant of good faith and fair dealing, Plaintiff must allege all of the following: (1) that plaintiff and defendant entered into a contract; (2) that plaintiff did all, or substantially all of the significant things that the contract required it to do, or that it was excused from having to do those things; (3) that all conditions required for defendant's performance had occurred; (4) that defendant unfairly interfered with plaintiff's right to receive the benefits of the contract; and (5) that plaintiff was harmed from defendant's conduct. (CACI no. 325.) "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Ind. (2000) 24 Cal.4th 317, 349*.) "With the exception of bad faith insurance cases, a breach of the covenant of good **[*10]** faith and fair dealing permits a recovery solely in contract." (*Spinks v. Equity Residential Briarwood Apartments (2009) 171 Cal.App.4th 1004, 1054* [internal citations omitted].)

Here, Plaintiff alleged that it entered into the Distribution Agreement with "Masimo International, SARL." (SAC, ¶ 17.) But really, the agreement was between Plaintiff and Defendant. (SAC, ¶ 24.) Plaintiff alleges that it performed all duties under the Distribution Agreement for more than five years. (SAC, ¶ 92.) But, Plaintiff failed to set forth facts to show that all conditions required for Defendant's performance had occurred. (See SAC, at pp. 14-15.) Accordingly, the demurrer as to the third cause of action is sustained with 15 days leave to amend.

The Clerk is ordered to give notice of the ruling.

End of Document

Vestis, LLC v. Caramel Sales, Ltd

United States District Court for the Central District of California

April 30, 2019, Decided; April 30, 2019, Filed

Case No. SA CV 18-2257-DOC (KESx)

Reporter

2019 U.S. Dist. LEXIS 127987 *; 2019 WL 3312212

VESTIS, LLC ET AL V. CARAMEL SALES, LTD. ET AL

Subsequent History: Motion granted by, in part, Without prejudice, Motion denied by, in part *Vestis v. Caramel Sales, Ltd., 2019 U.S. Dist. LEXIS 221961 (C.D. Cal., Nov. 5, 2019)*

Stay denied by, Motion denied by *Vestis, LLC v. Caramel Sales, Ltd., 2019 U.S. Dist. LEXIS 221972 (C.D. Cal., Nov. 5, 2019)*

Magistrate's recommendation at *Vestis v. Carmel Sales, Ltd., 2019 U.S. Dist. LEXIS 212898 (C.D. Cal., Nov. 21, 2019)*

Partial summary judgment granted by *Vestis LLC v. Caramel Sales, Ltd., 2020 U.S. Dist. LEXIS 45518 (C.D. Cal., Feb. 19, 2020)*

Core Terms

Counterclaimants, motion to dismiss, aiding and abetting, conversion, purchase agreement, accounting, fraudulent, promised, damages, parties, intentional interference, cause of action, prospective economic advantage, authorization, deliver, fraud claim, pleaded, breach of contract claim, negligent misrepresentation, breach of implied contract, breach of contract, quantum meruit, customs, economic loss rule, claim for breach, contractual, unfair business practice, fail to state, oral contract, Plaintiffs'

Counsel: **[*1]** For Vestis Llc, a Nevada Limited Liability Company, also known as Vestis California, LLC, Ginve Modas SL, a Spanish Limited Liability Company, Plaintiffs: Michael J Perry, LEAD ATTORNEY, Michael J Perry Law Offices, Marina Del Rey, CA USA; Peter W Ross, Tyler J King, Browne George Ross LLP, Los Angeles, CA USA.

For Caramel Sales Ltd, David Popeck, an individual, Tet Aps, Thomas Schmidt, Defendants: John M Houkom, LEAD ATTORNEY; Andres F Quintana, Quintana Law Group APC, Calabasas, CA USA.

For Thomas Schmidt, an individual, Tet Aps, a Denmark Limited Company, Counter Claimants: John M Houkom, LEAD ATTORNEY; Andres F Quintana, Quintana Law Group APC, Calabasas, CA USA.

For Vestis Llc, also known as, Vestis California LLC, Ginve Modas SL, a Spanish Limited Liability Company, Counter Defendants: Michael J Perry, Michael J Perry Law Offices, Marina Del Rey, CA USA; Peter W Ross, Tyler J King, Browne George Ross LLP, Los Angeles, CA USA.

For Morgan Recchia, an individual, Recchia Serge, an individual, Counter Defendants: Peter W Ross, Browne George Ross LLP, Los Angeles, CA USA.

For Caramel Sales Ltd, a United Kingdom Limited Company, David Popeck, an individual, Counter Claimants: John M Houkom, **[*2]** Andres F Quintana, Quintana Law Group APC, Calabasas, CA USA.

For Vestis Llc, Counter Defendant: Michael J Perry, Michael J Perry Law Offices, Marina Del Rey, CA USA; Peter W Ross, Tyler J King, Browne George Ross LLP, Los Angeles, CA USA.

Judges: HONORABLE DAVID O. CARTER, UNITED STATES DISTRICT JUDGE.

Opinion by: DAVID O. CARTER

Opinion

CIVIL MINUTES — GENERAL

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING IN PART AND DENYING IN PART COUNTERDEFENDANTS' MOTIONS TO DISMISS [42] [43]

Before the Court is Plaintiffs and Counterdefendants Vestis, LLC ("Vestis") and Ginve Modas SL's ("Ginve Modas") (collectively, "Counterdefendants") Motion to Dismiss Caramel Sales, Ltd. ("Caramel") and David Popeck's ("Popeck") First Amended Counterclaim (Dkt. 42) ("Motion to Dismiss Caramel Amended Counterclaim" and "Caramel Amended Counterclaim"); and Counterdefendants' Motion to Dismiss TET APS ("TET") and Thomas Schmidt's ("Schmidt") First Amended Counterclaim ("Motion to Dismiss TET Amended Counterclaim" and "TET Amended Counterclaim").[1] (Dkt. 43). The Court finds this matter appropriate for resolution without oral argument. *Fed. R. Civ. P. 78*; *L.R. 7-15*. To the extent that the Motions to Dismiss discussed near-identical Counterclaims by Caramel & Popeck, and by **[*3]** TET & Schmidt, the Court addresses those Counterclaims together. Having reviewed the moving papers and considered the parties' arguments, the Court GRANTS IN PART and DENIES IN PART Counterdefendants' Motions to Dismiss.

I. Background

A. Facts

1. Complaint

The following facts are drawn from Plaintiffs' Complaint and Counterclaimants' First Amended Counterclaims. Caramel Amended Counterclaim (Dkt. 34); TET Amended Counterclaim (Dkt. 35) (collectively "Amended Counterclaims"). This dispute involves fraud and breach of contract between parties involved in the apparel business. *See generally* Amended Counterclaims.

Plaintiffs Vestis and Ginve Modas are involved in wholesale and retail apparel business. Vestis is duly organized as a Nevada limited liability company and its principal place of business is in Las Vegas, Nevada. Complaint (Dkt. 1) ¶ 1. Vestis is registered to do business in California and has a place of business in Costa Mesa, California. *Id.* ¶ 1. Ginve Modas is a duly organized Spanish limited liability company, with its principal place of business in Barcelona, Spain. *Id.* ¶ 2. Ginve Modas does business in southern California. *Id.*

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[1] Caramel, Popeck, TET, and Schmidt will be referred to collectively as "Counterclaimants" throughout this Order. Similarly, when the Court addresses near-identical Counterclaims by Caramel & Popeck, and TET & Schmidt, the two sets of Counterclaims will be referred to collectively as "Amended Counterclaims."

Defendant Caramel is a United Kingdom limited company **[*4]** with its principal place of business in Hertfordshire, England. *Id.* ¶ 3. The managing owner of Caramel is Defendant Popeck who resides in Mougins, France. *Id.* ¶ 5. Defendant TET is a Denmark limited company with its principal place of business in Karlslunde, Denmark. *Id.* ¶ 4. Defendant Schmidt is the managing owner of TET and resides in Karlsrunde, Denmark. *Id.* ¶ 6.

In 2017, Caramel and Popeck acted as a business broker to arrange a business transaction for Plaintiffs with TET and Schmidt. *Id.* ¶ 12. Plaintiffs allege that Defendants requested access to Plaintiffs' trade secrets and access to Plaintiffs' facilities, products, and information pertaining to Plaintiffs' business dealings with their product suppliers, Levi's and Quetico, LLC, in southern California. *Id.* Plaintiffs entered into Mutual Non-Disclosure Agreements with each of the Defendants, Caramel & Popeck, and TET & Schmidt; Plaintiffs allege these agreements have been breached by Defendants' wrongdoings. *Id.* ¶ 13. Plaintiffs allege that each of the Defendants acted as an agent, servant, partner or joint venture of each other. *Id.* ¶ 9. Popeck and Schmidt allegedly dominate and control the business affairs of their limited **[*5]** companies for their own personal benefit, and to avoid creditors as well as personal liability for their own wrongdoings. *Id.* ¶ 10. Further, Plaintiffs allege Popeck and Schmidt purportedly use the limited companies to personally interfere in the contractual and prospective business relationships of others. *Id.* Plaintiffs also believe Caramel is not adequately capitalized for the business it conducts. *Id.* ¶¶ 10, 11. Plaintiffs allege that Popeck and Schmidt use the limited liability funds and assets of Caramel and TET as their own, and that Popeck and Schmidt commingle their personal assets with those of the entity Defendants. *Id.* ¶ 11. Plaintiffs seek damages for Defendants' failure to keep trade secrets, diverting and taking away Plaintiffs' customers and suppliers, and damaging Plaintiffs' business and reputation overall. *Id.* ¶¶ 60-63.

2. Amended Counterclaims

Counterclaimants filed Counterclaims against Counterdefendants Vestis and Ginve Modas, as well as individual owners of Vestis and Ginve Modas, Serge Recchia ("Serge") and Morgan Recchia ("Morgan"). Morgan resides in California and his citizenship is unknown. Caramel Amended Counterclaim (Dkt. 34) ¶ 6. Counterclaimants allege **[*6]** that Morgan is the owner and/or alter ego of Vestis. *Id.* Counterdefendant Serge resides in Spain and his citizenship is unknown. *Id.* ¶ 8. Serge is the owner and/or alter ego of Ginve Modas. *Id.*

a. Burberry Polo Shirt Purchase Agreement

In addition to the claims shared in the Amended Counterclaims, Caramel and Popeck allege an additional breach of contract claim against Plaintiffs arising out of the purchase agreement of Burberry clothing. In July 2017, Caramel entered into an oral agreement, later memorialized in writing, to pay Counterdefendants €280,444.91 for the delivery of 20,163 pieces of clothing by August of 2017. Caramel Amended Counterclaim ¶ 13. The transaction consisted of Burberry brand polo shirts in specified styles and sizes. *Id.* According to Caramel, it delivered the full payment in July 2017, but Counterdefendants have failed to, and still refuse to, deliver the promised goods. *Id.* ¶ 14.

b. Levi's Jeans Purchase Agreement

At the beginning of 2017, Schmidt and Popeck met with Serge and Morgan Recchia, the individual owners of Vestis and Ginve Modas; Serge and Morgan are father and son, and operate under the umbrella of the trade name "American Brands." Caramel Amended **[*7]** Counterclaim ¶ 16. At the meeting, Serge and Morgan allegedly proposed to Counterclaimants that Ginve Modas and Vestis would sell certain products to TET and Schmidt, in partnership with Caramel and Popeck. *Id.* ¶ 17. Ginve Modas and Vestis promised to arrange the purchase in the United States of 180,000 units of Levi's jeans for the subsequent sale of the products in the European Economic Community, under the express authorization of Levi's. *Id.* Serge and Morgan represented that the proposed sale was possible due to their good relationship with Levi's USA, which would facilitate the authorization to buy and sell Levi's brand jeans. *Id.* The Levi's jeans stock would be purchased from Hybrid, an American licensee of Levi's in the United States. *Id.* ¶ 18. Such purchase would be made with the prior authorization of Levi Strauss & Co, given that Vestis and Ginve Modas had a close relationship with Mr. Harmon Kirsch, the Vice President at Levi Strauss & Co. *Id.*

Counterdefendants assured TET and Caramel that Levi Strauss & Co had authorized the sale of the goods, but stated that the authorization in writing would not be sent until the invoice was issued and the money transferred for the purchase **[*8]** of the goods. *Id.* ¶ 19. Popeck and Caramel would act as the partners of TET and Schmidt in relation to the Counterdefendants' sales to Counterclaimants. *Id.* ¶ 20. TET and Schmidt agreed to participate in a partnership with Popeck and Caramel in connection to the transaction alleged above, and equally share in the profits and debts. *Id.* In reliance on the assurances and directions provided by Counterdefendants, Schmidt and TET made five transfers for a total amount of € 1,116,513 to Ginve as payment for the first portion of the 180,000 units, representing approximately 63,000 of those units. *Id.* ¶ 22. As of the opening of the currency market on January 9, 2019, the value of € 1,116,513 was $1,277,402.52 based on the rate of 1.1441 Euros to 1 U.S. Dollar. *Id.*

On July 8, 2017, once the money had been transferred to Ginve, Morgan sent an email and attached a letter purportedly authorized by Mr. Harmon Kirsch of Levi Strauss & Co., allowing the export of Levi's jeans for sale in Europe. *Id.* ¶ 23. According to Counterdefendants, the jeans would initially be acquired by Vestis, (controlled by Morgan) who would sell them to Ginve (controlled by Morgan's father, Serge), and TET would receive **[*9]** the jeans via Ginve. *Id.* ¶ 23.

In August 2017, Counterdefendants informed TET and Caramel that German customs authorities had blocked the three containers with the first shipment of Levi's jeans at the request of Levi's Europe, which refused to commercialize the goods in Europe despite Counterdefendants' assurances that they had obtained Levi's USA's authorization to do so. *Id.* ¶ 24. From that time forward, Counterdefendants sent various documents purporting to inform TET and Caramel about steps taken to negotiate with the German customs authorities to unblock the merchandise and deliver the goods to TET. *Id.* ¶ 25. The efforts did not result in the release of the goods, and the goods were never delivered to either of the Counterclaimants. *Id.* ¶ 26.

Instead, in late September 2017, Counterclaimants became aware of a letter dated and signed by Harmon Kirsch on September 14, 2017, stating that the "European office" of Levi's would not allow the sale of the goods purchased from Counterdefendants to be sold in Europe. *Id.* ¶ 27. After further unproductive discussions between the parties, Counterclaimants received a letter from Ginve Modas on November 29, 2017, stating that Counterdefendants **[*10]** would not be able to deliver the products previously promised because they had not obtained the final authorization from Levi's Europe. *Id.* ¶ 28. The letter also stated that in order to "fully reimburse [the] funds," Counterdefendants would have to first obtain permission to sell the goods in another region so that [Caramel and TET] could "sell[] the products and settle your open balances." *Id.* According to Counterdefendants, the approximately 63,000 pairs of Levi's jeans stopped at German customs were available to be shipped to North and Central Africa for sale there, if the Counterclaimants could obtain a distribution agreement to sell there. *Id.* ¶ 29.

But Counterclaimants state that there never had been any Levi's jeans that Counterdefendants had shipped to Germany. *Id.* ¶ 30. Instead, Counterdefendants had provided false shipping documents and had made false representations about the supposed goods. *Id.* Unaware of the truth and led on by Counterdefendants' continuing false representations in regards to the shipment, Counterclaimants coordinated together over several months trying to obtain a distribution agreement in North Africa and to establish and work with clients in the region **[*11]** in relation to the Levi's jeans. *Id.* ¶ 31. These were time spent that would otherwise have been spent on servicing their clients, and thus caused injury to Counterclaimants and their businesses. *Id.* Counterdefendants had never intended to include Counterclaimants in a partnership for sale of Levi's jeans in Africa, and had instead already appointed a different person to runs sales in Africa. *Id.* ¶ 32.

Suspecting fraudulent behavior by Counterdefendants, Counterclaimants grew suspicious; accordingly, Counterclaimants carried out limited investigations to determine if the facts would concern their concerns. *Id.* ¶ 33. Popeck contacted Mr. Ignacio Parra, owner and manager of the logistics company, Tempest Logistics, to discern the whereabouts of the merchandise that Counterdefendants claimed had been transported and blocked in. *Id.* Mr. Parra came into contact with Blanca Lopez of the logistics company, ARCC LOGISTIC SA, a company that appears as an issuer in the bill of lading delivered by the Counterdefendants. Through Lopez, Parra confirmed that this bill of lading was false and that the merchandise had never even been sent by the Counterdefendants. *Id.* ¶ 34.

A representative of Counterclaimants **[*12]** also made contact with Mr. Ram Fatingan of Ultra Cargo Consultancy BC, a person who was in contact with Ginve, to inquire about the purported customs blockade of the goods, because the documentary records indicated that the company was an intervener in the transport of the goods. *Id.* ¶ 35. Mr. Fatingan confirmed to a Spanish counsel for Counterclaimants that everything promised by Counterdefendants was likely false, because neither his company nor ARC Air Logistics, an entity identified on the paper supplied by Counterdefendants, were aware of the shipment in question. *Id.* ¶ 36. Fatingan stated the shipment had likely not been made, the bill of lading forwarded by Counterdefendants was false (and as he pointed, printed on an air waybill and not the proper form for maritime transport), his company had never been in contact with Counterdefendants for the goods at issue, and the emails sent by Serge on behalf of the Counterdefendants contained falsehoods. *Id.*

Faced with the new information, Counterclaimants commissioned a handwriting expert to study the signatures that Counterdefendants had sent of Mr. Harmon Kirsch on the documents relevant to the goods at issue: (1) the letter purportedly **[*13]** from Mr. Kirsch stating that the company had authorized the sale of the goods in European territory; and (2) a second letter from Mr. Kirsch which referred to the blockade of goods in Germany as the basis of Levi's Europe's refusal to authorize the sale in European territory. *Id.* ¶ 37. The handwriting expert found that at least one of the two signatures was not original because it was transferred to the document through a reproduction system of photomechanical or computer origin, and reported those findings to the Counterclaimants. *Id.* ¶ 38.

Counterclaimants then made multiple demands asking for a return of the funds they had transferred to Counterdefendants as part of the Levi's Jeans Agreement. *Id.* ¶ 39. Counterdefendants have not returned any portion of the € 1,116,513 paid to them, nor have any of the 180,000 pairs of Levi's jeans been delivered. *Id.* ¶ 40. Prior to the activities described in this pleading, Counterclaimants had established an excellent reputation in the clothing industry in Europe over many years. *Id.* ¶ 41. As a result of this incident, Counterclaimants suffered significant reputational injury in their industry, since the goods at issue could not be resold to vendors **[*14]** in Europe. Due to Counterdefendants' contractual breach, Counterclaimants were forced to cancel agreements they had entered with other parties to purchase the goods Counterdefendants had promised to deliver. *Id.* The amount of the reputational injury is under investigation, but the amount of injury is likely to be in excess of the statutory minimum for diversity jurisdiction in this Court, above and beyond the profits lost from those cancelled sales. *Id.*

B. Procedural History

On September 20, 2018, Plaintiffs Vestis and Ginve Modas initiated the instant action in the Superior Court of Orange County (Dkt. 1). Plaintiffs assert the following seven claims for: (1) breach of written contract against Defendants Caramel, Popeck, and Does 1-10; (2) breach of written contract against Defendants Tet APS, Schmidt, and Does 11-20; (3) intentional misrepresentation against all Defendants; (4) intentional interference with prospective economic advantage against all Defendants; (5) intentional interference with contractual relationships against all Defendants; (6) defamation and libel against all Defendants; and (7) violation of the Uniform Trade Secrets Act pursuant to Civil Code § 3426.3 against all Defendants. **[*15]** Compl. ¶¶ 14-36. Plaintiffs seek general, special, and consequential damages of $1 million with respect to the first and second claims; $30 million of general, special, and consequential damages plus punitive and exemplary damages as for the third through seventh claims; and reasonable attorneys' fees, and prejudgment fees. *Id.* at 11-12.

On December 19, 2018, Defendants removed the action to this Court (Dkt. 1). On January 15, 2019, Defendants answered the Complaints (Dkt. 10) (Dkt. 11) and filed Counterclaims against Counterdefendants Vestis, Ginve Modas, Morgan Recchia, and Recchia Serge (Dkt. 12) (Dkt. 15). On February 25, 2019, Counterclaimants Caramel and Popeck filed a First Amended Counterclaim ("Caramel Amended Counterclaim") (Dkt. 34) and Counterclaimants TET and Schmidt filed a First Amended Counterclaim ("TET Amended Counterclaim") (Dkt. 35). On March 18, 2019, Plaintiffs/Counterdefendants filed the instant Motion to Dismiss Caramel Amended Counterclaim (Dkt. 42) and Motion to Dismiss TET Amended Counterclaim (Dkt. 43). On April 8, 2019, Counterclaimants Caramel and Popeck opposed ("Caramel Opposition") (Dkt. 46), and Counterclaimants TET and Schmidt opposed ("TET Opposition") (Dkt. **[*16]** 47). On April 15, 2019, Plaintiffs/Counterdefendants replied (Dkt. 48) ("Reply").

Counterclaimants assert thirteen claims against Counterdefendants for: (1) breach of contract; (2) breach of implied-in-law contract; (3) quantum meruit; (4) conversion and constructive trust; (5) money had and received; (6) for accounting; (7) intentional interference with prospective economic advantage; (8) fraud; (9) aiding and abetting fraud; (10) negligent misrepresentation; (11) aiding and abetting negligent misrepresentation; (12) violation of the Unfair Business Practices under California law pursuant to Business and Professions Code *§§ 17200, et seq.*; and (13) violation of the Racketeer Influenced and Corrupt Organizations Act pursuant to *18 U.S.C. §§ 1961, et seq.* in connection to the Jeans Agreement. TET Amended Counterclaims (Dkt. 35) ¶¶ 39-123; Caramel Amended Counterclaims (Dkt. 34) ¶¶ 58-142. Counterclaimants Caramel and Popeck additionally assert three claims against Counterdefendants for (1) breach of contract, (2) breach of implied-in-law contract, and (3) quantum meruit in connection to the Burberry Agreement. Caramel Amended Counterclaims (Dkt. 34) ¶¶ 42-57.

Counterclaimants seek judgment to be rendered jointly and severally **[*17]** against each Counterdefendant for damages, restitution, treble damages, exemplary and punitive damages, injunctive relief, and prejudgment interest. TET Amended Counterclaim (Dkt. 35) at 24-25; Caramel Amended Counterclaim (Dkt. 34) at 27-28.

II. Legal Standard

A. Motion to Dismiss

Under *Federal Rule of Civil Procedure 12(b)(6)*, a complaint must be dismissed when a plaintiff's allegations fail to set forth a set of facts that, if true, would entitle the complainant to relief. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (holding that a claim must be facially plausible in order to survive a motion to dismiss). The pleadings must raise the right to relief beyond the speculative level; a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555* (citing *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986))*. On a motion to dismiss, a court accepts as true a plaintiff's well-pleaded factual allegations and construes all factual inferences in the light most favorable to the plaintiff. *See* *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)*. A court is not required to accept as true legal conclusions couched as factual allegations. *Iqbal, 556 U.S. at 678*.

In evaluating a *Rule 12(b)(6)* motion, review is ordinarily limited to the contents of the complaint and material properly submitted with the complaint. *Van Buskirk v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002)*; *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990)*. Under the incorporation **[*18]** by reference doctrine, the court may also consider documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)*, *overruled on other grounds by* *307 F.3d 1119, 1121 (9th Cir. 2002)*; *see also* *United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)*.

III. Discussion

Counterdefendants move to dismiss the entirety of the counterclaims on the grounds that: (1) Counterclaimants are not the real parties in interest;[2] (2) the entire amended counterclaim is defective because it does not set forth which counterclaimant is asserting each claim;[3] (3) the breach of contract, breach of implied contract, and *quantum meruit* claims in regards to the Levi's Jeans Purchase Agreement fail to state claims; (4) the claims for conversion and constructive trust fail to state claims; (5) the claims for monies had and received and action for accounting fail to state claims; (6) the cause of action for intentional interference with prospective economic advantage fails to state a claim; (7) the causes of action for fraud, negligent misrepresentation, and aiding and abetting fail to state claims; (8) the cause of action for unfair business practices fails to state a claim; and (9) the cause of action for RICO fails **[*19]** to state a claim. Mot. to Dismiss Caramel Amended Counterclaim (Dkt. 42) at 12-35; Mot. to Dismiss TET Amended Counterclaim (Dkt. 43) at 12-34.

Counterdefendants additionally move to dismiss Counterclaimants Caramel and Popeck's claims for breach of contract, breach of implied contract, and quantum meruit claims with regards to the Burberry Polo Shirt Purchase Agreement for failure to state claims. Mot. to Dismiss Caramel Amended Counterclaim (Dkt. 42) at 13-16; Mot. to Dismiss TET Amended Counterclaim (Dkt. 43) at 13-15.

A. Breach of Contract Claims

1. Burberry Polo Shirt Oral Purchase Agreement

Counterdefendants move to dismiss Counterclaimants Caramel/Popeck's First through Third Claims for Breach of Contract, Breach of Implied Contract, and Quantum Meruit for failure to state claims in connection to the Burberry Purchase Agreement. Counterdefendants argue that a breach of oral contract with regards to the Burberry Purchase Agreement for Counterclaimants Caramel and Popeck's first through third claims cannot be asserted because the two-year statute of limitations under California law bars these claims. Mot. to Dismiss Caramel Amended Counterclaim (Dkt. 42) **[*20]** at 13-14; Mot. to Dismiss TET Amended Counterclaim (Dkt. 43) at 12-14. Counterclaimants state they are bringing a breach of contract claim for "oral agreement(s), confirmed in writing," which are not written agreements, absent any argument addressing the statute of limitations for oral contracts. Caramel Opp'n (Dkt. 46) at 10-11; TET Opp'n (Dkt. 47) at 9-11.

Under California law, the statute of limitations for breach of an oral contract is two years. *Zecos v. Nicholas-Applegate Capital Mgmt., 42 Fed. Appx. 31, 31-32 (9th Cir. 2002)*; *Cal. Code Civ. Proc. § 339*. A cause of action for a breach of an oral contract accrues at the time of the breach, i.e., when the party charged with the duty to perform under the contract fails to perform. *Zecos, 42 Fed. Appx. at 32* (citing *Cochran v. Cochran, 56 Cal. App. 4th 1115. 1124, 66 Cal. Rptr. 2d 337 (1997)*.

Viewing the evidence presented in the light most favorable to the non-moving party, the breach of the oral contract with respect to the Burberry Purchase Agreement is not barred by the two-year statute of limitations. Counterclaimants Caramel and Popeck allege that they entered into an oral contract with Counterdefendants in or about July of 2017. Caramel Amended Counterclaims (Dkt. 34) ¶ 13. Counterclaimants allege they performed by

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[2] The Court notes that, while individual Defendants/Counterclaimants Popeck and Schmidt are not real parties in interest to the dispute because joint venturers with ownership interests may not sue for damage to the joint venture, *Bekele v. Ford, No. C11-01640 WHA, 2011 U.S. Dist. LEXIS 108062, 2011 WL 4368566 at *4 (Sept. 17, 2011)*; *Cal. Corp. Code § 1620*, the joint venture entities, Caramel and TET, have been correctly identified as real parties in interest. Despite Counterclaimants' error in naming real parties to the dispute, the Court does not find that this constitutes a ground for dismissal absent any allegation that Counterdefendants have been prejudiced by the error entered here. Thus, the Court declines to dismiss the counterclaims on the basis that Counterclaimants are not the real parties in interest.

[3] This claim will be dismissed because the issue does not exist. The causes of actions in the counterclaims are being pursued by all the parties involved in the counterclaim. *See generally* Amended Counterclaims (Dkt. 34) (Dkt. 35).

paying for the goods in July 2017, yet Counterdefendants failed and refused to deliver the promised goods. *Id.* ¶ 14. **[*21]** Due to Counterdefendants' failure to deliver the goods as promised, Counterclaimants allege that they were unable to sell the products at issue to third parties, causing them harm in the excess of € 455,550.41. *Id.* ¶ 47. The breach of the oral agreement occurred in or around July 2017, and the cause of action started to accrue when the breach occurred. As a result, the statute of limitations does not terminate until July 2019. Thus, because Counterclaimants Caramel and Popeck filed the instant counterclaims on January 15, 2019, well within the time limit proscribed by California law on oral contracts, they are not barred from bringing the breach of contract claim for the Burberry Purchase Agreement.

Accordingly, Counterdefendants' Motion to Dismiss as to Counterclaimants Caramel and Popeck' First through Third Claims for Breach of Contract, Breach of Implied Contract, and *Quantum Meruit* in connection to the Burberry Agreement is DENIED.

2. Levi's Jeans Purchase Agreement

Counterdefendants move to dismiss Counterclaimants Caramel and Popeck's fourth through sixth claims and TET and Schmidt's first through third claims for Breach of Contract, Breach of Implied Contract, and Quantum Meruit **[*22]** fail to state claims in connection to the Levi's Jeans Purchase Agreement. Counterdefendants assert that Counterclaimants have not sufficiently pleaded facts to make a claim because if a written instrument is the foundation of a cause of action, it must be pleaded by attaching a copy of the contract as an exhibit and incorporating it by proper reference. Mot. to Dismiss Caramel Amended Counterclaim (Dkt. 42) at 13-16; Mot. to Dismiss TET Amended Counterclaim (Dkt. 43) 12-15. Counterdefendants argue that the sales transaction for the jeans was an exchange between Counterdefendants and TET and Schmidt, and no allegation has been made as to whether a contract exists between Counterdefendants and Caramel and Popeck; therefore, standing has not been established for Counterclaimants Caramel and Popeck. *Id.* Counterclaimants contend that the relevant material elements for a breach of contract claim has been pleaded. Caramel Opp'n (Dkt. 46) at 10-11; TET Opp'n (Dkt. 47) at 9-11. As a result, other breach of contract related claims such as the breach of implied in law contract and quantum meruit should not be dismissed. *Id.*

Under California law, "the essential elements for a contract are (1) **[*23]** "[p]arties capable of contracting;" (2) "[t]heir consent;" (3) "[a] lawful object;" and (4) "[s]ufficient cause or consideration."' *United States ex rel. Oliver v. Parsons Co., 195 F.3d 457, 462 (9th Cir. 1999)* (quoting *Cal. Civ. Code § 1550*). The standard elements of a claim for breach of contract are: "(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damage to plaintiff therefrom." *Wall Street Network, Ltd. v. New York Times Co., 164 Cal. App. 4th 1171, 1178 (2008)*. If a written instrument is the foundation of a cause of action, "it may be pleaded in haec verba by attaching a copy as an exhibit and incorporating it by proper reference." *Saldate v. Wilshire Credit Corp., 268 F.R.D. 87, 104 (E.D. Cal 2010)* (citing *Byrne v. Harvey, 211 Cal. App. 2d 92, 103, 27 Cal. Rptr. 110 (1962)*. By asserting claims based upon a contract in writing, "and it affirmatively appears that all the terms of the contract are not set forth in hoc verba, nor stated in their legal effect, but that a portion which may be material has been omitted, the complaint is insufficient." *Gilmore v. Lycoming Fire Ins. Co., 55 Cal. 123, 124 (1880)*.

a. Breach of Contract Claims

Here, the Court finds that Counterclaimants have sufficiently pleaded facts to establish a breach of contract claim in connection to the Levi's Jeans Agreement. As noted above, Counterclaimants Caramel and TET are joint venture entities and are correctly identified as real parties in interest in the counterclaims. Therefore, Caramel has standing to bring this **[*24]** breach of contract claim along with Counterclaimant TET.

Moreover, the essential elements for a contract are sufficiently alleged. Caramel and TET willingly entered into the contract with Counterdefendants for the lawful object of purchasing 180,000 total units of Levi's brand jeans for sale in the European Economic Community. Caramel Amended Counterclaims (Dkt. 34) ¶ 17. The parties agreed to make the first transaction in July 2017, with TET delivering €1,116,513 to Ginve Modas as payment for approximately 63,000 units of Levi's jeans. *Id.* ¶¶ 22-23. The contract was breached when Counterdefendants failed to deliver the goods as promised. Lastly, Counterclaimants seek damages in excess of €1,116,513 for the injury suffered. *Id.* ¶ 63.

With regards to the breach of implied contract and quantum meruit claims, Plaintiff must allege that there was a contract or promise between the parties to pay for the goods. *See Unichappell Music, Inc. v. Modrock Production, Inc.*, No. CV 14-2382 DDP, 2015 WL 546059, at *2 (C.D. Cal. Feb. 10, 2015) (holding a complaint must include the essential terms or legal effect of the contract sufficient to provide the defendant with notice of the contract allegedly **[*25]** breached). Here, Counterclaimants sufficiently established that there was a contract that Counterdefendants breached by failing to deliver the goods.

Thus, the Court DENIES the Motion to Dismiss as to Counterclaimants TET and Schmidt's First through Third Claims for Breach of Contract, Breach of Implied Contract, and *quantum meruit* in connection to the Levi's Jeans Purchase Agreement. The Court also DENIES the Motion to Dismiss as to Caramel and Popeck's Fourth through Sixth Claims for Breach of Contract, Breach of Implied Contract, and *Quantum Meruit* in connection to the Levi's Jeans Purchase Agreement.

C. Conversion

Counterdefendants move to dismiss Counterclaimants Caramel and Popeck's seventh claim and TET and Schmidt's fourth claim for conversion. Counterdefendants assert that California law does not recognize a conversion claim if it is based on a breach of contract claim and that the failure to pay money owed does not constitute conversion. Mot. to Dismiss Caramel Amended Counterclaims (Dkt. 42) at 17; Mot. to Dismiss TET Amended Counterclaims (Dkt. 43) 16-17. Counterclaimants respond that they are not seeking payment of money from Counterdefendants, but instead rest their conversion **[*26]** claim on the fact that they were induced by Counterdefendants' fraudulent acts to pay money to them. Caramel Opp'n (Dkt. 46) at 11-12; TET Opp'n (Dkt. 47) at 11-12. As such, there is no bar to recovery of money obtained by fraud under a conversion claim. *Id.*

Conversion is the wrongful exercise of dominion over the property of another. *Oakdale Vill. Grp. v. Fong, 43 Cal. App. 4th 539, 543-44, 50 Cal. Rptr. 2d 810 (1996)*. Under California law, the elements of conversion are: (1) a plaintiff's ownership or right to possession of the property, (2) the defendant's conversion by a wrongful act, and (3) damages. *Welco Elec., Inc. v. Mora, 223 Cal. App. 4th 202, 208, 166 Cal. Rptr. 3d 877 (2014)*. A mere contractual right to payment does not entitle the plaintiff to seek immediate possession as a cause of action for the tort of conversion. *In re Bailey, 197 F.3d 997, 1000 (9th Cir. 1999)*; *Farmers Ins. Exch. v. Zerin, 53 Cal. App. 4th 445, 452, 61 Cal. Rptr. 2d 707 (1997)*. However, a tortious breach of contract may be found when "the breach is accompanied by a traditional common law tort, such as fraud or conversion." *Robinson Helicopter Co., Inc. v. Dana Corp., 34 Cal. 4th 979, 990, 22 Cal. Rptr. 3d 352, 102 P.3d 268 (2004)*. California courts have permitted tort damages in contract cases where "the plaintiff was fraudulently induced to enter the contract." *Aqua Connect v. Code Rebel, LLC, No. CV 11-05764 RSWL (MANx), 2013 U.S. Dist. LEXIS 103078, 2013 WL 3820544, *4 (C.D. Cal. July 23, 2013)*.

Here, Counterclaimants sufficiently plead a conversion claim, by alleging that Counterdefendants caused fraudulent inducement such that Counterclaimants entered into a contract and paid money to **[*27]** Counterdefendants. Pursuant to the Levi's Jeans Agreement formed between Counterclaimants and Counterdefendants, TET transferred funds totaling €1,396,957.91 to Ginve Modas in expectation of the delivery of goods. Caramel Amended Counterclaim (Dkt. 34) ¶¶ 22-23. Not only did Counterdefendants fail to deliver the goods, they did not return the money owed to Counterclaimants despite multiple demands. *Id.* ¶¶ 39-40. Therefore, Counterclaimants have sufficiently alleged facts demonstrating that Counterdefendants acted in bad faith and possibly misappropriated and converted those monies. A tortious breach of contract is sufficiently alleged due to the fraudulent nature of the contractual breach.

Thus, Counterclaimants have sufficiently stated a claim for conversion. The Motions to Dismiss as to Counterclaimants Caramel and Popeck's Seventh Claim for Conversion, and Counterclaimants TET and Schmidt's Fourth Claim for Conversion, are DENIED.

D. Money Had & Received, and Accounting

Counterdefendants move to dismiss Caramel's eighth claim and TET's fifth claim for money had & received, and as well as Caramel's ninth claim and TET's sixth claim for accounting. Counterdefendants assert, because the **[*28]** payment for Levi's Jeans were paid by Counterclaimants TET and Schmidt, Counterclaimants are not entitled to assert the money had & received claims. Mot. to Dismiss Caramel Amended Counterclaim (Dkt. 42) at 17-19; Mot. to Dismiss TET Amended Counterclaim (Dkt. 43) 17-18. Counterclaimants contend that the money had and received claim corresponds to the issue of standing, and that as joint venturers, all of the Counterclaimants are entitled to sue for injuries suffered. Caramel Opp'n (Dkt. 46) at 12-13; TET Opp'n (Dkt. 47) at 12-13. Moreover, a claim for accounting is warranted under California law because the elements required to meet the action for accounting are extremely liberal. *Id.*

A money had and received cause of action may be brought "wherever one person has received money which belongs to another, and which in equity and good conscience, ... should be returned." *Mains v. City Title Ins. Co., 34 Cal. 2d 580, 586, 212 P.2d 873 (1949)* (internal citations omitted). A cause of action for money had and received is stated if it is alleged that "the defendant is indebted to the plaintiff in a certain sum for money had and received by the defendant for the use of the plaintiff." *Avidor v. Sutter's Place, Inc., 212 Cal. App. 4th 1439, 1454, 151 Cal. Rptr. 3d 804 (2013)*. To bring a claim for accounting, a plaintiff must show (1) that a relationship **[*29]** exists between the plaintiff and defendant that requires an accounting; and (2) that some balance is due to the plaintiff that can only be ascertained by an accounting. *See Brosious v. JP Morgan Chase Bank, N.A., No. 2:15-CV-00047-KJM, 2015 U.S. Dist. LEXIS 117957, 2015 WL 5173063, at *3 (E.D. Cal. Sept. 2, 2015)* (citing *Teselle v. McLoughlin, 173 Cal. App. 4th 156, 179, 92 Cal. Rptr. 3d 696 (2009))*.

Here, the Court finds that Counterclaimants sufficiently pleaded the claims for money had & received, and accounting. As noted above, joint venture entities TET and Caramel are entitled to sue for injuries as real parties in interest. Further, with regards to the money had and received claim, Counterclaimants assert that Counterdefendants received money that was intended to be used for the benefit of Counterclaimants. Caramel Amended Counterclaim (Dkt. 34) ¶ 81. However, Counterclaimants allege that sum of money was neither used for the benefit of Counterclaimants nor was the money owed returned, and Counterclaimants sufficiently seek damages as such. *Id.* ¶¶ 82-83. Furthermore, the accounting claim has been sufficiently alleged; Counterclaimants state that they were in a contractual relationship with Counterdefendants for the purchase of Levi's jeans, and they seek a balance of €1,396,957.91, which can only be ascertained by an accounting. *Teselle, 173 Cal. App. 4th at 179*. Therefore, **[*30]** Counterclaimants have sufficiently pleaded the elements of the money had & received claim, and the accounting claim.

Accordingly, the Court DENIES Counterdefendants' Motion to Dismiss as to Counterclaimants Caramel and Popeck's Eighth Claim for Money Had & Received, and Ninth Claims for Accounting. The Court DENIES Counterdefendants' Motion to Dismiss as to Counterclaimants TET and Schmidt's Fifth Claim for Money Had & Received, and Sixth Claim for Accounting.

E. Intentional Interference with Prospective Economic Advantage

Counterdefendants move to dismiss Caramel and Popeck's tenth claim and TET and Schmidt's seventh claim for intentional interference with prospective economic advantage, arguing the interference allegations are conclusory and nonspecific with respect to the identifies of lost business customers and a specific opportunity lost. Mot. to Dismiss Caramel Amended Counterclaim (Dkt. 42) at 19-20; Mot. to Dismiss TET Amended Counterclaim (Dkt. 43) 18-20. Counterclaimants contend that the facts have been sufficiently pleaded to notify Counterdefendants of the basis for the claims. Caramel Opp'n (Dkt. 46) at 13-14; TET Opp'n (Dkt. 47) at 13-14. Moreover, the information sought **[*31]** is confidential information that Counterclaimants intend to reveal only under the protection of the Stipulated Protective Order already entered in this case. *Id.*

The elements of the tort of intentional interference with prospective economic advantage are: "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." *Westside Ctr. Assoc. v. Safeway Stores 23, Inc., 42 Cal. App. 4th 507, 521-522, 49 Cal. Rptr. 2d 793 (1996)*. A plaintiff must plead and prove that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." *See Della Penna v. Toyota Motor Sales, U.S.A., Inc., 11 Cal. 4th 376, 393-94, 45 Cal. Rptr. 2d 436, 902 P.2d 740 (1995)*. The intent requirement is met by pleading specific intent, but "plaintiff may alternately plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action." *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1159, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*.

Here, Counterclaimants sufficiently pled the elements of intentional interference with **[*32]** prospective economic advantage. Counterclaimants allege that they are established apparel businesses that have developed valuable and profitable ongoing businesses and relationships with clients who promise future economic benefit. Caramel Amended Counterclaim (Dkt. 34) ¶ 89. Counterclaimants also allege Counterdefendants had knowledge that Counterclaimants had long been in this business and had formed business relationships with valuable customers. *Id.* Moreover, Counterclaimants validly assert that their intent was to keep the identity of the third parties confidential since they were sensitive business information, and would only reveal them under the Stipulated Protective Order, which was granted on March 14, 2019. *See* Stipulated Protective Order (Dkt. 41).

Additionally, Counterclaimants sufficiently pleaded Counterdefendants knew that interference in Counterclaimants' economic relationship with their clients "was certain or substantially certain to occur as a result of its action" by failing and refusing to deliver the 180,000 Levi's jeans previously promised. *Korea Supply Co., 29 Cal. 4th at 1159*. Counterclaimants alleged that their expected business and corresponding business relationships were disturbed, and that **[*33]** they not only lost profit that would have been derived from the sales of the Levi's and Burberry goods, but also suffered reputational harm as a result of the contractual breach. Caramel Amended Counterclaim (Dkt. 34) ¶ 93. Therefore, Counterclaimants have sufficiently pleaded the elements of intentional interference with prospective economic advantage.

Accordingly, the Court declines to dismiss Counterclaimants' claim for intentional interference with prospective economic advantage. Counterdefendants' Motions to Dismiss as to Caramel and Popeck's Tenth Claim, and as to TET and Schmidt's Seventh Claim for Intentional Interference with Prospective Economic Advantage, is DENIED.

F. Fraud Claims

Counterdefendants move to dismiss Caramel and Popeck's eleventh through fourteenth claims and TET and Schmidt's eighth through eleventh claims (i.e. claims for fraud, aiding and abetting fraud, negligent misrepresentation, and aiding and abetting negligent misrepresentation). According to Counterdefendants, there are at least three fundamental defects with the fraud claims: (1) fraud claims are barred by the economic loss rule; (2) the fraud and negligent misrepresentation claims have been alleged **[*34]** with requisite specificity under statutory law and case law; and (3) a party cannot aid and abet himself to commit a tort. Mot. to Dismiss Caramel Amended Counterclaim (Dkt. 42) at 21-23; Mot. to Dismiss TET Amended Counterclaim (Dkt. 43) at 20-23.

Counterclaimants respond that the economic loss rule does not bar claims for fraudulent inducement, nor are fraud claims for actions taken after the contract is entered into barred, which can cause the complaining party additional injury beyond the injuries caused by the breach of the purported contract. Caramel Opp'n (Dkt. 46) at 14-16; TET Opp'n (Dkt. 47) at 14-15.

To establish a claim for fraud under California law, a plaintiff must allege "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud; (d) justifiable reliance; and (e) resulting damages. *Kearns v. Ford Motor Co., 567 F.3d 1120, 1126 (9th Cir. 2009)* (citing *Engalla v. Permanente Med. Grp., Inc., 15 Cal. 4th 951, 974, 64 Cal. Rptr. 2d 843, 938 P.2d 903 (1997)*. *Rule 9(b)*'s particularity standard requires "an account of the time, place, and specific content of the false representation, as well as the identifies of the parties to the misrepresentation." *Swartz v. KPMG, 476 F.3d 756, 763 (9th Cir. 2007)*; *Fed. R. Civ. P. 9(b)*.

1. Economic Loss Rule

Counterdefendants argue that fraud claims are barred by the economic loss rule, while Counterclaimants **[*35]** claim that fraudulent inducement is a well-recognized exception to the rule. Mot. to Dismiss Caramel Amended Counterclaim (Dkt. 43) at 20-21; Caramel Opp'n (Dkt. 46) 14-15.

California's economic loss doctrine "requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise." *Robinson Helicopter Co., Inc. v. Dana Corp., 34 Cal. 4th 979, 988, 22 Cal. Rptr. 3d 352, 102 P.3d 268 (2004)*. To maintain a fraud claim based on the same factual allegations as a breach of contract claim, a plaintiff must show that "the duty that gives rise to tort liability is either completely independent of the contract or arises from conduct which is both intentional and intended to harm." *Id. at 989-90*. Therefore, fraudulent inducement is an exception to the economic loss rule. *See* *Lazar v. Super. Ct., 12 Cal. 4th 631, 645, 49 Cal. Rptr. 2d 377, 909 P.2d 981 (1996)* ("It has long been the rule that where a contract is secured by fraudulent representations, the injured party may elect to affirm the contract and sue for the fraud.").

Here, the economic loss rule does not bar Counterclaimants' fraud claims. Counterdefendants allegedly represented to Counterclaimants that they had received authorization to resale the Levi's Jeans in the European Economic Community, by sending an email with a purported **[*36]** authorization from Mr. Harmon Kirsch, the Vice President at Levi Strauss & Co, allowing the export of the Levi's jeans to the E.U. Caramel Amended Counterclaim (Dkt. 34) ¶ 23. Counterdefendants also represented that the approximately 63,000 pairs of Levi's brand jeans that had been shipped to the E.U. were stopped at German customs, the steps taken to get the German customs authorities to unblock the merchandise were ultimately unsuccessful, and that Mr. Kirsch had sent a second letter claiming that the European office of Levi's does not permit the sale of the goods in Europe. *Id.* ¶¶ 24-27. Counterclaimants also argue that Counterdefendants had provided false shipping documents and made false representations about those supposed goods, having conducted internal investigations and obtained multiple witnesses claiming that everything promised by Counterdefendants were likely false. *Id.* ¶¶ 33-36. Counterclaimants even commissioned a handwriting expert to investigate the signatures of Mr. Harmon Kirsch in the letters he purportedly emailed to Counterclaimants, allegedly discovering that at least one of the two signatures is not original because the signature had been transferred to the **[*37]** document by a reproduction system of photomechanical or computer origin. *Id.* ¶¶ 37-38. Counterclaimants have sufficiently pleaded Counterdefendants' knowledge of falsity, intent to defraud, and Counterclaimants' justifiable reliance on the misrepresentation. Lastly, Counterclaimants claim damages of €1,116,513 for money paid for the promised Levi's jeans and never returned. Because fraudulent inducement is an exception to the economic loss rule, Counterclaimants have sufficiently pleaded the fraud elements to defeat a *Rule 12(b)(6)* dismissal. *Lazar, 12 Cal. 4th at 645*.

Therefore, the Court declines to dismiss Counterclaimants' fraud claims under the economic loss rule.

2. Requisite Specificity to Allege Fraud Claims

Viewing the facts specifically alleged, the Court finds that Counterclaimants sufficiently plead facts that meet the higher pleading standard under *Rule 9(b)*. Pursuant to *Rule 9(b)*'s particularity standard requiring "an account of the time, place, and specific content of the false representation, as well as the identifies of the parties to the misrepresentation," Counterclaimants sufficiently alleged details of Counterdefendants' many attempts to mislead and defraud the Counterclaimants. *Swartz, 476 F.3d at 763*.

Accordingly, the Court declines to dismiss **[*38]** Counterclaimants' fraud claims, which meet the higher pleading standard under *Rule 9(b)*. *Fed. R. Civ. P. 9(b)*.

3. Sufficiency of the Aiding and Abetting Claim

Counterdefendants move to dismiss the aiding and abetting claim because a party cannot aid and abet himself to commit a tort. Mot. to Dismiss Caramel Amended Counterclaim (Dkt. 43) at 23. Counterclaimants clarify their position, which is that they are accusing Counterdefendants Vestis and Ginve Modas, as well as individual owners Morgan and Serge Recchia, of aiding and abetting each other. Caramel Opp'n (Dkt. 46) at 14-16; TET Opp'n (Dkt. 47) at 14-15. California law finds liability for aiding and abetting the commission of an intentional tort in two different ways: if a defendant (1) "knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act," or (2) "gives substantial assistance to the other in accomplishing a tortious result and the [entity]'s own conduct, separately considered, constitutes a breach of duty to the third person." *Seaman v. Sedgwick, LLP, No. 11-664, 2012 U.S. Dist. LEXIS 9917, 2012 WL 254046, at *7 (C.D. Cal. Jan. 26, 2012)* (quoting *Casey v. U.S. Bank Nat'l Ass'n, 127 Cal. App. 4th 1138, 1144, 26 Cal. Rptr. 3d 401 (2005))*. Mere allegation that a defendant had "vague suspicion of wrongdoing" or knew of "wrongful or illegal conduct...d[o] not constitute sufficient pleading" **[*39]** that the defendant had "actual knowledge." *In re First Alliance Mortgage Co., 471 F.3d 977, 993 n.4*. Aiding and abetting implies an intentional participation with knowledge of the object to be attained. *Lomita Land Water Co. v. Robinson, 154 Cal. 36, 47, 97 P. 10 (1908)*.

Here, Counterclaimants sufficiently pled facts regarding the aiding and abetting claim. Counterclaimants assert that all the Counterdefendants named in the counterclaims are liable for aiding and abetting the commission of an intentional tort because each party knew of the other's conduct constitutes a breach of duty and substantially assisted or encouraged each other to act so. Caramel Opp'n (Dkt. 46) at 16. The facts alleged show that Counterdefendants had more than a "vague suspicion of wrongdoing" and rise to the level of "actual knowledge," considering that Ginve Modas and Vestis were business partners and both parties entered into the contracts at issue in this dispute. *In re First Alliance Mortgage Co., 471 F.3d at 993 n.4*.

Accordingly, the Court DENIES the Motions to Dismiss as to Counterclaimants Caramel and Popeck's Eleventh through Fourteenth Claims, and as to TET and Schmidt's Eighth through Eleventh Claims, for Fraud, Aiding and Abetting Fraud, Negligent Misrepresentation, and Aiding and Abetting Negligent Misrepresentation.

G. Unfair Business Practices

Counterdefendants move to **[*40]** dismiss Caramel and Popeck's fifteenth claim and TET and Schmidt's twelth claim for violation of the Unfair Business Practices under *California's Business and Professions Code § 17200*. Counterdefendants state that, absent a showing that the public is likely to be deceived, the claims for violation of the Unfair Business Practices has not been sufficiently alleged. Mot. to Dismiss Caramel Amended Counterclaim (Dkt. 42) at 24-25; Mot. to Dismiss TET Amended Counterclaim (Dkt. 43) 23-24. Counterclaimants argue the requisite elements have been alleged. Caramel Opp'n (Dkt. 46) at 16-17; TET Opp'n (Dkt. 47) at 16.

California's statutory unfair competition laws broadly prohibit unlawful, unfair, and fraudulent business acts. *Sybersound Records, Inc. v. UAC Corp., 517 F.3d 1137, 1151 (9th Cir. 2008)*. Unlawful acts are "anything that can properly be called a business practice" and is forbidden by law. *Nat'l Rural Telecomm., Co-op v. DIRECTV, Inc., 319 F. Supp. 2d 1059, 1074 & n.22 (C.D. Cal. 2003)*. Unfair acts among competitors refer to conduct that violates ***antitrust law***, or the spirit or policy of those laws "because its effects are comparable to or at the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 191, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. Finally, fraudulent acts are ones where members of the public are likely to be deceived. *Sybersound Records, 517 F.3d at 1152*. Unless the challenged conduct "targets a particular disadvantaged or **[*41]** vulnerable group, it is judged by the effect it would have on a reasonable consumer." *Aron v. U-Haul Co. of Cal., 143 Cal. App. 4th 796, 806, 49 Cal. Rptr. 3d 555*

(2006). A breach of contract may form the predicate for a section 17200 claim, provided that the claim constitutes conduct that is unlawful, or unfair, or fraudulent. *Id.*

Here Counterclaimants cannot sufficiently state a claim for unfair business practices claim pursuant to California Business and Professions Code § 17200 et seq. Counterclaimants bring this claim under statutes prohibiting unlawful, unfair, and fraudulent business acts, arguing that Counterdefendants' fraudulent acts led to the breach of contracts for the Burberry Agreement and the Levi's Jeans Agreement. However, there are insufficient allegations demonstrating that Counterdefendants' fraudulent business conduct was directed at members of the public likely to be deceived or that the conduct "judged by the effect it would have on a reasonable consumer" is unlawful or fraudulent. Aron, 143 Cal. App. 4th at 806. Counterclaimants are not entitled to the protection of this prong of § 17200, as they are not members of the public or consumers entitled to such protection. *See* Watson Lab., Inc. v. Rhone-Poulenc Rorer, Inc., 178 F. Supp. 2d 1099, 1121 (C.D. Cal 2001). One competitor may not proceed against another under the fraudulent prong of § 17200. *Id.* Moreover, it is not the case that "fraudulent business acts are separately actionable by business **[*42]** competitors absent a showing that the public, rather than merely the plaintiff, is likely to be deceived." *Id.*

Thus, the Court GRANTS WITH PREJUDICE Counterdefendants' Motions to Dismiss as to Counterclaimants Caramel and Popeck's Fifteenth Claim, and as to TET and Schmidt's Twelve Claim for violation of the California Unfair Business Practices pursuant to California's Business and Professions Code § 17200.

H. RICO Claims

Counterdefendants move to dismiss the RICO cause of action arising under 18 U.S.C. §§ 1964(c) under Caramel and Popeck's sixteenth claim and TET and Schmidt's thirteenth claim. Mot. to Dismiss Caramel Amended Counterclaim (Dkt. 42) at 25. Counterclaimants contend that Counterdefendants provide no analysis of the actual allegations and therefore the RICO claim should not be dismissed. Caramel Opp'n (Dkt. 46) at 17.

RICO provides a private right of action for "[a]ny person injured in his business or property" by a RICO violation. 18 U.S.C. § 1964(c). "To state a civil RICO claim, plaintiffs must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (5) causing injury to plaintiffs' 'business or property.'" Ove v. Gwinn, 264 F.3d 817, 825 (9th Cir. 2001); *see also* 18 U.S.C. § 1964(c). Moreover, Rule 9(b) provides that in allegations of fraud or mistake, "a party must state with particularity the **[*43]** circumstances constituting fraud or mistake. Fed. R. Civ. P. 9(b). To satisfy the rule, a plaintiff must allege the "who, what, where, when, and how" of the charged misconduct. Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997). The "circumstances constituting the alleged fraud must be specific enough to give defendants notice of the particular misconduct so that they can defend against the charge and not just deny that they have done anything wrong." Vess v. Ciba-Geigy Corp. U.S.A., 317 F.3d 1097, 1106 (9th Cir. 2003).

Here, Counterclaimants have not sufficiently pled a RICO claim. Granted, as Counterclaimants state, Counterdefendants Vestis and Ginve Modas are business enterprises engaged in interstate commerce, owned and operated by Serge and Morgan Recchia. Caramel Amended Counterclaim (Dkt. 34) ¶ 137. Counterclaimants also state that Counterdefendants allegedly engaged in fraudulent conduct, which includes but is not limited to providing false statements and representations to Counterclaimants using written representations, misleading and/or fabricated shipping documents, and electronic mail for the purpose of acquiring monies from victims for goods that Counterdefendants never had the right to sell or intended to deliver. *Id.* ¶ 138. However, Counterclaimants do not establish a "pattern" of racketeering activity. **[*44]** Counterclaimants' conclusory statements that Counterdefendants engaged in a pattern do not suffice; absent some specific articulation that Counterdefendants engaged in the alleged activity on multiple occasions or as to multiple agreements, such "bare assertions" are not sufficient to plead a civil RICO claim. Iqbal, 556 U.S. at 681.

Thus, at this stage the Court GRANTS WITHOUT PREJUDICE Counterdefendants' Motions to Dismiss as to Counterclaimants' Caramel and Popeck's Sixteenth Claim, and as to TET and Schmidt's Thirteenth Claim for violation of RICO pursuant to *18 U.S.C. §§ 1964(c)*.

IV. Disposition

For the reasons set forth above, Counterdefendants' Motions to Dismiss are DENIED IN PART and GRANTED IN PART.

Counterdefendants' Motion to Dismiss as to Counterclaimants Caramel and Popeck's first, second, and third claims for breach of contract in connection to the Levi's Jeans Purchase Agreement is DENIED.

Counterdefendants' Motions to Dismiss as to Counterclaimants Caramel and Popeck's fourth fifth, and sixth claims, and as to Counterclaimants TET and Popeck's first, second, and third claims, for Breach of Contract, Breach of Implied Contract, and *Quantum Meruit* in connection to the Levi's Jeans Purchase Agreement, are DENIED.

[*45] Counterdefendants' Motions to Dismiss as to Counterclaimants Caramel and Popeck's Seventh Claim, and as to Counterclaimants TET and Popeck's Fourth Claiml for Conversion, are DENIED.

Counterdefendants' Motions to Dismiss as to Counterclaimants Caramel and Popeck's Tenth Claim for Intentional Interference with Prospective Economic Advantage, and as to Counterclaimants TET and Schmidt's Seventh Claim, for Intentional Interference with Prospective Economic Advantage, are DENIED.

Counterdefendants' Motions to Dismiss as to Counterclaimants Caramel and Popeck's eleventh, twelfth, thirteenth, and fourteenth claims, and as to Counterclaimants TET and Schmidt's eight, ninth, tenth, and eleventh claims, for Fraud, Aiding and Abetting Fraud, Negligent Misrepresentation, and Aiding and Abetting Negligent Misrepresentation, are DENIED.

Counterdefendants' Motions to Dismiss as to Counterclaimants Caramel and Popeck's Sixteenth Claim, and as to Counterclaimants TET and Schmidt's Thirteenth Claim, pursuant to RICO, are GRANTED WITHOUT PREJUDICE.

Counterdefendants' Motions to Dismiss as Counterclaimants Caramel and Popeck's Fifteenth Claim, and as to Counterclaimants TET and Schmidt's Twelve Claim, under **[*46]** *California Business and Professions Code §§ 17200 et seq.*, are GRANTED WITH PREJUDICE.

Counterclaimants may file amended counterclaims, if desired, consistent with this Court's Order on or before May 15, 2019.

The Clerk shall serve this minute order on the parties.

End of Document

Kickham Hanley PLLC v. Oakland Cty. Mich.

Court of Appeals of Michigan

May 2, 2019, Decided

No. 341076

Reporter

2019 Mich. App. LEXIS 1550 *; 2019 WL 1965891

KICKHAM HANLEY PLLC, Plaintiff-Appellant, v OAKLAND COUNTY MICHIGAN, Defendant, and GEORGE W. KUHN DRAINAGE DISTRICT, Defendant-Appellee.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Leave to appeal denied by *Kickham Hanley PLLC v. Oakland Cty. Mich., 2020 Mich. LEXIS 704 (Mich., Apr. 29, 2020)*

Prior History: **[*1]** Oakland Circuit Court. LC No. 2017-159351-CZ.

Kickham Hanley PLLC v. Oakland Cty. Mich., 2018 Mich. App. LEXIS 2407 (Mich. Ct. App., May 17, 2018)

Core Terms

trial court, overcharges, assumpsit, summary disposition, Drainage, drain, Apportionment, unjust enrichment, ratepayers, charges, amended complaint, final order, stormwater, disposal, amend, assignee, costs, governmental immunity, water and sewer, equitable, antitrust, parties, money had and received, court rule, municipalities, documents, belongs, novo, express contract, motion for leave

Judges: Before: MURRAY, C.J., and SAWYER and REDFORD, JJ.

Opinion

PER CURIAM.

Plaintiff, Kickham Hanley PLLC, appeals as of right the trial court's order granting summary disposition of its claims under *MCR 2.116(C)(7)* and *(8)* and denying its motion for leave to amend its complaint. We affirm.

I. BACKGROUND

Plaintiff commenced this action against defendants[1] after the settlement of a class action lawsuit brought by a water and sewer ratepayer against Royal Oak, Michigan. The class representative alleged Headlee Amendment violations, *Const 1963, art 9, § 31*, and challenged Royal Oak's mandatory debt service charge and mandatory

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[1] The trial court dismissed Oakland County based upon a stipulation of the parties.

stormwater disposal charge to users of its water and sanitary disposal services. The circuit court in that action dismissed both counts of the complaint and the class representative moved for reconsideration. While that motion pended, the parties settled. judgment. The circuit court approved the settlement and entered a final

During the class action litigation, the class representative came to believe that defendant, the George W. Kuhn Drainage District (GWKDD), inflated Detroit Water and Sewerage Department (DWSD) charges for stormwater disposal and overcharged for several years Royal Oak which **[*2]** passed on the charges to users. As part of the settlement in the class action lawsuit, Royal Oak paid a settlement to the class and assigned any claims it may have had for refund of the overcharges to plaintiff, as the trustee for a litigation trust. In its assignment, Royal Oak made no warranty or representation that it, in fact, imposed any overcharges or that any refunds were owed. The class members in turn released Royal Oak from any and all claims they had against Royal Oak concerning the city's rates and charges. The circuit court entered a final judgment and order approving the settlement and appointing plaintiff as the trustee of a litigation trust established for the benefit of the class members. The order authorized plaintiff to pursue a claim for refund of the GWKDD's alleged overcharges and ordered that any monetary recovery be distributed to the class members.

In its complaint, plaintiff alleged that Royal Oak's combined sewer system flows through the George W. Kuhn Drain, which is owned and maintained by Oakland County. The GWKDD is a component unit of Oakland County, comprised of several municipalities in the area, including Royal Oak, whose stormwater and sewerage flow **[*3]** into the Kuhn Drain. The GWKDD's stormwater flow is conveyed for ultimate disposal by Oakland County to a treatment plant operated by DWSD or the Great Lakes Water Authority (GLWA) for ultimate disposal. The DWSD charges the GWKDD a flat annual rate for stormwater disposal based on a formula tied to the amount of rainfall and the volume of surface water that enters the county's system for disposal. The GWKDD, in turn, proportionately allocates DWSD's stormwater charges among the municipalities in the district and charges each municipality that has a combined sewer system, including Royal Oak, a flat rate per month for stormwater disposal based on an apportionment formula stated in a resolution approved and adopted by the Drainage Board for the George W. Kuhn Drain at a public meeting held on April 19, 2005, and specified in the Drainage Board's Final Order of Apportionment issued April 19, 2005, pursuant to the board's resolution. The Final Order of Apportionment provided for the apportionment of the costs of administration, operations, and maintenance of the George W. Kuhn Drain. The Drainage Board allocated 29.7915% of the costs to Royal Oak.

Royal Oak, in turn, passed through the **[*4]** charges imposed by the GWKDD to its ratepayers by incorporating the charges into its water and sewer rates to recover the entire amount of the GWKDD's charge. The Drainage Board's Final Order of Apportionment provided that the charges to the municipalities, including Royal Oak, were comprised of two components: (1) the DWSD's charges to the George W. Kuhn Drain to treat the total stormwater flow and (2) the administrative costs of operating and maintaining the balance of the George W. Kuhn Drain System.

Plaintiff, as Royal Oak's assignee, filed a two count complaint against Oakland County and the GWKDD alleging a breach of contract claim and an equitable claim in assumpsit for money had and received. Plaintiff alleged that the GWKDD charged Royal Oak in excess of the amount DWSD charged for disposal of the stormwater and that the Drainage Board's resolution contractually obligated the GWKDD to charge Royal Oak only its proportionate share of the DWSD's actual charges to the GWKDD. Plaintiff claimed that, by overcharging Royal Oak, the GWKDD breached the contract causing Royal Oak breach of contract damages. Alternatively, plaintiff alleged that, if no express contract existed, based **[*5]** on Royal Oak's assignment of its claims, plaintiff had entitlement to recover the GWKDD's overcharges through an action in assumpsit. The GWKDD, in lieu of filing an answer, moved for summary disposition under *MCR 2.116(C)(7)* and *(8)*. The GWKDD asserted that the Drainage Board's resolution that formed the basis of plaintiff's breach of contract claim did not constitute a contract. The GWKDD also asserted that plaintiff's claims in actuality alleged tort liability from which the GWKDD had governmental immunity. Regarding the assumpsit count, the GWKDD asserted that plaintiff stood in the shoes of Royal Oak as its assignee and had no right to any damages from the alleged overcharges because the city passed through the overcharges to the ratepayers and suffered no compensable loss.

While the GWKDD's summary disposition motion pended, plaintiff filed an amended complaint that added an unjust enrichment claim. Defendant moved to strike plaintiff's amended complaint and the trial court granted the motion prompting plaintiff to file a motion for leave to amend. At the conclusion of a hearing on the parties' motions, the trial court granted defendant's motion for summary disposition under *MCR 2.116(C)(8)*, denied plaintiff's **[*6]** motion for leave to amend, and dismissed plaintiff's lawsuit with prejudice.

II. SUMMARY DISPOSITION UNDER *MCR 2.116(C)(8)*

A. STANDARD OF REVIEW

We review de novo the trial court's grant of summary disposition under *MCR 2.116(C)(8)* to determine whether the opposing party failed to state a claim upon which relief can be granted. *Dalley v Dykema Gossett, PLLC, 287 Mich App 296, 304; 788 NW2d 679 (2010)*. In *Dalley*, this Court explained:

> A motion brought under *subrule (C)(8)* tests the legal sufficiency of the complaint solely on the basis of the pleadings. When deciding a motion under *(C)(8)*, this Court accepts all well-pleaded factual allegations as true and construes them in the light most favorable to the moving party. A party may not support a motion under *subrule (C)(8)* with documentary evidence such as affidavits, depositions, or admissions. Summary disposition on the basis of *subrule (C)(8)* should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. [*Id. at 304-305* (quotation marks and citations omitted).

In a contract action the trial court may examine the contract attached to the complaint. *Liggett Restaurant Group, Inc v Pontiac, 260 Mich App 127, 133; 676 NW2d 633 (2003)*. "The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza, LLC, 273 Mich App 449, 452; 733 NW2d 766 (2006)*. Further, whether an **[*7]** equitable claim can be maintained presents a question of law subject to de novo review. *Morris Pumps v Centerline Piping, Inc, 273 Mich App 187, 193; 729 NW2d 898 (2006)*.

B. BREACH OF CONTRACT

Plaintiff first claims that the trial court erred by granting summary disposition of its breach of contract claim. We disagree.

The party claiming a breach of contract must establish by a preponderance of the evidence (1) the existence of a contract, (2) the other party's breach, and (3) damages to the party claiming breach. *Miller-Davis Co v Ahrens Constr, Inc, 495 Mich 161, 178; 848 NW2d 95 (2014)*. An express contract is "an actual agreement of the parties, the terms of which are openly uttered or declared at the time of making it, being stated in distinct and explicit language either orally or in writing." *Benson v Dep't of Mgt and Budget, 168 Mich App 302, 307; 424 NW2d 40 (1988)* (quotation marks and citation omitted). In *AFT Mich v Michigan, 497 Mich 197, 235; 866 NW2d 782 (2015)*, our Supreme Court summarized the principles of contract formation as follows:

> A valid contract requires five elements: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. The party seeking to enforce a contract bears the burden of proving that the contract exists. Contracts necessarily contain promises: a contract may consist of a mutual exchange of promises, or the performance of a service in exchange **[*8]** for a promise. [Citations omitted.]

Further, to create a contract, there must be an offer and acceptance by the parties signifying their unambiguous mutual assent or meeting of the minds on the essential terms. *Kloian, 273 Mich App at 452-453* (citations omitted).

In this case, plaintiff alleged one count of breach of contract based on the resolution adopted by the Drainage Board. It argued to the trial court that the resolution coupled with the Drainage Board's Final Order of Apportionment constituted an express contract that the GWKDD breached. The record reflects that plaintiff attached the resolution and the Final Order of Apportionment to its complaint as exhibits making them part of its pleadings and relied on those documents to allege the existence of a contract between the GWKDD and Royal Oak. Therefore, the trial court could properly consider those documents for determination of defendant's summary disposition motion under *MCR 2.116(C)(8)*. *Liggett, 260 Mich App at 133*.

Plaintiff argues as it did to the trial court that the resolution and the Final Order of Apportionment constituted a binding express contract between the GWKDD and Royal Oak that the GWKDD breached. We disagree.

The language of the Drainage Board's resolution and its Final Order of Apportionment **[*9]** plainly establish that these two documents neither individually, nor combined, constituted a binding contract between the GWKDD and Royal Oak. The documents expressed no offer or promises made by either party to the other that required acceptance. Nor did the documents express the five elements necessary for the creation of a valid contract in Michigan.

The Drainage Board's resolution and its Final Order of Apportionment expressed independent determinations made by the Drainage Board, as statutorily required under Chapter 20 of Michigan's drain code of 1956, *MCL 280.461 et seq.* which governs intracounty drains. The GWKDD is a drainage district, a governmental body with powers conferred upon it by law. See *MCL 280.5*. The drain code authorizes recovery of the costs of county drains necessary for the public health, *MCL 280.462*, and makes drainage boards responsible for the operation and maintenance of such drains, *MCL 280.478*.[2] Under the drain code, drainage boards must establish percentages to apportion the costs of operating and maintaining drains to the public corporations assessed for the costs of the drain, considering the benefits that accrue to each public corporation and the extent to which each public corporation contributes to **[*10]** the conditions which make the drain necessary. See *MCL 280.468*; *MCL 280.469*; *MCL 280.478*. Drainage boards are statutorily required to determine, after notice and a hearing, the apportionment of the costs and confirm their determinations by issuance of a final order of apportionment. See *MCL 280.469*; *MCL 280.478*. The drain code, however, nowhere provides that a final order of apportionment issued by a drainage board constitutes a contract with the municipal entities to which the order applies. Nor does the drain code grant a right of action to such entities for an alleged breach of a final order of apportionment.

The resolution and Final Order of Apportionment at issue in this case, therefore, constituted a statutorily required determination that apportioned the costs of stormwater disposal and treatment by the DWSD, and allocated to the municipalities in the GWKDD their proportionate share. Neither the resolution nor the Final Order of Apportionment, nor those documents combined constituted contracts on which Royal Oak could base a breach of contract claim. Plaintiff, therefore, failed and could not meet its burden of establishing the existence of a contract. Accordingly, the trial court properly granted summary disposition of plaintiff's **[*11]** breach of contract claim under *MCR 2.116(C)(8)*.[3]

C. ASSUMPSIT

Plaintiff next argues that the trial court erred by granting defendant summary disposition because, in the absence of an express contract, it could recover the overcharges on equitable grounds in assumpsit for money had and received. We disagree.

A claim in assumpsit is "an equitable action, and can be maintained in all cases for money which in equity and good conscience belongs to the plaintiff." *Hoyt v Paw Paw Grape Juice Co, 158 Mich 619, 626; 123 NW 529 (1909)* (quotation marks and citation omitted). The right to bring an action in assumpsit "exists whenever a person, natural or artificial, has in his or its possession money which in equity and good conscience belongs to the plaintiff, and

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[2] *MCL 280.462* provides: "County drains which are necessary for the public health may be located, established and constructed under the provisions of this chapter where the cost thereof is to be assessed wholly against public corporations." *MCL 280.478* provides, in part: "Any necessary expenses incurred in the administration and in the operation and maintenance of the drain and not covered by contract shall be paid by the several public corporations assessed for the cost of the drain."

[3] Defendant also argues that, because plaintiff's claims were premised on the resolution and Final Order of Apportionment, the claims challenged the propriety of the Final Order of Apportionment and the legality of apportioning the costs to Royal Oak. Defendant contends that plaintiff's claims were barred by the limitations period prescribed under *MCL 280.483* which governs challenges to orders of apportionment. We find no merit to defendant's argument because plaintiff's complaint plainly did not challenge the apportionment decision. Further, we decline to review this issue because it is not necessary for the disposition of this case. See *Fast Air, Inc v Knight, 235 Mich App 541, 549-550; 599 NW2d 489 (1999)*.

neither express promise nor privity between the parties is essential." *Id. at 626* (citation and emphasis omitted); see also *Trevor v Fuhrmann, 338 Mich 219, 223-224; 61 NW2d 49 (1953)*. As our Supreme Court explained in *Moore v Mandlebaum, 8 Mich 433, 448 (1860)*:

> We understand the law to be well settled that an action of assumpsit for money had and received is essentially an equitable action, founded upon all the equitable circumstances of the case between the parties; and if it appear, from the whole case, that the defendant has in his hands money, which, according to the rules of equity and good conscience, belongs, or ought **[*12]** to be paid, to the plaintiff, he is entitled to recover; and that as a general rule, where money has been received by a defendant under any state of facts which would in a court of equity entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover the money in this action.

"The basis of a common-law action for money had and received is not only the loss occasioned to the plaintiff on account of the payment of the money, but the consequent enrichment of the defendant by reason of having received the same." *Trevor, 338 Mich at 224-225*.

In this case, plaintiff alleged a claim in assumpsit for money had and received on the ground that the GWKDD improperly overcharged Royal Oak contrary to the Drainage Board's resolution. Plaintiff based that alternative claim on its position as Royal Oak's assignee. Plaintiff did not dispute that Royal Oak passed through the alleged overcharges to its water and sewer ratepayers. The trial court ruled that plaintiff, as Royal Oak's assignee, could not maintain the assumpsit claim because Royal Oak suffered no recoverable loss. The trial court did not err in this regard.

Under Michigan law, an assignee **[*13]** stands in the shoes of the assignor and acquires only the same rights as the assignor and remains subject to the same defenses as the assignor. *Coventry Parkhomes Condo Ass'n v Fed Nat'l Mortg Ass'n, 298 Mich App 252, 256-257; 827 NW2d 379 (2012)*. Therefore, as Royal Oak's assignee, plaintiff acquired no more rights than Royal Oak had at the time of the assignment and it remained subject to the same defenses as Royal Oak. In this case, plaintiff sought a refund of the alleged overcharges as Royal Oak's assignee. Royal Oak, however, passed through to its water and sewer ratepayers the GWKDD's charges by incorporating them into the water and sewer rates. Royal Oak suffered no loss because the funds it paid to the GWKDD were recovered from its ratepayers who paid their water and sewer bills. The record reflects that plaintiff conceded at the hearing that Royal Oak did nothing wrong and had authority to charge its ratepayers whatever amount the GWKDD charged Royal Oak, including the alleged overcharges, because Royal Oak was "purely a pass-through." Thus, if the GWKDD overcharged and collected fees from Royal Oak for stormwater disposal, plaintiff can claim no right to recover from the GWKDD because Royal Oak suffered no loss from its payment of the alleged overcharges. Royal Oak passed **[*14]** on the charges and passed on the ratepayers' payments. Royal Oak recouped any excess payments from its water and sewer ratepayers. Royal Oak had no claim against the GWKDD that it had in its possession money which in equity and good conscience belonged to Royal Oak. Royal Oak, therefore, occasioned no compensable loss. *Trevor, 338 Mich at 224-225*; *Hoyt, 158 Mich at 626*. The trial court correctly discerned that Royal Oak had no claim in assumpsit. Consequently, plaintiff failed and could not state a claim in assumpsit.

Plaintiff argues that federal ***antitrust law*** principles articulated in the United States Court of Appeals for the Sixth Circuit's decision in *Oakland Co v Detroit, 866 F2d 839 (CA 6, 1989)* and the Supreme Court's decision in *Illinois Brick Co v Illinois, 431 U.S. 720; 97 S Ct 2061; 52 L Ed 2d 707 (1977)* should be considered and applied in this case. Both of those cases, however, are distinguishable because in *Oakland Co*, the Sixth Circuit addressed whether counties had standing to bring a federal antitrust action and seek treble damages under the Racketeering Influence and Corrupt Organizations Act (RICO), and in *Illinois Brick*, the Supreme Court addressed who could seek recovery under the Clayton Act in an antitrust action. The courts considered who constituted an injured party within the meanings of RICO and the Clayton Act for federal antitrust **[*15]** violation claim purposes. The courts based their decisions on concerns that holding otherwise would lead to the filing of numerous antitrust actions and unmanageable antitrust class actions that presented enormous evidentiary complexities and uncertainties. We do not find the rationale for the courts' decisions applicable in this case. Further, neither case involved an equitable action in assumpsit. Accordingly, we decline to apply federal ***antitrust law*** principles in this case.

Although the ratepayers may have had viable claims against a government entity for the overcharges they allegedly paid,[4] the class members settled and released Royal Oak from any and all liability for refunds of their alleged overpayments. Under *Hoyt*, the right to bring an action for assumpsit must be held by the plaintiff who can establish that the defendant has in its possession money which, in equity and good conscience, belonged to the plaintiff. In this case, plaintiff sued as Royal Oak's assignee for recovery of money paid to the GWKDD. The money plaintiff sought did not belong to Royal Oak, its assignor, but to the ratepayers. Therefore, the trial court did not err by granting the GWKDD summary disposition **[*16]** of plaintiff's claim in assumpsit.[5]

III. GOVERNMENTAL IMMUNITY

Defendant argues that, in the absence of a contract, plaintiff's claims constituted negligence claims subject to government immunity under the Governmental Tort Liability Act (GTLA), *MCL 691.1401 et seq.* Plaintiff counters by asserting that the trial court correctly decided that government immunity did not apply in this case. We agree that the trial court correctly determined this issue.

Under *MCR 2.116(C)(7)*, "[s]ummary disposition may be granted when, among other things, a claim is barred by governmental immunity." *Dybata v Wayne Co, 287 Mich App 635, 637; 791 NW2d 499 (2010)*. "When considering a motion brought under subrule (C)(7), the trial court must consider any affidavits, depositions, admissions, or other documentary evidence submitted by the parties to determine whether there is a genuine issue of material fact precluding summary disposition." *Id.* (citations omitted). "If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of those facts, then the question whether the claim is barred by governmental immunity is an issue of law." *Id. at 637*. Further, this Court reviews de novo the application of governmental immunity. *Id. at 638*.

"The [GTLA] provides 'broad immunity from tort liability to governmental **[*17]** agencies whenever they are engaged in the exercise or discharge of a governmental function.'" *Milot v DOT, 318 Mich App 272, 276; 897 NW2d 248 (2016)*, quoting *Ross v Consumers Power Co (On Rehearing), 420 Mich 567, 595; 363 NW2d 641 (1984)*. There is no dispute that the GWKDD, a unit of Oakland County, a political subdivision of the state of Michigan, is a governmental entity generally immune from tort liability under *MCL 691.1407(1)*. *Milot, 318 Mich App at 276*. This Court explained in *Yellow Freight Sys, Inc v State of Michigan, 231 Mich App 194, 203; 585 NW2d 762 (1998)*, rev'd on other grounds *464 Mich 21; 627 N.W.2d 236 (2001)*, rev'd *537 U.S. 36; 123 S Ct 371; 154 L Ed 2d 377 (2002)*, that "[a]n action in assumpsit for money had and received is not an action in tort." "Therefore, governmental immunity from tort liability under *MCL 691.1407* . . . does not apply." *Id.* Accordingly, we find no merit to defendant's argument that, in the absence of a contract, plaintiff's assumpsit claim should have been construed as a negligence claim barred by governmental immunity. We hold that the trial court did not err in concluding that governmental immunity did not apply in this case.

IV. AMENDED COMPLAINT

Plaintiff also argues that the trial court erred by granting defendant's motion to strike its first amended complaint and by denying its motion for leave to amend under *MCR 2.118(A)(2)* based on futility. We disagree.

We review for an abuse of discretion a trial court's decision to strike a pleading. *Belle Isle Grill Corp v Detroit, 256 Mich App 463, 469; 666 NW2d 271 (2003)*. We also review for an abuse of discretion a trial court's decision **[*18]** regarding a motion for leave to file an amended complaint. *Kostadinovski v Harrington, 321 Mich App 736, 742-743; 909 NW2d 907 (2017)*. An abuse of discretion occurs when the court's decision results in an outcome outside the range of principled outcomes. *Decker v Trux R US, Inc, 307 Mich App 472, 478; 861 NW2d 59 (2014)*. A trial court

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[4] See *Bond v Public Schools of Ann Arbor, 383 Mich 693; 178 NW2d 484 (1970)*.

[5] Defendant also argues that this action improperly imposed against it a certified class from the earlier settled action despite the fact that defendant was not a party to that action. Although defendant raised this issue before the trial court, the trial court did not decide the issue. Therefore, the issue was not preserved for review by this Court and we decline to review it. Further, the issue is not necessary for the disposition of this case. *Fast Air, Inc, 235 Mich App at 549-550*.

abuses its discretion when it makes an error of law. *Kostadinovski, 321 Mich App at 743*. We review de novo a trial court's interpretation of a court rule. *Acorn Investment Co v Mich Basic Prop Ins Ass'n, 495 Mich 338, 348; 852 NW2d 22 (2014)*. "[W]hether a claim for unjust enrichment can be maintained is a question of law" subject to de novo review. *Morris Pumps, 273 Mich App at 193*.

"The principles of statutory construction apply to the interpretation of the Michigan Court Rules." *Decker, 307 Mich App at 479*. We look to "'the plain language of the court rule in order to ascertain its meaning' and the 'intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole.'" *Id.*, quoting *Henry v Dow Chem Co, 484 Mich 483, 495; 772 NW2d 301 (2009)*. "'If the rule's language is plain and unambiguous, then judicial construction is not permitted and the rule must be applied as written.'" *Decker, 307 Mich App at 479*, quoting *Jenson v Puste, 290 Mich App 338, 342; 801 NW2d 639 (2010)*.

In this case, plaintiff filed the complaint on June 20, 2017. In lieu of answering, on August 18, 2017, the GWKDD moved for summary disposition pursuant to *MCR 2.116(C)(7)* and *(C)(8)*. Before responding to the GWKDD's summary disposition motion, plaintiff filed an amended **[*19]** complaint. That prompted the GWKDD to move to strike plaintiff's amended complaint under *MCR 2.115(B)* on the ground that its filing of a motion for summary disposition precluded plaintiff from filing an amended complaint without first obtaining leave from the trial court under *MCR 2.118(B)(2)*. At the hearing on the GWKDD's motion to strike, the trial court held in abeyance its ruling. Nevertheless, the trial court later entered an order granting the GWKDD's motion and striking plaintiff's amended complaint.

MCR 2.118 governs amendment of a party's pleadings. *Ligons v Crittenton Hosp, 490 Mich 61, 80; 803 NW2d 271 (2011)*. *MCR 2.118(A)* provides, in pertinent part:

> (1) A party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party, or within 14 days after serving the pleading if it does not require a responsive pleading.
>
> (2) Except as provided in *subrule (A)(1)*, a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.

MCR 2.118(A)(1) permits a party to "amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party[.]" *Ligons, 490 Mich at 80* (quotation marks and citation omitted). *MCR 2.110(A)* specifies that the term **[*20]** "pleading" includes only a complaint, a cross-complaint, a counterclaim, a third-party complaint, an answer, and a reply to an answer, and states that "[no] other pleading is allowed." "[W]hen a court rule specifically defines a given term, that definition alone controls." *Ligons, 490 Mich at 81* (quotation marks and citation omitted). The GWKDD's motion for summary disposition, therefore, was not a responsive pleading. *Huntington Woods v Ajax Paving Indus, Inc, 179 Mich App 600, 601; 446 NW2d 331 (1989)*. Accordingly, plaintiff's right as a matter of course to amend its complaint under *MCR 2.118(A)(1)* was not triggered by GWKDD filing of its motion for summary disposition of plaintiff's claims in its original complaint. Plaintiff's filing without leave to amend did not comport with the requirements of *MCR 2.118(A)(1)*. The trial court, therefore, did not abuse its discretion by striking plaintiff's improperly filed amended complaint.

The record reflects that plaintiff then moved for leave to amend its complaint to state two claims in assumpsit and to assert a new count for unjust enrichment. Under *MCR 2.118(A)(2)*, "[a] court should freely grant leave to amend a complaint when justice so requires." *Lane v Kindercare Learning Ctrs, Inc, 231 Mich App 689, 696; 588 NW2d 715 (1998)*. In *Lane*, this Court explained:

> Ordinarily, a motion to amend a complaint should be granted, and should be denied only for the following particularized **[*21]** reasons: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, or (5) futility of the amendment.
>
> * * *

> An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim. [*Id. at 697* (citations omitted).]

In this case, the record reflects that the trial court considered plaintiff's proposed amended complaint and determined that the amended allegations and proposed unjust enrichment claim failed to overcome plaintiff's original complaint's deficiencies and failed to state a claim upon which relief could be granted. The trial court concluded that plaintiff's new unjust enrichment claim was futile for the same reasons that plaintiff's assumpsit claim failed.

The equitable right of restitution exists when a person has been unjustly enriched at another person's expense. *Morris Pumps, 273 Mich App at 193*. The law will imply a contract "to prevent unjust enrichment when one party inequitably receives and retains a benefit from another." *Id. at 194*; see also *Belle Isle Grill, 256 Mich App at 478*. To sustain a claim of unjust enrichment, "a plaintiff **[*22]** must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Morris Pumps, 273 Mich App at 195*. "In other words, the law will imply a contract to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Id.*

In this case, plaintiff stood in the shoes of Royal Oak as its assignee. It alleged in its proposed amended complaint that the GWKDD was unjustly enriched by overcharging Royal Oak for the costs of stormwater disposal. Although plaintiff alleged that the GWKDD received a benefit and asserted that it would be unjust for the GWKDD to retain the alleged overcharges, plaintiff cannot establish any inequity resulting to Royal Oak from the GWKDD's retention of the overcharges because Royal Oak passed through to ratepayers the alleged overcharges and recouped from them the amount it allegedly overpaid. While the retention of the alleged overcharges collected by the GWKDD may have resulted in an inequity to the ratepayers, Royal Oak suffered no loss. The record reflects that plaintiff did not specifically allege in its proposed amended **[*23]** complaint that any inequity resulted to Royal Oak. Royal Oak could not state a claim for unjust enrichment under the circumstances presented in this case. Therefore, plaintiff, as Royal Oak's assignee, could not state a claim for unjust enrichment. Because Royal Oak admittedly passed through the charges to its water and sewer ratepayers, the GWKDD was not unjustly enriched at the expense of Royal Oak. *Id. at 195*. Accordingly, plaintiff's proposed unjust enrichment claim suffered from the same defect as its assumpsit claim and the trial court could properly deny plaintiff's motion to amend on the ground of futility. Therefore, the trial court did not abuse its discretion by denying plaintiff's motion for leave to amend its complaint.

Affirmed.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ James Robert Redford

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SC Innovations, Inc. v. Uber Techs., Inc.

United States District Court for the Northern District of California

May 2, 2019, Decided; May 2, 2019, Filed

Case No. 18-cv-07440-JCS

Reporter

2019 U.S. Dist. LEXIS 74620 *; 2019-1 Trade Cas. (CCH) P80,759; 2019 WL 1959493

SC INNOVATIONS, INC., Plaintiff, v. UBER TECHNOLOGIES, INC., et al., Defendants.

Subsequent History: Dismissed by, in part, Without prejudice, Dismissed by, Motion granted by *SC Innovations, Inc. v. Uber Techs., Inc., 434 F. Supp. 3d 782, 2020 U.S. Dist. LEXIS 9848, 2020 WL 353543 (N.D. Cal., Jan. 21, 2020)*

Motion denied by, in part *SC Innovations, Inc. v. Uber Techs., Inc., 2020 U.S. Dist. LEXIS 77397 (N.D. Cal., May 1, 2020)*

Motion granted by *SC Innovations, Inc. v. Uber Techs., Inc., 2021 U.S. Dist. LEXIS 89932 (N.D. Cal., May 11, 2021)*

Core Terms

pricing, cases, taxi, disqualify, disqualification, confidential information, former client, antitrust, ride-hailing, drivers, transportation, competitors, passengers, predatory, representations, confidential, declaration, markets, matters, recoup, substantial relation, unfair competition, circumstances, alleges, parties, advice, losses, loans, former representation, legal issue

Counsel: **[*1]** For SC Innovations, Inc., Plaintiff: Ethan Glass, LEAD ATTORNEY, Quinn Emanuel Urquhart & Sullivan, LLP, Washington, DC; Robert P. Feldman, LEAD ATTORNEY, Quinn Emanuel Urquhart & Sullivan, LLP, Redwood Shores, CA; Claude M. Stern, Quinn Emanuel Urquhart & Sullivan, LLP, Redwood Shores, CA; Michael Domenic Bonanno, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan, LLP, Washington, DC.

For Uber Technologies, Inc., Rasier, LLC, Rasier-CA, LLC, Rasier-PA, LLC, Rasier-NY, LLC, Uber USA, LLC, Rasier-DC, LLC, Defendants: Daniel Glen Swanson, Theodore J. Boutrous, Jr., LEAD ATTORNEYS, Gibson, Dunn & Crutcher LLP, Los Angeles, CA; Cynthia Richman, PRO HAC VICE, Gibson Dunn and Crutcher LLP, Washington, DC.

Judges: JOSEPH C. SPERO, Chief United States Magistrate Judge.

Opinion by: JOSEPH C. SPERO

Opinion

ORDER REGARDING MOTION TO DISQUALIFY COUNSEL

Re: Dkt. No. 30

I. INTRODUCTION

Plaintiff SC Innovations, Inc. ("Sidecar"[1]) brings this action against Defendants Uber Technologies, Inc. and several of its subsidiaries (collectively, "Uber") asserting claims under the *Sherman Act* and *California's Unfair Practices Act*. Sidecar is represented by the law firm Quinn Emanuel Urquhart & Sullivan, LLP ("Quinn Emanuel"), which previously represented **[*2]** Uber from 2012 to 2016, including the defense of several antitrust cases. Uber now moves to disqualify Quinn Emanuel from representing Sidecar. The Court held a hearing on April 26, 2019. For the reasons discussed below, Uber's motion is GRANTED.[2]

II. BACKGROUND

A. Sidecar's Complaint

Sidecar and Uber both offered smartphone applications allowing passengers to arrange for transportation, or to use the term favored by the parties, "ride-hailing apps." Compl. (dkt. 1) ¶¶ 2-3. Uber entered this market first in 2009, originally offering only rides with licensed limousine drivers. *Id.* ¶ 2. Sidecar's competing product, which debuted in 2012, allowed drivers to use their personal vehicles without special licensing. *Id.* ¶ 3. Uber offered a similar product under the name "UberX" beginning in 2013. *Id.* ¶ 5. Sidecar alleges that Uber was able to dominate the market and drive Sidecar out of business by subsidizing both its payments to drivers and the fares it charged passengers, such that "the average price paid by a passenger was well below Uber's average variable cost for completing a transaction on its platform," with the intention of raising prices to recoup those losses after competitors exited **[*3]** the market. *Id.* ¶¶ 6-7. According to Sidecar, Uber in fact "raised prices to supra-competitive levels" after Sidecar went out of business in December of 2015. *Id.* ¶¶ 92-93. Since Sidecar left the market for ride-hailing apps, the only two remaining participants have been Uber and Lyft, Inc. *Id.* ¶ 110.

Sidecar also alleges that Uber maliciously disrupted the operations of its competitors, including Sidecar, by submitting fake requests for rides through competitors' services and canceling them before drivers reached the locations where they expected to pick up passengers, thus "inundating competitors with fraudulent ride requests," "using fraudulently requested trips as an opportunity to convince drivers to work exclusively with Uber instead of its competitors," and frustrating competitors' passengers with longer wait times. *Id.* ¶¶ 9-10, 101-08. Sidecar contends that such conduct caused both passengers and drivers to switch from Sidecar's product to Uber. *Id.* ¶ 104.

Based on the alleged conduct described above, Sidecar asserts claims for monopolization under the Sherman Act, *id.* ¶¶ 116-45, attempted monopolization under the Sherman Act, *id.* ¶¶ 146-54, and sales below cost for the purpose **[*4]** of injuring competitors under the California Unfair Practices Act, *id.* ¶¶ 155-61. Sidecar alleges that the relevant markets for its claims are the cities in which it formerly operated: "San Francisco, Austin, Los Angeles, Chicago, Philadelphia, Washington DC, New York, Seattle, San Diego, San Jose, and Boston." *Id.* ¶ 61.

B. Quinn Emanuel's Previous Representations of Uber

Uber relies primarily on several cases in which Quinn Emanuel defended Uber from claims by local taxi operators. Although Uber cites at least nine such cases, it addresses only four of them in detail. *See* Mot. (dkt. 30) at 4-7, 12-19 & nn.6, 7; *see also* Yoo Decl. (dkt. 30-2) ¶ 9 ("I am informed that Uber's records reflect that Quinn Emanuel

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[1] SC Innovations is the assignee of all causes of action of Sidecar Technologies, Inc., a defunct former competitor of Uber. This order, like Sidecar's complaint, uses the term "Sidecar" to refer to both SC Innovations and Sidecar Technologies.

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

represented Uber in approximately 16 U.S. lawsuits that alleges violations of antitrust and unfair competition laws, as well as a litigation matter in Germany."). Quinn Emanuel ceased representing Uber in 2016 due to a dispute regarding fee structures. Allen Decl. (dkt. 30-4) ¶ 12.

In *Yellow Group LLC v. Uber Technologies, Inc.*, No. 12-cv-7967 (N.D. Ill.), the plaintiff Chicago-area taxi and limousine operators alleged that Uber wrongfully implied a partnership with the plaintiffs **[*5]** by dispatching vehicles bearing the plaintiffs' colors and trademarks, violated ordinances granting taxis the exclusive right to respond to street hails, violated ordinances requiring flat rates for livery transportation, exceeded the rates permitted for taxi services, and made false representations regarding the quality of its services, among other claims. *See generally Yellow Group*, ECF Doc. No. 1 (Compl.). The *Yellow Group* plaintiffs initially brought claims under the *Lanham Act*, the *Illinois Deceptive Trade Practices Act*, and the *Illinois Consumer Fraud and Deceptive Business Practices Act*, as well as a claim for tortious interference with contractual relations. *Id.* ¶¶ 86-111. After Uber, represented by Stephen Swedlow[3] of Quinn Emanuel, moved to dismiss, the plaintiffs filed an amended complaint based on similar allegations, and after that complaint was dismissed in part, they filed a second amended complaint again asserting similar claims. *See generally* Glass Decl. (dkt. 32-3) Ex. B (*Yellow Group* 1st Am. Compl.); *Yellow Group*, ECF Doc. No. 77 (2d Am. Compl.). The plaintiffs voluntarily dismissed their complaint in 2015. *Yellow Group*, ECF Doc. No. 138.

Salle Yoo, who was **[*6]** Uber's only in-house attorney at the time the *Yellow Group* case was filed, states that it was the first case naming Uber as a defendant and that Uber retained Quinn Emanuel with the expectation that Quinn Emanuel "could defend potentially similar cases filed elsewhere," "provide advice on compliance with state and federal antitrust and unfair competition laws," and serve as "an important strategic partner to Uber in these matters." Yoo Decl. ¶¶ 5-6. According to Yoo, Quinn Emanuel initially served "as Uber's primary outside litigation counsel and later as a member of [Uber's] 'Preferred Counsel' program," during which time it "advised Uber on many of [Uber's] most sensitive and high-profile litigation matters and legal issues." *Id.* ¶ 7. Yoo states that Uber sought antitrust compliance advice from attorneys at Quinn Emanuel, including managing partner John Quinn, and that Uber and Quinn Emanuel's collaborative "analysis of competitors and the competitive landscape in various geographic areas, market conditions, pricing, confidential business strategies, and confidential data" included consultation with Swedlow regarding proposed price changes in the Chicago market during the *Yellow **[*7]** Group* litigation. *Id.* ¶¶ 8, 10. Quinn disputes having provided antitrust compliance advice to Uber, Quinn Decl. (dkt. 32-1) ¶ 6, and Swedlow states that Quinn Emanuel was only involved in discussions of "how best to present the 'split' of the total cost to the ride between the driver and Uber," not "how much Uber charged in total for transportation to riders or the competitive price for Ride-Hailing App services," Swedlow Decl. (dkt. 32-2) ¶¶ 17-18. Uber's former in-house counsel Jennifer Ghaussy states that Quinn Emanuel attorneys reviewed confidential discovery documents regarding the Chicago market during the *Yellow Group* case. Ghaussy Decl. (dkt. 30-3) ¶ 11.

In a similarly named but separate case filed in 2014, *Yellow Cab Co. v. Uber Technologies, Inc.*,[4] Maryland taxi operators asserted antitrust, unfair competition, and tortious interference claims against Uber under Maryland law, alleging that Uber imposed uniform rates both above and below the allowed taxi meter rates, depending on the tier of service. *See* Glass Decl. Ex. T (*Yellow Cab* Compl.). Uber removed the case to federal court, the plaintiffs successfully moved to remand to Maryland state court, and the parties ultimately **[*8]** stipulated to dismiss the case. *See* Glass Decl. Ex. S (*Yellow Cab* state court docket sheet). In its unsuccessful opposition to the plaintiffs' motion to remand, Uber—represented by Quinn Emanuel attorneys Stephen Swedlow and Ben O'Neil, among others—argued that several individual drivers named as defendants were fraudulently joined because the plaintiffs could not state an antitrust claim against them based on the test for predatory pricing under the Sherman Act. *Yellow Cab*, No. 1:14-cv-02764-RDB, ECF Doc. No. 18 at 15 (D. Md. Oct. 17, 2014) (citing *Brooke Grp. Ltd. v.*

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[3] Swedlow was "the primary Quinn Emanuel partner who managed [the] firm's work for Uber." Swedlow Decl. (dkt. 32-2) ¶ 4; *see also* Quinn Decl. (dkt. 32-1) ¶ 5. According to Uber's in-house attorneys, Swedlow and Quinn Emanuel touted their familiarity with "every nuance of Uber's business." Ghaussy Decl. (dkt. 30-3) ¶ 19; Allen Reply Decl. (dkt. 33-1) ¶ 7.

[4] This case was assigned case number 24C14004064 in Maryland Circuit Court for Baltimore City where it was initially filed, and case number 1:14-cv-02764-RDB upon removal to the U.S. District Court for the District of Maryland.

Brown & Williamson Tobacco Corp., 509 U.S. 209, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993), for the rule that "a plaintiff competitor must show defendant had a reasonable probability of later recouping losses from predatory pricing in the form of monopoly profits"). Stephen Swedlow's declaration does not address the *Yellow Cab* case, nor does the declaration of any other Quinn Emanuel attorney, with the exception that Ethan Glass's declaration attaches documents publicly filed in the case. *See* Swedlow Decl.; Quinn Decl.; Feldman Decl. (dkt. 32-4); Stern Decl. (dkt. 32-5); Bonanno Decl. (dkt. 32-6); Glass Decl. Exs. S—T. Sidecar has not filed a declaration by Ben O'Neil, a Quinn Emanuel attorney whose signature appears on most **[*9]** if not all of Uber's filings in *Yellow Cab*.

In *Boston Cab Dispatch v. Uber Technologies, Inc.*, taxi dispatchers and operators in the Boston area sued Uber for violations of the Lanham Act, Massachusetts unfair competition laws, and the *Racketeer Influenced and Corrupt Organizations ("RICO") Act*, based primarily on allegations that Uber provided de facto taxi dispatch services without complying with the local regulatory scheme for such services. *See* Glass Decl. Ex. L (*Boston Cab* Compl.). The parties litigated a motion to dismiss (filed by an attorney at Littler Mendelson, P.C., with Swedlow and other Quinn Emanuel attorneys listed as "of counsel"), a motion to compel brought by Uber and signed by Swedlow, and multiple motions to compel brought by the plaintiffs. Glass Decl. Exs. M—R. Discovery included issues related to Uber's pricing strategy in the Boston area, and Quinn Emanuel defended a *Rule 30(b)(6)* deposition of Uber addressing topics including revenue, pricing, and the competitive landscape in Boston. Ghaussy Decl. ¶ 17. As with the *Yellow Group* case, Swedlow states that to the best of his recollection, any discussion of pricing only concerned the characterization of how Uber divided riders' **[*10]** payments between itself and drivers. Swedlow Decl. ¶¶ 17-18. Swedlow also states that although Quinn Emanuel produced documents related to Uber's revenue in certain geographic markets to the plaintiffs in some of the taxi cases, Quinn Emanuel merely "acted as a conduit for information regarding revenue" that Uber provided for production, without itself analyzing such information or providing advice related to it. *Id.* ¶¶ 14-15.

Finally, in *Greater Houston Transportation Company v. Uber Technologies*, No. 14-941 (S.D. Tex.), Texas taxi operators accused Uber of violating local regulations in Houston and San Antonio governing passenger transportation for hire, and brought claims under the RICO Act, the Lanham Act, and Texas unfair competition law, as well as a claim for declaratory relief. Glass Decl. Ex. C (*Greater Houston* Compl.). The parties litigated the case through a motion for summary judgment, which some of the plaintiffs' claims survived, and settled less than a week before trial was set to begin in February of 2016. *See* Glass Decl. Exs. D—K. Quinn Emanuel represented Uber, and Uber's former in-house counsel Ghaussy states that Quinn Emanuel received confidential information regarding **[*11]** pricing and other topics in the course of discovery, including in preparing for and defending a *Rule 30(b)(6)* deposition. Ghaussy Decl. ¶ 13. Swedlow states in his declaration that, to the best of his recollection, Quinn Emanuel attorneys were not exposed to "how competitive pricing was determined" in the course of preparing for the *Rule 30(b)(6)* deposition, and that Quinn Emanuel served only as a "conduit" in producing revenue information during discovery. Swedlow Decl. ¶¶ 14-15, 17.

Swedlow's declaration also includes a number of relatively narrow and specific denials "to the best of [his] recollection," such as that "Quinn Emanuel did not provide Uber with legal advice regarding whether Uber's market share indicates it has market power in the market for ride-hailing software" or "whether Uber exercised market power and harmed competition in the market for ride-hailing software by raising prices starting in 2016," as well as the broader assertion, again to the best of Swedlow's recollection, that "Quinn Emanuel was not exposed to confidential information concerning Uber's pricing, costs, or competitive strategies that would be material to the issues raised in the current Sidecar matter." Swedlow Decl. ¶¶ 7-13. **[*12]**

Aside from the litigation matters discussed above, Uber also argues that Quinn Emanuel should be disqualified based on its representation of Uber in certain non-litigation matters, as well as a current Quinn Emanuel representation that, Uber cryptically asserts, grants Quinn Emanuel access to relevant confidential information but cannot be disclosed on the record in this case. *See* Mot. at 8-9, 21-23. Because, as discussed below, Quinn Emanuel's work for Uber in the *Yellow Cab* taxi litigation matter is sufficient to require disqualification, this order does not address in detail the non-litigation matters cited by Uber or the parties' arguments concerning them.

III. ANALYSIS

A. Legal Standard

This Court's local rules require attorneys to "comply with the standards of professional conduct required of members of the State Bar of California." Civ. L.R. 11-4(a)(1). The Ninth Circuit has recognized that, where a district court has adopted such rules, "California law governs questions of conflicts of interest and disqualification." Radcliffe v. Hernandez, 818 F.3d 537, 541 (9th Cir. 2016). Rule 3-310(E) of the State Bar's Rules of Professional Conduct provides that an attorney "shall not, without the informed written consent of the client or former client, accept employment adverse **[*13]** to the client or former client where, by reason of the representation of the client or former client, the [attorney] has obtained confidential information material to the employment."

"Where the potential conflict is one that arises from the *successive* representation of clients with potentially adverse interests, [California] courts have recognized that the chief fiduciary value jeopardized is that of client *confidentiality*." Flatt v. Superior Court, 9 Cal. 4th 275, 283, 36 Cal. Rptr. 2d 537, 885 P.2d 950 (1994). There is no "'lifetime prohibition against representation adverse to a former client.'" Khani v. Ford Motor Co., 215 Cal. App. 4th 916, 921, 155 Cal. Rptr. 3d 532 (2013) (quoting Farris v. Fireman's Fund Ins. Co., 119 Cal. App. 4th 671, 680, 14 Cal. Rptr. 3d 618 (2004)); *see also* TWiT, LLC v. Twitter Inc., No. 18-cv-00341-JSC, 2018 U.S. Dist. LEXIS 92321, 2018 WL 2470942, at *5 (N.D. Cal. June 1, 2018). Nor does an "attorney's acquisition of general information about the former client's 'overall structure and practices,'" "'litigation philosophy' or 'key decision makers'" *necessarily* disqualify the attorney from future adverse representations, although such knowledge may be grounds for disqualification where the information at issue is "'found to be "material"—i.e., directly in issue or of critical importance—in the second representation.'" Khani, 215 Cal. App. 4th at 921 (quoting Farris, 119 Cal. App. 4th at 680).

A party that has not consented to a conflict of interest may disqualify its former counsel from representing an adversary in one of two ways. First, counsel **[*14]** will be disqualified if the former client establishes that "the former attorney actually possesses [material] confidential information adverse to the former client." H. F. Ahmanson & Co. v. Salomon Bros., Inc., 229 Cal. App. 3d 1445, 1452, 280 Cal. Rptr. 614 (1991). Confidential information is "material," and thus disqualifying, if it is "directly at issue in, or ha[s] some critical importance to, the second representation." Farris, 119 Cal. App. 4th 671, 680, 14 Cal. Rptr. 3d 618 (2004). As an alternative, "it is well settled actual possession of confidential information need not be proved in order to disqualify the former attorney," and "it is enough to show a 'substantial relationship' between the former and current representation." H. F. Ahmanson, 229 Cal. App. 3d at 1452. This "substantial relationship" test is rooted in the need to avoid even the "appearance of the possibility[] that the attorney may have received confidential information during the prior representation," as well as in the expectation "that the lawyer will use every skill, expend every energy, and tap every legitimate resource in the exercise of independent professional judgment on behalf of the client." Trone v. Smith, 621 F.2d 994, 998-99 (9th Cir. 1980).

Whether there is a substantial relationship for the purpose of this test "turns on two variables: (1) the relationship between the legal problem involved in the former representation and the legal problem **[*15]** involved in the current representation, and (2) the relationship between the attorney and the former client with respect to the legal problem involved in the former representation." Jessen v. Hartford Cas. Ins. Co., 111 Cal. App. 4th 698, 709, 3 Cal. Rptr. 3d 877 (2003). Where matters "turn on the same issue," they are substantially related. *See* Farris, 119 Cal. App. 4th at 684. In other words, an attorney will be disqualified where the available record "supports a rational conclusion that information material to the evaluation, prosecution, settlement or accomplishment of the former representation given its factual and legal issues is also material to the evaluation, prosecution, settlement or accomplishment of the current representation given its factual and legal issues." Jessen, 111 Cal. App. 4th at 713.

As part of this test, "courts ask whether confidential information material to the current dispute would normally have been imparted to the attorney by virtue of the nature of the former representation." H. F. Ahmanson, 229 Cal. App.

3d 1445, 1454, 280 Cal. Rptr. 614 (1991). Nevertheless, the inquiry into the actual attorney-client relationship under the second prong of the test is not searching: so long as "the relationship between the attorney and the former client is shown to have been direct—that is, where the lawyer was personally involved in providing legal advice and services to the former **[*16]** client—then it must be presumed that confidential information has passed to the attorney and there cannot be any delving into the specifics of the communications between the attorney and the former client in an effort to show that the attorney did or did not receive confidential information during the course of that relationship." Jessen, 111 Cal. App. 4th at 709. The precise nature of the former attorney-client relationship only comes into play as a factor to be balanced against the similarity of issues if the relationship "was not direct." City & Cty. of San Francisco v. Cobra Sols., Inc., 38 Cal. 4th 839, 847, 43 Cal. Rptr. 3d 771, 135 P.3d 20 (2006).

"Where the requisite substantial relationship between the subjects of the prior and the current representations can be demonstrated, access to confidential information by the attorney in the course of the first representation (relevant, by definition, to the second representation) is *presumed* and disqualification of the attorney's representation of the second client is mandatory; indeed, the disqualification extends vicariously to the entire firm." Flatt, 9 Cal. 4th at 283. "[D]isqualification of the firm is required, even if the firm erects an ethical wall around the attorney who possesses the opponent's confidences . . . ." Pound v. DeMera DeMera Cameron, 135 Cal. App. 4th 70, 36 Cal. Rptr. 3d 922, (2005) (citing Henriksen v. Great Am. Savings & Loan, 11 Cal. App. 4th 109, 14 Cal. Rptr. 2d 184 (1992)); *see also, e.g.,* Genentech, Inc. v. Sanofi-Aventis Deutschland GMBH, No. C 08-04909 SI, 2010 U.S. Dist. LEXIS 35867, 2010 WL 1136478, at *7 (N.D. Cal. Mar. 20, 2010) **[*17]** ("Further, California law rejects the use of ethical walls to prevent disqualification by imputed conflicts."); Meza v. H. Muehlstein & Co., 176 Cal. App. 4th 969, 978, 98 Cal. Rptr. 3d 422 (2009) ("[A]n 'ethical wall" between an attorney with confidential information and his or her firm will generally not preclude the disqualification of the firm. . . . Instead, there is a presumption that each member of the firm has imputed knowledge of the confidential information."); *but see* Kirk v. First Am. Title Ins. Co., 183 Cal. App. 4th 776, 108 Cal. Rptr. 3d 620 (2010) (discussing circumstances where an ethical wall may be sufficient to avoid imputed conflicts from attorneys moving between law firms, a circumstance not at issue in the present case).[5]

The Ninth Circuit has noted—albeit in the context of disqualification where an attorney may serve as a witness at trial, not disqualification based on adversity to a former client—that "disqualification motions should be subjected to 'particularly strict judicial scrutiny'" due to the potential for tactical abuse. Optyl Eyewear Fashion Int'l Corp. v. Style Companies, Ltd., 760 F.2d 1045, 1050 (9th Cir. 1985). Nevertheless, in determining whether to disqualify counsel based on a prior representation, "the paramount concern must be the preservation of public trust both in the scrupulous administration of justice and in the integrity of the bar." State Farm Mut. Auto. Ins. Co. v. Fed. Ins. Co., 72 Cal. App. 4th 1422, 1428, 86 Cal. Rptr. 2d 20 (1999) (citing Comden v. Superior Court, 20 Cal. 3d 906, 915, 145 Cal. Rptr. 9, 576 P.2d 971 (1978)); *see also* People ex rel. Dep't of Corps. v. SpeeDee Oil Change Sys., Inc., 20 Cal. 4th 1135, 1145, 86 Cal. Rptr. 2d 816, 980 P.2d 371 (1999).

B. Judge [*18] White's Decision Regarding *DeSoto Cab*

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[5] Even if California law permitted the use of ethical walls to limit conflicts from being imputed to lawyers working at the same firm throughout both representations, which it does not appear to, Quinn Emanuel's establishment of such a wall at the recent outset of its representation of Sidecar would not be effective, because no such wall was in place over the years in which it represented Uber, and there is no reason to believe that the attorneys who worked on those matters would have had any reason at that time to hesitate before sharing information with their colleagues. The scope of Quinn Emanuel's ethical wall is also unclear, with no information in the record addressing, for example, any measures put in place to prevent access to documents or efforts to determine whether attorneys other than those who "performed work for Uber" obtained information before the wall was imposed. *See, e.g.*, Glass Decl. ¶ 27 ("The wall has prevented me from having any substantive communication regarding this case or Quinn Emanuel's prior work for Uber with anyone at Quinn Emanuel who performed work for Uber."); *cf.* Kirk, 183 Cal. App. 4th at 810-11 ("The typical elements of an ethical wall are: [1] physical, geographic, and departmental separation of attorneys; [2] prohibitions against and sanctions for discussing confidential matters; [3] established rules and procedures preventing access to confidential information and files; [4] procedures preventing a disqualified attorney from sharing in the profits from the representation; and [5] continuing education in professional responsibility." (citation omitted)).

As a starting point, the Court rejects Sidecar's argument that the present motion is informed in any way by Judge White's decision that this case is not related to another case between Uber and local taxi companies, *DeSoto Cab Co. v. Uber Techs, Inc.*, No. 16-cv-06385-JSW (N.D. Cal.). *See* Opp'n (dkt. 32) at 22. Under this Court's local rules, cases are related only if: "(1) The actions concern substantially the same parties, property, transaction or event; *and* (2) It appears likely that there will be an unduly burdensome duplication of labor and expense or conflicting results if the cases are conducted before different Judges." Civ. *L.R. 3-12(a)* (emphasis added). Neither element of that test is the same as the test for whether cases are "substantially related" for the purpose of disqualification as discussed above. Moreover, Uber has not argued that any connection between this case and the *DeSoto Cab* case, which does not involve Quinn Emanuel, would be grounds for disqualification. The decision not to find the cases related is irrelevant to the issue at hand.

C. Substantial Relationship to Adverse Representations

Sidecar's opposition brief makes much of the distinction **[*19]** between ride-hailing apps and "transportation companies," arguing that this case does not materially overlap with Quinn Emanuel's previous representations of Uber because all of those cases involved litigation with traditional taxi companies, while this case is between two ride-hailing companies that—at least nominally[6]—do not themselves provide transportation. According to Sidecar, this case "involves different markets, different facts, different claims, different statutes, and different legal theories than those at issue in the taxicab cases." Opp'n at 11.

Sidecar analogizes this case to the Eastern District of California's decision in *Foster Poultry Farms v. ConAgra Foods Refrigerated Foods Co., No. F 04-5810 AWI LJO, 2005 U.S. Dist. LEXIS 39648, 2005 WL 2319186 (E.D. Cal. Sept. 22, 2005)*. Opp'n at 11-12. In that case, the court affirmed a magistrate judge's decision denying a motion to disqualify counsel from representing plaintiff Foster Poultry in an antitrust case involving "the market for browned and smoked turkey," despite counsel having previously represented defendant ConAgra in a different antitrust case concerning the market for chicken. *Foster Poultry, 2005 U.S. Dist. LEXIS 39648, 2005 WL 2319186, at *2, *7*. "The Magistrate Judge determined as a factual matter that ConAgra neither provided [counsel] with detailed information **[*20]** about the turkey market nor gave it information that would be pertinent in determining whether the various chicken businesses impacted the turkey businesses under relevant market analysis." *2005 U.S. Dist. LEXIS 39648, [WL] at *9*. Sidecar argues that, just as the chicken and turkey markets were distinct in *Foster Poultry*, the taxi market asserted in the earlier cases is separate from the ride-hailing market asserted in this case. *See* Opp'n at 12 ("Ride-Hailing Apps like Uber do not offer or provide the transportation of persons by motor vehicle or carry passengers.").

Unlike in *Foster Poultry*, however, this case and the taxi cases all relate to the same services provided by Uber, even if the competitors might be in different markets. Regardless of whether Sidecar is correct as to how the market for those operations should be defined, the earlier cases required at least some degree of discovery into and analysis of the same Uber operations at issue in this case—the provision or facilitation of ride-hailing for passenger transportation. That remains true even if Sidecar is correct that Uber did not participate in the same markets as the taxi companies that previously sued it. *Foster Poultry* might be on point if, say, earlier **[*21]** cases addressed Uber's "Uber Eats" food delivery service while the current case addressed its passenger services.[7] With all of the cases at issue addressing the same class of Uber products, however, *Foster Poultry* has little bearing on this case. *Cf. also* *Human Longevity, Inc. v. J. Craig Venter Inst., No. 18cv1656-WQH-LL, 2018 U.S. Dist. LEXIS 191638,*

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[6] The nature of such companies' business has been and continues to be widely litigated in, for example, disputes regarding drivers' status as employees or independent contractors. The Court need not and does not reach such questions on the present motion.

[7] Conversely, the circumstances of this case might be analogous to a counterfactual version of *Foster Poultry* where the company only sold turkey but had been sued previously by a chicken seller who argued that the two products were part of the same market. If that had been the case, the Eastern District likely would have found the first lawsuit, concerning both chicken and turkey, to be substantially related to a subsequent lawsuit concerning only turkey.

2018 WL 5840045, at *6 (S.D. Cal. Nov. 8, 2018) (declining to disqualify a law firm from defending a client in a trade secrets case where it had previously opposed the same party in another trade secrets case involving different types of information, a different former employee with a different position, and a different alleged method of misappropriation). Sidecar's assertion that the taxi cases "had nothing to do with Ride-Hailing Apps," Opp'n at 16, is incorrect, because the cases related to Uber.

That is not the end of the inquiry. As Uber correctly notes, many of the claims at issue in the taxi cases, such as claims for false advertising and failure to comply with local taxi regulations, do not directly relate to the subject matter of this case. *See, e.g.*, Opp'n at 12-14. To the extent that Quinn Emanuel would have been called upon to litigate whether, for example, Uber was required to obtain taxi medallions **[*22]** for its drivers, or whether Uber's advertising regarding its drivers' background checks was accurate, such issues do not substantially overlap with the predatory pricing and tortious interference claims here. At least one of the prior cases, however, bears a sufficient resemblance to the claims at issue here to warrant concern.

In *Yellow Cab*, Maryland taxi operators alleged, among other claims and theories, that Uber violated Maryland ***antitrust law*** by setting "uniform prices so far below the market rate as to constitute illegal predatory pricing with which Plaintiffs . . . are unable to compete." Glass Decl. Ex. T ¶ 110. Sidecar's first argument against disqualification based on *Yellow Cab* is that Quinn Emanuel had only limited involvement because the case only lasted slightly over a year before voluntary dismissal and Uber never responded to the complaint. Opp'n at 16-17. But while the extent of an attorney's involvement with a case may be relevant in some circumstances, that factor only comes into play "[w]hen the attorney's contact with the prior client was not direct." *Cobra Sols., 38 Cal. 4th at 847*; *see also* *Jessen, 111 Cal. App. 4th at 709*. Quinn Emanuel appeared as Uber's lead counsel in *Yellow Cab* and performed substantive work on Uber's **[*23]** behalf, including removing the case to federal court, filing an unsuccessful opposition to the plaintiffs' motion to remand, and preparing to file a motion to dismiss. *See, e.g.*, Glass Decl. Ex. S; Allen Reply Decl. (dkt. 33-1) ¶ 9. Sidecar cites no case where the factor addressing the nature of the attorney-client relationship prevented disqualification for a law firm that served as the former client's lead counsel in the earlier representation at issue.

Somewhat similarly, Sidecar asserts that "Quinn Emanuel's lack of exposure to [material] confidential information in the *Yellow Cab* engagement . . . is confirmed by the conspicuous absence of any such claim from Uber's declarants." Opp'n at 17. But "the former client need not prove that the attorney possesses actual confidential information" under the "substantial relationship" test. *Cobra Sols., Inc., 38 Cal. 4th at 847*. It is enough that the former and current matters are substantially similar, and that the attorney had a direct relationship with the former client, with no "'inquiry into the actual state of the lawyer's knowledge' acquired during the lawyers' representation of the former client." *Jessen, 111 Cal. App. 4th at 710-11* (quoting *Ahmanson, 229 Cal. App. 3d at 1453*).

Sidecar also argues that the theory of predatory pricing asserted **[*24]** in *Yellow Cab* is distinct from Sidecar's Sherman Act predatory pricing claim here, because unlike the Maryland plaintiffs' claim based on Uber undercutting regulated taxi fares, the Sherman Act requires a competitor bringing such a claim to show that the defendant set a price below the defendant's own costs and posed a dangerous threat of recouping that loss through higher prices after market consolidation. Opp'n at 17-18 (citing *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-24, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993))*. As Uber notes in its reply, however, Quinn Emanuel itself specifically argued on behalf of Uber that the Maryland plaintiffs were required to show antitrust injury as that term is defined under federal law, as well as market power as defined in *Brooke Group*, including a "reasonable probability of later recouping losses from predatory pricing in the form of monopoly profits." *Yellow Cab*, ECF Doc. No. 18 (Opp'n to Remand) at 14-15;[8] *see* Reply (dkt. 33) at 6-7. Uber's brief in *Yellow Cab*, authored by Quinn

[8] As noted above, Quinn Emanuel presented this argument in an unsuccessful effort to establish diversity jurisdiction by showing that certain individual driver defendants were fraudulently joined. The District of Maryland held that Uber had not established fraudulent joinder because the plaintiffs had met their very low burden to show "a 'glimmer of hope' that their price-fixing claim [would] succeed." *The Yellow Cab Co. v. Uber Techs., Inc., No. RDB-14-2764, 2015 U.S. Dist. LEXIS 109417, 2015 WL 4987653, at *5 (D. Md. Aug. 19, 2015)*. The court did not contradict Quinn Emanuel's position that the plaintiffs' claims required antitrust injury, market power, and a danger of recouping losses through later price increases. *See id.*

Emanuel, quoted *Brooke Group* for the proposition that "'The plaintiff must demonstrate that' the predators will 'obtain enough market power to set higher than competitive prices, and then sustain those prices long enough to earn in excess profits what they **[*25]** earlier gave up in *below-cost prices*.'" *Yellow Cab*, ECF Doc. No. 18 (Opp'n to Remand) at 15 (quoting *Brooke Grp., 509 U.S. at 225*) (emphasis added).

Accordingly, at least in Quinn Emanuel and Uber's view at the time—presumably the most relevant perspective from which to determine the expected scope of attorney-client communications—claims at issue in the Maryland case turned on the issue of whether Uber could be expected to recoup its losses from offering low, purportedly below-cost predatory prices by raising its prices after obtaining a dominant market position. The plaintiffs in that case also alleged that such an outcome was likely. Glass Decl. Ex. T (*Yellow Cab* Compl.) ¶ 116(b) (alleging that "the Uber Rates [will] become unaffordable even for consumers of average means" after Uber "forces taxicab companies out of the market"). Sidecar alleges similarly in this case, as it must to support a predatory pricing claim under the Sherman Act. Compl. ¶¶ 134-36 (alleging that "[a]fter Sidecar exited the market [due to predatory pricing], Uber imposed price increases on Passengers" and reduced payments to drivers such that it was "likely to recoup the losses it sustained"). **[*26]**

The question of whether Uber set below-cost prices and employed a strategy in which it expected to recoup losses by raising prices after establishing a dominant position in the market constitutes at least one issue material to both the claims at issue in *Yellow Cab* and those asserted by Sidecar here. Uber argues that the markets in the two cases differ because this case concerns ride-hailing apps while *Yellow Cab* concerned taxis, but both cases implicate the same prices offered by Uber to customers seeking transportation. Moreover, the scope of the market is itself a common material issue—whether Uber competed against traditional transportation companies would have been a central dispute of *Yellow Cab* had the case proceeded further, and might well be at issue in defining the relevant market for this case. As counsel for Uber noted at the hearing on the present motion, the software-only market definition on which Sidecar relies to distinguish *Yellow Cab* was a legal strategy that Quinn Emanuel pioneered for Uber in the years in which it served as Uber's litigation counsel.

While certain other aspects of the claims differ, "[t]he substantial relationship test does not require that the issues **[*27]** in the two representations be identical." *Trone, 621 F.2d at 1000*. The Court concludes that the two cases are substantially related, and that Quinn Emanuel must be disqualified. *See* *Jessen, 111 Cal. App. 4th at 713* ("[S]uccessive representations will be 'substantially related' when . . . information material to the evaluation, prosecution, settlement or accomplishment of the former representation given its factual and legal issues is also material to the evaluation, prosecution, settlement or accomplishment of the current representation . . . .").[9]

Other cases on which Sidecar primarily relies are not analogous to the present circumstances. In *TWiT, LLC v. Twitter Inc.*, Judge Corley denied a motion to disqualify where the law firm Durie Tangri, serving as defense counsel in a trademark dispute brought by TWiT, had previously advised TWiT in connection with a third party's threat of patent litigation, and "[a]ny confidential communications Durie Tangri would have had with [TWiT] regarding the patent litigation threat would be immaterial to the issues in [the trademark] case." *TWiT, LLC v. Twitter Inc., No. 18-cv-00341-JSC, 2018 U.S. Dist. LEXIS 92321, 2018 WL 2470942, at *4 (N.D. Cal. June 1, 2018)*. That case stands for the noncontroversial rule that familiarity with a former client's **[*28]** approach to litigation and similarly general knowledge is not disqualifying without a showing that such knowledge is specifically material to the new adverse representation. *See* *2018 U.S. Dist. LEXIS 92321, [WL] at *5-6*. Similarly, in a case where the Central District of

[9] Other aspects of Quinn Emanuel's past representations of Uber also raise concern. As one example, it seems likely that the revenue information disclosed to Quinn Emanuel in the *Boston Cab* and *Greater Houston* cases would be material to the present antitrust claims concerning the same geographic markets, and Quinn Emanuel cites no authority adopting its "conduit" theory of excusing confidential information actually disclosed to counsel so long as the attorneys who received it state that they did not "analyze" such information or provide advice. *See* Swedlow Decl. ¶¶ 14-15; Ghaussy Decl. ¶ 16. The Court also hesitates to allow attorney declarations attesting to only a limited exchange of information "[t]o the best of [the attorney's] recollection" to trump a former client's declaration that the attorney had access to more extensive information. *See* Swedlow Decl. ¶¶ 7-13, 15-17; Ghaussy Decl. ¶¶ 7, 24. Because the *Yellow Cab* representation satisfies the "substantial relationship" test for disqualification, however, the Court does not reach these other issues.

California declined to disqualify counsel, the court determined that each of the former and current representations "involve[d] distinct circumstances regarding the loans at issues, the borrowers who procured the loans, the loan officers who made the loans, the locations of the loans, the defendants who sold the loans . . ., the circumstances constituting the alleged breaches, and the resulting damages," and each of the material disputed issues "turn[ed] on the unique factual circumstances surrounding the individual loans." *Lehman Bros. Holdings Inc. v. Direct Mortg. Corp., No. 2:09-cv-04170-CJC(RNBx), 2013 U.S. Dist. LEXIS 193940, 2013 WL 12114447, at *4 (C.D. Cal. Feb. 4, 2013)*. The party seeking disqualification identified "no specific legal issue that was present in the [earlier] cases that is also critical to [the current adverse representation]." *2013 U.S. Dist. LEXIS 193940, [WL] at *5*. Neither *TWiT* nor *Lehman Brothers* conflict with disqualification in this case, where a necessary element of Sidecar's claims was also at issue in *Yellow Cab* with respect to the same Uber product **[*29]** or products, an overlapping time period, and an overlapping (or at least immediately neighboring) geographic market.[10]

IV. CONCLUSION

A lawyer can be expected over time to represent zealously and fairly a wide range of clients whose interests might sometimes be at odds with positions that the lawyer has previously taken. As discussed above, California recognizes that reality by declining to impose a "lifetime prohibition against representation adverse to a former client." *Khani, 215 Cal. App. 4th at 921*. Here, however, it is reasonable for Uber to expect that Quinn Emanuel would not now serve as counsel to a plaintiff bringing antitrust claims based on Uber's alleged conduct during the same time that Quinn Emanuel served as Uber's sole outside litigation counsel and defended Uber against unfair competition and antitrust claims—including at least some claims turning on factual questions underlying the case at hand. While the Court has no reason to doubt the veracity of the Quinn Emanuel attorneys who have declared their lack of exposure to confidential information, allowing this case to proceed while Uber is left to speculate what information its former attorneys shared with their colleagues **[*30]** would undermine "the public trust both in the scrupulous administration of justice and in the integrity of the bar." *See* *State Farm, 72 Cal. App. 4th at 1428*.

The motion is GRANTED. Quinn Emanuel is disqualified from representing Sidecar in this action, and Sidecar is instructed to retain new counsel.

A case management conference will occur on June 7, 2019 at 2:00 PM. The parties shall file an updated joint case management statement no later than May 31, 2019. The deadline for Uber to respond to the complaint remains stayed pending further order of the Court.

IT IS SO ORDERED.

Dated: May 2, 2019

/s/ Joseph C. Spero

JOSEPH C. SPERO

Chief Magistrate Judge

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[10] The various plaintiffs in *Yellow Cab* are described as providing taxi services "in the State of Maryland," "in the City [of Baltimore]," and "in Montgomery County, Maryland." *See* Glass Decl. Ex. T ¶¶ 9-40. Portions of Maryland, including Montgomery County, are suburbs of Washington, DC, which is one of the geographic markets asserted in Sidecar's present complaint. *See* Compl. ¶ 61. Although, as discussed above, Sidecar disputes other aspects of the relationship between this case and *Yellow Cab*, it does not argue that the geographic markets of the two cases are a relevant difference between them. *See* Opp'n at 16-19.

W. Air Charter v. Sojitz Corp.

United States District Court for the Central District of California

May 2, 2019, Decided; May 2, 2019, Filed

CV 18-7361 JGB (KSx)

Reporter
2019 U.S. Dist. LEXIS 163181 *; 2019 WL 4509304

Western Air Charter, Inc., et al. v. Sojitz Corporation, et al.

Subsequent History: Motion granted by, Motion denied by, As moot, Motion denied by *Western Air Charter, Inc. v. Sojitz Corp., 2019 U.S. Dist. LEXIS 221334 (C.D. Cal., Aug. 1, 2019)*

Prior History: *Western Air Charter, Inc. v. Schembari, 2019 U.S. Dist. LEXIS 221918, 2019 WL 6998769 (C.D. Cal., Jan. 11, 2019)*

Core Terms

Jet, alleges, contractual relationship, Defendants', intentional interference, motion to dismiss, confidential information, customers, contacts, seal, trade secret, personal jurisdiction, declaration, fraudulent, contracts, preempted, prospective economic advantage, conspiracy, Stock, disrupted, forum state, prong, fair dealing, negotiations, parties, induce, implied covenant of good faith, negligent interference, good cause, good faith

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For Sojitz Corporation, a Japanese corporation, Tropical Sky Investment, Inc., a Guam corporation, Yohei Sakurai, Hiroshi Naito, Elsie Quenga, Defendants: Alexandrea H Young, Hunton Andrews Kurth LLP, Los Angeles, CA; Edwin Huffman, John T Gerhart, PRO HAC VICE, Hunton Andrews Kurth LLP, Dallas, TX.

Judges: JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE.

Opinion by: JESUS G. BERNAL

Opinion

CIVIL MINUTES—GENERAL

Proceedings: Order GRANTING IN PART and DENYING IN PART Defendants' Motion to Dismiss (Dkt. No. 27) (IN CHAMBERS)

Before the Court is Defendants Sojitz Corporation ("Sojitz"), Tropical Sky Investments, Inc. ("TSI"), Yohei Sakurai ("Sakurai"), Hiroshi Naito ("Naito"), Elsie Quenga ("Quenga"), Sojitz Jet Corporation ("Sojitz Jet"), and Does 1-50's (collectively, "Defendants") Motion to Dismiss ("MTD," Dkt. No. 27). The Court determined the Motion is appropriate for resolution without a hearing. See *Fed. R. Civ. P. 78*; *L.R. 7-15*. On April **[*2]** 26, 2019, the Court vacated the

April 29, 2019 hearing and took the matter under submission. (Dkt. No. 44.) After considering the papers filed in support of and in opposition to the MTD, the Court GRANTS IN PART and DENIES IN PART the MTD.

I. BACKGROUND

A. Procedural History

On August 22, 2018, Plaintiff Western Air Charter, Inc., doing business as Jet Edge International, a California corporation ("Plaintiff" or "Jet Edge") filed this a complaint against Defendants. ("Complaint," Dkt. No. 1.) On December 20, 2018, Plaintiff filed its First Amended Complaint. ("FAC," Dkt. No 26.) Plaintiff brings seven causes of action: (1) Intentional Interference with Contractual Relations; (2) Interference with Prospective Economic Advantage; (3) Negligent interference with Prospective Economic Advantage; (4) Breach of Contract; (5) Breach of Implied Covenant of Good Faith and Fair Dealing; (6) Unfair Competition; and (7) Fraud. (Id.)

On January 14, 2019, Defendants filed a Motion to Dismiss the complaint for failure to state a claim under *Federal Rule of Civil Procedure 12(b)(6)*. ("MTD," Dkt. No. 27.) In that same motion, Defendant Elsie Quenga moves to dismiss all claims against her for lack of personal jurisdiction under *Rule 12(b)(2)*. (Id.) Quenga **[*3]** submits a declaration in support of her motion. ("Quenga Decl.," Dkt. No. 27-1.) Plaintiff filed an opposition to this motion on February 7, 2019. ("Opp.," Dkt. No. 30.) Defendants filed a reply on February 18, 2019. ("Reply," Dkt. No. 31.) On March 28, 2019, Defendant Sojitz Jet filed a separate Motion to Dismiss the complaint for lack of personal jurisdiction under *Rule 12(b)(2)* and failure to state a claim under *Rule 12(b)(6)*. ("Sojitz MTD," Dkt. No. 33.) On April 8, 2019, Plaintiff filed a redacted opposition ("Redacted Opp.", Dkt. No. 37-2) accompanied by an application to file under seal. ("Application", Dkt. No. 37.) Defendants filed a reply to the Sojitz MTD on April 15, 2019. ("Reply to Sojitz", Dkt No 42.)

II. FACTUAL ALLEGATIONS

Plaintiff alleges the following facts which are assumed to be true for purposes of this motion.

Jet Edge is a provider of jet charter, maintenance, and management services, with operations around the world and a principal place of business in Van Nuys, California. (FAC ¶ 1.) Sojitz is a Japanese corporation with a principal place of business in Tokyo, Japan that has offices and subsidiaries throughout the world, including Los Angeles. (Id. ¶ 3.) Sojitz engages in a wide range **[*4]** of businesses, including purchasing, selling, managing and operating commercial aircraft and business jets. (Id.) Yohei Sakurai is citizen and resident of Japan who is an officer of Sojitz's aerospace department and is also an officer of ACP Jet Charters, Inc. dba Phenix Jet International, LLC ("ACP"). (Id. ¶ 4.) Elsie Quenga is a citizen and resident of Guam. (Id. ¶ 5.) Quenga is and was an employee, officer, and/or director of ACP. (Id.) Hiroshi Naito is a citizen and resident of Japan who is and was an officer of Sojitz's aerospace department and a director of Tropical Sky Investments, Inc. a wholly owned subsidiary of Sojitz. (Id. ¶ 6.) Tropical Sky Investments, Inc. ("TSI") is a Guam Company and a wholly owned subsidiary of Sojitz. (Id. ¶ 7.)

On July 18, 2013, Jet Edge entered into a Memorandum of Understanding ("MOU") with Sojitz in which the parties contemplated Sojitz's purchase of an equity stake in Jet Edge. (FAC ¶ 30.) The confidential MOU stated both parties were to act in good faith while negotiating and drafting the equity purchase and allowed Sojitz to work as a liaison between Jet Edge and its customers. (Id.) However, the equity purchase never occurred, as the parties **[*5]** never reached an agreement. (Id. ¶ 31.) Jet Edge contends that these negotiations were the first part of a conspiracy by Sojitz to steal confidential information from Jet Edge, to establish ACP as a competing business, and to steal Jet Edge's Asian business operations. (Id. ¶ 32.)

The second part of Sojitz's conspiracy involved Sojitz convincing Jet Edge to hire Paul Schembari ("Schembari") as a pilot.[1] (Id. ¶ 40.) Jet Edge and Schembari entered into an employment agreement on or about February 14, 2014. (Id. ¶ 42.) Sojitz planted Schembari within Jet Edge so he could access valuable and confidential information of the workings of Jet Edge's business in order to compete with Jet Edge. (Id. ¶ 43.) Jet Edge promoted Schembari to Assistant Director of Operations for Jet Edge, a position which allowed him to access confidential information regarding Jet Edge's operations, customers, business practices, and structure. (Id.)

Sakurai, Quenga, and Schembari planned to create their own company, YEP, to compete with both Jet Edge and Sojitz. (Id. ¶ 44.) On April 8, 2015, Quenga sent an email to Sakurai and Schembari regarding such plans. (Id.) **[*6]** However, YEP failed to secure funding and never materialized. (Id.) Sakurai, Quenga, and Schembari then pivoted back to acting as agents of Sojitz, using information obtained in planning for YEP to help Sojitz launch ACP, a new aircraft management and operations company that would compete with Jet Edge. (Id.)

While Schembari was still employed at Jet Edge, Defendants took action to launch ACP (Id. ¶ 45). On November 29, 2015, Sakurai emailed Schembari a Bank of America form regarding a request to finance ACP. (Id. ¶ 46.) On or about December 3, 2015, Schembari and Quenga met with a Guam-based business consultant to develop a business plan for ACP. (Id. ¶ 47.) Sakurai, Schembari, and Quenga discussed plans to persuade Jet Edge customers to instead work with ACP. (Id. ¶ 51.) Sakurai told Jet Edge customers of Sojitz's plan to enter into a new venture with ACP and provided them with many reasons to leave Jet Edge. (Id. ¶ 50.) Sakurai also told Jet Edge customers he would not serve as a liaison between them and Jet Edge if they elected to stay with Jet Edge. (Id.) Further, Schembari and Sakurai/Sojitz diverted the management of a Global 6000 MSN 9685 aircraft with tail number N2020 toward **[*7]** ACP instead of Jet Edge. (Id. ¶ 49.) Sakurai subsequently created projections for the new company based on management of aircrafts that were under contract as Jet Edge clients and shared these projections with Schembari. (Id. ¶ 53.)

On or about March 8, 2016, Sojitz acquired ACP. Schembari's holding company, Cosa Di Famiglia Holdings, LLC, was paid for brokering the deal between ACP and Sojitz. (Id. ¶ 51.) Schembari resigned from his position at Jet Edge on March 14, 2016. (Id. ¶ 58.) On May 5, 2016, Sojitz broke off negotiations for the equity purchase of Jet Edge. (Id. ¶ 59.) Plaintiff alleges Sakurai, Sojitz, and the other Defendants along with Schembari were responsible for convincing Jet Edge's clients to break their aircraft charter management agreements (ACMAs) with Jet Edge, which was accomplished, in part, by making disparaging comments about Jet Edge to Jet Edge customers. (Id. ¶¶ 50, 61.) Between March and December 2016, five companies terminated their ACMAs with Jet Edge and entered into agreements with ACP for operation and management services for their aircrafts, including (1) Sam Cayman, Inc., (2) Fast Retailing Co., LTD., (3) Sega Sammy Holdings, Inc., (4) Pocket Corporation, **[*8]** and (5) Hideyuki Busujima. (Id. ¶¶ 61-66.) Defendants also copied Jet Edge's confidential information, including its ACMAs, employee handbook, and employment contracts in order to set up ACP. (Id. ¶ 78.) Plaintiff has suffered damages because of Defendants' conduct due to lost clients. (Id. ¶ 80.)

III. APPLICATION TO FILE UNDER SEAL

On April 8, 2019, Plaintiff Jet Edge submitted an application to file documents under seal in support of its Opposition to the Sojitz MTD ("Application," Dkt. No. 38) and a sealed declaration in support of the Application. ("Plaintiff Decl.," Dkt. No. 39.) On April 12, 2019, Defendants filed a sealed declaration in support of the Application ("Defendants' Decl.," Dkt. No. 40) along with a Declaration of Sojitz Jet Vice President Yohei Sakurai ("Sakurai Decl.," Dkt No 40-1).

A. Legal Standard

[1] Jet Edge sued Schembari in the related action Western Air Charter, Inc., v. Schembari, No. 2:17-cv-00420JGB(KSx) (C.D. Cal 2017), so he is not a Defendant here. All Citations to filings in the Schembari Action will appear as "Schembari Dkt. No. __."

There is a strong presumption of public access to judicial records and documents. *Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 n.7, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978)* ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."); *Pintos v. Pac. Creditors Ass'n, 605 F.3d 665, 677 (9th Cir. 2010)*. The presumption applies to pleadings filed with the court and extends to discovery material attached to those pleadings. **[*9]** *Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1134 (9th Cir. 2003)*. Although a request to seal judicial records offends the presumption in favor of public access, the right of access "is not absolute." *Id. at 1135*.

Generally, two standards govern requests to seal documents: the "compelling reasons" standard and the "good cause" standard. *Pintos, 605 F.3d 665, 677*. A party seeking to seal judicial records relating to a dispositive motion must overcome the strong presumption of public access by satisfying the compelling reasons standard. *Kamakana v. City and Cty of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006)*. "That is, the party must articulate compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure." *Id. at 1178-79* (internal citation of quotation marks omitted). "[C]ompelling reasons sufficient to outweigh the public's interest in disclosure and justify the sealing of court records exist when such court files might have become a vehicle for improper purposes, such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets." Id. (citing *Nixon, 435 U.S. at 598*). However, "[t]he mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel **[*10]** the court to seal its records." Id. (citing *Foltz, 331 F.3d at 1136*).

While the presumption of public access is the starting point of a court's analysis for dispositive motions, the presumption does not apply to non-dispositive motions. *Id. at 1179*; see also *Pintos, 565 F.3d at 678-79*. "[T]he public has less of a need for access to court records attached only to non-dispositive motions because those documents are often unrelated, or only tangentially related, to the underlying cause of action." *Kamakana, 447 F.3d at 1179* (internal citation omitted). In such instances, a party moving to seal judicial records need only meet the good cause standard. *Foltz, 331 F.3d at 1135*; *Phillips ex rel. Estates of Byrd v. General Motors Corp., 307 F.3d 1206, 1213 (9th Cir. 2002)*.

The good cause standard, defined by *Federal Rule of Civil Procedure 26(c)*, is the same good cause standard that applies to the entry of a protective order: "The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense ...." *Fed. R. Civ. P. 26(c)*. Pursuant to the good cause standard, a court must determine whether "good cause exists to protect th[e] information from being disclosed to the public by balancing the needs for discovery against the need for confidentiality." *Pintos, 605 F.3d at 678* (internal citation and quotation marks omitted). Notably, only a particularized showing of good cause satisfies the standard. *Kamakana, 447 F.3d at 1180*. **[*11]** A blanket protective order on its own is insufficient to establish good cause for purposes of an application to seal. *Foltz, 331 F.3d at 1133*.

B. Discussion

A motion to dismiss is a dispositive motion. See *In re PPA Products Liability Litig., 460 F.3d 1217, 1231 (9th Cir. 2006)*. Accordingly, Defendant must meet the "compelling reasons" standard. See *Pintos, 605 F.3d 665 at 677*.

The following documents are the subject of Plaintiff's Application:

1. Exhibit 1 of the Declaration of Robert Estrin in Support of Plaintiff's Opposition to Sojitz Jet Corporation's Motion to Dismiss
2. Exhibit 2 of the Declaration of Robert Estrin in Support of Plaintiff's Opposition to Motion to Dismiss
3. Exhibit 3 of the Declaration of Robert Estrin in Support of Plaintiff's Opposition to Sojitz Jet Corporation's Motion to Dismiss
4. Plaintiff's Opposition to Sojitz Jet Corporation's Motion to Dismiss at 6:1-6:27

Local Rule 79-5.2.2(b), provides:

> "At least 3 days before seeking to file under seal a document containing information previously designated as confidential by another pursuant to a protective order,[2] the Filing Party must confer with the person that designated the material confidential (the "Designating Party") in an attempt to eliminate or minimize the need for filing under seal by means of redaction. If the document cannot be suitably redacted **[*12]** by agreement, the Filing Party may file an application pursuant to *subsection (a)*, but the supporting declaration must identify the material previously designated as confidential, as well as the Designating Party, and must describe in detail the efforts made to resolve the issue. The declaration must be served on the Designating Party of the same day it is filed, and proof of this service must be filed with the declaration."

Pursuant to this *L.R. 79-5.2.2*, Plaintiff's counsel conferred with Defendants' counsel on April 5, 2019, three days prior to the filing of this application. (Appl. at 1.) Plaintiff's then filed the application on April 8, 2019. (Id.) Four days later, on April 12, 2019, Defendants filed a declaration narrowing the request for sealing to items Exhibits 1 and 2 of the Declaration of Robert Estrin in Support of Plaintiff's Opposition to Sojitz Jet Corporation's Motion to Dismiss. (Defendants' Decl. at 2.) Defendants do not seek to seal Exhibit 3 nor any portion of the Opposition. Defendants also submitted a declaration by Sojitz Manager and Sojitz Jet Vice President Yohei Sakurai to support sealing Exhibits 1 and 2 of the Declaration. (Sakurai Decl. ¶ 4.)

Protecting **[*13]** proprietary business information can be a compelling reason to permit the filing of a document under seal. See *Morawski v. Lightstorm Entertainment, Inc., 2013 WL 12122289, at *2 (C.D. Cal. Jan 14, 2013)*; see also *Bauer Bros. LLC v. Nike, Inc., 2012 U.S. Dist. LEXIS 72848, 2012 WL 1899838, at *1 (S.D. Cal. May 24, 2012)*. A compelling reason exists where public disclosure of proprietary business information could harm competitive standing and/or result in the improper use of the information by others who might circumvent investing their own time and resources. See *Morawski, 2013 WL 12122289, at *2*; *Bauer Bros., 2012 U.S. Dist. LEXIS 72848, 2012 WL 1899838, at *1*.

The Court finds that Defendants, as the designating party, have satisfied the compelling reasons standard such that sealing is appropriate. The Sakurai Declaration discusses how Exhibits 1 and 2 contain a copy of a March 31, 2017 Stock Purchase Agreement by and among Sojitz Corporation, ACP Jet Charters, Inc, and Cosa di Famiglia Holdings, LLC ("Stock Purchase Agreement") and a copy of a July 3, 2017 Escrow Agreement between Sojitz Corporation, Sojitz Jet Corporation, ACP Jet Charters, Inc. and Cosa di Famiglia Holdings, LLC ("Escrow Agreement") respectively. (Sakurai Decl. ¶¶ 3-4.) Sakurai notes Sojitz treats the key economic terms for both the Stock Purchase Agreement and the Escrow Agreement as "non-public, confidential, and commercially sensitive information" because they are unavailable to the public and would **[*14]** be of value to a competitor or future counterparty of Sojitz or Sojitz Jet. (Id.) Here, the Court finds public disclosure of the Stock Purchase Agreement and the Escrow Agreement would harm Sojitz's standing in negotiations. The economic terms contained in the Stock Purchase and Escrow Agreements represent the final product of negotiations, and their public dissemination would give Sojitz's future business partners the upper-hand in negotiations of similar deals. Defendants also submitted a copy of the relevant sealable material with the proposed redactions highlighted as required by the Local Rules.

The Court finds Defendants have established a compelling reason to seal portions of the Stock Purchase and Escrow Agreements. These documents contain economic terms which could provide an advantage to Sojitz's business partners or competitors if publicized. Thus the Court also finds Plaintiff has met the requirements of *L.R. 79-5.2.2(b)*. Thus, the Court GRANTS IN PART Plaintiff's Application with respect to Exhibits 1 and 2.

It appears Defendants invoke the protective order from the Schembari action to prevent Plaintiff from alleging facts or presenting evidence in this action. The protective order in the **[*15]** Schembari action extended to the

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[2] Although there is no Protective Order in this action, the parties, in light of the Protective Order in Western Air Charter, Inc., v. Schembari, No. 2:17-cv-00420JGB(KSx) (C.D. Cal 2017) have prepared the Application and relevant declarations pursuant to *Local Rule 79-5.2.2(b)*. The Court will analyze the Application under section b of the *L.R. 79-5.2.2* but advises the parties to either seek a Protective Order in this matter prior to filing a similar application in the future or to apply pursuant to *L.R. 79-5.2.2(a)*, for Documents Not Designated as Confidential Pursuant to a Protective Order in future cases.

commencement of trial and does not govern the action here. If parties seek to protect any information in this matter, the parties must stipulate to a new protective order.

IV. LEGAL STANDARD

A. Personal Jurisdiction

"The general rule is that personal jurisdiction over a defendant is proper if it is permitted by a long-arm statute and if the exercise of that jurisdiction does not violate federal due process." *Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1154-55 (9th Cir. 2006)* (citing *Fireman's Fund Ins. Co. v. Nat. Bank of Coops., 103 F.3d 888, 893 (9th Cir. 1996))*. Because California authorizes jurisdiction to the fullest extent permitted by the Constitution, see *Cal. Code Civ. P. § 410.10*, the only question the Court must ask is whether the exercise of jurisdiction over Defendants would be consistent with due process. *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1129 (9th Cir. 2003)*.

The *Fourteenth Amendment's Due Process Clause* permits courts to exercise personal jurisdiction over any defendant who has sufficient "minimum contacts" with the forum such that the "maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)*. There are two recognized bases for exercising personal jurisdiction over a non-resident defendant: (1) "general jurisdiction," which arises where defendant's activities in the forum state are sufficiently "substantial" or "continuous and systematic" to justify the exercise **[*16]** of jurisdiction over him in all matters; and (2) "specific jurisdiction," which arises when a defendant's specific contacts with the forum give rise to the claim in question. See *Helicopteros Nacionales de Colombia S.A. v. Hall, 466 U.S. 408, 414-16, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)*.

Where, as here, a court decides a motion to dismiss for lack of personal jurisdiction without an evidentiary hearing, the plaintiff need only make a prima facie showing of jurisdictional facts to withstand the motion to dismiss. *Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995)*; *Doe v. Unocal Corp., 27 F. Supp. 2d 1174, 1181 (C.D. Cal. 1998)*, aff'd,*248 F.3d 915 (9th Cir. 2001)*. Plaintiff's version of the facts is taken as true for purposes of the motion if not directly controverted, and conflicts between the parties' affidavits must be resolved in plaintiff's favor for purposes of deciding whether a prima facie case for personal jurisdiction exists. *AT&T v. Compagnie Bruxelles Lambert, 94 F.3d 586, 588 (9th Cir. 1996)*; *Unocal, 27 F. Supp. 2d at 1181*.

B. Failure to State a Claim

A *Rule 12(b)(6)* motion tests the legal sufficiency of the claims asserted in a complaint. "Dismissal under *Rule 12(b)(6)* is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008)*. Factual allegations must be enough to "raise a right to relief above a speculative level." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

Rule 12(b)(6) must be read in conjunction with *Federal Rule of Civil Procedure 8(a)*, which requires a "short and plain statement of the claim showing that a pleader is entitled to relief," in order to **[*17]** give the defendant "fair notice of what the claim is and the grounds upon which it rests." Id.; see also *Horosny v. Burlington Coat Factory, Inc., 2015 U.S. Dist. LEXIS 179419, 2015 WL 12532178, at *3 (C.D. Cal. Oct. 26, 2015)*. In considering a *Rule 12(b)(6)* motion to dismiss, a court accepts the plaintiff's factual allegations in the complaint and construes the pleadings in the light most favorable to the non-moving party. See *Shwarz v. United States, 234 F.3d 428, 435 (9th Cir. 2000)*. Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)*.

V. DISCUSSION

A. Elsie Quenga and Sojitz Jet

Quenga and Sojitz Jet seek dismissal of all claims against them for lack of personal jurisdiction. (MTD at 3; Sojitz MTD at 3.)

1. General Personal Jurisdiction

Elsie Quenga is a citizen of and domiciled in Guam. (FAC ¶ 15.) She does not have a mailing address, bank account, property, or telephone number in California. ("Quenga Decl.," Dkt. No. 27-1 at 3.) She has only been to California for the purposes of visiting her sister. (Id.) Unquestionably, Elsie Quenga is not domiciled in California and general jurisdiction is not proper. See *Goodyear Dunlop Tires Operations, S.A., 564 U.S. 915, 131 S. Ct. 2846 at 2851, 180 L. Ed. 2d 796*. Similarly, Defendant Sojitz Jet is incorporated in Guam and has its principal place of business in Guam. (Sojitz MTD at 5.) Thus, it is also not subject to general jurisdiction. **[*18]**

2. Specific Personal Jurisdiction

Specific jurisdiction arises when a defendant's specific contacts with the forum give rise to the claim in question. See *Helicopteros, 466 U.S. at 414-416*. In the Ninth Circuit, courts apply a three-part test to determine whether specific jurisdiction exists:

> (1) the non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1205-06 (9th Cir. 2006) (citing *Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004))*.

The plaintiff bears the burden of satisfying the first two prongs of this test. *Schwarzenegger 374 F.3d at 802*. If it does, "the burden then shifts to the defendant[s] to 'present a compelling case' that the exercise of jurisdiction would not be reasonable." Id. (quoting *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-78, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985))*.

"Purposeful availment analysis examines whether the defendant's contacts with the forum are attributable to his own actions or are solely the actions of the plaintiff." **[*19]** *Sinatra v. Nat'l Enquirer, 854 F.2d 1191, 1195 (9th Cir. 1988)*. To demonstrate purposeful availment, plaintiffs must show that Quenga "engage[d] in some form of affirmative conduct allowing or promoting the transaction of business within the forum state." *Gray & Co. v. Firstenberg Mach. Co., 913 F.2d 758, 760 (9th Cir. 1990)* (citing Shute v. Carnival Cruise Lines, Inc., *897 F.2d 377, 381 (9th Cir. 1990))*; see also *Burger King, 471 U.S. at 475* ("This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, . . . or of the 'unilateral activity of another party or a third person . . . ."). Quenga's contacts must be such that he should "reasonably [have] anticipate[d] being haled into court [ ]here." *World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)*.

Courts distinguish between contract and tort cases in assessing whether a defendant has purposefully availed itself of the benefits of conducting activities in the forum. See *Roth v. Garcia-Marquez, 942 F.2d 617, 621 (9th Cir. 1991)*; see also *Schwarzenegger, 374 F.3d at 802* (noting that "purposeful availment" is often used "in shorthand fashion, to include both purposeful availment and purposeful direction[, the jurisdictional test in tort cases.] [B]ut availment and direction are, in fact, two distinct concepts").

"[P]urposeful availment analysis is most often used in suits sounding in contract." *Schwarzenegger, 374 F.3d at 802*. The fact that the defendant entered into a contract with a forum resident, standing alone, is **[*20]** not sufficient to establish purposeful availment. See *Burger King, 471 U.S. at 478*; *Gray, 913 F.2d at 760*; *Sher v. Johnson, 911 F.2d 1357, 1362 (9th Cir. 1990)*. Rather, the court must utilize "a 'highly realistic' approach that recognizes that a 'contract' is 'ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.' . . . It is these factors—prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing—that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum." *Burger King, 471 U.S. at 479*.

In tort cases, by contrast, courts exercise jurisdiction over defendants who have engaged in an act that is purposefully directed at, and has an effect in, the forum state, even if the act itself takes place outside state boundaries. See *Schwarzenegger, 374 F.3d at 802-03*. The Supreme Court clarified that "although physical presence in the forum is not a prerequisite to jurisdiction, physical entry into the State—either by the defendant in person or through an agent, goods, mail, or some other means—is certainly a relevant contact." *Walden v. Fiore, 571 U.S. 277, 134 S. Ct. 1115, 1125, 188 L. Ed. 2d 12 (2014)*. As a result, it stated, "a 'mere injury to a forum resident is not a sufficient **[*21]** connection to the forum.' Rather, 'an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State.'" *Picot v. Weston, 780 F.3d 1206, 1214 (9th Cir. 2015)* (quoting *Walden, 134 S. Ct. at 1122*). This is because "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Walden, 134 S. Ct. at 1122* (emphasis added); *id. at 1123* ("Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State"). Thus, "a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." *Id. at 1123*.

Applying this general principle, the Walden Court explained that the purposeful direction or "effects test" enunciated in *Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)*, reflected the fact that

> the reputation-based 'effects' of the alleged libel [in that case] connected the defendants to California, not just to the plaintiff. The strength of that connection was largely a function of the nature of the libel tort. However scandalous a newspaper article might be, it can lead to a loss of reputation **[*22]** only if communicated to (and read and understood by) third persons. Accordingly, the reputational injury caused by the defendants' story would not have occurred but for the fact that the defendants wrote an article for publication in California that was read by a large number of California citizens. Indeed, because publication to third persons is a necessary element of libel, the defendants' intentional tort actually occurred in California. In this way, the 'effects' caused by the defendants' article—i.e., the injury to the plaintiff's reputation in the estimation of the California public-connected the defendants' conduct to California, not just to a plaintiff who lived there. That connection, combined with the various facts that gave the article a California focus, sufficed to authorize the California court's exercise of jurisdiction.

Walden, 134 S. Ct. at 1123 (citations omitted). All of the claims alleged against Quenga and Sojitz Jet sound in tort. The court must therefore examine whether Quenga and Sojitz Jet purposefully directed their activities toward California such that those contacts make it proper to exercise personal jurisdiction over them in this forum.

"In analyzing whether a court has specific **[*23]** personal jurisdiction over a tort claim, [the Ninth Circuit applies a] three-part 'effects' test derived from Calder[, ...] *465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804*.... Under this test, a defendant purposefully directed his activities at the forum if [s]he: '(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.'" *Picot, 780 F.3d at 1213-14* (citations omitted). As both the Supreme Court and Ninth Circuit have clarified, "applying this test, [courts] must 'look[ ] to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there.'" *Id. at 1214* (quoting *Walden, 134 S. Ct. at 285*).

a. Quenga

Plaintiff argues Quenga is subject to specific personal jurisdiction in California because of her interference with Jet Edge's ACMAs. ("Opp.," Dkt. No. 30 at 5.)

The effects test from *Calder* is appropriate here, as Plaintiff alleges the following torts: intentional interference of contractual relations, intentional and negligent interference with prospective business advantage, unfair business practices, and fraud. With respect to the first prong of the Calder test, Plaintiff alleges Quenga committed intentional acts. Specifically, Plaintiff alleges **[*24]** Quenga joined a conspiracy to intentionally interfere with contracts between Jet Edge and its customers, stole Jet Edge's customers, and used confidential information to launch a new company. (FAC ¶ 7.) Plaintiff further contends Quenga was involved in creating a business plan based on the management of 6 jets which she knew were managed by Jet Edge. (Id. ¶ 51(d).) The Court finds these allegations sufficient to satisfy the first prong.

The second prong, "express aiming," asks whether the defendant's allegedly tortious action was "expressly aimed at the forum." *Picot, 780 F.3d 1206* (quoting *Brayton Purcell LLP v. Recordon & Recordon, 606 F.3d 1124, 1129 (9th Cir. 2019)*. Jet Edge argues this requirement is satisfied because Quenga's acts were targeted at Jet Edge, a California Corporation who felt the effects of her actions in California. (Opp. at 5 (citing *CE Distribution, LLC v. New Sensor Corp., 380 F.3d 1107, 1111 (9th Cir. 2004))*.)

"[A]n injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State." *Picot, 780 F.3d 1206, 1214 (9th Cir. 2015)* (emphasis added). In Walden, the Supreme Court explained that personal jurisdiction analysis must focus on the defendant's contacts with the forum state, not the defendant's contacts with a resident of the forum. *134 S. Ct. at 284*. Plaintiff's argument ignores the effect of Walden and Picot on the purposeful direction analysis. "[T]he **[*25]** plaintiff cannot be the only link between the defendant and the forum." Id. Here, Plaintiff anchors its analysis of Quenga's California contacts on Jet Edge's status as a California corporation. For example, Plaintiff states Quenga "interfered with these contracts by conspiring with Defendants to interfere with Jet Edge's California contracts. . ." and "caused harm that she knew was likely to occur in California." (FAC ¶ 27.) The FAC alleges no other contacts Quenga formed with California. Accordingly, Plaintiff does not satisfy the second Calder prong, and the FAC fails to satisfy the effects test overall. Quenga is not subject to specific personal jurisdiction, and the Court GRANTS her Motion to Dismiss as to all claims against her.

b. Sojitz Jet

Plaintiff alleges Defendant Sojitz Jet is subject to specific personal jurisdiction because it is the alter ego of Sojitz, for whom jurisdiction is not challenged. (Redacted Opp. at 5.) In order to meet the alter ego test, a plaintiff "must make out a prima facie case (1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would **[*26]** result in fraud or injustice.'" *Doe v. Unocal Corp., 248 F.3d 915, 926 (9th Cir. 2001)* (alterations in original) (quoting *AT & T Co. v. Compagnie Bruxelles Lambert, 94 F.3d 586, 591 (9th Cir.1996))*, abrogated on other grounds by *Williams v. Yamaha Motor Co. Ltd., 851 F.3d 1015 (9th Cir. 2017)*. The"unity of interest and ownership" prong requires "a showing that the parent controls the subsidiary to such a degree as to render the latter the mere instrumentality of the former." Id. (internal quotation marks omitted). "This test envisions pervasive control over the subsidiary, such as when a parent corporation 'dictates every facet of the subsidiary's business—from broad policy decisions to routine matters of day-to-day operation.'" *Ranza v. Nike, Inc., 793 F.3d 1059, 1073 (9th Cir. 2015)* (quoting *Unocal, 248 F.3d at 926*). Complete ownership and shared management personnel are, by themselves, insufficient to establish the required pervasive control. See *Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd., 328 F.3d 1122, 1135 (9th Cir. 2003)*.

In Unocal, the Ninth Circuit held a plaintiff fails to meet the "unity of interest and ownership" prong when the evidence shows only "an active parent corporation involved directly in decision-making about its subsidiaries' holdings," but each entity "observe[s] all of the corporate formalities necessary to maintain corporate separateness." *248 F.3d at 928*. Courts have identified a number of factors that may bear on whether there is a unity of interest and ownership. A list of non-dispositive factors includes:

> the commingling **[*27]** of funds and other assets; the failure to segregate funds of the individual and the corporation; the unauthorized diversion of corporate funds to other than corporate purposes; the treatment by an individual of corporate assets as his own; the failure to seek authority to issue stock or issue stock under existing authorization; the representation by an individual that he is personally liable for corporate debts; the failure to maintain adequate corporate records; the intermingling of individual and corporate records, the ownership of all the stock by a single individual or family; the domination or control of the corporation by the stockholders; the use of a single address for the individual and the corporation; the inadequacy of the corporation's capitalization; the use of the corporation as a mere conduit for an individual's business; the concealment of the ownership of the corporation; the disregard of formalities and the failure to maintain arm's-length transactions with the corporation; and the attempts to segregate liabilities to the corporation.

Butler v. Adoption Media, LLC, 486 F. Supp. 2d 1022, 1067 (N.D. Cal. 2007) (quoting *Mid—Century Ins. Co. v. Gardner, 9 Cal. App. 4th 1205, 1213 n.3, 11 Cal. Rptr. 2d 918 (1992))*; see also *id. at 1077* (finding no personal jurisdiction under an alter ego theory because plaintiffs did not establish alter ego **[*28]** liability). Because there is no single dispositive factor, the Court should look at the totality of circumstances to determine whether application of the alter ego doctrine is appropriate. Id. (citing *Sonora Diamond Corp. v. Superior Court, 83 Cal. App. 4th 523, 539, 99 Cal. Rptr. 2d 824 (2000))*.

Here, Sojitz Jet is a wholly-owned subsidiary of Sojitz. However, this, by itself, is not enough show unity of interest, as Plaintiff must also show Sojitz sufficiently controls the actions of Sojitz Jet. Plaintiff alleges the information and circumstances of the Stock Purchase Agreement provides evidence of Sojitz's control over Sojitz Jet. For example, Plaintiff argues the fact that Sojitz Jet was created a month before the Stock Purchase Agreement, then subsequently purchased 75% of ACP as part of the agreement suggest Sojitz created Sojitz Jet for the purpose of carrying out the Stock Purchase. (Redacted Opp. at 6.) Plaintiff further points to language from the Stock Purchase agreement that states "Sojitz shall cause Sojitz Jet to use commercially reasonable efforts to enter into, execute, and deliver the PJI MIPA" to further show Sojitz's control over Sojitz Jet. (Stock Purchase at PHX004469). Finally, Plaintiff also points to the Escrow Agreement to support its theory of unity of interest. The Escrow Agreement shows **[*29]** Sojitz and Sojitz Jet share a common address and a common officer in Yohei Sakurai. (Escrow Agreement at PHX004939.) The Court finds Plaintiff presents compelling evidence showing a unity of ownership and interest.

However, Plaintiff fails to establish the second prong of the alter ego test, as it cannot show alter ego liability is necessary to prevent fraud or injustice where all the alleged wrongful conduct giving rise to this action happened well before Sojitz Jet's formation. The events alleged in the FAC took place between July 2013, when Sojitz entered into an MOU with Jet Edge, and March 2016 when Sojitz acquired ACP. (FAC ¶¶ 30-73.) Plaintiff does not allege any of the former Jet Edge customers at issue terminated their contract with Jet Edge after Sojitz Jet formed in February 2017. Even if the Court were to impute Sojitz's contacts with the forum state to Sojitz Jet under an alter-ego theory, only those Sojitz contacts that occurred during the alter-ego relationship (i.e. during the existence of Sojitz Jet) would be attributable to Sojtz Jet. See *Young v. Actions Semiconductor Co., 386 F. App'x 623, 628 (9th Cir. 2010)* (declining to exercise specific personal jurisdiction over a company that acquired shares of another company whose conduct gave **[*30]** rise to action in question where the acquisition took place after the alleged wrongdoing.) Because none of Sojitz's alleged forum contacts took place after the formation of Sojitz Jet, none can be attributed to Sojitz Jet here.[3] Thus, declining to exercise jurisdiction over Sojitz Jet creates no fraud or injustice. The Court GRANTS Defendants' Motion to Dismiss Sojitz Jet.

B. Defendants' Motion to Dismiss for Failure to State a Claim [4]

1. Plaintiff Adequately Pleads Defendants' Conspiracy

Civil conspiracy is not a separate cause of action; it merely "imposes liability on persons whom, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its preparation." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 510-11, 28 Cal. Rptr. 2d 475, 869 P.2d 454 (1994)*. And "[p]ersonal liability, if otherwise justified, may rest upon a 'conspiracy' among officers and directors to injure third parties through the corporation." *Wyatt v. Union Mortgage Co., 24 Cal. 3d 773, 785, 157 Cal. Rptr. 392, 598 P.2d 45 (1979)*. To establish a civil conspiracy, Plaintiff must allege: "(a) an agreement among the alleged conspirators to commit a tortious act (formation and operation of the conspiracy); (b) the tortious act(s) committed pursuant to the agreement; and (c) resulting damage to the Plaintiffs." Woodard v. Labrada, 2017 WL 1018307, *9 (C.D. Cal. March 10, 2017) (citing *Wyatt, 24 Cal. 3d 773, 157 Cal. Rptr. 392, 598 P.2d 45*). Courts apply *Rule 9(b)*'s heightened **[*31]** pleading standard to claims of civil conspiracy where the object of the conspiracy is to commit fraud. See *Wasco Prods., Inc., v. Southwall Techs., Inc., 435 F.3d 989, 990-91 (9th Cir. 2006)*. Yet, "there is no absolute requirement that where several defendants are sued in connection with an alleged fraudulent scheme, the complaint must identify false statements made by each and every defendant." *Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007)*.

Rule 9(b) requires a party alleging fraud to "state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P. 9(b)*. Particularity means the pleader should state the "who, what, where, when, and how of the misconduct charged." *Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009)* (internal quotation marks omitted). At its core, *Rule 9(b)*'s particularity requirement exists to give defendants fair notice of the alleged misconduct "so that they can defend against the charge and not just deny that they have done anything wrong." Id. If a complaint alleges fraudulent conduct by multiple defendants, it may not "lump multiple defendants together," because *Rule 9(b)* obligates plaintiffs to "identify the role of each defendant in the alleged fraudulent scheme." *Swartz, 476 F.3d at 764-65 (9th Cir. 2007)* (internal quotation marks and alterations omitted). *Rule 9(b)*, by its terms, does not apply to allegations of a defendant's state of mind (e.g., a defendant's knowledge of the falsity of a misrepresentation), **[*32]** which may be pleaded generally. *Fed. R. Civ. P. 9(b)* ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."); see also *Swingless Golf Club Corp. v. Taylor, 679 F. Supp. 2d 1060, 1067 (N.D. Cal. 2009)* (citing *Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 990 (9th Cir. 2009))*; Shinde v. Nithyananda Found., No. EDCV 13-363, 2015 WL 12732434, at *4 (C.D. Cal. Feb. 23, 2015).

Here, Plaintiff adequately pleads conspiracy based on its allegations that the remaining Defendants[5] aided Schembari in his tortious interference with contractual relations and his breaches of contract and his duty of loyalty. (FAC ¶ 61.) The FAC alleges Defendants, along with Schembari, planned to commit and committed these wrongful actions in order to steal Jet Edge's customers, including "copying Jet Edge's confidential information, including its ACMAs, employee handbook, employment contracts and more.[. .] by pretending that it was interested in developing a long term relationship with Jet Edge." (Id. ¶ 87.) In a related case, Schembari was found liable for breach of contract, breach of his duty of loyalty, intentional interference with contractual relations, and a jury found

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[3] The Court also declines Plaintiff's request for jurisdictional discovery as it would be fruitless.

[4] Defendant Sojitz Jet filed a separate Motion to Dismiss for failure to state a claim (Dkt. No. 33) that echoes the arguments in the other Defendants' Motion (Dkt. No. 27). For the purposes of efficiency, all citations in this section will be to Defendants' MTD (Dkt. No. 27.)

[5] The remaining Defendants will hereby be referred to as "Defendants" and will no longer include Quenga or Sojitz Jet for purposes of this motion.

that he, along with his co-defendants ACP, Cosa Di Famiglia, and Phenix Jet LLC, acted with malice, oppression of fraud. (Schembari Dkt. No. 302.)

Plaintiff's FAC provides detail as to each Defendants' actions in **[*33]** furtherance of the alleged conspiracy. Plaintiff alleges Sojitz planted Schembari inside Jet Edge to start planning a new business to disrupt Jet Edge's contracts, meeting with Schembari on December 18, 2014 to discuss the plan to set up ACP, and inducing Jet Edge's customers to leave Jet Edge and join ACP. (FAC ¶¶ 40, 50.) As part of this scheme, Plaintiff alleges Sakurai planned a competing company with Schembari while Schembari was still employed by Jet Edge and diverted jet N2020 away from Jet Edge's management. (FAC ¶¶ 44, 49.) Plaintiff alleges Quenga met with Schembari in December 2015 to create a business plan for ACP to compete with and steal customers from Jet Edge while Schembari was still employed by Jet Edge and assisted in acquiring an aircraft operators certificate (AOC) for ACP. (Id. ¶¶ 46-47.) Plaintiff alleges TSI entered into a broker agreement with Schembari's wholly owned company in violation of Schembari's employment agreement and payed Schembari thousands of dollars pursuant to the agreement. (Id. ¶¶ 51.) Naito allegedly met with Bob Seidel of Alerion on March 8, 2016 to discuss the purchase of an AOC for ACP. (Id.) These allegations sufficiently establish with **[*34]** particularity each Defendant's role in aiding Sojitz's efforts to interfere with contracts and steal confidential information. Thus the Court finds Plaintiff has adequately plead conspiracy to commit fraud under the heightened *Rule 9* standards.

2. CUTSA Preemption Generally

Section 3426.7(b) of the California Uniform Trade Secrets Act ("CUTSA" "preempts common law claims that are 'based on the same nucleus of facts as the misappropriation of trade secrets claim for relief.'" *K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations., Inc., 171 Cal. App. 4th 939, 958, 90 Cal. Rptr. 3d 247 (2009)* (quoting *Digital Envoy, Inc. v. Google, Inc, 370 F. Supp. 2d 1025, 1035 (N.D. Cal. 2005))*. The statute is broad and "supersedes claims based on the misappropriation of confidential information, whether or not that information meets the statutory definition of a trade secret." *Mattel, Inc. v. MGA Entm't, Inc., 782 F. Supp. 2d 911, 987* (C.D. Cal. 2011.) CUTSA even preempts a common law tort claim seeking "'something more' than trade secret relief[.]" *Id. at 958*. This rule precludes a plaintiff from asserting claims that "do not genuinely allege 'alternative legal theories' but are a transparent attempt to evade the strictures of CUTSA by restating a trade secrets claim as something else." *Silvaco Data Sys. v. Intel Corp., 184 Cal. App. 4th 210, 240, 109 Cal. Rptr. 3d 27 (2010)*, disapproved on other grounds in *Kwikset v. Superior Court, 51 Cal. 4th 310, 337, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)*.

However, a common law tort is not preempted by CUTSA where its allegations "[are] not based on the existence of a trade secret." *Angelica Textile Servs., Inc, v. Park, 220 Cal. App. 4th 495, 508, 163 Cal. Rptr. 3d 192 (2013)*; see also **[*35]** Western Air Charter, Inc., v. Schembari, No. 2:17-cv-00420JGB(KSx), Dkt. No. 166 at *5 (C.D. Cal 2017) (finding a sufficient basis for an intentional interference with contractual relations claim on a basis independent from trade secrets). "The test for whether a claim overlaps with the CUTSA involves 'a factual inquiry, one that examines the conduct alleged in the claim.'" *GeoData Sys. Mgmt., Inc. v. Am. Pac. Plastic Fabricators, Inc., No. 5:15-cv-04125VAP(JEMx), 2016 U.S. Dist. LEXIS 184789, 2016 WL 6601656, at *7 (C.D. Cal. 2016)* (quoting *Lifeline Food Co. v. Gilman Cheese Corp., No. 5:15-CV-00034-PSG, 2015 U.S. Dist. LEXIS 64155, 2015 WL 2357246, *1 (N.D. Cal. 2015)*). "To avoid CUTSA preemption, therefore, a claim must be based on 'sufficient independent facts to be viable after the trade secret facts are removed.'" *GeoData Sys., 2016 U.S. Dist. LEXIS 184789, 2016 WL 6601656 at *13* (quoting *Jardin v. DATAllegro, Inc., No. 10-cv-2552IEG(WVGx), 2011 U.S. Dist. LEXIS 84509, 2011 WL 3300152, *2 (S.D. Cal. July 29, 2011)* (internal quotation marks and citation omitted).

3. Related Issues from the Schembari Action

In Schembari, both this Court and Judge Birotte weighed similar issues in analyzing whether Plaintiff Jet Edge's claims against defendants Schembari, ACP, and Cosa Di Famiglia, LLC were preempted by CUTSA. (Schembari Dkt. No. 166 at 1.) These opinions are instructive given the relationship between the two cases. In Schembari, which involved much of the same underlying conduct as here, Plaintiff **[*36]** explicitly alleged a trade secret misappropriation claim under CUTSA. (Schembari Dkt. No. 87.) In the Schembari action, Defendants argued Plaintiff's intentional interference with contractual relations, interference with prospective economic advantage, negligent interference with prospective economic advantage, and unfair competition claims should be preempted under CUTSA. (Id. at 4-8.) Judge Birotte ruled all four of those claims were preempted by CUTSA due to having a common nucleus of facts with Plaintiff's misappropriation of trade secrets claim because the additional claims relied on Schembari's alleged use of confidential client lists. (Id.)

The Schembari case was transferred to this Court on June 19, 2018. (Schembari Dkt. No 142.) On July 2, 2018, Plaintiff filed a motion for reconsideration of Judge Birotte's decision to dismiss its intentional interference with contractual relations claim in light of new information uncovered during discovery. (Schembari Dkt. No. 144 at 10.) This information included evidence that Schembari diverted jet N2020 from Jet Edge management to ACP management. (Id. at 8.) On August 3, 2018, the Court granted Plaintiff's motion for reconsideration because this new fact **[*37]** regarding the diversion of jet N2020 provided Plaintiff with a factual basis for its claim that Schembari interfered with Jet Edge's contract with Sojitz which was not premised on the allegation of Schembari's use of Jet Edge's client information. (Schembari Dkt. 166 at 5.) However, Plaintiff did not argue the new information had any effect on Judge Birotte's rulings that CUTSA preempted Plaintiff's interference with prospective economic advantage, negligent interference with prospective economic advantage, and unfair competition claims. Thus, the Court did not consider the effect of this new fact on the preemption analysis concerning those claims.

4. Claims Six and Seven: Fraud and Unfair Competition

Plaintiff alleges Defendants Sojitz and Naito are liable for fraud and that each Defendant is liable under California's unfair competition law ("UCL," *Cal. Bus. & Prof. Code Section 17200, et seq.*). (FAC ¶¶ 113-126.) Defendants argue Plaintiff fails to satisfy *Rule 9(b)*'s pleading requirements because it has not sufficiently identified the particular circumstances of any fraudulent conduct. (MTD at 16.) Defendants further argue CUTSA preempts Plaintiff's claims for fraud and UCL violation because they are each premised on the alleged misuse of trade **[*38]** secret client lists stolen from Jet Edge. (MTD at 10-11.)

The elements of fraud under California law are: (1) a misrepresentation (which may include a false representation, concealment, or nondisclosure); (2) knowledge of its falsity; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. *Barefield v. HSBC Holdings PLC, No. 118-cv-00527LJO(JLT), 2018 U.S. Dist. LEXIS 130193, 2018 WL 3702307, at *7 (E.D. Cal. Aug. 2, 2018)*. Plaintiff also seeks relief under the UCL, which prohibits any unlawful, unfair, or fraudulent business act or practice. *Cal. Bus. & Prof. Code § 17200*. Under the statute there are three varieties of unfair competition: business acts or practices which are unlawful, unfair, or fraudulent. *Tucker v. Pacific Bell Mobile Services, 208 Cal. App. 4th 201, 225, 145 Cal. Rptr. 3d 340 (2012)* (citing *In re Tobacco II Cases, 46 Cal. 4th 298, 311, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009))*. To state a claim under the UCL, a plaintiff must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that that economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim." *In re Turner, 859 F.3d 1145, 1151 (9th Cir. 2017)* (quoting *Kwikset Corp. v. Superior Court, 51 Cal.4th 310, 322, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)* (emphasis in original)). The causation requirement fails if the plaintiff would have suffered "the same harm whether or not a defendant complied with the law." *Daro v. Superior Court, 151 Cal. App. 4th 1079, 1099, 61 Cal. Rptr. 3d 716 (2007)*.

The Court finds Plaintiff successfully alleges its fraud claim. **[*39]** Plaintiff alleges Sojitz and Naito contracted an MOU with Jet Edge by fraudulently misrepresenting its intention to establish a long-term mutually beneficial relationship between Sojitz and Jet Edge. (FAC ¶ 118.) Citing testimony from the Schembari action, Plaintiff alleges Sojitz never intended to enter into a joint venture, despite their contrary representations. (Id. ¶¶ 31-32, 118-120.) Rather, Defendants and Schembari allegedly intended to induce Jet Edge's reliance, persuading them to hire Schembari as a pilot and allowing Sojitz to act as a liaison between Jet Edge and its customers. (Id. ¶¶ 120-121.) This put Defendants in the position to disparage Jet Edge to its customers, thus providing the customers with reason to leave Jet Edge. (Id. ¶ 50.) Jet Edge alleges this caused its customers to leave, resulting in monetary damages due to lost business. (Id. ¶ 123.) Thus, Plaintiff alleges the necessary elements of its fraud claim.

CUTSA does not preempt Plaintiff's fraud claim because the fraud claim can survive without relying on the same nucleus of facts as a potential trade secret claim.[6] As alleged, Defendants acted fraudulently to "steal Jet Edge's confidential information and **[*40]** customers." In the Schembari action, Judge Birotte ruled that facts regarding Schembari's use of confidential information were grounds for preemption under CUTSA. (Schembari Dkt. No. 88 at 7.) The Court agrees that using confidential information and client lists falls within the purview of CUTSA preemption. Plaintiff cannot pursue its fraud claim on the basis that Defendants used stolen confidential information. However, Plaintiff states a claim for fraud even when ignoring allegations concerning the use of confidential information. Defendants did not use confidential information to enter into an MOU with Jet Edge. (FAC ¶ 118.) Nor did they use confidential information to induce Jet Edge to hire Schembari. (Id.) Schembari used his position within Jet Edge to divert the N2020 contract and to disparage Jet Edge to its own customers. (Id. ¶¶ 49-50.) These independent acts allowed Defendants to gain access to Jet Edge's clients, resulting in harm to Jet Edge. Thus, Plaintiff alleges fraudulent acts that do not share a common nucleus of fact with a trade secret misappropriation. Plaintiff's fraud claim is not preempted by CUTSA. The Court DENIES Defendants' Motion to Dismiss Plaintiff's **[*41]** fraud claim because it can survive without allegations concerning theft of confidential information.

Turning to the UCL claim, Plaintiff specifically alleges its cause of actions under the unfair and fraudulent prongs. (Id. ¶ 114.) Plaintiff alleges Defendants and Schembari engaged in unfair and fraudulent competition when they persuaded Jet Edge to sign the MOU and then to hire Schembari with the intent of defrauding Jet Edge. (Id. ¶ 119.) A cause of action under the "unfair" prong requires that a plaintiff suffer injury from a direct competitor's unfair act, which means "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Levitt v. Yelp! Inc., 765 F.3d 1123, 1136 (9th Cir. 2014)*. Plaintiff's complaint does not detail how Defendants' acts harm competition, but rather focus on harm to Jet Edge as a competitor, thus failing under the unfair prong. See *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 196, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*.

To state a claim under the UCL's fraudulent practice prong, a plaintiff must show that "members of the public are likely to be deceived" by the alleged fraudulent conduct. *Schnall v. Hertz Corp., 78 Cal. App. 4th 1144, 1167, 93 Cal. Rptr. 2d 439 (2000)*. However, Plaintiff's **[*42]** allegations focus on how it, not members of the public, were deceived by Defendants' conduct. Thus, it is not clear from the FAC how Defendants inducing Plaintiff to sign the MOU and hire Schembari can be construed as acts that would deceive the public. Accordingly, the Court finds Plaintiff fails to allege a fraudulent practice violation of the UCL. The Court GRANTS Defendants' Motion to Dismiss Plaintiff's UCL claim.[7]

5. Claim One: Intentional Interference with Contractual Relations

Plaintiff alleges Defendants are liable for intentional interference with contractual relations because they acted intentionally to disrupt Jet Edge's contractual relationships with its customers Sam Cayman, Fast Retailing, Sega Sammy, Pocket Corporation, Private Wings, and Busujima. (FAC ¶ 78.) Plaintiff contends its claim is not preempted by CUTSA because they rely on facts independent from the misappropriation of trade secrets. Plaintiff argues it relies on other allegations including: (1) "Sojitz used the MOU merely as a vessel to accomplish its well thought out conspiracy to defraud and harm Jet Edge and steal its Asian business operations, among other things" (Id. ¶ 31);

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[6] Although Plaintiff does not expressly allege any trade secrets claim, including a trade secret claim is not required for CUTSA pre-emption. See *Silvaco Data Sys. v. Intel Corp., 184 Cal. App. 4th 210, 240, 109 Cal. Rptr. 3d 27 (2010)*, disapproved on other grounds in *Kwikset v. Superior Court, 51 Cal. 4th 310, 337, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)*.

[7] Although Plaintiff's briefing mentioned a potential action under the UCL's unlawful prong, such an action was absent from the FAC. (Opp. at 24.)

and (2) Defendants "aided and **[*43]** abetted Schembari to unlawfully breach his duty of loyalty to Plaintiff and intentionally interfere with Plaintiff's contractual relations, all while Schembari was still employed by Jet Edge." (Opp. at 13 (citing FAC ¶¶ 31, 45-55).)

A claim for intentional interference with contractual relations requires a plaintiff to establish: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *Pacific Gas & Electric Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 1126, 270 Cal. Rptr. 1, 791 P.2d 587 (1990)*.

As a preliminary matter, Plaintiff alleges the ACMAs were valid contracts and that Defendants had knowledge of these contracts. (FAC ¶¶ 76-77.) The Court first addresses whether the at-will ACMAs are proper subject for this claim. Courts have upheld tortious interference claims regarding at-will contracts. "We have affirmed that interference with an at-will contract is actionable interference on the theory that a contract 'at the will of the parties, respectively does not make it one at the will of others.'" *Pac. Gas & Elec., 50 Cal. 3d at 1127* (citations omitted). "The actionable wrong lies in the inducement **[*44]** to break the contract or to sever the relationship, not in the kind of contract or relationship so disrupted, whether it is written or oral, enforceable or not enforceable." *Zimmerman v. Bank of America. 191 Cal. App. 2d 55, 57, 12 Cal. Rptr. 319 (1961)*.

Defendants cite *Reeves v. Hanlon, 33 Cal. 4th 1140, 1152, 17 Cal. Rptr. 3d 289, 95 P.3d 513 (2004)*, to argue that the facts alleged are properly pleaded as an intentional interference with prospective economic advantage, not as intentional interference with contractual relations. (MTD at 12.) In Reeves, the California Supreme Court explained that because parties to an at-will employment contract have the right to terminate, tortious interference disrupts the future relationship between two contracted parties. *Reeves, 29 Cal. 4th at 1152*. However, the Reeves court explicitly noted that plaintiffs can plead intentional interference with an at-will employment contract if they plead and prove an independent wrongful act—i.e. "an act 'proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard'—that induced an at-will employee to leave the plaintiff." *Id. at 1153* (quoting *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1156, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*. Although this case does not arise in the context of an at-will employment contract, the Court finds that an independent wrongful act may similarly enable a plaintiff to plead intentional interference with other at-will contracts. **[*45]**

Here, Plaintiff contends it has pleaded several independent wrongful acts, including its claims Defendants acted fraudulently in entering into an MOU with Jet Edge and induced Schembari to breach his duty of loyalty. (Opp. at 18-19 (citing FAC ¶ 78).) Although the ACMAs from which this claim arises were at-will contracts, Defendants' alleged fraud is an independent wrongful basis on which Plaintiff's claim may rest. See SuperGuide Corp. v. Gemstar Dev. Corp., 2010 WL 11463159, at *13 (C.D. Cal. June 3, 2010) (stating fraud constitutes an "independently wrongful" act for the purposes of a tortious interference claim). Thus, the Court concludes the AMCAs are a proper subject for Plaintiff's claim for tortious interference with contractual relations. Plaintiff further alleges Defendants knew of the existing ACMAs and that Defendants' fraud, which induced Jet Edge to hire Schembari, involved intentional actions, e.g., Schembari's wrongful conduct while employed by Jet Edge, and disrupted the contractual relations the ACMAs embodied. (FAC ¶¶ 76-78.) Plaintiff suffered damages because of this disruption. (FAC ¶¶ 80-81.) Thus, Plaintiff pleads all elements of its intentional interference with contractual relations claim.

i. CUTSA Preemption

Defendants argue CUTSA preempts Plaintiff's claim for **[*46]** intentional interference with contractual relations because the claim is premised on the alleged misuse of trade secret client lists stolen from Jet Edge. (MTD at 11.)

In the Schembari action, the Court, relying on the new factual allegation that Schembari diverted jet N2020 away from Jet Edge, found Plaintiff's intentional interference with contractual relations claim was not be preempted by CUTSA. (Schembari Dkt. No. 166 at 5.) The Court reasoned Schembari's diversion of jet N2020 alone constituted interference in Jet Edge's contractual relationship with Sojitz and did not involve the stolen client lists that were the subject of Plaintiff's trade secrets claim. Id. Thus, Plaintiff had a basis for alleging intentional interference with contractual relations based on a different nucleus of facts than their trade secrets claim. Id.

Like in Schembari, Plaintiff's aforementioned allegations here state a claim for intentional interference with contractual relations without relying on the alleged misuse of the stolen client lists or other confidential information that might be considered trade secrets. Here, Plaintiff alleges Defendants committed fraud by inducing Plaintiff into signing an MOU and hiring Schembari **[*47]** while falsely representing an intention to establish a long-term relationship between Sojitz and Jet Edge. (Id. ¶¶ 120-123.) Plaintiff further alleges Defendants disparaged Jet Edge to convince companies to abandon their ACMA's with Jet Edge. (Id. ¶ 50.) Plaintiff contends this disrupted contractual relations, causing Jet Edge damage in the form of the lost contracts. (Id. ¶ 78.)

Viewing the allegations in a light most favorable to Plaintiff, it is reasonable to infer that Defendants interfered with Jet Edge's ACMAs without relying on client lists or other confidential information. Defendants used fraud as an avenue to make disparaging comments that interfered with Jet Edge's contractual relations with aircraft owners.[8] (Id. ¶ 120.) These disparaging comments are wrongful acts which form an independent basis to find interference with contractual relations, even when ignoring other bases that would trigger CUTSA preemption. Thus, Plaintiff's intentional interference with contractual relations claim is not preempted. The Court DENIES Defendants' Motion to Dismiss Plaintiff's claim for intentional interference with contractual relations.

6. Claim Two: Intentional Interference [*48] with Prospective Economic Advantage

Plaintiff alleges Defendants are liable for intentional interference with prospective economic advantage. (Id. ¶ 82.) Like the intentional interference with contractual relations claim, Plaintiff bases this claim on Defendants' alleged interference with Plaintiff's business arrangements with Sam Cayman, Fast Retailing, Sega Sammy, Pocket Corporation, Private Wings, and Busujima. (Id.)

To plead a claim for intentional interference with prospective business advantage, a plaintiff must allege:

> (1) a specific economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff;
> (2) knowledge by defendant of the existence of the relationship;
> (3) intentional acts on the part of the defendant designed to disrupt the relationship;
>
> (4) actual disruption of the relationship; and
>
> (5) damages proximately caused by the defendant's acts.

Panavision Int'l, L.P. v. Toeppen, 945 F. Supp. 1296, 1305 (C.D. Cal. 1996) (citing *Eichman v. Fotomat Corp., 871 F.2d 784, 800 (9th Cir. 1989)*; *Youst v. Longo, 43 Cal. 3d 64, 71 n.6, 233 Cal. Rptr. 294, 729 P.2d 728 (1987)*; *Buckaloo v. Johnson, 14 Cal. 3d 815, 826-29, 122 Cal. Rptr. 745, 537 P.2d 865 (1975))*.

The factual allegations supporting Plaintiff's intentional interference with contractual relations claim apply to Plaintiff's claim for intentional interference with prospective economic advantage. (FAC ¶¶ 82.) This includes Defendants' knowledge of the **[*49]** ACMAs Plaintiff contracted with Sam Cayman, Fast Retailing, Sega Sammy, Pocket Corporation, Private Wings, and Busujima. (FAC ¶¶ 82-100.) Plaintiff further alleges Defendants "conspired to and did intentionally interfere with and destroy Jet Edge's relationships with its customers" and, as a result, caused damage to Jet Edge in the form of the disrupted relationships and loss of economic benefit reasonably expected from these relationships. (FAC ¶¶ 86-89.) Plaintiff alleges these five companies broke off their ACMAs with Plaintiff (FAC ¶ 86.) Thus, Plaintiff provides sufficient allegations to support its intentional interference with

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[8] This inference is particularly reasonable given the events in Schembari, where a jury found Schembari tortiously interfered with Jet Edge's contracts based partially on evidence regarding disparaging comments he made to Jet Edge customers. (Schembari Dkt. No. 144 at 12.) The Court takes judicial notice of these proceedings.

prospective economic advantage claim. The Court further finds that this claim is not preempted by CUTSA for reasons identical to Plaintiff's claim for intentional interference with contractual relations. See supra Section IV.B.5. Accordingly, the Court DENIES Defendants' Motion to Dismiss Plaintiff's claim for intentional interference with prospective economic advantage.

7. Claim Three: Negligent Interference with Prospective Economic Advantage

Plaintiff alleges Defendants acted negligently in their actions to setup a competing venture, in part, by using **[*50]** Jet Edge's confidential information, representing that Sojitz intended to establish a long-term relationship with Jet Edge, and planting Schembari within Jet Edge to facilitate in the creation of ACP. (FAC ¶ 96.) Defendants argue that Plaintiff fails to state a claim for negligent interference with prospective economic advantage because it fails to allege Defendants' duty of care. (MTD at 14.) To plead a claim for negligent interference with prospective business advantage a plaintiff must allege:

> (1) an economic relationship existed between the plaintiff and a third party which contained a reasonably probable future economic benefit or advantage to plaintiff;
> (2) the defendant knew of the existence of the relationship and was aware or should have been aware that if it did not act with due care its actions would interfere with this relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship;
>
> (3) the defendant was negligent; and
>
> (4) such negligence caused damage to plaintiff in that the relationship was actually interfered with or disrupted and plaintiff lost in whole or in part the economic benefits or advantage reasonably expected **[*51]** from the relationship.

UMG Recordings, Inc. v. Glob. Eagle Entm't, Inc., 117 F. Supp. 3d 1092, 1118 (C.D. Cal. 2015) (citing *N. Am. Chem. Co. v. Superior Court, 59 Cal. App. 4th 764, 786, 69 Cal. Rptr. 2d 466 (1997))*.

Citing to *J'aire Corp. v. Gregory, 24 Cal. 3d 799, 803, 157 Cal. Rptr. 407, 598 P.2d 60 (1979)*, Plaintiff contends Sojitz's duty of care is established by a special relationship between Plaintiff created through the July 18, 2013 MOU between Jet Edge and Sojitz. (Opp. at 19; "MOU," Dkt. No. 1-1 ¶ 6.) The relevant portions of the MOU explicitly state it is nonbinding and that it only represents an intention to create a relationship in the future. (See MOU ¶ 6.) Additionally, Plaintiff's FAC alleges no facts concerning Defendants' duty of care under the MOU, nor does it allege that the MOU creates such a "special relationship." Accordingly, the Court GRANTS Defendants' Motion to Dismiss the negligent interference claim.

8. Claim Four: Breach of Contract

Plaintiff a brings claim for breach of contract against Sojitz based on the MOU. (FAC ¶¶ 101-112.) The MOU contemplated Sojitz's potential purchase of an equity stake in Jet Edge and creation of a jointly owned jet charter entity in Asia. (MOU at 5.) Plaintiff claims Sojitz breached the MOU by failing to negotiate or otherwise act in good faith because when it acted in bad faith by conspiring with the other Defendants to form a competing business and steal Jet Edge's clients. (FAC. ¶ 104.) Defendants argue Plaintiff fails to allege a **[*52]** breach of contract because the MOU explicitly states it is non-binding. (MTD at 14-15.)

According to Paragraph 7(a) of the MOU, Delaware law governs its terms. "In order to survive a motion to dismiss for failure to state claim for breach of contract, a plaintiff must demonstrate: first, the existence of the contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third, the resultant damage to the plaintiff." *VLIW Tech., LLC v. Hewlett-Packard Co., 840 A.2d 606, 612 (Del. 2003)*.

Section 6 of the MOU signed by Sojitz and Jet Edge states that the MOU:

> is intended to express only a mutual indication of interest in the Proposed Transaction and does not represent any legal binding commitment or obligation on the part of Sojitz or Jet Edge with respect to the Proposed Transaction, except with respect to Section 4 (Confidentiality), this Section 6 (No Commitment) and Section 7 (Miscellaneous) and no party hereto will assert otherwise.

MOU ¶ 6. Based on this section of the MOU, the Court finds the MOU is binding with respect to Sections 4, 6, and 7. Plaintiff cites *Gillenardo v. Connor Broadcasting Delaware Co., 2002 Del. Super. LEXIS 402, 2002 WL 991110, at *6 (April 30, 2002)*, to argue it sufficiently alleges that Defendants breached the MOU. However, in Gillenardo, the court held a good faith obligation existed because the contract in question "ha[d] absolutely no express or explicit provision **[*53]** limiting liability for a bad-faith failure to negotiate," leaving it to the court to determine whether the parties intended to be bound by a good faith requirement. *Id.* Here, the language of the MOU leaves no similar uncertainty, as its explicit terms state the agreement is non-binding save for three expressly-listed provisions-Sections 4, 6, and 7. (MOU ¶ 6.) The MOU does not enumerate such an exception for , which contains the good faith provision in question. (Id. ¶¶ 2, 6.) Given the expressly non-binding nature of the MOU and the limited exceptions enumerated in paragraph 6, the Court cannot find that Jet Edge and Sojitz intended to be bound by the good faith provision in Section 2. See, e.g., *Newharbor Partners, Inc. v. F.D. Rich Co., Inc., 961 F.2d 294, 300 (1st Cir. 1992)* (holding a good faith provision in a non-binding letter of intent is unenforceable where it was not included as an exception to the letter's non-binding nature). Section 2For these reasons, the Court GRANTS Defendants' Motion to Dismiss Plaintiff's claim for breach of contract.

9. Claim Five: Breach of Implied Covenant of Good Faith and Fair Dealing

Plaintiff also brings a cause of action for breach of the implied covenant of good faith and fair dealing based on the MOU. Specifically, Plaintiff alleges Sojitz denied Plaintiff **[*54]** the benefits of the MOU by setting up a competing venture to Jet Edge by using confidential information. (Id. ¶ 106.)

All contracts are subject to an implied covenant of good faith and fair dealing. *Wilgus v. Salt Pond Investment Co., 498 A.2d 151, 159 (Del. Ch. 1985)*. In order to plead successfully a breach of an implied covenant of good faith and fair dealing, the plaintiff must allege a specific implied contractual obligation, a breach of that obligation by the defendant, and resulting damage to the plaintiff. *Fitzgerald v. Cantor, 1998 Del. Ch. LEXIS 212, 1998 WL 842316, at *1 (Del. Ch. Nov. 10, 1998)* (footnote omitted). Because a court "can only imply a contractual obligation when the express terms of the contract indicate that the parties would have agreed to the obligation had they negotiated the issue, the plaintiff must advance provisions of the agreement that support this finding in order to allege sufficiently a specific implied contractual obligation." Id. (footnote omitted).

The Court finds Plaintiff fails to plead breach of an implied contractual obligation based on the contract encompassed in Sections 4, 6, and 7 of the MOU. Plaintiff bases its allegation of breach of the implied covenant of good faith and fair dealing claim on Section 2, which, as discussed above, is non-binding. (FAC ¶ 108.) The Court finds that MOU Section 6 renders portions of the MOU non-binding, **[*55]** making those portions of the agreement improper bases of a claim for breach of the implied covenant of good faith and fair dealing. This does not foreclose the possibility that Plaintiff may allege a breach of the implied covenant of good faith and fair dealing based on an implied contractual obligation grounded in the binding sections of the MOU. However, Plaintiff's FAC and Opposition do not raise such arguments. Accordingly, Plaintiff does not state a claim for breach of the implied covenant of good faith and fair dealing. The Court GRANTS Defendants' Motion to Dismiss Plaintiff's claim for breach of the implied covenant of good faith and fair dealing.

VI. LEAVE TO AMEND

Generally, a "district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by allegation of other facts." *Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)* (en banc) (internal quotation marks and citation omitted). Here, the Court identifies specific factual deficiencies which may be cured by amendment as to Plaintiff's claims for negligent interference with prospective business advantage (claim 3), the implied covenant of good faith and fair dealing (claim 5), and **[*56]** violation of the UCL (claim 6). Accordingly, Court GRANTS Plaintiff LEAVE TO AMEND as to claims 3, 5, and 6. However, given the terms of the MOU, the Court finds Plaintiff will be unable to amend its claims concerning its breach of contract claim (claim 4). The Court DENIES LEAVE TO AMEND as to claim 4.

VII. CONCLUSION

For these reasons, the Court GRANTS Quenga's Motion to Dismiss the claims against her for lack of personal jurisdiction. The Court GRANTS Defendants' Motion to Dismiss Sojitz Jet for lack of personal jurisdiction. The Court DENIES Defendants' Motion to Dismiss as to claims one, two, and seven. The Court GRANTS Defendants' Motion to Dismiss as to claims three, four, five, and six. Plaintiff shall file an amended complaint, if any, by May 27, 2019.

IT IS SO ORDERED.

City of Rockford v. Mallinckrodt ARD, Inc.

United States District Court for the Northern District of Illinois

May 3, 2019, Decided; May 3, 2019, Filed

Case No: 17 C 50107

Reporter

2019 U.S. Dist. LEXIS 103885 *; 2019-1 Trade Cas. (CCH) P80,769; 2019 WL 2763181

City of Rockford, Plaintiff, v. Mallinckrodt ARD, Inc., et al., Defendants.

Prior History: *City of Rockford v. Mallinckrodt ARD, Inc., 360 F. Supp. 3d 730, 2019 U.S. Dist. LEXIS 12171, 2019 WL 330471 (N.D. Ill., Jan. 25, 2019)*

Core Terms

conspiracy, distributors, reconsideration motion, interlocutory appeal, manufacturer, Acquisition, certify

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Judges: FREDERICK J. KAPALA, District Judge.

Opinion by: FREDERICK J. KAPALA

Opinion

ORDER

Express Scripts Holding Co.; Express Scripts, Inc.; United Biosource Corp.; Accredo Health Group, Inc.; and Curascript, Inc.'s motion for reconsideration, or, in the alternative, to certify an interlocutory appeal [190] is denied.

STATEMENT

On February 22, 2019, defendants—Express Scripts Holding Co.; Express Scripts, Inc.; United Biosource Corp.; Accredo Health Group, Inc.; and Curascript, Inc. (collectively "Express Scripts")—filed this motion for **[*4]** reconsideration of the court's January 25, 2019 order granting in part and denying in part Express Scripts' and Mallinckrodt's[1] motion to dismiss the second amended complaint ("the MTD Order").[2] In the alternative, Express Scripts moves for certification of an interlocutory appeal.[3] For the reasons stated below, the court denies both motions.

I. Motion for Reconsideration[4]

A motion for reconsideration is appropriate where a court has "patently misunderstood a party, or has made a decision outside the adversarial issues presented to the court by the parties, or has made an error not of reasoning but of apprehension." *Bank of Waunakee v. Rochester Cheese Sales, Inc., 906 F.2d 1185, 1191 (7th Cir. 1990)*. Motions for reconsideration are not to be used to "rehash" arguments previously made in the underlying motion. *Vesely v. Armslist LLC, 762 F.3d 661, 666 (7th Cir. 2014)*.

Express Scripts advances four arguments in its motion. The court addresses each in turn. First, Express Scripts argues that "[t]here is no allegation anywhere in the [second amended complaint] that an Express Scripts Entity

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[1] The court refers to both Mallinckrodt plaintiffs, Mallinckrodt plc and Mallinckrodt ARD, Inc. (including its acquisition of Questcor Pharmaceuticals, Inc.), as "Mallinckrodt" for purposes of this opinion.

[2] Since the MTD Order was issued, Acument has voluntarily withdrawn from the case. Therefore, the claims referred to in this opinion refer to Rockford's claims only.

[3] Express Scripts also requests oral argument. The court has determined that it can resolve the disputed issues on the briefs and therefore denies that request. See *L.R. 78.3* ("Oral argument may be allowed in the court's discretion.").

[4] Express Scripts does not specify what Federal Rule of Civil Procedure they move under. However, the court has inherent authority to reconsider its own orders entered prior to final judgment. *VBR Tours, LLC v. Nat'l R.R. Passenger Corp., No. 14-CV-00804, 2015 U.S. Dist. LEXIS 130455, 2015 WL 5693735, at *5 (N.D. Ill. Sept. 28, 2015)* (citing *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 12, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983))*.

was involved in the Synacthen Acquisition." (emphasis in original). The court has determined that, as it must, drawing all reasonable inferences in favor of plaintiff and accepting all well-pleaded allegations as true, plaintiff has alleged **[*5]** the factual circumstances which follow.

Express Scripts has come to play a dominant role in the prescription drug industry and wields great influence in the manufacturing and distribution of prescription drugs to the public. Express Scripts has an agreement with Mallinckrodt that enables it to exclusively control all aspects of Acthar distribution from manufacturer to patient. The court can reasonably infer from the allegations of the second amended complaint that, as a major participant in the prescription drug business, Express Scripts would keep apprised of all the significant developments in the field. As Express Scripts' chief medical officer is alleged to have said, "We are constantly trying to be vigilant and chase the bad actors out of the marketplace." It stands to reason that this would especially be true as to any business activity that concerns Acthar, an extremely profitable drug for which Express Scripts was the exclusive distributor. As such, the court surmises that Express Scripts would have been aware of such developments, including Mallinckrodt's acquisition and shelving of Synacthen as well as the Federal Trade Commission's action against Mallinckrodt. See also MTD **[*6]** Order at 24 ("Plaintiffs allege that Mallinckrodt was acting in concert with Express Scripts in an exclusive dealing arrangement well before the Synacthen Acquisition, and thus, plaintiffs plausibly alleged that defendants' conspiracy encompassed and facilitated the Acquisition."). Knowing what actions Mallinckrodt was taking in connection with Synacthen, Express Scripts brought its power, expertise and influence to the aid of Mallinckrodt. Express Scripts continued as the exclusive distributor of Acthar, all the while sharing in the enormous profits generated by its sale to the public. Mallinckrodt benefitted by Express Scripts' cooperation in eliminating any interference by other distributors allowing Mallinckrodt to optimize its ability to act in an unrestrained manner to raise the price of Acthar to unconscionable levels.

As to the legal landscape in which we are operating it is worth noting that the Seventh Circuit's holding in Paper Systems Inc. v. Nippon Paper Industries Co. stands apart from other circuits in its understanding of the "co-conspirator" exception. There, the Seventh Circuit held that allowing downstream purchasers to sue the various entities that conspire to restrain **[*7]** trade is consistent with, and not an exception to, the principles of Illinois Brick:

> The right to sue middlemen that joined the conspiracy is sometimes referred to as a co-conspirator 'exception' to Illinois Brick, but it would be better to recognize that Hanover Shoe and Illinois Brick allocate to the first non-conspirator in the distribution chain the right to collect 100% of the damages. . . . Thus our plaintiffs are entitled to collect damages from both the manufacturers and their intermediaries if conspiracy and overcharges can be established. . . . Nothing in Illinois Brick displaces the rule of joint and several liability, under which each member of a conspiracy is liable for all damages caused by the conspiracy's entire output.

Paper Systems, 281 F.3d 629, 631-32 (7th Cir. 2002). Other Seventh Circuit opinions remind us that "[i]t is helpful to recall that at common law a conspiracy was unlawful if the conspirators used unlawful means to a lawful end or lawful means to an unlawful end." *Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 709-10 (7th Cir. 1984)* (citing *United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 293 (6th Cir. 1898))*. Also, "[a]n express agreement among all the conspirators is not a necessary element of a civil conspiracy. The participants in the conspiracy must share the general conspiratorial objective, but they need not know all the details of **[*8]** the plan designed to achieve the objective or possess the same motives for desiring the intended conspiratorial result." *Lenard v. Argento, 699 F.2d 874, 882 (7th Cir. 1983)*. Finally, "[a] plaintiff seeking redress need not prove that each participant in a conspiracy knew the exact limits of the illegal plan or the identity of all participants therein. . . . To demonstrate the existence of a conspiratorial agreement, it simply must be shown that there was a single plan, the essential nature and general scope of which was known to each person who is to be held responsible for its consequences." *Cameo Convalescent Ctr., Inc. v. Senn, 738 F.2d 836, 841 (7th Cir. 1984)*.

Express Scripts need not have been sitting in the board room contributing to Mallinckrodt's plan to acquire Synacthen for this court to find that it was "involved" in the scheme to exorbitantly raise the price of Acthar. Express Scripts' decision to cooperate with Mallinckrodt, a lawful act in and of itself, can be a part of a scheme if there was an understanding between the two sides as to how they could facilitate Mallinckrodt's monopoly and its effort to raise the price of Acthar. In order to be counted as a member of the conspiracy Express Scripts did not have to be an integral participant in the Synacthen Acquisition; it just needed to know **[*9]** about it and assist in achieving the ultimate aim of eliminating Synacthen as a competitive drug. In the court's view the complaint plausibly implicates both Mallinckrodt and Express Scripts as part of the purported scheme to increase Acthar's price and prevent potential competition from entering the relevant market. The court did not misapprehend this issue; it carefully considered the alleged relationship and concluded that plaintiffs have sufficiently alleged an antitrust conspiratorial arrangement between Mallinckrodt and Express Scripts.

Second, Express Scripts argues that the exclusive distribution arrangement could not have harmed competition. Express Scripts cites *E & L Consulting, Ltd. v. Doman Industries Ltd., 472 F.3d 23 (2d Cir. 2006)* to argue that monopolists "can control its own pricing and output to the same extent regardless of distributors it employs." But central to the Second Circuit's finding was the fact that the manufacturer in that case could have distributed the product themselves and did not have to rely on the intermediary. *Id. at 29*. The complaint in this case does not suggest that Mallinckrodt had the ability to act as its own distributor. As pled, Mallinckrodt needed Express Scripts so that it could sell Acthar without meddling from competing **[*10]** distributors who might impede Mallinckrodt's ability to cement its control of the price of the drug.

The Court in E & L also made a point to note that the complaint in that case "simply does not allege . . . 'that the challenged action has had an actual adverse effect on competition as a whole in the relevant market.'" *Id. at 31*. Unlike in E & L, the complaint here does allege an "actual adverse effect on competition." (emphasis in original). In the court's MTD Order it found that plaintiff had plausibly alleged the ability of both Mallinckrodt and Express Scripts through their arrangement to keep prices high in large part because patients' options were limited as a result of the sequestration of Synacthen from the market. Thus, as the allegations go, Mallinckrodt with the aid of Express Scripts had unfettered ability to raise the price to whatever it chose, as parents would not allow their children to suffer from infantile spasms. Express Scripts' exclusive distribution arrangement effectively kept other distributors from interfering in Mallinckrodt's plan, and in doing so helped both its and Mallinckrodt's businesses. This is enough for Rockford to have standing to sue. Cf. *In re ATM Fee Antitrust Litigation 686 F.3d 741 (9th Cir. 2012)*; *Dickson v. Microsoft Corp., 309 F.3d 193 (4th Cir. 2002)*.[5]

Third, in a **[*11]** related argument, Express Scripts contends that the exclusive dealing arrangement cannot have prevented another pharmaceutical manufacturer from developing an alternative to Acthar. Express Scripts quotes language from the complaint which stated "[t]he goal of this strategy was to lock patients into receiving Acthar through one channel and prevent a competitive product from entering the market." Compl. P 222. The "competitive product" alleged in the complaint and referenced in the court's order was Synacthen, not some unknown pharmaceutical manufacturer. As the court has already set forth, Express Scripts aided Mallinckrodt in keeping Synacthen from seeing the light of day which inured to the benefit of both. As stated in the MTD Order, ***antitrust law*** is intended to prevent consumers from suffering the adverse effects of lessened competition. See *Agnew v. NCAA, 683 F.3d 328, 334-35 (7th Cir. 2012)* ("The purpose of the Sherman Act is to protect consumers from injury that results from diminished competition."). The court rejects Express Scripts' contention at this stage of litigation.

Finally, Express Scripts argues that it "owes no affirmative duty to 'force competition' or to 'push back' on price increases." However as the court's order **[*12]** states, Express Scripts plausibly aided Mallinckrodt. The exclusive dealing arrangement allowed Mallinckrodt to market and sell Acthar, unhampered by any interference from other distributors. Express Scripts is alleged to be in a "unique position" to negotiate lower Acthar prices, and that the exclusive dealing arrangement played a role in their decision not to do so. Whether or not Express Scripts had an affirmative duty to force competition, what matters is that Express Scripts' arrangement with Mallinckrodt kept other distributors at bay.

The court finds that it has not misapprehended the issues of this case and that, to the extent Express Scripts' arguments do not constitute simply "rehashing," these arguments do not persuade the court to alter its reasoning as to these issues. To be sure, further proceedings in this case may debunk the allegations of the second amended complaint and the inferences to be made therefrom. But in the court's assessment, at this stage of the case

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[5] While the court found that Express Scripts conspired with Mallinckrodt to "restrict" the output of Acthar, the court used the term "restrict" in the sense of confining Acthar to the control of Mallinckrodt with the aid of Express Scripts.

Rockford should not be deprived of an opportunity to prove its remaining causes of action. Accordingly, the court denies Express Scripts' motion for reconsideration.

II. Motion to Certify an Interlocutory Appeal [*13] Under *§ 1292(b)*

The Express Scripts defendants also move for certification of an interlocutory appeal to the Seventh Circuit under *28 U.S.C. § 1292(b)*. For the reasons stated below, the court denies their request.

Section 1292(b) enumerates four criteria for granting a petition for interlocutory appeal: (1) there must be a question of law; (2) it must be controlling; (3) it must be contestable; and (4) its resolution must promise to speed up the litigation. *Ahrenholz v. Bd. of Trs. of Univ. of Ill., 219 F.3d 674, 675 (7th Cir. 2000)*. "Unless all these criteria are satisfied, the district court may not and should not certify its order to us for an immediate appeal under *section 1292(b)*. To do so in such circumstances is merely to waste our time and delay the litigation in the district court, since the proceeding in that court normally grinds to a halt as soon as the judge certifies an order in the case for an immediate appeal." *Id. at 676*. Plaintiffs do not dispute that there is a question of law—there is: whether plaintiffs have plausibly alleged a conspiracy between all the defendants to price-fix and unlawfully maintain a monopoly—or whether those questions are controlling—they are: this case would likely be over if the Seventh Circuit found that plaintiffs did not state a claim.

On the third prong, whether these questions **[*14]** are contestable, the court finds that they are not. An issue is contestable within the meaning of *§ 1292(b)* if there is a "difficult central question of law which is not settled by controlling authority" and a "substantial likelihood" exists that the district court's ruling will be reversed on appeal. *In re Brand Name Prescription Drugs Antitrust Litigation, 878 F. Supp. 1078, 1081 (N.D. Ill. 1995)*. The court is satisfied, even after a review and consideration of defendants' briefings here as well as in their underlying motions to dismiss, that there is not a "substantial likelihood" that its rulings will be reversed on appeal.

A matter qualifies for appeal under the fourth prong if its resolution could "head off protracted, costly litigation." *Ahrenholz, 219 F.3d at 677*. Here, even if the Seventh Circuit were to find for Express Scripts, there are still claims under federal and state laws that will proceed against Mallinckrodt and thus the litigation will not be quickly concluded. In the court's mind it would be improper to seriously disrupt the progress of this already two-year-old case by sending the case to the Court of Appeals. Accordingly, the court denies the Express Scripts defendants' request under *§ 1292(b)*.

III. CONCLUSION

For the foregoing reasons, the Express Scripts defendants' motion for reconsideration, or, **[*15]** in the alternative, to certify an interlocutory appeal is denied.

Date: 5/3/2019

ENTER:

/s/ Frederick J. Kapala

FREDERICK J. KAPALA

District Judge

In re Broiler Chicken Antitrust Litig.

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

May 6, 2019, Decided; May 6, 2019, Filed

Case No. 16 C 8637

Reporter

2019 U.S. Dist. LEXIS 114664 *; 2019 WL 2764260

IN RE BROILER CHICKEN ANTITRUST LITIGATION. This Document Relates To: All Actions

Prior History: *In re Broiler Chicken Antitrust Litig., 2017 U.S. Dist. LEXIS 73219 (N.D. Ill., Apr. 21, 2017)*

Core Terms

Products, subpoenas, purchasers, parties, confidential, discovery, confidentiality order, confidential information, Non-Party, indirect, downstream, cases

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For Jennifer Wallace, Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Steve W. Berman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; J Gerard Stranch, IV, PRO HAC VICE, Branstetter, Stranch & Jennings, PLLC, Nashville, TN; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Alpine Special Treatment Center, Inc., Plaintiff: Bobby Pouya, LEAD ATTORNEY, PRO HAC VICE, PEARSON, SIMON & WARSHAW, LLP, Sherman Oaks, CA; Cadio Zirpoli, PRO HAC VICE, Saveri & Saevri, Inc., San Francisco, CA; Matthew Dickinson Heaphy, Sarah Jane Van Culin, PRO HAC VICE, Saveri & Saveri, Inc., San Francisco, CA; Robert J Gralewski, Jr., PRO HAC VICE, Kirby McInerney **[*17]** LLP, San Diego, CA; Shana Scarlett, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Indirect Purchaser Plaintiffs, Plaintiff: Adam John Zapala, LEAD ATTORNEY, Cotchett, Pitre & Mccarthy, Burlingame, CA.

For Piggly Wiggly Alabama Distributing Co., Inc., Plaintiff: Eric Richard Lifvendahl, LEAD ATTORNEY, Lowis & Gellen LLP, Chicago, IL; Jeffrey Philip Campisi, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP (NYC), New York, NY; Matthew Powers McCahill, Robert N. Kaplan, LEAD ATTORNEYS, Kaplan Fox & Kilsheimer LLP, New York, NY; Matthew P. Mccahill, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer Llp, New York, NY; Solomon B Cera, LEAD ATTORNEY, Cera LLP, San Francisco, CA; Charles Andrew Dirksen, PRO HAC VICE, Cera LLP, Boston, MA; Richard Lyle Coffman, The Coffman Law Firm, Beaumont, TX.

For Affiliated Foods, Inc.'s Plaintiffs, Merchants Distributors, LLC, Associated Grocers of New England, Inc., Plaintiffs: Charles Andrew Dirksen, Solomon B Cera, LEAD ATTORNEYS, Cera LLP, Boston, MA; Eric Richard Lifvendahl, LEAD ATTORNEY, Lowis & Gellen LLP, Chicago, IL; Jeffrey Philip Campisi, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP (NYC), New York, NY; **[*18]** Rick A. Decker, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, P.C., Rochester, MI; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox LLP, New York, NY.

Plaintiffs in 1:16-cv-08637, Plaintiff, Pro se.

For Alex Lee, Inc., Plaintiff: Charles Andrew Dirksen, Solomon B Cera, LEAD ATTORNEYS, Cera LLP, Boston, MA; Eric Richard Lifvendahl, LEAD ATTORNEY, Lowis & Gellen LLP, Chicago, IL; Jeffrey Philip Campisi, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP (NYC), New York, NY; Matthew Powers McCahill, LEAD ATTORNEY, Kaplan Fox & Kilsheimer LLP, New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox LLP, New York, NY; Evan Patrick Boyle, Williams Montgomery & John, Chicago, IL. Jonathan Eric Grossman, Williams Montgomery & John Ltd., Chicago, IL.

For Big Y Foods, Inc., Plaintiff: Charles Andrew Dirksen, Solomon B Cera, LEAD ATTORNEYS, Cera LLP, Boston, MA; Eric Richard Lifvendahl, LEAD ATTORNEY, Lowis & Gellen LLP, Chicago, IL; Jeffrey Philip Campisi, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP (NYC), New York, NY; Matthew Powers McCahill, LEAD ATTORNEY, Kaplan Fox & Kilsheimer LLP, New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer **[*19]** & Fox LLP, New York, NY; Evan Patrick Boyle, Williams Montgomery & John, Chicago, IL.

For Winn-Dixie Stores, Inc., Plaintiff: Patrick John Ahern, Ahern and Associates, P.C., Chicago, IL; Theodore Beloyeannis Bell, Ahern & Associates P.C., Chicago, IL.

For Sysco Corporation, Plaintiff: Erica Michelle Spevack, Jonathan M. Shaw, Boies, Schiller & Flexner Llp, Washington, DC,PRO HAC VICE, Boies Schiller Flexner LLP, Washington, DC.

For US Foods, Inc., Plaintiff: Scott Gant, LEAD ATTORNEY, PRO HAC VICE, Boies Schiller Flexner LLP, Washington, DC; Daryl M. Schumacher, Kopecky Schumacher Rosenburg PC, Chicago, IL; Erica Michelle Spevack, Jonathan M. Shaw, Kyle N Smith, PRO HAC VICE, Boies Schiller Flexner LLP, Washington, DC.

For Piggly Wiggly Alabama Distributing Co., Inc., Plaintiff: Jeffrey Philip Campisi, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP (NYC), New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox LLP, New York, NY.

For End-User Consumer Plaintiffs, Plaintiff: Breanna LE Van Engelen, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Jason A. Zweig, Rio Shaye Pierce, Hagens Berman Sobol Shapiro Llp, Chicago, IL; Steve W. Berman, Hagens Berman **[*20]** Sobol Shapiro LLP, Seattle, WA.

For Action Meat Distributors, Inc., Plaintiff: Eric Richard Lifvendahl, Lowis & Gellen LLP, Chicago, IL.

For Jetro Holdings. LLC, Plaintiff: Mark A. Singer, LEAD ATTORNEY, PRO HAC VICE, Boies Schiller Flexner LLP, Albany, NY; Philip J. Iovieno, LEAD ATTORNEY, Anne M. Nardacci, Boies Schiller Flexner, Albany, NY; Nicholas A Gravante, Jr, Boies, Schiller and Flexner LLP, New York, NY; Ryan Thomas McAllister, PRO HAC VICE, Boies Schiller Flexner LLP, Albany, NY; Terence H. Campbell, Cotsirilos, Tighe, Streicker, Poulos, & Campbell, Ltd., Chicago, IL.

For The Kroger Co., Plaintiff: Brandon S Floch, Douglas H Patton, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL; Samuel J. Randall, William J Blechman, Kenny Nachwalter, P.a., Miami, FL.

For Hy-Vee, Inc., Albertsons Companies, Inc., Plaintiffs: Brandon S Floch, Douglas H Patton, PRO HAC VICE, William J Blechman, Kenny Nachwalter, P.A., Miami, FL; Samuel J. Randall, Kenny Nachwalter, P.a., Miami, FL.

For Associated Grocers of the South, Inc., Plaintiff: David P Germaine, John Paul Bjork, Joseph Michael Vanek, LEAD ATTORNEYS, Sperling & Slater, P.C., Chicago, IL; Ryan Thomas Holt, Sherrard Roe Voigt & Harbison, **[*21]** Plc, Nashville, TN.

For Meijer, Inc., Meijer Distribution, Inc., OSI Restaurant Partners, LLC, Publix Super Markets, Inc., Supervalu Inc., Wakefern Food Corporation, Plaintiffs: David P Germaine, Joseph Michael Vanek, LEAD ATTORNEYS, Sperling & Slater, P.C., Chicago, IL.

For Ahold Delhaize USA, Inc., Plaintiff: Ryan Patrick Phair, LEAD ATTORNEY, Hunton Andrews Kurth, Washington, DC; Carter C. Simpson, Emily K Bolles, PRO HAC VICE, Hunton Andrews Kurth LLP, Washington, DC; John S Martin, PRO HAC VICE, Hunton Andrews Kurth, Richmond, VA; Julie B. Porter, Salvatore Prescott & Porter PLLC, Evanston, IL.

For W. Lee Flowers & Co., Inc., Howard Samuels as Trustee in Bankruptcy for Central Grocers, Inc., et al., Plaintiffs: Eric Richard Lifvendahl, Lowis & Gellen LLP, Chicago, IL.

For BJ's Wholesale Club Inc., Maximum Quality Foods, Inc., Darden Restaurants, Inc., Sherwood Food Distributors, LLC, Plaintiffs: Philip J. Iovieno, LEAD ATTORNEY, Anne M. Nardacci, Boies Schiller Flexner, Albany, NY; Ryan Thomas McAllister, PRO HAC VICE, Mark A. Singer, Boies Schiller Flexner LLP, Albany, NY; Nicholas A Gravante, Jr, Boies, Schiller and Flexner LLP, New York, NY; Terence H. Campbell, Cotsirilos, Tighe, **[*22]** Streicker, Poulos, & Campbell, Ltd., Chicago, IL.

For Associated Wholesale Grocers, Inc., on behalf of itself and as assignee of Affiliated Foods Midwest Cooperative, Inc.'s claims, Plaintiff: Amy D. Fitts, LEAD ATTORNEY, Polsinelli PC, Kansas City, MO; Daniel D. Owen, LEAD ATTORNEY, PRO HAC VICE, Polsinelli, Kansas City, MO; Guillermo Gabriel Zorogastua, LEAD ATTORNEY, PRO HAC VICE, Kansas City, MO; Rodney L. Lewis, Polsinelli PC, Chicago, IL.

For United Supermarkets, LLC, Krispy Krunchy Foods, LLC, Cheney Bros., Inc., Plaintiffs: Amanda R Jesteadt, David Bedford Esau, LEAD ATTORNEYS, Kristin Alexandra Gore, Carlton Fields, P.A., West Palm Beach, FL; Sarah Cortvriend, LEAD ATTORNEY, Carlton Fields Jorden Burt, P.a., West Palm Beach, FL.

For Commercial and Institutional Indirect Purchaser Plaintiffs, Plaintiff: Scott Patton Tift, LEAD ATTORNEY, PRO HAC VICE, Barrett Johnston Martin & Garrison, LLC, Nashville, TN; Gabrielle Sliwka, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN; Kara Anne Elgersma, Michelle Perkovic, Thomas Arthur Doyle, Wexler Wallace LLP, Chicago, IL.

For Quirch Foods, LLC, f/k/a Quirch Foods Co., Plaintiff: Andrew Szot, Marvin Alan Miller, Matthew E Van Tine, Miller **[*23]** Law LLC, Chicago, IL.

For Hooters of America, LLC, Plaintiff: Amanda R Jesteadt, LEAD ATTORNEY, Carlton Fields, P.A., West Palm Beach, FL; Sarah Cortvriend, LEAD ATTORNEY, Carlton Fields Jorden Burt, P.a., West Palm Beach, FL.

For Hooters of America, LLC, Checkers Drive-In Restaurants, Inc., Plaintiffs: Kristin Alexandra Gore, Carlton Fields, P.A., West Palm Beach, FL.

Associated Grocers, Inc., Plaintiff, Pro se.

Brookshire Grocery Company, Plaintiff, Pro se.

For Schnuck Markets, Inc., Plaintiff: Evan Patrick Boyle, Williams Montgomery & John, Chicago, IL.

For Direct Purchaser Plaintiffs, Plaintiff: Allan Howard Steyer, D. Scott Macrae, Jill M. Manning, PRO HAC VICE, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA.

For Unified Grocers, Inc., Associated Grocers of Florida, Inc., Plaintiffs: David P Germaine, Sperling & Slater, P.C., Chicago, IL.

Save Mart Supermarkets, Plaintiff, Pro se.

For Giant Eagle, Inc., Plaintiff: Bernard D Marcus, PRO HAC VICE, Marcus & Shapira, L.L.P., Pittsburgh, PA; Erin Gibson Allen, Moira E. Cain-Mannix, PRO HAC VICE, Marcus & Shapira LLP, Pittsburgh, PA.

For Bi-Lo Holdings, LLC, Plaintiff: Theodore Beloyeannis Bell.

Bashas' Inc., Plaintiff, Pro **[*24]** se.

For Walmart, Inc., Plaintiff: Shawn J. Rabin, LEAD ATTORNEY, Susman Godfrey L.L.P., New York, NY.

For Conagra Brands, Inc., Pinnacle Foods, Inc., Kraft Heinz Foods Company, Nestle USA, Inc., Nestle Purina Petcare Company, Plaintiffs: David C. Eddy, LEAD ATTORNEY, Dennis John Lynch, ***Antitrust Law*** Group, LLC, Columbia, SC; Rachael Cecelia Brennan Blackburn, Robert M. Andalman, A & G Law LLC, Chicago, IL.

United States of America, Plaintiff, Pro se.

Services Group of America, Inc., Plaintiff, Pro se.

For WalMart, Inc., WAL-MART STORES EAST, LP, Wal-Mart Stores Arkansas, LLC, Wal-Mart Stores Texas, LLC, Wal-Mart Louisiana, LLC, Sam's West, Inc., Sam's East, Inc., Plaintiffs: Shawn J. Rabin, Susman Godfrey L.L.P., New York, NY.

For Koch Foods, Inc., JCG Foods of Alabama, LLC, JCG Foods of Georgia, LLC, Koch Meats Co., Inc., Defendants: Stephen Novack, LEAD ATTORNEY, Brian E. Cohen, Christopher S. Moore, Elizabeth Carlson Wolicki, Julie Ann Johnston-Ahlen, Stephen J. Siegel, Novack and Macey LLP, Chicago, IL.

For Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Breeders, Inc., Tyson Poultry, Inc., Defendants: John M. Tanski, LEAD ATTORNEY, Axinn, Veltrop & Harkrider LLP-HTFD, Hartford, CT; Nicholas **[*25]** Gaglio, LEAD ATTORNEY, PRO HAC VICE, Axinn, Veltrop & Harkrider LLP, New York, NY; Rachel J Adcox, LEAD ATTORNEY, PRO HAC VICE, Axinn, Veltrop & Harkrider LLP, Washington, DC; Bradley Charles Nahrstadt, Lipe Lyons Murphy Nahrstadt & Pontikis, Ltd., Chicago, IL; Daniel K. Oakes, Kenina J Lee, Michael J O'Mara, PRO HAC VICE, Axinn, Veltrop & Harkrider LLP, Washington, DC; Jarod G. Taylor, PRO HAC VICE, Axinn, Veltrop & Harkrider LLP, Hartford, CT.

For Pilgrim's Pride Corporation, Defendant: Carrie C. Mahan, Cecile L. Farmer, Christopher J. Abbott, Jonathan S. Goldsmith, PRO HAC VICE, Weil, Gotshal & Manges LLP, Washington, DC; Clayton E. Bailey, PRO HAC VICE, Bailey Brauer PLLC, Dallas, TX; Jessica L. Falk, PRO HAC VICE, Weil, Gotshal & Manges LLP, New York, NY; Kevin J Arquit, Kasowitz Benson Torres LLP, New York, NY; Lorell Guerrero, PRO HAC VICE, Weil Gotshal & Manges, Miami, FL; Michael Lee McCluggage, Eimer Stahl LLP, Chicago, IL; Rachel A. Farnsworth, PRO HAC VICE, Weil, Gotshal & Manges LLP, Princeton, NJ; Robert A Dahnke, PRO HAC VICE, Weil, Gotshal & Manges LLP, Washington DC, DC.

For Perdue Farms, Inc., Defendant: Andrew Thomas Hernacki, LEAD ATTORNEY, PRO HAC VICE, James Douglas **[*26]** Baldridge, LEAD ATTORNEY, Robert Paul Davis, Zakariya Koorosh Varshovi, LEAD ATTORNEYS, PRO HAC VICE, Danielle R Foley, Lisa Jose Fales, PRO HAC VICE, Mary M Gardner, PRO HAC VICE, Venable LLP, Washington, DC; Deborah Leah Bessner, LEAD ATTORNEY, PRO HAC VICE, Benjamin P. Argyle, PRO HAC VICE, Leonard L. Gordon, PRO HAC VICE, Venable LLP, New York, NY; Kirstin Beth Ives, Falkenberg Ives LLP, Chicago, IL.

For Sanderson Farms, Inc., Sanderson Farms, Inc. (Foods Division), Sanderson Farms, Inc. (Production Division), Sanderson Farms, Inc. (Processing Division), Defendants: Christa Cynthia Cottrell, Daniel E. Laytin, Stacy L Pepper, LEAD ATTORNEYS, Martin L. Roth, Kirkland & Ellis LLP, Chicago, IL; Joseph Benjamin Tyson, III, Kirkland & Ellis Llp, Chicago, IL.

For Wayne Farms, LLC, Defendant: Peter Duffy Doyle, LEAD ATTORNEY, Proskaver Rose, New York, NY; Christopher E Ondeck, PRO HAC VICE, Stephen R Chuk, PRO HAC VICE, Proskauer Rose LLP, Washington, DC; Marc Eric Rosenthal, Proskauer Rose LLP, Chicago, IL; Rucha A Desai, PRO HAC VICE, Proskauer Rose LLP, Boston, MA.

For Mountainaire Farms, Inc., Mountainaire Farms, LLC, Defendants: John W. Treece, LEAD ATTORNEY, Sidley Austin LLP (Chicago), **[*27]** Chicago, IL; Adam Lee Hopkins, PRO HAC VICE, Rose Law Firm, Fayetteville, AR; Amanda K. Wofford, PRO HAC VICE, Rose Law Firm, Little Rock, AR; Bourgon Burnelle Reynolds, PRO HAC VICE, Rose Law Firm, P.A., Little Rock, AR.

For House of Raeford Farms, Inc., Defendant: Gregory Gene Wrobel, LEAD ATTORNEY, Vedder Price P.C., Chicago, IL; Henry W. Jones, Junio, PRO HAC VICE, Jordan Price, Raleigh, NC.

For Simmons Foods, Inc., Defendant: Lynn Hagman Murray, Peter Francis O'Neill, LEAD ATTORNEY, Shook, Hardy & Bacon LLP, Chicago, IL; John R Elrod, Conner & Winters, LLP, Fayetteville, AK; Laurie A. Novion, Shook, Hardy & Bacon, Kansas City, MO; Vicki D Bronson, PRO HAC VICE, Conner & Winters, Fayetteville, AR.

For Fieldale Farms Corporation, Defendant: Anthony Thomas Greene, Brian Parker Miller, James Butler Cash, Jr., Max Paul Marks, valarie cecile williams, PRO HAC VICE, Alston & Bird LLP, Atlanta, GA; Brendan J. Healey, Mandell Menkes LLC, Chicago, IL; Roger Brent Hatcher, Jr., PRO HAC VICE, Smith, Gilliam, Williams & Miles, P.A., Gainesville, GA.

For George's Inc., George's Farms, Inc., Defendants: William L. Greene, LEAD ATTORNEY, PRO HAC VICE, Stinson LLP, Minneapolis, MN; Gary V Weeks, Kristy **[*28]** Elizabeth Boehler, PRO HAC VICE, The Law Group of Northwest Arkansas LLP, Fayetteville, AR; Jaclyn Niccole Warr, Stinson LLP, St. Louis, MO; John Conroy Martin, Sugar Felsenthal Grais and Helsinger LLP, Chicago, IL; K.C. Dupps Tucker, PRO HAC VICE, The Law Group of Northwest Arkansas LLP, Fayetteville, AR; Kevin Parker Kitchen, Peter Joseph Schwingler, PRO HAC VICE, Stinson LLP, Minneapolis, MN; Zachary H Hemenway, PRO HAC VICE, Stinson Leonard Street, Kansas City, MO.

For O.K. Foods, Inc., O.K. Farms, Inc., O.K. Industries, Inc., Defendants: John P. Passarelli, LEAD ATTORNEY, PRO HAC VICE, Kutak Rock LLP, Omaha, NE; Robin Stewart, LEAD ATTORNEY, PRO HAC VICE; J.R. Carroll, PRO HAC VICE, Kutak Rock, LLP, Fayetteville, AR; James M. Sulentic, PRO HAC VICE, Kuak Rock LLP, Omaha, NE; Jeffrey Michael Fletcher, PRO HAC VICE, Kutak Rock, LLP, Fayetteville, AR; Kimberly Michelle Hare, Kutak

Rock Llp, Chicago, IL; Maggie Benson, Scott Jackson, Stephen Michael Dacus, PRO HAC VICE, Kutak Rock LLP, Fayetteville, AR.

For Mar-Jac Poultry, Inc., Defendant: Edward C. Konieczny, LEAD ATTORNEY, Edward C. Konieczny LLC, Atlanta, GA; Andrew Gordon May, Neal, Gerber & Eisenberg LLP, Chicago, IL; David C **[*29]** Newman, PRO HAC VICE, Smith, Gambrell & Russell, Atlanta, GA; Jonathan Stuart Quinn, Neal, Gerber & Eisenberg, Chicago, IL; Pennington Philip John, PRO HAC VICE, Smith, Gambrell & Russell, LLP, Washington, DC; Wm. Parker Sanders, PRO HAC VICE, Smith Gambrell & Russell LLP, Atlanta, GA.

For Harrison Poultry, Inc., Defendant: Kaitlin Ann Carreno, Nicholas Robert Boyd, LEAD ATTORNEYS, PRO HAC VICE, Eversheds Sutherland, Atlanta, GA; Patricia Anne Gorham, LEAD ATTORNEY, PRO HAC VICE, Eversheds Sutherland (US) LLP, Atlanta, GA; Clay H. Phillips, SmithAmundsen LLC (Chgo), Chicago, IL; James Robert McGibbon, Peter M. Szeremeta, PRO HAC VICE, Eversheds Sutherland (US) LLP, Atlanta, GA; Ronald David Balfour, Smithamundsen Llc, Chicago, IL.

For Agri Stats, Inc., Defendant: Jacob D Koering, Miller, Canfield, Paddock and Stone, P.L.C., Chicago, IL; Jeffrey Mark Drake, Miller, Canfield, Paddock and Stone, Chicago, IL; Jennifer A. Fleury, PRO HAC VICE, Hogan Lovells US LLP, Houston, TX; Justin Wade Bernick, PRO HAC VICE, William L Monts, III, Hogan Lovells US LLP, Washington, DC.

For Norman W. Fries, Inc., d/b/a Claxton Poultry Farms, Inc., Defendant: James Franklin Herbison, LEAD ATTORNEY, Brett Anthony **[*30]** Walker, Michael P Mayer, Winston & Strawn LLP, Chicago, IL; Charles C. Murphy, Jr., PRO HAC VICE, Vaughan & Murphy, Atlanta, GA.

For Mar-Jac Poultry MS, LLC, Mar-Jac Poultry AL, LLC, Mar-Jac AL/MS, Inc., Mar-Jac Poultry, LLC, Mar-Jac Holdings, LLC, Defendants: Edward C. Konieczny, LEAD ATTORNEY, Edward C. Konieczny LLC, Atlanta, GA; Andrew Gordon May, Neal, Gerber & Eisenberg LLP, Chicago, IL; David C Newman, PRO HAC VICE, Smith, Gambrell & Russell, Atlanta, GA; Jonathan Stuart Quinn, Neal, Gerber & Eisenberg, Chicago, IL; Pennington Philip John, PRO HAC VICE, Smith, Gambrell & Russell, LLP, Washington, DC; Wm. Parker Sanders, PRO HAC VICE, Smith Gambrell & Russell LLP, Atlanta, GA.

For Perdue Foods LLC, Defendant: Deborah Leah Bessner, LEAD ATTORNEY, PRO HAC VICE, Venable LLP, New York, NY; Benjamin P. Argyle, PRO HAC VICE, Venable LLP, New York, NY; Kirstin Beth Ives, Falkenberg Ives LLP, Chicago, IL; Mary M Gardner, Zakariya Koorosh Varshovi, PRO HAC VICE, Venable LLP, Washington, DC.

For Foster Poultry Farms, Defendant: Carmine R. Zarlenga, Mayer Brown LLP, Washington, DC.

For Simmons Prepared Foods, Inc., Defendant: Lynn Hagman Murray, Shook, Hardy & Bacon LLP, Chicago, IL; Vicki **[*31]** D Bronson, PRO HAC VICE, Conner & Winters, Fayetteville, AR.

For Amick Farms, LLC, Defendant: Steven Howard Gistenson, LEAD ATTORNEY, Dykema Gossett PLLc, Chicago, IL; Cody D. Rockey, Dykema Gossett PLLC, Ann Arbor, MI; Dante Andreas Stella, Dykema Gossett Pllc, Detroit, MI; Howard Bruce Iwrey, Dykema Gossett Pllc, Bloomfield Hills, MI.

For Case Foods, Inc., Case Farms, LLC, Case Farms Processing, Inc., Defendants: Joseph D Carney, LEAD ATTORNEY, PRO HAC VICE, Joseph D. Carney & Associates, LLC, Avon, OH; Daniel Martin Feeney, Miller Shakman Levine & Feldman LLP, Chicago, IL; Daniel Richard Karon, Karon LLC, Cleveland, OH; Deborah A Klar, PRO HAC VICE, D. Klar Law, Bel Air, CA; Thomas M. Staunton, Miller, Shakman & Beem LLP, Chicago, IL.

For R.W. Zant Co., Respondent: Joshua Erik Bidzinski, Shera D. Wiegler, LEAD ATTORNEYS, Swanson, Martin & Bell, LLP, Chicago, IL.

For Service List: David C. Eddy, LEAD ATTORNEY, ***Antitrust Law*** Group, LLC, Columbia, SC; Matthew P. Mccahill, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer Llp, New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox LLP, New York, NY; Maura R. Grossman, PRO HAC VICE, Maura Grossman Law, Buffalo, NY; Patrick **[*32]** John Ahern, Ahern and Associates, P.C., Chicago, IL; Rachael Cecelia Brennan Blackburn, Robert M. Andalman, A & G Law LLC, Chicago, IL.

For Gerber's Poultry, Inc., Movant: Charles B. Leuin, Benesch, Friedlander, Coplan & Aronoff, LLP, Chicago, IL.

For Shamrock Foods Company, United Food Service, Inc., Movants: Ilana Drescher, Jerry R Goldsmith, Lori P Lustrin, Robert W Turken, Scott N Wagner, PRO HAC VICE, Bilzin Sumberg Baena Price & Axelrod, Miami, FL; Josh Goldberg, Steven Christopher Moeller, Carpenter Lipps & Leland LLP, Chicago, IL.

For Porky Products, Inc., Movant: Ariel Welker Schepers, Barack Ferrazzano Kirschbaum & Nagelberg LLP, Chicago, IL; JORDAN DEREK WEINREICH, PRO HAC VICE, Sherman Wells Sylvester & Stamelman, LLP, Florham Park, NJ; Shermin Kruse, Barack, Ferrazzano, Kirschbaum, Perlman & Nagelberg, Chicago, IL.

For Quirch Foods, LLC, f/k/a Quirch, Foods Co., Movant: Carlos Juan Canino, LEAD ATTORNEY, PRO HAC VICE, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami, FL; Abigail Grieco Corbett, Jay Brian Shapiro, Samuel Olds Patmore, PRO HAC VICE, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami, FL; Gregory Gene Wrobel, Vedder Price P.C., Chicago, **[*33]** IL.

For United States of America, Intervenor: Michael Thomas Koenig, LEAD ATTORNEY, U.S. Department of Justice, Antitrust Division, Washington, DC; Heather Diefenbach Call, U.S. Department of Justice, Antitrust Division, Washington Criminal, Washington, DC.

Judges: Jeffrey T. Gilbert, United States Magistrate Judge.

Opinion by: Jeffrey T. Gilbert

Opinion

ORDER

Non-Party Porky Products, Inc.'s Amended Motion to Quash Subpoenas [ECF No. 1436] is denied without prejudice. In light of its filing of an Amended Motion to Quash [ECF No. 1436], Porky Products, Inc.'s initial Motion to Quash Subpoenas [ECF No. 1426] is denied as moot. This matter is referred to the Special Master to convene a meet and confer with the parties to discuss ways to facilitate production of the information sought by the subpoenas at issue and to minimize any potential burden on Porky Products. See Statement below for further details.

STATEMENT

This matter is before the Court on Non-Party Porky Products, Inc.'s Amended Motion of to Quash Subpoenas [ECF No. 1436] served by End-User Plaintiffs ("EUPs"), the Commercial and Institutional Indirect Purchaser Plaintiffs ("CIIPPs") and the Koch Defendants. The Motion was withdrawn as to the Koch Defendants. **[*34]** [1] The EUPs and CIIPPs (collectively, the Indirect Purchaser Plaintiffs or "IPPs") seek structured and transactional data from Porky Products, including its purchase and sales data, its contracts relating to those purchases and sales, its rebate and discounts terms (if any), and any market analysis Porky Products conducted, as evidence to establish that any alleged overcharge for the purchase of Broilers was passed through the distribution chain to the IPPs.

Porky Products opposes the subpoenas arguing the information IPPs are seeking is: (1) irrelevant; (2) confidential trade secret and business information; and (3) not proportional to the needs of this case because it would be unduly burdensome for Porky Products to produce the information sought by the subpoenas. The Court will address each of these arguments in turn.

I. Relevance

[1] Pursuant to the Joint Status Report Regarding Porky Products, Inc.'s Amended Motion to Quash Subpoenas [ECF No. 1940], Porky Products and Koch Defendants have reached a compromise, and the Amended Motion to Quash is withdrawn as to the Koch Defendants.

The information the IPPs are seeking from Porky Products as a large distributor of Broilers is relevant to the claims being made by the EUPs and CIIPPs in the indirect purchaser actions and to Defendants' defenses to those claims. To the extent Porky Products argues the Court already has determined that information is irrelevant, it is mistaken.

Under different **[*35]** circumstances in connection with motion practice involving different interested parties earlier in this case, the Court did not allow some other downstream discovery to proceed. *See* [ECF Nos. 749, 1060]; *In re Broiler Chicken Antitrust Litigation, 2018 U.S. Dist. LEXIS 116658, 2018 WL 3398141 (N.D. Ill. July 12, 2018)*; *2018 U.S. Dist. LEXIS 27155. 2018 WL 999899 (N.D. Ill. Feb. 21, 2018)*. In none of its previous opinions and orders, however, did the Court address whether the IPPs are entitled to the information they now are seeking from Porky Products. Indeed, to the extent the Court referenced the type of sales data the IPPs are seeking from Porky Products in its earlier orders, the Court recognized that such information may be relevant and discoverable by IPPs from third parties like Porky Products. *See, e.g.*, *2018 U.S. Dist. LEXIS 116658, 2018 WL 3398141, at *2* ("[C]ourts have held that downstream discovery of direct purchasers may be relevant for certain purposes in indirect purchaser actions."); *2018 U.S. Dist. LEXIS 116658, 2018 WL 3398141, at *4* ("Defendants also acknowledge that sales data produced by other direct purchasers, some of whom are larger than DPPs, which was subpoenaed by the IPP classes from those direct purchasers . . . will be available to Defendants [and] will help them understand how some larger direct purchasers determine prices and pass-through price increases."); *2018 U.S. Dist. LEXIS 27155. 2018 WL 999899, at *4* ("DPPs are relatively smaller players in the distribution chain, and Defendants **[*36]** may be able to obtain sufficient discovery to address the commonality and predominance issues in the IPP cases from other sources, to the extent those issues need to be addressed at all.").

Further, when the Court previously distinguished cases in which courts had allowed some downstream discovery of direct purchasers to go forward, it did so on grounds that are not germane to the IPPs' subpoenas now before the Court. The IPPs' subpoenas seek information that is directly relevant to whether Defendants' allegedly anticompetitive prices were passed through to the IPPs by direct purchasers. The cases the Court previously distinguished allowed discovery from direct purchasers under certain circumstances in anti-trust cases including for the reasons the IPPs now are seeking that discovery from Porky Products. *See* *In re Aftermarket Filters, 2010 U.S. Dist. LEXIS 105108, 2010 WL 3909502, at *2 (N.D. Ill. Oct. 1, 2010)* (noting that in an antitrust case "it is undisputed that discovery from direct purchasers is necessary on the issue of certifying an indirect purchaser class"); *In re Cathode RayTube (CRT)Antitrust Litig., 301 F.R.D. 449, 452-54 (N.D. Cal. 2014)* (overruling direct purchaser plaintiff's objection and allowing downstream discovery related to direct purchaser's pricing because it was "directly relevant to the question of how, and in what amount, any potential overcharges **[*37]** were passed through to other plaintiffs").

The IPPs are in a materially different position than were Defendants in seeking downstream discovery from the Direct Purchaser Plaintiffs ("DPPs") in this case, which was the context in which the Court's prior opinions were written. To show impact on the indirect purchaser classes, the IPPs will have to establish that any overcharge due to the alleged conspiracy was passed through to the EUPs and CIIPPs. The transaction data and information being sought from Porky Products is directly relevant to the EUPs' and CIIPPs' efforts to show that any alleged overcharge for the purchase of Broilers was passed through the distribution chain to the IPPs.

II. Burden and Proportionality

Based on an undeveloped record, the Court is not persuaded by Porky Products' burden arguments at this time. Specifically, Porky Products has not convinced the Court that production of the information sought by the IPPs is unduly burdensome or not proportional to the needs of this case.

Porky Products' burden arguments are very general and, in some instances, a bit hyperbolic. *See, e.g.*, Declaration of Robert Melloy, Jr. [ECF No. 1428], at ¶ 24 (characterizing as "a massive **[*38]** undertaking" the work that would be required to "compile [the] mountain of information" that would result from "finding every scrap of paper related to each of the millions of orders [Porky Products] has had in the last 8.5 years"). In addition, Mr. Melloy speaks fairly generally in his Declaration without much in the way of specifics. He says, for example, that "[t]here is no simple way to quickly isolate all purchases and sales of Defendants' products" in its archived data ([ECF No. 1428], at ¶¶

16-18), but simplicity and speed may not be the target standard. And he suggests the only way to obtain the data the IPPs are seeking would be to hire an SAP consultant "to write a computer program to cull and filter the data" ([ECF No. 1428], at ¶ 22), but that presupposes Porky Products knows what data the IPPs ultimately will be seeking.

Although the subpoenas are broad as drafted, the Court doubts the IPPs want "every scrap of paper" that Porky Products has in its possession that relates to its sales of Broilers over an almost 10-year period. Further, while it may or may not be necessary for Porky Products to hire a consultant to assist it in responding to the subpoenas, much of what Porky **[*39]** Products has to say about the burden of responding to the IPPs' subpoenas does not take into account that the EUPs and CIIPPs have offered to narrow the scope of their subpoenas to accommodate Porky Products' objections and to help streamline the production of information sought. IPPs' Joint Opposition [ECF No. 1526], at 13. From the briefs submitted, however, it does not appear that Porky Products has engaged seriously with the IPPs to try to right-size the information being sought by the subpoenas and its response to them. That, in turn, prevents Porky Products from estimating the cost of responding to the subpoenas which is a highly relevant consideration on burden and proportionality. *See* Declaration of Brian D. Penny in Support of IPPs' Joint Opposition [ECF No. 1527] at ¶ 8 ("While discussing production of data [with Porky Products], I explained that often the first step is to obtain a sample of data from the producing party. From that sample, plaintiffs can often streamline their requests, excluding superfluous data fields and perhaps otherwise narrowing the scope of production. Although Porky Products apparently pulled a sample of one day's worth of transactional data, it refused **[*40]** to produce that sample to CIIPPs.")

There may be ways to extract the information the IPPs are requesting or some categories of that information that would be less time-consuming and less expensive than Porky Products surmises and that still would satisfy the IPPs' legitimate need in the case. At this juncture, however, the Court does not have enough information to determine the actual burden on Porky Products if it had to comply with the IPPs' subpoenas. Porky Products, therefore, has not met its burden on a critical foundational piece of its Amended Motion to Quash.

Moreover, although Porky Products argues that it is a non-party to these proceedings and, therefore, any burden imposed upon it by the IPPs' subpoenas is particularly undue, Porky Products also is a potential member of the putative DPP class as a large distributor of Broilers. Thus, Porky Products potentially could benefit from a recovery by the DPPs in this case and it is not a completely disinterested party in the classic sense. Regardless, even putting that aside, without more specifics from Porky Products on its alleged burden and hardship, particularly if the subpoenas can be narrowed, the discovery sought even from **[*41]** a third party seems proportional to the needs of the case.

Fortunately, the Court has appointed a Special Master in this case to help with this exact situation. *See* [ECF No. 491], at ¶ 1 ("The Special Master is appointed to address and resolve, by mediation or otherwise, issues and disputes that may arise between the parties in relation to electronic discovery, including, but not limited to, identification preservation, processing, search, review, and production of electronically stored information ("ESI") in this matter ("eDiscovery matters") and to assist and advise the Court concerning those matters."). Because a good deal of the information the IPPs are seeking is stored electronically, this is a matter that falls within the expertise of the Special Master. *See* [ECF No. 491], at ¶ 1. The Special Master has been particularly effective in assisting the parties to this case in resolving a number of thorny disputes and the Court believes this dispute also is one that could benefit from her attention.

For these reasons, this matter is referred to the Special Master to convene a meet and confer with the parties to discuss ways to facilitate production of the information sought by the IPPs **[*42]** and to minimize any burden on Porky Products from complying with the subpoenas.

III. Confidentiality

Although some of the data the IPPs are seeking from Porky Products contains sensitive business and financial information that is confidential, the Court is not persuaded by Porky Products' argument that such information should not be produced in this case or that the Agreed Confidentiality Order entered in this case would not protect Porky Products' interests once it is produced.

Confidentiality orders routinely are entered in cases like this to protect sensitive and confidential material. The Agreed Confidentiality Order in this case allows documents to be designated "Confidential" and "Highly Confidential." [ECF No. 202], at ¶¶ 2-4. The Order further provides that "Confidential or Highly Confidential Information shall not be used or disclosed by the parties, counsel for the parties or any other persons identified in subparagraph (b) for any purpose whatsoever other than the prosecution or defense of claims, or the settlement of, this litigation, including any appeal thereof." [ECF No. 202], at ¶ 6.

Porky Products argues that the Agreed Confidentiality Order in this case is inadequate **[*43]** because it "allows for disclosure of confidential information or highly confidential information to, among others, named Plaintiffs, the parties' in-house and outside counsel, contractors, consultants, experts and witnesses for various purposes." Porky Products' Amended Memorandum in Support of its Motion to Quash [ECF No. 1437], at 14. It is not clear to the Court that information Porky Products produces will need to be disclosed to employees of any named Plaintiff or Defendant as opposed to only outside counsel and expert consultants or witnesses. And if that information is disclosed to party employees, whether the information will be attributable to Porky Products. For example, the information the IPPs are seeking may be part of a large mix of information they will give to their experts, and Porky Products' data may be largely anonymized by the time it is disclosed in any attributed way. Therefore, this may not be a situation in which party employees are going to pour through Porky Products' confidential business information. To the extent real risk exists that will occur and jeopardize Porky Products' legitimate business interests, however, it may be that IPPs or Defendants will **[*44]** agree to additional procedures designed to guard against potential harm or prejudice to Porky Products.

Porky Products also speculates there is a potential risk of inadvertent disclosure of confidential information by the IPPs based upon an earlier filing that Porky Products says contained such information. Porky Products' speculation is not persuasive evidence that the confidentiality order in this case is inefficacious based on the one example it cites. *JAB Distribs., LLC v. London Luxury, LLC, 2010 U.S. Dist. LEXIS 109178, at *9* ("[T]he mere possibility of an inadvertent disclosure of confidential information [does not] fatally undermine[] the operation of a protective order.") *See also* *In re Dealer Management Systems Antitrust Litigation, 2018 U.S. Dist. LEXIS 206588, 2018 WL 6413199, at *4 (N.D. Ill. Dec. 6, 2018)* ("If a party or non-party were able to bar an opponent's litigation counsel from having access to confidential or highly confidential information on the basis of speculation and unsupported supposition that counsel would misuse that information and violate a court order in the process, the already high cost of federal litigation would increase astronomically . . . .").

In short, the Court believes that Porky Products' confidentiality concerns can be protected adequately within the context of the Agreed Confidentiality Order in this case. If, however, Porky Products has a more **[*45]** specific concern about particular information that actually will be produced, it can raise the issue first with the IPPs, who represent they offered to revise the Agreed Confidentiality Order to further restrict access to Porky Products' production, then with the Special Master, and eventually with the Court, if necessary, with respect to any dispute as to which the IPPs and Porky Products reach an impasse. It will be easier to resolve a focused dispute than the more amorphous one now before the Court with Porky Products broadly asserting that all the information being sought by the subpoenas is so confidential that its disclosure even in accordance with the Agreed Confidentiality Order threatens Porky Products' business to the core.

IV. Allocation of Costs

Finally, Porky Products argues if the Court were inclined to deny its Amended Motion to Quash and to order production of the information the IPPs are seeking, then the Court should shift the cost of production to the requesting parties. As a non-party, Porky Products contends that it should not have to bear the cost of production. The Court, however, does not have enough information at this time to evaluate this request. Porky Products **[*46]** has not offered any specific information that would allow the Court to begin to evaluate whether cost shifting, or possibly cost sharing, would be appropriate in this case. The Court would need to hear more from Porky Products, the parties, and the Special Master after the parties and Porky Products have completed their meet and confer process. Accordingly, the Court denies, without prejudice, Porky Products' request to shift the cost of its production in response to the subpoenas at this time, and the matter of whether cost shifting and/or cost sharing is appropriate when the burden is placed properly in perspective also is referred to the Special Master.

V. Conclusion

For all these reasons, Non-Party Porky Products, Inc.'s Amended Motion to Quash Subpoenas [ECF No. 1436] is denied without prejudice. This matter is referred to the Special Master to convene a meet and confer with the parties to discuss ways to facilitate production of the information sought by the subpoenas at issue and to minimize any potential burden on Porky Products. If necessary, the Court can revisit any issues that need to be decided after that process has taken place with much better information with respect **[*47]** to cost and burden than it has now.

It is so ordered.

/s/ Jeffrey T. Gilbert

Magistrate Judge Jeffrey T. Gilbert

Dated: May 6, 2019

In re Commodity Exch., Inc.

United States District Court for the Southern District of New York

May 6, 2019, Decided; May 6, 2019, Filed

14-MD-2548 (VEC); 14-MC-2548 (VEC)

Reporter

2019 U.S. Dist. LEXIS 75886 *; 2019-1 Trade Cas. (CCH) P80,772; 2019 WL 1988525

IN RE: COMMODITY EXCHANGE, INC., GOLD FUTURES AND OPTIONS TRADING LITIGATION. This Document Relates to All Actions

Prior History: *In re Commodity Exch., Inc., 38 F. Supp. 3d 1394, 2014 U.S. Dist. LEXIS 113202 (J.P.M.L., Aug. 13, 2014)*

Core Terms

customer, disclosure, pseudonymize, documents, discovery, Banking, redact, foreign law, Plaintiffs', comity, transferred, compliance, confidentiality, specificity, antitrust, requests, parties, secrecy, production of documents, unredacted, discovery obligations, customer information, protective order, bank secrecy, class member, communications, particularity, declaration, compulsion, originated

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For Barclays Capital Inc., Defendant (1:14-md-02548-VEC): Michael Svetkey Feldberg, LEAD ATTORNEY, Allen & Overy, New York, NY; Todd Steven Fishman, LEAD ATTORNEY, Allen & Overy, LLP, New York, NY.

For Deutsche Bank Securities, Inc, Defendant (1:14-md-02548-VEC): Peter Joseph Isajiw, LEAD ATTORNEY, King & Spalding LLP (NYC), New York, NY; Joseph Serino, JR., Kuangyan Huang, Latham & Watkins LLP (NY), New York, NY.

For HSBC USA, Inc., Defendant (1:14-md-02548-VEC): Damien Jerome Marshall, LEAD ATTORNEY, Boies, Schiller & Flexner LLP(NYC), New York, NY; Timothy Joseph Coleman, LEAD ATTORNEY, Freshfields Bruckhaus Deringer Us LLP, Washington, DC; Jessica Phillips, Boies, Schiller & Flexner LLP (DC), Washington, DC; Laura Elizabeth Harris, Leigh Mager Nathanson, Boies, Schiller & Flexner LLP, New York, NY.

For The London Gold Market Fixing, LTD., Defendant (1:14-md-02548-VEC): **[*13]** James Vincent Masella, III, LEAD ATTORNEY, R. James Madigan, III, Patterson, Belknap, Webb & Tyler LLP, New York, NY.

For Societe Generale S.A., Defendant (1:14-md-02548-VEC): Dennis H. Tracey, III, Marc Joel Gottridge, LEAD ATTORNEYS, Hogan Lovells US LLP (nyc), New York, NY.

For SG Americas Securities, LLC, Defendant (1:14-md-02548-VEC): Dennis H. Tracey, III, Marc Joel Gottridge, LEAD ATTORNEYS, Denae Marie Thomas, Hogan Lovells US LLP (nyc), New York, NY.

For The Bank of Nova Scotia, Defendant (1:14-md-02548-VEC): Stephen Ehrenberg, LEAD ATTORNEY, William Henry Wagener, Sullivan and Cromwell, LLP(NYC), New York, NY.

For Scotia Capital (USA) Inc., Defendant (1:14-md-02548-VEC): Stephen Ehrenberg, LEAD ATTORNEY, Sullivan and Cromwell, LLP(NYC), New York, NY.

For Deutsche Bank AG New York, Branch, Deutsche Bank Trust Corporation, Deutsche Bank Trust Company, Americas, Deutsche Bank Americas Holding, Corporation, DB U.S. Financial Markets Holding, Corporation, Defendants (1:14-md-02548-VEC): Joseph Serino, JR., Kuangyan Huang, Latham & Watkins LLP (NY), New York, NY.

For United States Of America, Carol Sipperly, Intervenor (1:14-md-02548-VEC): Ankush Khardori, United States Department of **[*14]** Justice(1400 DC), Criminal Division Fraud Section, Washington, DC; Carol L Sipperly, Us, Washington, DC.

Judges: VALERIE CAPRONI, United States District Judge.

Opinion by: VALERIE CAPRONI

Opinion

OPINION AND ORDER

VALERIE CAPRONI, United States District Judge:

These consolidated cases concern an alleged conspiracy to manipulate the price of gold and gold-denominated instruments during the class period of January 1, 2004 to December 31, 2012. *See* Third Amended Complaint (Dkt. 266) ¶ 406; Dkt. 377 at 1. Defendants are multinational financial institutions ("Fixing Banks") that perceive a conflict between their discovery obligations in this litigation and the bank secrecy laws in France, Singapore, England, and Wales. *See* Def. Letter (Dkt. 362) at 1, 3-4. In an ostensible effort to avoid disclosing any customer identifying information ("CII") in violation of foreign law, Defendants propose producing documents during discovery in pseudonymized or redacted form. Plaintiffs contend that foreign law does not conflict with Defendants' discovery obligations and, even if a conflict does exist, that this Court should not defer to foreign law under a comity analysis. *See* Pl. Opp. (Dkt. 366) at 3, 5. Defendants' motion for a protective **[*15]** order is granted in part and denied in part as set forth below.

I. Background

The Court will not recount the full history of this litigation here and will instead briefly describe the context of the discovery issues currently in contention.[1]

[1] For a detailed description of the underlying allegations and factual background, see *In re Commodity Exch., Inc., 213 F. Supp. 3d 631 (S.D.N.Y. 2016)*.

After much negotiation, the parties are now largely in agreement as to the appropriate scope of Defendants' document production. *See* Def. Letter (Dkt. 362) at 1.[2] The anticipated document production contains customer information, including customers' identities and their transaction data. *See* Def. Letter at 1. Defendants, however, argue that disclosure of CII would violate bank secrecy statutes in France and Singapore and common law obligations in England and Wales. *Id.* at 3-4.

Defendants have proposed what they view as a compromise that would allow them to meet their discovery obligations without violating foreign laws. Specifically, Defendants seek permission to pseudonymize customer names where possible and to redact identifying information where pseudonymization is impracticable. *Id.* at 2. Pseudonymization is not always feasible, because only electronically tabulated data, typically in the form of spreadsheets, contain CII that can be readily manipulated in a consistent **[*16]** way. *See id.* The electronically tabulated data in this case largely consists of transaction data, whereas other documents are a mix of emails, chat histories, and other materials that contain sporadic, non-uniform references to CII. *See id.*

Plaintiffs object to Defendants' proposed compromise, in part because pseudonymization and redaction may deprive readers of important context. Pl. Opp. at 1. Specifically, they argue that the combination of pseudonymization and redaction would prevent Plaintiffs from piecing together different documents that reference the same customer or account. Pl. Opp. at 2. Plaintiffs also object because pseudonymization would hinder their ability to demonstrate class-wide impact and provide class-wide notices. Pl. Opp. at 2-3. As to class-wide impact, Plaintiffs' primary concern appears to be that any given class member would be assigned a different pseudonym by each Defendant, preventing Plaintiffs from being able to compare or de-duplicate across datasets, including those obtained from other sources.[3] *See id.* at 3. Based on these concerns, Plaintiffs essentially argue that their interest in full production outweighs Defendants' interest in complying with foreign law, **[*17]** to the extent that such a conflict exists at all.

II. Discussion

A. Legal Framework

When foreign law is invoked as the basis for resisting discovery, the party resisting discovery bears the burden of "proving what the [foreign] law is and demonstrating why it impedes production." *S.E.C. v. Gibraltar Glob. Sec., Inc., No. 13-CV-2575, 2015 U.S. Dist. LEXIS 43773, 2015 WL 1514746 at *2 (S.D.N.Y. 2015)* (collecting cases). To meet that burden, the party must "provide the Court with information of sufficient particularity and specificity." *Alfadda v. Fenn, 149 F.R.D. 28, 34 (S.D.N.Y. 1993)*.

If a court finds that there is an actual conflict between the discovery request and foreign law, the court must then perform a comity analysis to decide "the weight to be given to the foreign jurisdiction's law," balancing this country's national interests against those of the foreign jurisdiction. *Laydon v. Mizuho Bank, Ltd., 183 F. Supp. 3d 409, 413 (S.D.N.Y. 2016)* (quotation marks and citations omitted). Courts in the Second Circuit consider a wide range of factors as part of the balancing test:

(1) the importance to the investigation or litigation of the documents or other information requested;

(2) the degree of specificity of the request;

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[2] The Court expresses its appreciation to the attorneys for all parties who have worked together cooperatively and collegially to resolve among themselves the logistics of the discovery in this case. The Court trusts that their successful collaboration will continue throughout the discovery in this matter.

[3] At the Court's direction, the parties have explored ways of generating consistent pseudonyms, which would enable Plaintiffs to track customer activity across datasets. Dkts. 390, 391. The available means of doing so appear to be prohibitive in terms of time and cost and would not enable Plaintiffs to cross-reference data provided by the Fixing Banks with documents obtained from third parties. *See* Tr. (Apr. 25, 2019 Hearing) at 6-10.

(3) whether the information originated in the United States;
(4) the availability of alternative means of securing the information;

(5) the extent to which noncompliance with the request would undermine **[*18]** important interests of the United States, or compliance with the request would undermine the important interests of the state where the information is located;

(6) the hardship of compliance on the party or witness from whom discovery is sought; and

(7) the good faith of the party resisting discovery.

Laydon, 183 F. Supp. 3d at 419-20 (citing *Wultz v. Bank of China Ltd., 910 F. Supp. 2d 548, 552-53 (S.D.N.Y. 2012))*. Of those factors, "the competing interests of the countries involved and the hardship imposed by compliance" are generally the most important. *Minpeco, S.A. v. Conticommodity Servs., Inc., 116 F.R.D. 517, 522 (S.D.N.Y. 1987)* (collecting cases).

B. Application

1. Conflict with Foreign Law

Defendants claim conflicts with bank secrecy laws in France, Singapore, England, and Wales. As detailed below, the Court concludes that Defendants have adequately demonstrated that disclosure of CII would violate bank secrecy requirements in France and, in at least some circumstances, Singapore, but they have not demonstrated that disclosure would violate common law obligations in England and Wales.

a. France

Defendant Société Générale (SG) has demonstrated with sufficient particularity and specificity that, as a French bank, it cannot disclosure CII during civil discovery without violating French law. Specifically, Article L. 511-33 of the French Monetary and Financial Code imposes **[*19]** a duty of "professional secrecy" on any person who "is employed by" or "participates in the management or administration of" a French credit institution. Parleani Decl. (Dkt. 362, Ex. A) ¶ 10. This duty of secrecy applies to any non-public information that would divulge the nature of an identifiable customer's business with a French bank. *See id.* ¶¶ 54-57. Protected information therefore includes transaction data, customer lists, account balances, and internal communications concerning customer activity that is connected to a customer's identity. *Id.* ¶ 52-53. Accordingly, there is no serious dispute that SG's document production will contain at least some information that is subject to the French duty of secrecy.

The French statute does contain exceptions, including for French criminal proceedings and French regulatory and tax authorities—but no exception exists for civil lawsuits, whether French or foreign. *Id.* ¶ 22. In addition to civil liability and regulatory discipline, a breach of the duty of secrecy is also punishable under the French Criminal Code, which provides for penalties of one year's imprisonment and a fine of €15,000. *Id.* ¶¶ 12-13, 39, 41 (quoting Article L. 571-4 and **[*20]** Article 226-13 of French Criminal Code). While Plaintiffs dispute the weight that this Court should give to French law under the comity analysis, such as by pointing out that the risk of actual prosecution and liability is low, Pl. Opp. at 5, there is no genuine dispute that SG has adequately supported its position that disclosure would violate French law.[4] Indeed, at the most recent hearing on this issue after the

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[4] Plaintiffs mischaracterize a case in which, purportedly, a court in the Second Circuit "[found] no conflict with the French Bank Secrecy Statute." *See* Pl. Opp. at 5. In *Strauss v. Credit Lyonnais, S.A., 242 F.R.D. 199 (E.D.N.Y 2007)*, the district court ruled in favor of disclosure but only after concluding that the French bank had "adequately supported its position that the discovery sought is indeed prohibited by foreign law." *242 F.R.D. at 207* (internal quotations and citation omitted).

submission of letter briefs, Plaintiffs conceded that SG may violate "the [French] law on its face" if SG were to comply with Plaintiffs' discovery demands. *See* Tr. (Hearing on Apr. 25, 2019) at 43.

b. Singapore

Defendants have demonstrated with sufficient particularity and specificity that disclosure of CII would violate the Singapore Banking Act under limited circumstances. Specifically, the Singaporean prohibition applies only to disclosures by a bank's Singaporean branch or office (collectively "branch"), and to disclosures by a non-Singaporean branch if the disclosed information originated in a Singaporean branch and was transferred to the non-Singaporean branch via Part II of the Third **[*21]** Schedule of the Banking Act. Defendant Barclays has made an adequate showing that a subset of its documents is entitled to protection under Singaporean law; no other Defendant has done so.

Section 47 of the Singapore Banking Act prohibits the disclosure of "customer information" by "a bank in Singapore." Hai Decl. (Dkt. 362, Ex. B) ¶ 9; Bull Decl. (Dkt. 368) ¶ 13. Under Section 40A, "customer information" includes "any information relating to, or any particulars of, an account of a customer of the bank," a definition that clearly includes the customer identities and transaction data sought in this case. Hai Decl. ¶ 11 (noting exceptions for "deposit information" and "information that is not referable to any named customer or group of named customers"). Section 2(1) defines a "bank in Singapore" as either "a bank incorporated in Singapore" or the Singaporean branches of a bank incorporated outside Singapore. *Id.* ¶ 10; Bull Decl. ¶ 14. In this case, because no Defendant is incorporated in Singapore, the Court is only concerned with the documents that originate in one of Defendants' Singaporean branches. Bull Decl. ¶ 15. Based on the parties' supplemental joint letter, the Court agrees with Plaintiffs that such documents **[*22]** will likely make up only a very small portion of the expected production and cannot justify wholesale redaction of documents regardless of origin.[5] *See* Dkt 382 at 4.

The Singapore Banking Act does not expressly contain an exception for compulsion by a foreign court order. Hai Decl. ¶¶ 22(g), 25-26. Plaintiffs' declaration also concedes that a confidentiality order preventing further disclosure, like the protective order already entered in this case, would not immunize a Singaporean bank from liability. Bull Decl. ¶ 36 ("Disclosure pursuant to the terms of a confidentiality order is not an exception to bank secrecy under Singapore law."). A breach of the statute is criminally punishable, by a fine up to S$125,000 or a term of imprisonment of up to three years. Hai Decl. ¶ 33.

Plaintiffs also cite a line of cases holding that the French duty of secrecy does not apply to cases in which the bank is a party. *See* *Alfadda v. Fenn, No. 89-CV-6217, 1993 U.S. Dist. LEXIS 1092, 1993 WL 33445, at *3 (S.D.N.Y. Feb. 1, 1993)*; *see also* Bodner v. Paribas 202 F.R.D. 370, 376 n.6 (E.D.N.Y. 2000). In this Court's view, SG has sufficiently demonstrated that this carveout applies only if the customer whose information is at issue is the bank's adversary in the relevant litigation. Parleani Decl. ¶ 28. Such a distinction makes imminent sense: a bank customer, to whom the bank owes a duty of confidence, could waive that duty in order to litigate a claim against the bank. *See* Bodner, 202 F.R.D. at 376 n.6 (noting that French bank secrecy law does not apply when bank is "party to the action brought against it *by the beneficiaries of the principle of banking secrecy rule*" (quoting expert declaration) (emphasis added)). Additionally, a bank, to defend itself against an adversarial customer, could in fairness rely on information concerning subject matter that the client has placed at issue, in the same way that an attorney may use privileged communications to defend against a malpractice action. In contrast, there is no apparent rationale for a broader carveout that would apply to *every* case in which a bank is a party to litigation, whether as a plaintiff or as a defendant.

[5] The Singaporean production will likely consist of documents from one Barclays custodian for a period of one year, a slice of transaction data for orders placed in Singapore, and incidental communications related thereto. *See* Dkt. 382 at 1-4. As Defendant Barclays has noted, most of its custodians are not based in Asia. Dkt. 382 at 2. Defendant Bank of Nova Scotia (BNS) further indicated that its branch in Singapore does not execute trades of precious metals and instead channels precious metals orders to its Hong Kong office, which suggests that a relatively small share of its gold-related activity actually originates in Singapore. *Id.* at 2. Additionally, Defendants BNS, SG, and HSBC do not anticipate any document collection efforts in Singapore, and SG and HSBC are not able to speak with specificity and certainty as to their Singaporean customers and their processes for executing their gold orders. *Id.* Consequently, the share of documents likely to be impacted by Singaporean law is minimal.

If, however, a document otherwise protected from disclosure has been transferred out of Singapore, the Singapore Banking Act may not prohibit further disclosure by the non-Singaporean recipient. The parties' competing declarations agree that a recipient of a protected document transferred pursuant to Part I of the Third Schedule of the Banking Act may retransmit that document without risk of liability, whereas **[*23]** a recipient of a protected document transferred pursuant to Part II may not. Hai Decl. ¶¶ 21-23; Bull Decl. ¶ 16, 36. Defendant Barclays has represented that its transaction data pertaining to Singaporean customers were transferred to London under Part II, which would prevent further disclosure absent another exception; other Defendants are silent as to how their Singaporean CII has come to reside outside of Singapore. Dkt 382 at 1-3.

Based on the foregoing, only Barclays has demonstrated with particularity and specificity that production of at least a subset of its anticipated responsive documents is prohibited by the Singapore Banking Act. Specifically, Barclays has met its burden as to the documents obtained from Singapore associated with the options trader referenced in the parties' joint letter, for the time that the trader was based in Singapore. *See* Dkt. 382 at 1. Barclays has also met its burden as to the transaction data or other documents transferred out of Singapore pursuant to Part II of the Third Schedule of the Banking Act. *See id.* Defendants' request to redact or pseudonymize in accordance with Singaporean law is denied in all other respects.

c. England and Wales

Defendants **[*24]** have failed to show that the disclosure of materials from England and Wales would violate foreign law. Although Defendants have shown that the common law of England and Wales creates an implied contractual term of secrecy between a banker and a customer, they are unable to show that disclosure in this case would fall outside of recognized exceptions to the duty of secrecy; nor do they show that disclosure subject to a protective order would be inconsistent with that duty. *See* Tomlinson Decl. (Dkt. 367) at ¶ 3.

All parties agree that the common law duty of confidentiality has four exceptions. They are: customer consent, public duty, interests of the bank, and compulsion of law. Def. Letter at 4 (citing *Tournier v. Nat'l Provincial & Union Bank of England* [1924] 1 KB 461); Tomlinson Decl. ¶ 3 (citing Halsbury's Laws of England (Vo. 48, 2008, § 229)). Most relevant here are the public duty and compulsion of law exceptions. Defendants argue, without a supporting declaration, that ordinary civil lawsuits do not give rise to a public duty and that a foreign subpoena is inadequate to constitute compulsion of law. Def. Letter at 4. On the other hand, Plaintiffs' declaration asserts that it is essentially hornbook law that a court order, including a foreign one, **[*25]** is sufficient to trigger both exceptions. Tomlinson Decl. ¶ 4-6. Plaintiffs' declaration further represents that, under the common law, the duty of confidentiality is separate from a legal claim of privilege, which is necessary to resist discovery, and that the common law duty of confidentiality would be adequately safeguarded by a protective order. *Id.* ¶ 6-8.

The Court agrees with Plaintiffs. The Court finds Defendants' argument that no public duty is triggered because this private litigation does not pertain to "massive international fraud" to be disingenuous. *See* Def. Letter at 4. If the allegations in this case are true, Defendants have engaged in a decade-long antitrust conspiracy to manipulate the global price of gold, distorting the free market to the detriment of potentially tens of thousands (if not hundreds of thousands) of individuals across the world. In terms of public interest, the scale is easily comparable to that of a "massive international fraud." Defendants have also failed to establish that a federal court order necessarily falls short of the legal compulsion exception. *See* Tomlinson Decl. ¶ 5 (noting that Defendants' only authority on this point, *X Ag v. A Bank* **[*26]** [1983] 2 All ER 464, is distinguishable on due process grounds). Nor have Defendants demonstrated that the customers' interest in confidentiality would not be adequately preserved by the protective order in this case.

In short, Defendants have not met their burden to demonstrate, with "particularity and specificity," that their discovery obligations are in conflict with English or Welsh common law. *See* *Fenn, 149 F.R.D. 28 at 34*. As such, Defendants must proceed with discovery without regard to any duty of confidentiality created by the common law of England and Wales.

2. Comity Analysis

Because Defendants have adequately demonstrated a conflict between French law and SG's discovery obligations and between Singaporean law and a small subset of Barclays' document production, the Court must next determine whether to accommodate the relevant foreign laws under the comity analysis. As a starting point, the Court notes that Defendants are not seeking to block discovery altogether, but merely to pseudonymize where possible, or redact where pseudonymization is infeasible, their clients' identity. Plaintiffs' primary contention is that Defendants' risk of prosecution and liability in a foreign jurisdiction is likely to **[*27]** be low, which reduces Defendants' hardship of compliance with discovery. While that may be accurate, this Court will not require Defendants, who are acting in good faith, to mass-produce CII held in foreign jurisdictions in violation of foreign law, unless Plaintiffs demonstrate a specific need for that information.

Several of the comity factors weigh in Defendants' favor. First, there is no dispute that most of the information at issue in this case is of foreign origin, which favors deference to the law of the jurisdiction in which the information was created or is currently being held. Pl. Opp. at 7 ("Plaintiffs concede that much of the information they seek originates outside of the United States. Thus, this factor may weigh in favor of granting deference to foreign laws."). Second, as to the specificity of Plaintiffs' request, the Court finds it difficult to characterize the requests in this matter as "highly specific." *See* Pl. Opp. at 6. While it may be true that, ordinarily, a request for unredacted versions of agreed upon production may be considered a specific request, the Court cannot ignore the fact that the requests in this case likely sweep in thousands of customers and **[*28]** essentially all of those customers' account information over a decade-long period; to engage in massive understatement, the production of documents in this case is likely to include enormous amounts of otherwise private information that is irrelevant to the case. *See* *Minpeco, 116 F.R.D. at 528, 530* (declining to compel production in part because "given the wide scope of plaintiffs' requests and interrogatories, compliance by [the bank] is very likely to yield much material that plaintiffs will not find useful in this litigation); *cf.* *Royal Park Investments SA/NV v. Deutsche Bank Nat'l Tr. Co., No. 14-CV-4394, 2017 U.S. Dist. LEXIS 217165, 2017 WL 7512815, at *10 (S.D.N.Y. Dec. 29, 2017)*. Third, there is no indication that Defendants are acting in bad faith. *See* Pl. Opp. at 10.

The balance of national interests, ordinarily the most important factor, is not dispositive here. France and Singapore clearly have an interest in the application of their laws to banks operating within their jurisdictions; compliance with local laws provides certainty and predictability to those who do business with said banks.[6] *See* *Laydon, 183 F. Supp. 3d at 423* (noting that foreign nations have interest in protecting privacy rights of their citizens); *see also* *Minpeco, 116 F.R.D. at 523* (finding that codification of secrecy obligations into criminal law was indicative of substantial foreign interest). On the other hand, the United States also has **[*29]** an obvious interest in the application of federal law to discovery in its courts; compliance with federal procedural rules provides certainty and predictability to litigants in this country. *See* *Laydon, 183 F. Supp. 3d at 423*. Additionally, even in private litigation in which the United States government is not a party, the United States generally has a strong national interest in combatting antitrust and price manipulation conspiracies. *Minpeco, 116 F.R.D. at 523-24* ("The strength of the congressional policies behind the antitrust and commodities laws is not open to question."); *In re Air Cargo Shipping Servs. Antitrust Litig., 278 F.R.D. 51, 54 (E.D.N.Y. 2010)* ("[E]nforcement through private civil actions . . . is a critical tool for encouraging compliance with the country's antitrust laws."). The strength of the United States' interest in this case, however, depends substantially on whether Defendants' customer names are actually material to Plaintiffs' efforts to enforce this nation's antitrust and commodities laws and, if so, whether that information can be obtained through alternative means. *Laydon, 183 F. Supp. 3d at 423* (noting that interest of United States grows stronger when "the discovery sought is vital to the litigation" (internal quotation marks and citation omitted)); *In re*

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[6] Plaintiffs argue that the Court should discount French and Singaporean interests because they have not raised an objection to production in this case. While it is true that courts do often consider foreign governments' opposition or acquiescence to disclosure in particular cases, the lack of an apparent objection from France or Singapore is not especially probative here, because nothing in the record indicates that the governments were informed of this litigation (by either party) or otherwise had an opportunity to weigh in. *See* *Alfadda, 149 F.R.D. at 34-35* (noting that defendants gave Swiss government opportunity to express view on disclosure and that Swiss government declined to take position).

*Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720, 2010 U.S. Dist. LEXIS 89275, 2010 WL 3420517, at *9 (E.D.N.Y. Aug. 27, 2010)* **[*30]** (noting that "strength of the national interest in disclosure depends largely on . . . the importance of the contested documents to this litigation" when interest of United States is primarily private enforcement of ***antitrust law***).

The outcome of the comity analysis therefore turns on the relevance of the CII and its importance to this action. *See Milliken & Co. v. Bank of China, 758 F. Supp. 2d 238, 247 (S.D.N.Y. 2010)* ("[I]t is necessary [] to judge the degree of importance of the information—where it falls on the spectrum between merely relevant at one end and crucial at the other—and then weigh this along with all the other factors."). The affected documents, generally transaction data and bank communications regarding gold or gold-related trades, are clearly relevant, but to overcome the comity factors in Defendants' favor, Plaintiffs must show specifically that the identities of customers, which is the only information that Defendants intend to withhold, are relevant and important to the case. And in particular, Plaintiffs must show that they have a need for the customer names contained in SG's document production and Barclays' Singaporean documents, notwithstanding the voluminous, unredacted production that Plaintiffs are otherwise receiving. **[*31]** *See* *Trade Dev. Bank v. Cont'l Ins. Co., 469 F.2d 35, 41 (2d Cir. 1972)* (affirming decision not to compel disclosure of customer identities and noting that "the relative unimportance of the information as to the clients' identity in the present proceeding was entitled to be considered").

Plaintiffs object to Defendants' proposed pseudonymization of tabulated data and anonymization of other documents because the proposal interferes with Plaintiffs' ability to cross-reference potential evidence.[7] In particular, a pseudonym provided by one bank cannot be matched against a pseudonym generated by another bank, even when they refer to the same person or entity; nor can a pseudonym in a spreadsheet be linked to a redacted communication. *See* Pl. Opp. at 2-3.

The Court agrees with Plaintiffs that, generally speaking, the ability to piece together different documents about the same customer or account may lead to relevant evidence, and that de-duplicating class members across datasets may aid in determining the percentage of class members affected by Defendants' actions. *See* Pl. Opp. at 3; *In re Air Cargo Shipping Servs. Antitrust Litig., No. 06-MD-1175, 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100, at *55 (E.D.N.Y. Oct. 15, 2014)* ("Though *Rule 23* permits the possibility that some class members went un-impacted, the court still needs some assurance **[*32]** that these putative class members are relatively few in number."). Nonetheless, there are indications that Plaintiffs' need for customer names in this case is less than compelling. First, the parties in the sister case involving silver trading, which is also before this Court and is premised on essentially the same circumstances as in this case, have agreed to proceed with discovery without disclosure of CII. *See* Tr. at 19. Additionally, as Defendants have pointed out, the Antitrust Division of the Department of Justice closed its Fixing-related investigations without requiring the Fixing Banks to disclose CII. *See* Tr. at 36; Def. Letter at 8-9.

Under the circumstances of this case, the Court concludes that Plaintiffs' stated interests in obtaining CII do not justify wholesale disclosure of SG's client names or Barclays' Singaporean customers. First, to the extent that Plaintiffs are interested in the customer information referenced in SG's and Barclays' non-tabulated documents, which consist largely of chat transcripts and other communications, Plaintiffs will already have access to a majority

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[7] Plaintiffs also claim that CII is necessary for purposes of providing class notices under Federal *Rule 23(c)(2)(B)* of Civil Procedure. The Court finds any dispute over notice to be premature. If a class is certified in this case, the parties can work together on devising a method to provide notice to potential class members.

Similarly, Plaintiffs argue that Defendants may have an unfair advantage in this litigation if Defendants oppose class certification on the basis that Plaintiffs cannot show that class members suffered a net loss as a result of Defendants' manipulation of gold prices. *See* Pl. Opp. at 2 n.2. As the parties have described it, this netting issue could arise if a potential class member has multiple accounts across different banks, generating gains and losses that may need to be offset to determine the class member's actual injury. If and when Defendants make such an argument, the comity analysis would of course change, as Plaintiffs' need for non-anonymized transaction data would increase. The Court, however, finds no need to require, at this time, disclosure on the basis of a hypothetical response to a potential argument that Defendants have not yet tried to make.

of those documents in unredacted form, because the recipients of those messages, *e.g.*, other **[*33]** Fixing Banks, have no basis to redact or pseudonymize the customer information communicated to them by SG or Barclays. To the extent that there are internal communications that reference specific customers, those are unlikely to be probative of an inter-bank conspiracy—or, if Plaintiffs do identify redacted documents that are particularly probative, they can request SG or Barclays to provide the unredacted version of those documents.[8]

Second, as to Plaintiffs' professed need to de-duplicate customers across all Defendants to determine class-wide impact, the Court finds that wholesale disclosure of CII by Barclays (as to Singaporean customers) and SG is unnecessary in light of the other CII to which Plaintiffs have full access. Because Plaintiffs will have unredacted materials from Bank of Nova Scotia, HSBC, and Barclays (minus Singaporean accounts), Plaintiffs' experts can already perform much if not most of the desired de-duplication. Based on those results, the parties' experts can likely estimate the number of duplicates that would be found if SG's clients and Barclay's Singapore clients were added to the mix.

Finally, to the extent that Plaintiffs encounter redacted, non-tabulated **[*34]** documents of particular interest that need to be matched with pseudonymized transaction data, the Court concludes that Plaintiffs may make a reasonable number of requests to Defendants SG and Barclays to provide the pseudonym(s) associated with the customer(s) referenced in the non-tabulated document(s). Given the nature of the discovery in this case, the Court finds it too burdensome to require Defendants to pseudonymize every account reference contained in each and every document, particularly because the vast majority of customer and account references are likely to be of no utility to Plaintiffs.

In sum, the Court finds that, under the comity analysis, Defendants SG and Barclays should not be required to disclose CII in violation of foreign law unless Plaintiffs demonstrate a particular need for the disclosure. Although the Court finds that Plaintiffs have failed to articulate a sufficient need for the wholesale disclosure of CII, the Court concludes that Plaintiffs may make specific requests for disclosure after receiving the partially pseudonymized and partially redacted production from SG and Barclays. The parties must meet-and-confer in good faith to resolve any disputes over **[*35]** any targeted disclosures and to bring any intractable disputes to the Court's attention.

III. Conclusion

For the reasons discussed above, as to electronically tabulated data, Defendant SG is GRANTED leave to pseudonymize customer identity information from such datasets; Defendant Barclays is GRANTED leave to pseudonymize customer identity information from such datasets, to the extent that such information originated in Singapore and was transferred outside of Singapore pursuant to Part II of the Third Schedule of the Singapore Banking Act. As to the remaining documents that are not available in tabulated form, Defendants Barclays (only as to Singaporean documents produced by the sole Singapore-based custodian or transferred outside of Singapore pursuant to Part II of the Third Schedule of the Singapore Banking Act) and SG are GRANTED leave to redact customer identity information from their production, subject to a reasonable number of requests from Plaintiffs for disclosure of the pseudonym(s) associated with the customer(s) referenced in those documents. If after reviewing a pseudonymized or redacted document, Plaintiffs can articulate a specific need for the disclosure of the customer's **[*36]** identity, Plaintiffs may request that Defendants SG or Barclays produce the unredacted version of the document. Such requests must be reasonable in number, and the parties are directed to bring any disputes to the Court's attention if they cannot be resolved after a good-faith meet-and-confer.

As to all other documents, Defendants' request to redact or pseudonymize, including for purposes of complying with the common law of England and Wales, is DENIED.

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[8] As to these targeted requests, the balancing of the comity factors may weigh in Plaintiffs' favor. First, when making such requests, Plaintiffs will presumably be able point to specific documents and concrete circumstances that make clear the relevance of the particular customer's identity to the case. Additionally, a bank's limited disclosure of information for selected accounts is far less likely to result in prosecution or liability than wholesale disclosure of CII.

At the oral argument on this motion, the parties informed the Court that, despite their best efforts, the discovery schedule previously entered in this case, Dkt. 327, needs to be adjusted. The parties are directed to meet and confer and to submit an agreed-upon modification of the schedule by **May 17, 2019**.

The Clerk of Court is respectfully directed to close the open motion at docket entry 362.

SO ORDERED.

Date: May 6, 2019

New York, NY

/s/ Valerie Caproni

VALERIE CAPRONI

United States District Judge

Babb v. Cal. Teachers Ass'n

United States District Court for the Central District of California

May 8, 2019, Decided; May 8, 2019, Filed

CASE NO. 8:18-cv-00994-JLS-DFM; CASE NO. 8:18-cv-1169-JLS-DFM; CASE NO. 2:18-cv-06793-JLS-DFM; CASE NO. 2:18-cv-08999-JLS-DFM; CASE NO. 2:18-cv-09531-JLS-DFM

Reporter
378 F. Supp. 3d 857 *; 2019 U.S. Dist. LEXIS 79812 **; 2019 WL 2022222

GEORGIA BABB, et al., Plaintiffs, vs. CALIFORNIA TEACHERS ASSOCIATION, et al.; Defendants.SCOTT WILFORD, et al., Plaintiffs, vs. NATIONAL EDUCATION ASSOCIATION, et al.; Defendants.TINA MATTHEWS, et al., Plaintiffs, vs. UNITED TEACHERS LOS ANGELES, et al.; Defendants.MICHAEL MARTIN, et al., Plaintiffs, vs. CALIFORNIA TEACHERS ASSOCIATION, et al.; Defendants.THOMAS FEW, Plaintiff, vs. UNITED TEACHERS LOS ANGELES, et al; Defendants.

Subsequent History: Summary judgment granted by, Summary judgment denied by *Few v. United Teachers Los Angeles, 2020 U.S. Dist. LEXIS 24650 (C.D. Cal., Feb. 10, 2020)*

Decision reached on appeal by *Martin v. Cal. Teachers Ass'n, 2022 U.S. App. LEXIS 2390 (9th Cir. Cal., Jan. 26, 2022)*

Affirmed by, Motion denied by, As moot *Babb v. Cal. Teachers Ass'n, 2022 U.S. App. LEXIS 2395 (9th Cir. Cal., Jan. 26, 2022)*

Affirmed by *Wilford v. Nat'l Educ. Ass'n of the United States, 2022 U.S. App. LEXIS 2400 (9th Cir. Cal., Jan. 26, 2022)*

Prior History: *Babb v. Cal. Teachers Ass'n, 2018 U.S. Dist. LEXIS 223418, 2018 WL 7501267 (C.D. Cal., Dec. 7, 2018)*

Core Terms

Plaintiffs', agency fee, Teachers, good-faith, employees, collection, motion to dismiss, violates, good faith, rights, state law claim, immunity, courts, state law, cases, moot, public employee, resignation, retroactive, conversion, deductions, disclosure, alleges, cause of action, school district, membership, clarifies, parties, privacy, collective bargaining agreement

LexisNexis® Headnotes

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Union Violations

HN1[] **Unfair Labor Practices, Union Violations**

The United States Supreme Court has held that no form of payment to a union, including agency fees, can be deducted or attempted to be collected from an employee without the employee's affirmative consent.

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

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

In deciding a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, courts must accept as true all well-pleaded factual allegations in a complaint. Furthermore, courts must draw all reasonable inferences in the light most favorable to the non-moving party. However, courts are not bound to accept as true a legal conclusion couched as a factual allegation. The complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Although a complaint does not need detailed factual allegations, the factual allegations must be enough to raise a right to relief above the speculative level. Thus, a complaint must: (1) contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively; and (2) plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.

Civil Procedure > Preliminary Considerations > Justiciability > Mootness

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Union Violations

HN3[] **Justiciability, Mootness**

Claims for prospective relief to prevent the collection of agency fees post-Janus are moot.

Civil Rights Law > ... > Section 1983 Actions > Elements > Protected Rights

HN4[] **Elements, Protected Rights**

The threshold question of whether the good faith defense is available to private parties in *42 U.S.C.S. § 1983* actions has been answered affirmatively.

Civil Rights Law > ... > Section 1983 Actions > Elements > Protected Rights

HN5[] **Elements, Protected Rights**

Principles of equity and fairness may suggest that private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protection from liability pursuant to the good faith defense in *42 U.S.C.S. § 1983*.

Civil Rights Law > ... > Section 1983 Actions > Elements > Protected Rights

HN6[] **Elements, Protected Rights**

Although not entirely consistent in their approaches, every circuit court to address the question has held that some type of good faith defense in *42 U.S.C.S. § 1983* is available to private parties sued for constitutional violations.

Civil Rights Law > ... > Section 1983 Actions > Elements > Protected Rights

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Union Violations

HN7[] **Elements, Protected Rights**

Every district court to consider whether unions that collected agency fees prior to Janus have a good-faith defense to *42 U.S.C.S. § 1983* liability have answered in the affirmative.

Civil Rights Law > ... > Section 1983 Actions > Elements > Protected Rights

HN8[] **Elements, Protected Rights**

Clement gives no indication that courts must analyze a common law analogue to apply the good-faith defense. Further, insofar as courts have analyzed the common law analogue to a plaintiff's *42 U.S.C.S. § 1983* claim, none have done so to bar the good faith defense.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Affirmative Defenses

HN9[] **Defenses, Demurrers & Objections, Affirmative Defenses**

Affirmative defenses need not relate to or rebut specific elements of an underlying claim.

Governments > Courts > Judicial Precedent

Torts > Public Entity Liability > Immunities > Qualified Immunity

HN10[] **Courts, Judicial Precedent**

In the qualified immunity context, state officials are entitled to rely on Supreme Court precedent even if that precedent's reasoning has been questioned; applying a higher standard to private individuals would be inequitable.

Civil Rights Law > Protection of Rights > Section 1983 Actions

Torts > Public Entity Liability > Immunities > Qualified Immunity

HN11[] **Protection of Rights, Section 1983 Actions**

Even assuming the rule from qualified immunity cases applies to the good-faith defense in *42 U.S.C.S. § 1983*, a plaintiff may not circumvent qualified immunity or the good faith defense simply by labeling a claim for legal damages as one for equitable restitution.

Civil Procedure > Preliminary Considerations > Equity

HN12[] **Preliminary Considerations, Equity**

A personal claim against the defendant's general assets is a legal remedy, not an equitable one.

Governments > Courts > Judicial Precedent

HN13[] **Courts, Judicial Precedent**

When the United States Supreme Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Jurisdiction

HN14[] **Collective Bargaining & Labor Relations, Federal Preemption**

The Educational Employment Relations Act (EERA) expressly authorizes the collection of agency fees. *Cal. Gov't Code §§ 3543(a)*, *3546(a)*. Challenges to agency fees, even on constitutional grounds, are subject to the Public Employment Relations Board's (PERB) exclusive jurisdiction. The California Supreme Court has held that EERA broadly preempts state tort claims that allege conduct that is even arguably protected or prohibited under EERA. What matters is whether the underlying conduct on which the suit is based — however described in the complaint — may fall within PERB's exclusive jurisdiction.

Labor & Employment Law > Collective Bargaining & Labor Relations > Judicial Review

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Jurisdiction

HN15[] **Collective Bargaining & Labor Relations, Judicial Review**

The California courts have concurrent jurisdiction with the Public Employment Relations Board's (PERB) over breach of collective bargaining agreement claims pursuant to *Cal. Lab. Code § 1126*.

Labor & Employment Law > Collective Bargaining & Labor Relations > Judicial Review

HN16[] **Collective Bargaining & Labor Relations, Judicial Review**

The purpose of *Cal. Gov't Code § 1159* is explicit: to provide certainty to public employers and employee organizations that relied on state law, and to avoid disruption of public employee labor relations, after the Supreme Court's decision in Janus. *Cal. Gov't Code § 1159(e)(2)*. Further, *§ 1159* declares that application of this section to pending claims and actions clarifies existing state law rather than changes it. *§ 1159(e)(1)*. Public employees who paid agency or fair share fees as a condition of public employment in accordance with state law and Supreme Court precedent prior to June 27, 2018, had no legitimate expectation of receiving that money under any available cause of action. Thus, application of this section to pending claims will preserve, rather than interfere with, important reliance interests.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process

Governments > Legislation > Effect & Operation > Retrospective Operation

HN17[] **Fundamental Rights, Procedural Due Process**

In both federal and California due process analysis, the threshold question in determining retroactive application is whether the legislation changed or clarified the law. A statute that merely clarifies, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment because the true meaning of the statute remains the same.

Business & Corporate Compliance > ... > Collective Bargaining & Labor Relations > Labor & Employment Law > Collective Bargaining & Labor Relations

Governments > Legislation > Types of Statutes

HN18[] **Labor & Employment, Collective Bargaining & Labor Relations**

The California legislature was explicit that *Cal. Gov't Code § 1159* clarifies existing state law rather than changes it, because public employees who paid agency or fair share fees as a condition of public employment in accordance with state law and Supreme Court precedent prior to Janus, had no legitimate expectation of receiving that money under any available cause of action. *§ 1159(e)(1)*. At the time agency fees were collected, the Unions could not be held liable under any state law theory for collection of such fees, and *§ 1159* merely reinforces this point. A clarified law is simply a statement of what the law has always been. Further, although a legislative declaration of an existing statute's meaning is neither binding nor conclusive on the courts in construing the statute, the Court may give due consideration to the Legislature's views.

Governments > Legislation > Types of Statutes

HN19[] **Legislation, Types of Statutes**

Clarifying statutes can be remedial in nature and intended by the Legislature to be applied at the earliest possible time, including application to all cases not then finally decided.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process

Torts > Public Entity Liability > Immunities

HN20[] **Fundamental Rights, Procedural Due Process**

Under both the federal and state constitutions, when a law creates a substantive rule of law granting immunity to certain parties against certain types of claims, the legislative determination provides all the process that is due.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process

Governments > Legislation > Effect & Operation > Retrospective Operation

HN21[] Fundamental Rights, Procedural Due Process

Under the California constitution, the legislature can provide for retroactive application of a statute if it has a reasonable basis for doing so. In determining whether a retroactive law contravenes the due process clause, a court considers such factors as the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions.

Business & Corporate Compliance > ... > Collective Bargaining & Labor Relations > Labor & Employment Law > Collective Bargaining & Labor Relations

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process

HN22[] Labor & Employment, Collective Bargaining & Labor Relations

Cal. Gov't Code § 1159 serves the significant state interests of providing certainty to public employers and employee organizations that relied on state law, and avoiding disruption of public employee labor relations after Janus. *Cal. Gov't Code §1159(e)(2)*.

Business & Corporate Compliance > ... > Collective Bargaining & Labor Relations > Labor & Employment Law > Collective Bargaining & Labor Relations

Governments > Legislation > Effect & Operation > Retrospective Operation

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process

HN23[] Labor & Employment, Collective Bargaining & Labor Relations

Where Congress has expressed its clear intent that the legislation be retroactive, the constitutional impediments to retroactive civil legislation are now modest. The potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope. It has been squarely held that, although a cause of action is a species of property, a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained. Thus, *Cal. Gov't Code § 1159* is subject to rational basis review and its retroactive application must be upheld so long as the California legislature's decision was not irrational or arbitrary.

Governments > Legislation > Initiative & Referendum

HN24[] Legislation, Initiative & Referendum

The single subject rule of the California Constitution provides that a statute shall embrace but one subject, which shall be expressed in its title. *Cal. Const. art. IV, § 9*. An initiative measure does not violate the single-subject requirement if, despite its varied collateral effects, all of its parts are reasonably germane to each other, and to the general purpose or object of the initiative.

Business & Corporate Compliance > ... > Collective Bargaining & Labor Relations > Labor & Employment Law > Collective Bargaining & Labor Relations

Constitutional Law > Separation of Powers

HN25[] Labor & Employment, Collective Bargaining & Labor Relations

Cal. Gov't Code § 1159, regarding public employee labor relations, does not violate the separation-of-powers doctrine.

Business & Corporate Compliance > ... > Collective Bargaining & Labor Relations > Labor & Employment Law > Collective Bargaining & Labor Relations

Education Law > Faculty & Staff

HN26[] Labor & Employment, Collective Bargaining & Labor Relations

Cal. Gov't Code § 3558 provides that public school districts must provide unions that serve as exclusive representatives of bargaining units with the name, job title, department, work location, work, home, and personal cellular telephone numbers, personal email addresses on file with the employer, and home address of any newly hired employee within 30 days of the date of hire or by the first pay period of the month following hire, and with a list of that information for all employees in the bargaining unit at least every 120 days unless more frequent or more detailed lists are required by an agreement with the union. An employee may opt out of having such information shared with the union.

Business & Corporate Compliance > ... > Collective Bargaining & Labor Relations > Labor & Employment Law > Collective Bargaining & Labor Relations

HN27[] Labor & Employment, Collective Bargaining & Labor Relations

Cal. Gov't Code § 3558 codifies a California Supreme Court's decision which held that disclosure of public employees' contact information to a union does not violate their privacy rights under California's constitution. The Court explained that because the union's duty of fair representation extends to all employees in the bargaining unit, regardless of union membership, the union must have the means of communicating with all employees. Thus, direct communication between unions and all bargaining unit employees is essential to ensure that nonmembers' opinions are heard. Giving the unions "this contact information will not coerce employees into joining the union. An employee who chooses not to join a union still enjoys the benefits of union representation.

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

HN28[] Collective Bargaining & Labor Relations, Unfair Labor Practices

At least in the context of organized labor, the impingement of First Amendment rights must, at a minimum, satisfy exacting scrutiny; i.e., it must serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.

Business & Corporate Compliance > ... > Collective Bargaining & Labor Relations > Labor & Employment Law > Collective Bargaining & Labor Relations

HN29[] **Labor & Employment, Collective Bargaining & Labor Relations**

Cal. Gov't Code § 3558 serves a compelling government interest. A union has an obligation to communicate with members and non-members pursuant to their duty of representation, so the Union must have the means of communicating with all employees. This direct communication between unions and all bargaining unit employees is essential to ensure that nonmembers' opinions are heard. Thus, California has a compelling interest in ensuring that unions can communicate directly with employees.

Business & Corporate Compliance > ... > Collective Bargaining & Labor Relations > Labor & Employment Law > Collective Bargaining & Labor Relations

HN30[] **Labor & Employment, Collective Bargaining & Labor Relations**

A union must be able to communicate directly with all employees, and access to employee contact information is fundamental to the entire expanse of a union's relationship with the employees, permitting the union to perform its broad range of statutory duties in a truly representative fashion and in harmony with the employees' desires and interests.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Union Violations

HN31[] **Fundamental Freedoms, Freedom of Association**

Regarding unions, any associational freedom restriction presented by *Cal. Gov't Code § 3558* is significantly minimized by the fact that employees can opt out of the disclosures.

Education Law > Faculty & Staff > Compensation > Payment

HN32[] **Compensation, Payment**

Cal. Educ. Code § 45060 provides that employee requests to cancel or change authorizations for payroll deductions for employee organizations shall be directed to the employee organization rather than to the governing board. The employee organization shall be responsible for processing these requests. *Cal. Educ. Code § 45060(e)*. Further, *Cal. Educ. Code § 45060* requires school employees to revoke their consent to payroll deductions in writing.

Civil Procedure > ... > Justiciability > Mootness > Real Controversy Requirement

HN33[] **Mootness, Real Controversy Requirement**

A case becomes moot—and therefore no longer a Case or Controversy for purposes of Article III—when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.

Antitrust & Trade Law > Business & Corporate Compliance > Antitrust

Business & Corporate Compliance > ... > Collective Bargaining & Labor Relations > Labor & Employment Law > Collective Bargaining & Labor Relations

HN34[] **Antitrust & Trade Law**

Federal ***antitrust law***, which seeks to preserve competition in the private sector, simply does not encompass the way in which a state chooses to set employment terms for its public employees.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine

HN35[] **Exemptions & Immunities, Parker State Action Doctrine**

The state-action doctrine immunizes a union from antitrust liability because federal antitrust laws do not restrain a state or its officers or agents from activities directed by its legislature. To establish state-action immunity, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy and be actively supervised by the State.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine

Business & Corporate Compliance > ... > Collective Bargaining & Labor Relations > Labor & Employment Law > Collective Bargaining & Labor Relations

HN36[] **Exemptions & Immunities, Parker State Action Doctrine**

Regarding the state-action doctrine, a collective bargaining agreement negotiated by a representative union is clearly articulated and affirmatively expressed as state policy.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN37[] **Parker State Action Doctrine, Local Governments & Private Parties**

Unlike private parties, local government entities are not subject to the active state supervision requirement because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies.

Antitrust & Trade Law > Sherman Act

Business & Corporate Compliance > ... > Collective Bargaining & Labor Relations > Labor & Employment Law > Collective Bargaining & Labor Relations

HN38[] **Antitrust & Trade Law, Sherman Act**

The labor of a human being is not a commodity or article of commerce. *15 U.S.C.S. § 17*. Therefore, restraints on the sale of the employee's services to the employer—those employment terms set forth in a collective bargaining agreement—are not themselves combinations or conspiracies in the restraint of trade or commerce under the Sherman Act even if they curtail the competition among employees.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine

HN39[] Exemptions & Immunities, Noerr-Pennington Doctrine

Federal ***antitrust law*** does not regulate the conduct of private individuals in seeking anticompetitive action from the government.

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Union Violations

HN40[] Unfair Labor Practices, Union Violations

In Knight, the Supreme Court has held that a system of exclusive union representation does not violate the speech or associational rights of individuals who are not members of the union. Janus essentially reaffirmed Knight because it distinguished between financial support for a union and the underlying system of exclusive representation. Indeed, Janus explicitly noted that states can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions.

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For Attorney General of California, Intervenor Defendant (8:18cv1169): Lara Haddad, CAAG - Office of the Attorney General, Los Angeles, CA.

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For Austin Beutner in his official capacity as Superintendent of Los Angeles Unified School District, Defendant (2:18cv9531): Courtney J Hobson, Barrett K Green, Littler Mendelson PC, Los Angeles, CA USA.

Judges: JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE.

Opinion by: JOSEPHINE L. STATON

Opinion

[*866] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS (Doc. 63)

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS (Doc. 163)

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS (Doc. 27)

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS (Docs. 59 & 61)

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS (Doc. 43)

The above captioned cases all involve the Supreme Court's decision in *Janus v. AFSCME Council 31, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018)* and its effect on public sector unions in California. Having read and considered the papers and heard oral argument, the Court GRANTS in their entirety the following motions filed by the various Defendants[1] in each case:

• ***Babb v. California Teachers Ass'n***, No. 8:18-cv-00994-JLS-DFM: Motion to Dismiss and for Judgment on the **[**8]** Pleadings, and in the Alternative for Summary Judgment (*Babb* Mem., Doc. 63) filed by the California Teachers Association, National Education Association, and United Teachers of Los Angeles;[2]

• ***Wilford v. National Education Ass'n***, No. 8:18-cv-1169-JLS-DFM: Motion to Dismiss and for Judgment on the Pleadings, and in the Alternative for Summary Judgment (*Wilford* Mem., Doc. 163) filed by American Federation of Teachers, California Federation of Teachers, California Teachers Association, Certificated Hourly Instructors, Long Beach City College Chapter, Coast Federation of Educators, Local 1911, Community College Association, Exeter Teachers Association, Mt. San Antonio College Faculty Association, Inc., National Education Association, Orange Unified Education Association, Saddleback Valley Educators Association, Sanger Unified Teachers Association, Savanna District Teachers Association, and South Orange County Community College District Faculty Association;[3]

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[1] Nearly all of the moving Defendants are teachers' unions. After identifying the specific unions in each case, the Court will thereafter collectively refer to the teachers' unions as "the Union Defendants."

[2] Plaintiffs Georgia Babb, John J. Frangiamore Jr., William Happ, Aaron Holbrook, Michelle Pecanic-Lee, David Schmus, and Abram van der Fluit opposed (*Babb* Opp., Doc. 77) and the Union Defendants replied (*Babb* Reply, Doc. 78).

[3] Plaintiffs Scott Wilford, Bonnie Hayhurst, Rebecca Friedrichs, Michael Monge, Harlan Elrich, Jelena Figueroa, and Gene Gray opposed (*Wilford* Opp., Doc. 169) and the Union Defendants replied (*Wilford* Reply, Doc. 170).

[*867] • ***Matthews v. United Teachers Los Angeles***, No. 2:18-cv-06793-JLS-DFM: Motion to Dismiss and for Judgment on the Pleadings, and in the Alternative for Summary Judgment (*Matthews* Mem., Doc. 27) filed by California Teachers Association, National **[**9]** Education Association, San Diego Education Association, and United Teachers Los Angeles;[4]

• ***Martin v. California Teachers Ass'n***, No. 2:18-cv-08999-JLS-DFM: Motion to Dismiss (*Martin* State Mem., Doc. 59) filed by Eric Banks, Xavier Becerra, Arthur A. Krantz, Erich Shiners, and Priscilla Winslow (the "State Defendants")[5]; Motion to Dismiss (*Martin* Union Mem., Doc. 61) filed by California Teachers Association, National Education Association, and Riverside City Teachers Association;[6] and

• ***Few v. United Teachers Los Angeles***, No. 2:18-cv-09531-JLS-DFM: Motion to Dismiss Count II (*Few* Mem., Doc. 43) filed by United Teachers Los Angeles.[7]

I. BACKGROUND

On June 27, 2018, the Supreme Court decided *Janus* and overruled *Abood v. Detroit Board of Education, 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977)* ***HN1***[] and its progeny, holding that no form of payment to a union, including agency fees, can be deducted or attempted to be collected from an employee without the employee's affirmative consent. *Janus, 138 S. Ct. at 2486*.

The Plaintiffs in *Babb* are current or former public-school teachers who refused to join teachers' unions because they disapproved of their political advocacy and collective-bargaining activities. (*Babb* Third Amended Complaint ¶¶ 14-20, **[**10]** Doc. 90.) Prior to *Janus*, the Plaintiffs were required to pay agency fees to the unions as a condition of their employment. (*Id.*) *See* *Cal. Gov. Code § 3546(a)*. Plaintiffs allege that the compulsory collection of agency fees violates *Janus*. (*Babb* Third Amended Complaint ¶ 21.) Plaintiffs bring federal claims for relief for violation of the *First Amendment* pursuant to *42 U.S.C. § 1983* and the Declaratory Judgment Act, *28 U.S.C. § 2201*, and California state law claims for conversion, trespass to chattels, replevin, unjust enrichment, and restitution. (*Id.* ¶¶ 41-42.) Plaintiffs seek two forms of relief: (1) that compulsory agency fees be declared unconstitutional and enjoined; and (2) that the Union Defendants be required to repay all agency fees they received before *Janus*. (*Id.* ¶ 43 c-j.) The Union Defendants move to dismiss all claims. (*See Babb* Mem. at 1.)

Wilford is, for the purposes of the pending motions, identical to *Babb*. The *Wilford* Plaintiffs are also non-union teachers who allege that the compulsory collection of agency fees is unconstitutional after *Janus*. (*Wilford* First Amended Complaint ¶¶ 1-7, 25-29, Doc. 155.) They also bring federal claims for violation of the *First Amendment* pursuant to *§ 1983* (*id.* ¶¶ 41-47), **[*868]** and state law claims for conversion (*id.* ¶¶ 48-51) **[**11]** and restitution (*id.* ¶¶ 52-57). Further, as in *Babb*, the *Wilford* Plaintiffs seek an order enjoining the future collection of agency fees (*id.* Demand for Relief ¶ C) and requiring the Union Defendants to repay all agency fees received prior to *Janus* (*id.* ¶ D). The Union Defendants move to dismiss all claims. (*See Wilford* Mem. at 1.)

Matthews is very similar to *Wilford* and *Babb*, as the *Matthews* Plaintiffs are non-union teachers who allege that compulsory collection of agency fees is unconstitutional after *Janus*. (*Matthews* Complaint ¶¶ 16, 18-19, Doc. 1-1.) However, the *Matthews* Plaintiffs bring no federal claims for relief, but rather claims for unfair competition under California's Unfair Competition Law ("the UCL") (*id.* ¶¶ 35-45); conversion (*id.* ¶¶ 46-51); trespass to chattels (*id.* ¶¶

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[4] Plaintiffs Tina Matthews and Paul Tessaro opposed (*Matthews* Opp., Doc. 33) and the Union Defendants replied (*Matthews* Reply, Doc. 37).

[5] Plaintiffs Lori Bonner, Philip David Glick, Kimberly Jolie, and Michael Martin opposed (*Martin* State Opp., Doc. 79) and the State Defendants replied (*Martin* State Reply, Doc. 85.)

[6] Plaintiffs opposed (*Martin* Union Opp., Doc. 78) and the Union Defendants replied (*Martin* Union Reply, Doc. 87).

[7] Plaintiff Thomas Few opposed (*Few* Opp., Doc. 48) and United Teachers Los Angeles replied (*Few* Reply, Doc. 49.)

52-57); unjust enrichment (*id.* ¶¶ 58-61); and money had and received (*id.* ¶¶ 62-65). As with *Babb* and *Wilford*, the *Matthews* Plaintiffs seek to enjoin the future collection of agency fees (*id.* Prayer for Relief ¶ 6) and to order the Union Defendants to repay all agency fees received prior to *Janus* (*id.* ¶ 2). The Union Defendants move to dismiss all claims. (*See Matthews* Mem. at 1.)

Martin is different from **[**12]** *Matthews, Wilford*, and *Babb* in significant respects. Plaintiffs are public-school teachers who *were* union members prior to *Janus* but resigned thereafter. (*See Martin* First Amended Complaint at 2-3, Doc. 47.) The *Martin* Plaintiffs' first claim is, similar to *Babb, Wilford*, and *Matthews*, that compulsory collection of agency fees violates the *First Amendment*. (*Id.* ¶¶ 15-26.) Some Plaintiffs allege that they would not have joined the union or would have resigned earlier if not for the agency fee requirement, while others claim that "they were led to believe that union membership was a mandatory condition of their employment" and "were never informed of their constitutional right to quit the union." (*Id.* ¶¶ 17-19.) As part of first claim, Plaintiffs seek declaratory and injunctive relief to prevent the future collection of agency fees (*id.* ¶ 84) as well as "refunds equal to the amount of the [agency fees] that [the Union Defendants] extracted from [Plaintiffs] regardless of whether they stayed in the union or resigned" (*id.* ¶ 24). Plaintiffs' second claim is that their *First Amendment* rights were violated because, while they were union members, they had to opt out of making a $20 annual payment to the Union Defendants **[**13]** if they did not wish to make the payment. (*Id.* ¶¶ 27-42.) Plaintiffs seek injunctive relief to prevent the Union Defendants from continuing to charge the $20, as well as retrospective relief for the funds paid while they were members. (*Id.* ¶¶ 39-42.) With their third claim, Plaintiffs challenge the federal and state constitutionality of *California Government Code § 3558*, which provides for public school employers to share with unions that represent their employees the contact information of bargaining unit employees whom the unions represent, unless the employee has requested that his or her contact information not be shared. (*Id.* ¶¶ 43-56.) The fourth claim is asserted only by Plaintiff Martin and alleges that *California Education Code § 45060* violates the *First Amendment* because it provides that a union member must send a letter to the union, rather than to the employer, if the union member wishes to terminate membership dues deductions. (*Id.* ¶¶ 57-64.) Plaintiffs' fifth claim alleges that collective bargaining through an exclusive representative violates the *First Amendment*. (*Id.* ¶¶ 65-74.) Finally, the sixth claim is asserted only by Plaintiff Martin and alleges that the collective bargaining agreements between California school districts and the Union Defendants **[*869]** violate **[**14]** federal antitrust laws. (*Id.* ¶¶ 75-81, 89.)

The Union Defendants move to dismiss all of the *Martin* Plaintiffs' claims except the portion of the second claim that seeks retrospective monetary relief. (*Martin* Union Mem. at 1.) Plaintiffs have consented to dismissal of their fifth claim, as well as to dismissal of the prospective portions of their first and second claim. (*Martin* Union Opp. at 4, 23, 35.) Further, the State Defendants separately move to dismiss claims one and four. (*Martin* State Mem. at 1.)

Finally, the Plaintiff in *Few* is a public-school teacher in the Los Angeles Unified School District. (*Few* First Amended Complaint ¶ 14, Doc. 38.) Few brings two claims for relief, and United Teachers of Los Angeles seeks to dismiss only his second claim, which alleges that collective bargaining through an exclusive representative violates the *First Amendment*. (*See id.* ¶¶ 53-64; *Few* Mem. at 1.) Few's second claim is identical to the *Martin* Plaintiffs' fifth claim.

On February 13, 2019, the Court granted the California Attorney General's request to intervene in *Wilford, Babb*, and *Matthews* to defend the constitutionality of *California Government Code § 1159*. (Intervention Order in *Babb*, Doc. 72.) While the constitutionality of *§ 1159* is also relevant to *Martin*, the Attorney **[**15]** General was already a party to *Martin*, as noted above. Pursuant to the Court's Order, the Attorney General filed opening briefs in *Wilford, Babb, Matthews*, and *Martin*, the Plaintiffs in each case filed a response, and the Attorney General and Union Defendants filed replies. (*See id.*) However, the parties essentially filed one set of briefs in *Wilford* and simply incorporated those briefs by reference in their briefs in *Babb, Matthews*, and *Martin*. Thus, for ease of reference, to the extent the Court refers to the briefs filed pursuant to the Intervention Order, the Court will simply refer to the *Wilford* briefs. (*See* AG Opening Brief, Doc. 174; Plaintiffs' Opposition to AG, Doc. 175; AG Reply, Doc. 180; Union AG Reply, Doc. 181.)

II. LEGAL STANDARD

HN2[] In deciding a motion to dismiss under Rule 12(b)(6), courts must accept as true all "well-pleaded factual allegations" in a complaint. Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Furthermore, courts must draw all reasonable inferences in the light most favorable to the non-moving party. *See* Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010). However, "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)). The complaint must contain "sufficient factual matter, accepted as true, to 'state a claim **[**16]** to relief that is plausible on its face.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing Twombly, 550 U.S. at 556). Although a complaint "does not need detailed factual allegations," the "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . ." Twombly, 550 U.S. at 555. Thus, a complaint must (1) "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively[,]" and (2) "plausibly suggest an entitlement to relief, such that it is not unfair to require the **[*870]** opposing party to be subjected to the expense of discovery and continued litigation." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

III. DISCUSSION

First, as is relevant to *Wilford, Babb, Matthews*, and *Martin*, the Union Defendants argue that the Plaintiffs' claims for prospective relief from the compulsory collection of agency fees are moot because Defendants are fully complying with *Janus* and have no intention of doing otherwise. (*See Babb* Mem. at 3.)

Second, as is relevant to *Wilford, Babb*, and *Martin*, the Union Defendants argue that they are entitled to a good-faith **[**17]** defense to Plaintiffs' § 1983 claims for a refund of agency fees because the Union Defendants "received the fees in compliance with California statutes and then-controlling and directly on-point United States Supreme Court precedent that expressly authorized [agency] fees." (*See Wilford* Mem. at 1.)

Third, as is relevant only to *Martin*, the Union Defendants argue that the membership dues the *Martin* Plaintiffs paid while union members were voluntarily paid and thus not compelled pursuant to *Janus*. (*Martin* Union Mem. at 8.)

Fourth, as is relevant to *Wilford, Babb, Matthews*, and *Martin* the Union Defendants argue that the Plaintiffs' state law claims are preempted by the Educational Employment Relations Act ("EERA") and California Government Code § 1159. (*See Wilford* Mem. 11, 13.)

Fifth, as is relevant only to *Martin*, the Union Defendants argue that Government Code § 3558, which requires school districts to disclose all of their employees' contact information to the Union Defendants, does not violate the First Amendment. (*Martin* Union Mem. at 22.)

Sixth, as is relevant only to *Martin*, the Union and State Defendants argue that Martin does not have standing to challenge Education Code § 45060, which requires employees to direct their resignation requests to **[**18]** the union, rather than their employers, because his resignation has already been processed. (*Martin* Union Mem. at 30; *Martin* State Mem. at 7.)

Seventh, as is relevant only to *Martin*, the Union Defendants argue that Martin's antitrust claim must be dismissed because, for multiple reasons, the "purportedly anticompetitive conduct here falls entirely outside the scope of federal ***antitrust law***." (*Martin* Union Reply at 13.)

Finally, as is relevant only to *Few*,[8] United Teachers Los Angeles argues that Few's claim that exclusive representation violates the First Amendment is foreclosed by Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271, 104 S. Ct. 1058, 79 L. Ed. 2d 299 (1984). (*Few* Mem. at 6.)

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[8] As noted above, although the *Martin* Plaintiffs bring an identical claim, they consent to its dismissal pursuant to *Knight*. (*Martin* Union Opp. at 35.)

A. Mootness of Claims for Prospective Relief (*Babb, Wilford, Martin*, and *Matthews*)

HN3[] This Court has twice held that claims for prospective relief to prevent the collection of agency fees post-*Janus* are moot. *See* Yohn v. California Teachers Ass'n, Case No. SACV 17-202-JLS-DFM, 2018 U.S. Dist. LEXIS 209944, 2018 WL 5264076 (C.D. Cal. Sept. 28, 2018); Babb v. California Teachers Ass'n, Case No. 8:18-cv-00994-JLS-DFM, 2018 U.S. Dist. LEXIS 223418, 2018 WL 7501267 (C.D. Cal. Dec. 7, 2018) (dismissing claims for prospective relief against state defendants as moot). The claims for prospective relief in *Wilford, Babb, Matthews*, and *Martin* are indistinguishable, **[*871]** and the Union Defendants have again submitted declarations attesting to their commitment to no **[**19]** longer enforce California Government Code § 3546 and to fully comply with *Janus*.[9] Indeed, the *Martin* Plaintiffs admit that their claims for prospective relief are moot "in light of the [Union Defendants'] demonstrated compliance with *Janus* and their iron-clad promise to comply with *Janus* going forward." (*Martin* Union Opp. at 4.) Further, every other district court to consider this issue has found claims for prospective relief moot after *Janus. See, e.g.,* Cook v. Brown, 364 F. Supp. 3d 1184, 1188 (D. Or. 2019); Carey v. Inslee, 364 F. Supp. 3d 1220, 1225-27 (W.D. Wash. 2019); Danielson v. Inslee, 345 F. Supp. 3d 1336, 1339-40 (W.D. Wash 2018).

Accordingly, the Union Defendants' Motions to Dismiss the Plaintiffs' claims for prospective relief are GRANTED.[10]

B. Section 1983 Good-Faith Defense (*Babb, Wilford*, and *Martin*)

HN4[] "The threshold question of whether the good faith defense is available to private parties in § 1983 actions has been answered affirmatively by the Ninth Circuit." Cook v. Brown, 364 F. Supp. 3d at 1190. In Clement v. City of Glendale, 518 F.3d 1090 (9th Cir. 2008), the court held that the defendant towing company could assert a good faith defense to § 1983 liability where the plaintiff alleged that the towing company unconstitutionally seized her vehicle without notice. Id. at 1097. *Clement* "acknowledged that the Supreme Court in *Wyatt v. Cole* and again in *Richardson v. McKnight* had held open whether private defendants could avail themselves **[**20]** of the good faith defense in a § 1983 action." Cook, 364 F. Supp. 3d at 1190-91 (citing Clement, 518 F.3d at 1096-97; Wyatt v. Cole, 504 U.S. 158, 169, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992) ("[W]e do not foreclose the possibility that private defendants faced with § 1983 liability . . . could be entitled to an affirmative defense based on good faith."); Richardson v. McKnight, 521 U.S. 399, 413-14, 117 S. Ct. 2100, 138 L. Ed. 2d 540, (1997) ("*Wyatt* explicitly stated that it did not decide whether or not the private defendants before it might assert, not immunity, but a special 'good-faith' defense . . . we do not express a view on this last-mentioned question.")). HN5[] *Wyatt* recognized that "principles of equity and fairness may suggest . . . that private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protection from liability." 504 U.S. at 168.

In *Clement*, the Ninth Circuit held that "the facts of this case justify allowing [the towing company] to assert such a good faith defense." Clement, 518 F.3d at 1097. Specifically, the court noted that the towing company "did its best to follow the law" and that the "tow was authorized by the police department, conducted under close police supervision and appeared to be **[*872]** permissible under both local ordinance and state law." *Id.* HN6[] Further, "[a]lthough not entirely consistent in their approaches, every circuit court to address the question **[**21]** has held

[9] *See* Pan Decl. in *Babb* ¶¶ 3-4, 7-10, Doc. 63-9; Mar Decl. in *Babb* ¶¶ 4-15, Doc. 63-6; Pan Decl. in *Wilford* ¶¶ 3-4, 7-10, Doc. 163-8; Schneiderman Decl. in *Wilford* ¶¶ 2-6, Doc. 163-6; Pan Decl. in *Matthews* ¶¶ 3-4, 7-10, Doc. 27-5; Mar Decl. in *Matthews* ¶¶ 4-15, Doc. 27-8; Pan Decl. in *Martin* ¶¶ 3-4, 7-10, Doc. 61-7.

[10] The *Wilford* Plaintiffs suggest that their refunds for fees paid prior to *Janus* for post-*Janus* pay periods were incorrectly calculated. (*See Wilford* Opp. at 3-4.) The Pan Reply Declaration (Doc. 170-1) appears to answer their questions regarding the refund process, and regardless, whether the refunds were properly calculated is "not properly before the Court." *See* Lamberty v. Conn. St. Police Union, No. 3:15-CV-378 (VAB), 2018 U.S. Dist. LEXIS 179805, 2018 WL 5115559, at *9 (D. Conn. Oct. 19, 2018).

that some type of good faith defense is available to private parties sued for constitutional violations." Carey, 364 F. Supp. 3d at 1228 (citing Pinsky v. Duncan, 79 F.3d 306, 311-12 (2d Cir. 1996); Vector Research, Inc. v. Howard & Howard Attorneys, P.C., 76 F.3d 692, 698-99 (6th Cir. 1996); Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1275-78 (3d Cir. 1994)).

HN7[] On indistinguishable facts, every district court to consider whether unions that collected agency fees prior to *Janus* have a good-faith defense to § 1983 liability have answered in the affirmative. *See, e.g.,* Danielson v. AFSCME Council 28, 340 F. Supp. 3d 1083, 1084-87 (W.D. Wash. 2018); Cook, 364 F. Supp. 3d at 1190-94; Carey, 364 F. Supp. 3d at 1227-1233; Crockett v. NEA-Alaska, 3:18-CV-00179 JWS, 367 F. Supp. 3d 996, 2019 U.S. Dist. LEXIS 42923, 2019 WL 1212082, at *3-6 (D. Alaska March 14, 2019); Janus v. AFSCME Council 31, Case No. 15 C 1235, 2019 U.S. Dist. LEXIS 43152, 2019 WL 1239780, at *1-3 (N.D. Ill. March 18, 2019); *Hough v. SEIU Local 521*, No. 18-CV-04902-VC, 2019 WL 1785414 (N.D. Cal. Apr. 16, 2019); Lee v. Ohio Education Association, et al., No.1:18CV1420, 366 F. Supp. 3d 980, 2019 U.S. Dist. LEXIS 49403, 2019 WL 1323622, *2-3 (N.D. Ohio Mar. 25, 2019). The Court finds these courts' reasoning persuasive and applicable here.

The Union Defendants argue that they collected agency fees from Plaintiffs "at a time when California [statutes] and controlling U.S. precedent expressly allowed the collection of such fees." (*See Babb* Mem. at 9.) Indeed, this Court has acknowledged that "prior to *Janus*, [the Unions] were merely following the 40-year-precedent of *Abood*." Yohn, 2018 U.S. Dist. LEXIS 209944, 2018 WL 5264076, at *4. Plaintiffs argue that the good-faith defense should not apply because: (1) the most analogous common law tort to their § 1983 claims, conversion, rejects any consideration of the tortfeasor's state of mind; (2) the good-faith defense extends only to individuals and not entities; (3) Union Defendants cannot establish good faith unless they present evidence **[**22]** of their subjective states of mind; (4) the Union Defendants must prove that they complied with *Abood* to avail themselves of the good-faith defense; (5) the good-faith defense is inapplicable to claims for equitable relief such as backpay, restitution, and unjust enrichment; and (6) they are seeking the return of unconstitutionally seized property (the agency fees they paid prior to *Janus*) and not "collateral" damages stemming from the seizure. (*See Babb* Opp. at 1-2.)

1. Common Law Tort Analogy

Plaintiffs argue that *Wyatt* "compels courts to look to the most analogous common-law tort, and it allows courts to recognize a defense only if that tort would have conferred similar immunities when section 1983 was enacted." (*Babb* Opp. at 3-4.) Plaintiffs claim that "[t]he common-law tort most analogous to the union's unconstitutional confiscation of wages is conversion, and conversion is a strict-liability tort that is unconcerned with whether the defendant acted in good faith." (*Id.* at 4.) Plaintiffs' argument fails for a number of reasons.

First, as the Union Defendants note, the portion of *Wyatt* from which Plaintiffs derive their "rule" dealt with *immunity* from § 1983 liability, not the good-faith defense. (*See Babb* Reply at 4.) *See* Wyatt, 504 U.S. at 164 ("If parties **[**23]** *seeking immunity* were shielded from tort liability when Congress enacted [§ 1983] we infer from legislative silence that Congress did not intend to abrogate such *immunities* when it imposed liability for actions taken **[*873]** under color of state law.") (emphasis added); *see also* Carey, 364 F. Supp. 3d at 1229 ("[W]hile [*Wyatt*] did discuss common law analogues in dicta, that discussion was largely in reference to the history of qualified immunity.")

HN8[] Second, "Plaintiffs' construction of the good faith defense lacks precedent in the Ninth Circuit." Danielson, 340 F. Supp. 3d at 1086. *Clement* gives no indication that courts must analyze a common law analogue to apply the good-faith defense. *See* Clement, 518 F.3d at 1097. Further, "[i]nsofar as courts have analyzed the common law analogue to a plaintiff's § 1983 claim, none have done so to bar the good faith defense." Carey, 364 F. Supp. 3d at 1229-30 (citing Pinsky, 79 F.3d at 312 (discussing *Wyatt* and finding that the § 1983 claim was analogous to malicious prosecution)); Franklin v. Fox, No. C 97-2443 CRB, 2000 U.S. Dist. LEXIS 19651, 2001 WL 114438, at *6 (N.D. Cal. Jan. 22, 2001) (noting that the claim for violation of the Sixth Amendment right to counsel "is not easily analogized to the common law torts of malicious prosecution or abuse of process" for purposes of determining which party bears the burden but applying the good faith defense anyway)).[11]

Third, even assuming "the 'common law analogue' requirement from *Wyatt* does **[**24]** apply, conversion is not the most closely analogous common law claim." *Danielson, 340 F. Supp. 3d at 1086*. Indeed, conversion "does not account for the fact that Plaintiffs' constitutional claim is rooted in the *First Amendment*." *Carey, 364 F. Supp. 3d at 1230*. "Conversion involves taking another's property, regardless of intent, whereas the gravamen of the *First Amendment* claim in this case is that the Union Defendant[s] expended compelled agency fees on political and ideological activities that Plaintiffs oppose." *Danielson, 340 F. Supp. 3d at 1086*. In other words, Plaintiffs' *First Amendment* claim turns not upon the Union Defendants' receipt of Plaintiffs' property, but upon the dignitary harm resulting from being compelled to support speech with which they disagree. *See id.* Thus, the Court agrees with the other courts that have held that Plaintiffs' claims are most similar to dignitary torts, such as defamation, or to abuse of process because the Union Defendants used government processes to collect agency fees. *Id.; Carey, 364 F. Supp. 3d at 1230*; *Cook, 364 F. Supp. 3d at 1191*; *Crockett, 2019 U.S. Dist. LEXIS 42923, 2019 WL 1212082, at *5*. "Because these torts do have scienter requirements," even under Plaintiffs' proposed rule, the good-faith defense is available to the Union Defendants. *Carey, 364 F. Supp. 3d at 1230*.

2. Application of Good-Faith Defense to Entities

Plaintiffs next argue that the good-faith defense applies only to individuals, not entities such as **[**25]** the Union Defendants. (*See Babb* Opp. at 9.) Plaintiffs again conflate qualified immunity with the good-faith defense and argue that because qualified immunity applies only to individual officials, not government entities, the Union Defendants cannot avail themselves of the good-faith defense. (*Id.* at 9-10.) However, the controlling case law in this Circuit - *Clement* - allowed a private towing company to assert the good-faith defense. *See 518 F.3d at 1097*. Accordingly, the Court rejects Plaintiffs' argument.

3. Subjective Belief

Plaintiffs next argue that, if the good-faith defense applies, the Union Defendants **[*874]** have the burden to show their subjective state of mind, and Plaintiffs should be given the opportunity for discovery on this issue. (*Babb* Opp. at 14.) Further, Plaintiffs argue that the Union Defendants cannot rely on *Abood* to establish their belief that agency-fee collection was lawful because the Supreme Court issued "warnings" that collecting agency fees was "constitutionally dubious." (*Id.* at 16.) *See also Janus, 138 S. Ct. at 2485* ("[A]ny public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain.") Indeed, as *Danielson* notes, "the subjective state of **[**26]** mind of a party asserting good faith is a common inquiry in cases discussing the defense." *340 F. Supp. 3d at 1086*; *see Clement, 518 F.3d at 1097* (concluding that towing company "did its best to follow the law and had no reason to suspect that there would be a constitutional challenge to its actions").

Although the Supreme Court may have hinted in dicta that it would eventually overrule *Abood*, "reading the tea leaves of Supreme Court dicta has never been a precondition to good faith reliance on governing law." *Cook, 364 F. Supp. 3d at 1192*. For the 40 years prior to *Janus*, agency fee collection was constitutional pursuant to *Abood*. Thus, "[a]ny subjective belief [the Union Defendants] could have had that [*Abood*] was wrongly decided and should be overturned would have amounted to telepathy." *Danielson, 340 F. Supp. 3d at 1086*. ***HN10***[] Further, even assuming that the Union Defendants did expect *Abood* to be overruled, "such an expectation cannot produce subjective belief in unconstitutionality when [they are] also aware that the prior holding has not been overruled." *Carey, 364 F. Supp. 3d at 1229*. Moreover, in the qualified immunity context, state officials are entitled to rely on

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[11] ***HN9***[] Plaintiffs' proposed rule also fails "because affirmative defenses need not relate to or rebut specific elements of an underlying claim." *Cook, 364 F. Supp. 3d at 1191* (citing *Jarvis v. Cuomo, 660 F. Appx. 72, 75-76 (2d Cir. 2016))*.

Supreme Court precedent even if that precedent's reasoning has been questioned; applying a higher standard to private individuals would be inequitable. **[**27]** *See* Cook, 364 F. Supp. 3d at 1193 (citing Davis v. United States, 564 U.S. 229, 241, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011) (declining to apply exclusionary rule to evidence generated in searches that were consistent with then-binding case law because police were entitled to rely on that precedent, even though its reasoning had been questioned); Pinsky, 79 F.3d at 313 ("[I]t is objectively reasonable to act on the basis of a statute not yet held invalid.")); *see also* Wyatt, 504 U.S. at 168 (finding that good-faith defense is based on "principles of equity and fairness").

Thus, the Court concludes that the Union Defendants need not produce evidence of their subjective belief that agency fee collection was constitutional.

4. Compliance with *Abood*

Next, Plaintiffs argue that the Union Defendants must prove that they complied with *Abood* in order to assert a good-faith defense and that Plaintiffs are entitled to take discovery on this issue. (*Babb* Opp. at 20.) The Union Defendants argue that Plaintiffs have not alleged that they failed to comply with *Abood* and, regardless, a claim "that [the Union Defendants] received fees not permitted by *Abood* would be a different claim on behalf of a different class." (*Babb* Reply at 12.)

The Court agrees with the other district courts that have found this argument unavailing. *See* Crockett, 2019 U.S. Dist. LEXIS 42923, 2019 WL 1212082, at *6; Carey, 364 F. Supp. 3d at 1232. Here, just as in Carey, the *Babb* Plaintiffs **[**28]** have amended their Second Amended Complaint to "re-state the legal argument contained in their Opposition brief." 364 F. Supp. 3d at 1232. (*See Babb* Third Amended Complaint ¶ 29.) However, even with the amendment, **[*875]** the *Babb* Plaintiffs still do not allege that the Union Defendants failed to comply with *Abood*. (*See Babb* Third Amended Complaint ¶ 29 ("[The Union Defendants' must [] show that they complied with pre-*Janus* case law.") Further, even if they had alleged failure to comply, the Third Amended Complaint provides no facts to support such an allegation.

In short, Plaintiffs' lawsuits are not about whether the Union Defendants complied with *Abood*. Thus, "[t]heir argument that discovery is needed on a different claim for different relief on a different class before the court can apply the good-faith defense simply does not track." Crockett, 2019 U.S. Dist. LEXIS 42923, 2019 WL 1212082, at *6.

5. Application to Equitable Claims

Plaintiffs also argue that the good-faith defense does not apply to their equitable claims for relief. (*Babb* Opp. at 22.) Plaintiffs again rely on cases involving qualified immunity, not the good-faith defense, for this argument. (*Id.*) **HN11**[] Even assuming the rule from qualified immunity cases applies to the good-faith defense, "[a] plaintiff may not circumvent qualified **[**29]** immunity or the good faith defense simply by labeling a claim for legal damages as one for equitable restitution." Carey, 364 F. Supp. at 1232 (citing Lenea v. Lane, 882 F.2d 1171, 1178-79 (7th Cir. 1989) ("Regardless of what label is placed on the monetary relief which Lenea wants, 'equitable' or 'legal damages,' it remains a personal monetary award out of the official's own pocket.")).

The Court agrees with *Crockett* and *Carey*, both of which concluded that Plaintiffs' demand that the Union Defendants "refund" their agency fee payments sounds in law, not equity. **HN12**[] The Plaintiffs' agency fees "paid for [the] ongoing costs of representation" and "[t]here is no segregated fund to which Plaintiffs' payments can now be traced, and therefore any relief would be paid from the Union Defendants' general assets." Crockett, 2019 U.S. Dist. LEXIS 42923, 2019 WL 1212082, at *5. A "personal claim against the defendant's general assets . . . is a *legal* remedy, not an equitable one." *Id.* (quoting *Montanile v. Board of Trustees, 136 S. Ct. 651, 658, 193 L. Ed. 2d 556 (2016)*).

6. Return of Unconstitutionally Seized Property

Finally, Plaintiffs argue that the monetary relief they seek is qualitatively different from what they term "collateral damages" and more akin to the return of unconstitutionally seized property. As such, Plaintiffs argue that a good faith defense is unavailable, and that *whenever* property is unconstitutionally **[**30]** taken, even if in good-faith reliance on a long-standing decision of the United States Supreme Court, it must be returned. (*See Martin* Opp. at 1.) Although mentioned only briefly in their Opposition (*id.*), at oral argument, Plaintiffs relied on *Harper v. Virginia Department of Taxation, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993)* for support. ***HN13***[] *Harper* announced the general rule that "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect." *Id. at 97*. This rule is of no assistance to Plaintiffs in the present context; in arguing a good faith defense to a *§ 1983* claim, the Union Defendants assume, without conceding, that *Janus* applies retroactively.

The question here - one not addressed by *Harper* -is whether Union Defendants are precluded from asserting a good faith defense in this context, where Plaintiffs made payments for agency fees later determined to be unconstitutional. For the most part, the cases Plaintiffs cite have **[*876]** nothing to say about a good faith defense to a *§ 1983* claim. More significantly, the cases cited involve the return of discrete and identifiable property, not a refund of fees paid. *See, e.g., Wyatt v. Cole, 994 F.2d 1113, 1115 (5th Cir. 1993)* (involving *§ 1983* damages from unconstitutional seizure of cattle); *Clement, 518 F.3d at 1090* (involving **[**31]** *§ 1983* damages from unconstitutional seizure of vehicle); *United States v. Rayburn House Office Building Room 2113 Washington DC 20515*, *497 F.3d 654, 656, 378 U.S. App. D.C. 139 (D.C. Cir. 2007)* (ordering return of documents seized from a congressman's office in violation of the *Speech and Debate clause* despite good faith reliance on search warrant). In that sense, Plaintiffs' argument here is a refrain of their claim that the most analogous state law claim is one for conversion; a wrong for which the remedy might be replevin — the return of the specifically stolen property. As the Court noted above, that is not the gist of this case. It cannot be overlooked that the pre-*Janus* regime consisted of an obligation by the Plaintiffs to pay fees to the Union Defendants, and a concomitant obligation by the Union Defendants to use those fees to bargain on Plaintiffs' behalf. While the Supreme Court has determined that such an arrangement violated Plaintiffs' *First Amendment* rights, it is not the case that the agency fees remain in a vault, to be returned like a seized automobile. As the Union Defendants cannot retract their performance on this implied contract, it would be inequitable to force them to repay Plaintiffs' agency fees.

In short, the cases before the Court present a fundamentally **[**32]** different issue than those cited by the Plaintiffs. The Union Defendants did not merely rely on a presumptively valid state statute; they relied on the 40-year-precedent of *Abood*. The Court agrees with the Honorable Judge Chhabria who noted, "there is a strong argument that when the highest judicial authority has previously deemed conduct constitutional, reversal of course by that judicial authority should never, as a categorical matter, result in retrospective monetary relief based on that conduct." *Hough*, 2019 WL 1785414, at *1.

Accordingly, the Court rejects all of Plaintiffs' arguments against application of the good-faith defense. The Court agrees with every other district court to have decided this question and concludes that "[t]he good faith defense should apply here as a matter of law." *Danielson, 340 F. Supp. 3d at 1086*. Thus, the *Babb, Wilford*, and *Martin* Plaintiffs' *§ 1983* claims are DISMISSED WITH PREJUDICE.

C. Voluntariness of Membership Dues (*Martin*)

As noted above, the *Martin* Plaintiffs were dues-paying members of their respective unions prior to *Janus*. They seek recovery of an amount equal to the agency fees that non-members were required to pay based on the theory that they "chose to join the union and pay the *difference* between full **[**33]** membership dues and [agency fees] that they would have otherwise paid." (*Martin* Union Opp. at 5.) Essentially, though the *Martin* Plaintiffs did not actually pay agency fees, they argue that such fees were subsumed within their membership dues. (*Id.*) Thus, "they had no choice in whether to pay the mandatory portion of the dues that was imposed on every member of their bargaining unit." (*Id.*)

First, because the Court concludes that the Union Defendants have a good-faith defense to retroactive monetary relief based on *Janus*, the *Martin* Plaintiffs' claim fails as a matter of law. Further, the Court agrees with *Crockett*, which held that an indistinguishable claim failed. *See* **[*877]** *2019 U.S. Dist. LEXIS 42923, 2019 WL 1212082, at *7*. In short, the *Martin* Plaintiffs voluntarily chose to pay membership dues in exchange for certain benefits, and "[t]he fact that plaintiffs would not have opted to pay union membership fees if *Janus* had been the law at the time of their decision does not mean their decision was therefore coerced." *Id.*

D. State Law Claims for Refund of Agency Fees (*Wilford, Babb, Matthews*, and *Martin*)

1. EERA Preemption

First, the Union Defendants argue that Plaintiffs' state law claims for relief are preempted by the Educational Employment Relations Act ("EERA"), **[**34]** which "completely displaced any common law claims related to the collection of [agency fees]." (*Wilford* Mem. at 11-13.)

HN14[] The EERA expressly authorizes the collection of agency fees. *Cal. Gov. Code §§3543(a)*, *3546(a)*; *see* *Cumero v. Public Employment Relations Bd., 49 Cal. 3d 575, 587, 262 Cal. Rptr. 46, 778 P.2d 174 (1989)* ("EERA . . . contains provisions expressly. . . allowing . . . for compulsory nonmember service fees"). Challenges to agency fees, even on constitutional grounds, are subject to the Public Employment Relations Board's ("PERB") exclusive jurisdiction. *See* *Link v. Antioch Unified School Dist., 142 Cal. App. 3d 765, 769, 191 Cal. Rptr. 264 (1983)* ("Looking beyond the constitutional label given to plaintiffs' grievances herein, the substance of conduct complained of may also constitute unfair practices which arguably could be resolved by a PERB ruling." (internal citation omitted)). The California Supreme Court has held that EERA broadly preempts state tort claims that allege conduct that is even "arguably protected or prohibited under EERA." *El Rancho Unified School Dist. v. Nat'l Educ. Ass'n, 33 Cal.3d 946, 960, 192 Cal. Rptr. 123, 663 P.2d 893 (1983)*. "[W]hat matters is whether the underlying conduct on which the suit is based — however described in the complaint — may fall within PERB's exclusive jurisdiction." *Id. at 954 n.13*.

In *Crockett*, the court found that the plaintiffs' state law claims (indistinguishable from those asserted here) failed as a matter of law "because there can be no common law liability for **[**35]** conduct authorized by state statute." *2019 U.S. Dist. LEXIS 42923, 2019 WL 1212082, at *7*. *Crockett* involved Alaska's version of the EERA and PERB, but the Court finds *Crockett*'s reasoning persuasive and applicable here. "*Janus* does not change the fact that [the EERA] displaced any state common law tort claims that could have been brought with regard to [agency fees] collected prior to *Janus*." *2019 U.S. Dist. LEXIS 42923, [WL] at *7*. Plaintiffs argue that "statutes authorizing the collection of agency fees are to be treated as though they never existed." (*Babb* Opp. at 24.) However, the Court "cannot ignore the fact that the Union Defendants' collection of [agency fees] prior to *Janus* was authorized by state statute that was constitutional under controlling precedent. The court cannot now go back and impose tort liability under common law for that conduct." *Crockett, 2019 U.S. Dist. LEXIS 42923, 2019 WL 1212082, at *8*.

Plaintiffs also argue unpersuasively that EERA does not encompass their state law claims. (*See Wilford* Opp. at 12.) Plaintiffs argue that their state law claims require the Court to determine "the proper ownership of the money the Unions received from the Plaintiffs," whereas "PERB would consider whether the collection of fees constituted an unfair practice, which is wholly unrelated to ownership." (*Id.* at 13.) However, *Link* rejected this **[*878]** precise argument and **[**36]** concluded that the claims were preempted because "the substance of conduct complained of may also constitute unfair practices which arguably could be resolved by a PERB ruling." *Link, 142 Cal. App. 3d at 769*. Plaintiffs' citations to *San Lorenzo Education Association v. Wilson, 32 Cal. 3d 841, 187 Cal. Rptr. 432, 654 P.2d 202 (1982)* and *California Association of Professional Scientists v. Schwarzenegger, 137 Cal. App. 4th 371, 40 Cal. Rptr. 3d 354 (2006)* ("CAPS") are inapposite and unavailing. In *San Lorenzo*, no preemption was found because PERB does not have jurisdiction over disputes arising from contracts between unions and public employers. *See* *32 Cal. 3d at 853* ("[A]t issue is whether the union, under the terms of the collective bargaining agreement, can file a civil suit against a noncomplying employee."). In *CAPS*, the plaintiffs' claim was that a state law "impermissibly conflicts with the terms of the [collective bargaining agreement] and therefore violates the state and federal constitutional prohibitions against impairing the obligations of contracts." *137 Cal. App. 4th at 381*. ***HN15***[] As the Union Defendants note, the California courts have concurrent jurisdiction with PERB over breach of collective bargaining agreement claims pursuant to *California Labor Code § 1126*. *See* *Fresno Unified Sch. Dist. v. Nat'l Educ. Assn., 125 Cal. App. 3d 259, 274, 177 Cal. Rptr. 888 (1981)* ("[A]s to the contract cause of action the trial court had concurrent jurisdiction pursuant to Labor Code *section 1126*.").

Accordingly, the Court concludes that Plaintiffs' common law tort claims are preempted by the EERA.

2. Government [37] Code *§ 1159***

Furthermore, even assuming that Plaintiffs' claims are not preempted by the EERA, the Court concludes that Government Code *§ 1159* is an independent and adequate grounds upon which to dismiss Plaintiffs' state law claims.

Enacted on September 14, 2018, and effective immediately, *California Government Code § 1159* provides:

> (a) The Controller, a public employer, an employee organization, or any of their employees or agents, shall not be liable for, and shall have a complete defense to, any claims or actions under the law of this state for requiring, deducting, receiving, or retaining agency or fair share fees from public employees, and current or former public employees shall not have standing to pursue these claims or actions, if the fees were permitted at the time under the laws of this state then in force and paid, through payroll deduction or otherwise, prior to June 27, 2018.
> (b) This section shall apply to claims and actions pending on its effective date, as well as to claims and actions filed on or after that date.
> (c) The enactment of this section shall not be interpreted to create the inference that any relief made unavailable by this section would otherwise be available.

Cal. Gov. Code § 1159(a)-(c).

HN16[] The purpose of *§ 1159* is explicit: "to provide **[**38]** certainty to public employers and employee organizations that relied on state law, and to avoid disruption of public employee labor relations, after the Supreme Court's decision in [*Janus*]." *Id.* *§1159(e)(2)*. Further, *§ 1159* declares that "[a]pplication of this section to pending claims and actions clarifies existing state law rather than changes it." *Id.* *§ 1159(e)(1)*. "Public employees who paid agency or fair share fees as a condition of **[*879]** public employment in accordance with state law and Supreme Court precedent prior to June 27, 2018, had no legitimate expectation of receiving that money under any available cause of action." *Id.* Thus, "[a]pplication of this section to pending claims will preserve, rather than interfere with, important reliance interests." *Id.*

Because *§ 1159* clearly precludes their state law claims for relief, Plaintiffs argue primarily that it is unconstitutional in that its retroactive application violates their due process rights. (*See* *Wilford* Opp. at 18.) Plaintiffs also briefly argue that *§ 1159* effectuates an unlawful taking; violates the California Constitution's single-subject rule; and violates the "separation of powers" doctrine. (*See* Plaintiffs' Opp. to AG at 14-17.) The Court addresses each issue below.

i. Due Process [39]**

HN17[] In both federal and California due process analysis, the threshold question in determining retroactive application is whether the legislation changed or clarified the law. *See* *McClung v. Emp't Dev. Dept., 34 Cal. 4th 467, 471, 20 Cal. Rptr. 3d 428, 99 P.3d 1015 (2004)*; *Beverly Community Hosp. Ass'n v. Belshe, 132 F.3d 1259,* 1265 (9th Cir. 1997). "A statute that merely clarifies, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment because the true meaning of the statute remains the same." McClung, 34 Cal. 4th at 471 (internal alterations and quotations removed); *see also* Beverly, 132 F. 3d at 1265 (explaining that whether statute clarifies or changes the law is a "key threshold issue" and that there would be retroactive application issues only if the statute changed the law).

HN18[] Here, the California legislature was explicit that § 1159 "clarifies existing state law rather than changes it," because "[p]ublic employees who paid agency or fair share fees as a condition of public employment in accordance with state law and Supreme Court precedent prior to [*Janus*], had no legitimate expectation of receiving that money under any available cause of action." § 1159(e)(1). As the Union Defendants note, at the time agency fees were collected, the Unions could not be held liable under any state law theory for collection of such fees, and § 1159 merely reinforces this point. **[**40]** (*Wilford* Reply at 12.) "A clarified law is simply a statement of what the law has always been." In re Marriage of Walker, 138 Cal. App. 4th 1408, 1426, 42 Cal. Rptr. 3d 325 (2006). Further, although "a legislative declaration of an existing statute's meaning is neither binding nor conclusive on the courts in construing the statute," the Court may give "due consideration to the Legislature's views." *Id.*; *see also* Beverly, 132 F.3d 1265-66 (deferring to legislature's description of legislation as a "clarification"). In response, Plaintiffs argue that, if it were true that § 1159 merely clarified the law and they could not pursue their state law claims even in its absence, § 1159 is "superfluous." (*See Wilford* Opp. at 19.) **HN19**[] However, clarifying statutes can be "remedial in nature and intended by the Legislature to be applied at the earliest possible time, including application to all cases not then finally decided." City of Redlands v. Sorensen, 176 Cal. App. 3d 202, 212, 221 Cal. Rptr. 728 (1985).

Thus, the Court concludes that §1159 merely clarifies rather than changes the law. However, even assuming that § 1159 changes the law, Plaintiffs' procedural and substantive due process arguments fail under California and federal law, as discussed below.

a. State and Federal Procedural Due Process

HN20[] Under both the federal and state constitutions, when a law "creates a **[*880]** substantive rule of law granting immunity to certain parties **[**41]** against certain types of claims . . . 'the legislative determination provides all the process that is due.'" Ileto v. Glock, Inc., 565 F.3d 1126, 1142 (9th Cir. 2009) (citing Logan v. Zimmerman Brush Co., 455 U.S. 422, 433, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982)); *see also* Jenkins v. County of L.A., 74 Cal. App. 4th 524, 537, 88 Cal. Rptr. 2d 149 (1999) (rejecting federal and state due process challenges to retroactive application of a statute barring certain negligence claims and explaining that "the legislative determination provides all the process that is due" (quoting Logan, 455 U.S. at 433)). Plaintiffs argue against the application of *Illeto* to no avail. They rely on *Logan* and related California cases to argue that "a plaintiff must be given some opportunity to present her claim. Section 1159 violates this principle by purporting to cut off Plaintiffs' rights of action with no opportunity to present them." (*Wilford* Opp. at 23.)

However, Logan and the California cases upon which Plaintiffs rely involved changing the procedures through which a plaintiff could pursue his or her claims, not creating a substantive rule of law granting immunity to certain parties against certain types of claims, as is the case here. For example, *Logan* examined whether a change in a state administrative agency's procedures comported with due process. As *Illeto* noted, *Logan* "explicitly limited its holding to 'a procedural limitation on the claimant's ability to assert his **[**42]** rights, not a substantive element of the [underlying] claim.'" Ileto, 565 F.3d at 1142 (quoting Logan, 455 U.S. at 433) (alteration in original). Indeed, *Logan* noted that "the State remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily created causes of action altogether," and in such cases "the legislative determination provides all the process that is due." Logan, 455 U.S. at 432-33.[12] Here, if § 1159 changes the law, it grants the

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[12] Plaintiffs also argue, based on Callet v. Alioto, 210 Cal. 65, 290 P. 438 (1930), that *Illeto* does not apply because it involved *statutory* causes of action instead of *common law* causes of action, such as those asserted by Plaintiffs here. (*See Wilford* Opp.

Union Defendants immunity from all state law causes of action related to agency fee collection, and the California legislature's determination "provides all the process that is due." *Illeto, 565 F.3d at 1142*.

b. State Substantive Due Process

Plaintiffs' state substantive due process argument also fails. ***HN21***[] Under the California constitution, the legislature "can provide for retroactive application of a statute if it has a reasonable basis for doing so." *L.A. Cty. v. Superior Court, 62 Cal. 2d 839, 844, 44 Cal. Rptr. 796, 402 P.2d 868 (1965)*. "In determining whether a retroactive law contravenes the *due process clause*, we consider such factors as the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that **[**43]** reliance, the extent of actions taken on the basis of that reliance, and the extent to **[*881]** which the retroactive application of the new law would disrupt those actions." *In re Marriage of Bouquet, 16 Cal. 3d 583, 592, 128 Cal. Rptr. 427, 546 P.2d 1371 (1976)*. The Court concludes that the California legislature had a reasonable basis for retroactively applying *§ 1159* to bar Plaintiffs' claims. First, Plaintiffs' reliance interest is minimal in that *Abood* would have prevented them from any recovery of agency fees prior to *Janus*. ***HN22***[] Further, *§ 1159* serves the significant state interests of providing "certainty to public employers and employee organizations that relied on state law, and [avoiding] disruption of public employee labor relations" after *Janus. See Cal. Gov. Code §1159(e)(2)*. As noted throughout, the Court finds the Union Defendants' reliance on *Abood* reasonable and in good faith, and *§ 1159* seeks to protect these reliance interests. Further, the lawsuits that *Section 1159* bars — including those currently before the Court—seek to impose massive retroactive liability on public employers and unions that relied on state law, which would certainly disrupt public employee labor relations.

c. Federal Substantive Due Process

Finally, Plaintiffs' federal substantive due process argument fails. ***HN23***[] "Where, as here, Congress has expressed **[**44]** its clear intent that the legislation be retroactive, 'the constitutional impediments to retroactive civil legislation are now modest.'" *Ileto, 565 F.3d at 1138* (quoting *Landgraf v. USI Film Prods., 511 U.S. 244, 272, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994))*. "[T]he potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope." *Landgraf, 511 U.S. at 267*. "We have squarely held that although a cause of action is a species of property, a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained." *Ileto, 565 F.3d at 1141*. Here, Plaintiffs' claims have not vested because they have not obtained final judgments. Thus, *§ 1159* is subject to rational basis review and its retroactive application must be upheld so long as the California legislature's decision was not "irrational or arbitrary." *See id. at 1140*. For the reasons discussed in relation to the California substantive due process argument, the Court concludes that retroactively applying *§ 1159* is neither arbitrary nor irrational.

ii. Other Constitutional Challenges

Plaintiffs' *Fifth Amendment Takings Clause* argument is foreclosed by *Illeto*. As noted above, because Plaintiffs have not obtained a final unreviewable judgment, their rights in their causes of action have not vested and "[t]he *Fifth Amendment's Takings Clause* prevents the Legislature (and **[**45]** other government actors) from depriving private persons of *vested* property rights." *See Ileto, 565 F.3d at 1141* (quoting *Landgraf, 511 U.S. at 266*) (emphasis in original)).

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at 20.) First, while *Callet* did distinguish between statutory and common law causes of action, the California Supreme Court has since rejected this proposition, concluding that there is "no constitutional basis for distinguishing statutory from common-law rights merely because of their origin." *See L.A. Cty. v. Superior Court, 62 Cal.2d 839, 844, 44 Cal. Rptr. 796, 402 P.2d 868 (1965)*. Further, Plaintiffs are simply wrong about *Illeto*, as it upheld a law "intended to preempt common-law claims, such as general tort theories of liability." *565 F.3d at 1135*.

HN24[] Plaintiffs also argue that Senate Bill 846, which added *§ 1159* to the Government Code, violates the single subject rule of the California Constitution, which provides that "[a] statute shall embrace but one subject, which shall be expressed in its title." *Cal. Const., art. IV, § 9*. "'[A]n initiative measure does not violate the single-subject requirement if, despite its varied collateral effects, all of its parts are 'reasonably germane' to each other,' and to the general purpose or object of the initiative." *Brosnahan v. Brown, 32 Cal. 3d 236, 245, 186 Cal. Rptr. 30, 651 P.2d 274 (1982)* (quoting **[*882]** *Amador Valley Joint Union High Sch. Dist. v. State Bd. Of Equalization, 22 Cal. 3d 208, 230, 149 Cal. Rptr. 239, 583 P.2d 1281 (1978))*. "[T]he single subject rule is to be 'construed liberally,'" and "[n]umerous provisions, having one general object, if fairly indicated in the title, may be united in one act." *Id.* Here, the title of Senate Bill 846 is "Employment." *Section 1159* and the rest of the sections identified by Plaintiffs (Plaintiffs Opp. to AG at 16) are "reasonably germane" to employment. Accordingly, the Court concludes that Senate Bill 846 does not violate the single-subject rule.

Finally, Plaintiffs argue that *§ 1159* "violates the separation-of-powers doctrine." (Plaintiffs' Opp. to AG at 17.) Plaintiffs argue that **[**46]** *§ 1159* "effectively denies Plaintiffs a judicial forum to assert their state-law claims," and "[f]or the reasons stated in *In re National Sec. Agency Telecomm. Records Litig., 671 F.3d 881, 899 (9th Cir. 2011)*, this violates the separation-of-powers doctrine." (*Id.*) *In re Nat'l Sec. Agency*, however, states that separation of powers concerns would be raised if "faced with a situation in which Congress has enacted legislation and simultaneously declared that legislation to be immune from any constitutional challenge by the plaintiff." *In re Nat'l Sec. Agency, 671 F.3d at 889* (quoting *Bartlett v. Bowen, 816 F.2d 695, 703, 259 U.S. App. D.C. 391 (D.C. Cir. 1987))*. *Section 1159* does no such thing, and thus *In re Nat'l Sec. Agency* is irrelevant to Plaintiffs' claims. ***HN25***[] Thus, the Court concludes that *§ 1159* does not violate the separation-of-powers doctrine.

Accordingly, the Court concludes that *§ 1159* is constitutional and bars all of Plaintiffs' state law causes of action. Thus, the Court GRANTS the Motions to Dismiss and DISMISSES WITH PREJUDICE Plaintiffs' state law causes of action.[13]

E. Constitutionality of *California Government Code § 3558* (*Martin*)

HN26[] The *Martin* Plaintiffs argue that *California Government Code § 3558* violates the *First Amendment* or alternatively that it violates state tort law and their state and federal constitutional rights to privacy. *Section 3558* provides that public school districts must provide unions that serve as exclusive representatives of bargaining units with:

> the name, **[**47]** job title, department, work location, work, home, and personal cellular telephone numbers, personal email addresses on file with the employer, and home address of any newly hired employee within 30 days of the date of hire or by the first pay period of the month following hire, and . . . with a list of that information for all employees in the bargaining unit at least every 120 days unless more frequent or more detailed lists are required by an agreement with [the union].

Cal. Gov. Code § 3558. An employee may opt out of having such information shared with the union. *See id.*; *see also § 6254.3*.

HN27[] As the Union Defendants explain, *§ 3558* codifies the California Supreme Court's decision in *County of Los Angeles v. L.A. County Employee Relations Committee, 56 Cal. 4th 905, 157 Cal. Rptr. 3d 481, 301 P.3d 1102 (2013)*, which held that **[*883]** disclosure of public employees' contact information to a union does not violate their

[13] The *Matthews* Plaintiffs' UCL claim is also barred by *§ 1159*'s broad language. *See § 1159* (applying to "any claims or actions under the law of this state"). Furthermore, even if it were not barred by *§ 1159*, the UCL claim fails because the Union Defendants are not a "business" and collecting agency fees in compliance with state law is not a "business act or practice." *See That v. Alders Maintenance Ass'n, 206 Cal. App. 4th 1419, 1427, 142 Cal. Rptr. 3d 458 (2012)* (holding that homeowners' association was not subject to a UCL claim because it "does not participate as a business in the commercial market, much less compete in it").

privacy rights under California's constitution. *Id. at 931-32*; *see also* *§ 3558* ("The provision of information under this section shall be consistent with the employee privacy requirements described in *County of Los Angeles v. Los Angeles County Employee Relations Com. (2013) 56 Cal.4th 905, 157 Cal. Rptr. 3d 481, 301 P.3d 1102*.") There, the Court explained that "[b]ecause the union's duty [of fair representation] extends to all employees in the bargaining unit, regardless of union membership, the union must have the means of communicating with all employees." *County of L.A., 56 Cal. 4th at 931*. Thus, "[d]irect communication **[**48]** between unions and all bargaining unit employees is essential to ensure that nonmembers' opinions are heard." *Id.* Further, the court found that giving the unions "this contact information will not coerce employees into joining the union. An employee who chooses not to join a union still enjoys the benefits of union representation." *Id.*

The Union Defendants argue that *§ 3558* does not violate the *First Amendment*. (*Id.* at 25.)[14] Plaintiffs allege that *§3558* amounts to a "compelled disclosure," to which the Supreme Court applies "exacting scrutiny." (*See Babb* First Amended Complaint ¶ 51.) ***HN28***[] "At least in the context of organized labor, the impingement of *First Amendment* rights must, at a minimum, satisfy 'exacting scrutiny'; i.e., it must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'"[15] *Mentele v. Inslee, 916 F.3d 783, 790 (9th Cir. 2019)* (quoting *Janus, 138 S. Ct. at 2465*.)

The Union Defendants argue that *§ 3558* "does not infringe on Plaintiffs' *First Amendment* rights—and is not subject to exacting scrutiny—because the content-neutral contact information that is disclosed under the statute (unless Plaintiffs opt out) reveals nothing about their associations and beliefs." (*Martin* Union Mem. at 25.) Indeed, as the Union Defendants **[**49]** note and Plaintiffs impliedly concede (*see Martin* Union Opp. at 26-27), every compelled-disclosure case in which the Supreme Court applied exacting scrutiny involved disclosure of information that linked individuals to a cause, an association, or political activity, or identified the individuals' political beliefs. For example, in *NAACP v. Alabama, 357 U.S. 449, 462-63, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958)*, the Court held that compelled disclosure of NAACP membership was subject to exacting **[*884]** scrutiny.[16] The Court focused on the harm stemming from "compelled disclosure of affiliation with *groups engaged in advocacy*." *Id. at 462* (emphasis added). "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group *espouses dissident beliefs*." *Id.* (emphasis added). The disclosures here are not disclosures of membership or affiliation, but rather of employees' contact information, which reveals nothing about the employees' beliefs or political views. Plaintiffs cite to no authority providing that content-neutral disclosures such as those required by *§ 3558* are subject to exacting scrutiny. Plaintiffs argue that *§ 3558* "will have the undeniable effect of deterring those employees from engaging in anti-union speech." (*See* ***[**50]*** *Martin* Union Opp. at 27.) Plaintiffs allege no facts to support this claim, and further, it is illegal for the Union Defendants to discriminate against employees for not joining their respective unions. *See* *Cal. Gov. Code §3543.6(b)*.

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[14] The Union Defendants also argue that the *Martin* Plaintiffs lack standing to challenge *§ 3558* because their respective unions already have their contact information pursuant to *§ 3558*. (*Martin* Union Mem. at 23.) However, the harm that Plaintiffs identify is the fact that they were allegedly compelled to share the information, and thus the fact that the unions already have such information does not deprive Plaintiffs of standing.

[15] The Union Defendants rely on the less-stringent exacting scrutiny standard articulated by the Supreme Court in *John Doe No. 1 v. Reed, 561 U.S. 186, 196, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010)*, requiring only a "substantial relation between the disclosure requirement and a sufficiently important governmental interest." Although this less-stringent standard is typically applied in compelled disclosure cases and has been applied by the Ninth Circuit as recently as last year, *see* *Ams. For Prosperity Found v. Becerra, 903 F.3d 1000, 1008 (9th Cir. 2018)*, *Mentele* suggested that "in the context of organized labor," the more stringent standard applies. *See* *Mentele, 916 F.3d at 790*. Here, which version of exacting scrutiny is applied has no bearing on the outcome, as the Court concludes that *§ 3558* withstands the more stringent standard articulated in *Mentele*.

[16] *See also* *Buckley v. Valeo, 424 U.S. 1, 66, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)* (disclosed financial transactions with political candidate or party would "reveal much about a person's activities, associations, and beliefs") (internal quotation marks omitted); *John Doe No. 1*, *561 U.S.at 194-96* (individual's signature on petition would disclose his views on statute concerning gay rights).

HN29[] However, even assuming that exacting scrutiny applies, the Court concludes that *§ 3558* survives such scrutiny. *Section 3558* serves a compelling government interest. As the California Supreme Court noted in *County of L.A.*, the Union Defendants have an *obligation* to communicate with members and non-members pursuant to their duty of representation, so the Union Defendants "must have the means of communicating with all employees." *County of L.A., 56 Cal. 4th at 931*. This "[d]irect communication between unions and all bargaining unit employees is *essential* to ensure that nonmembers' opinions are heard." *Id.* (emphasis added). Thus, California has a compelling interest in ensuring that unions can communicate directly with employees.

Further, the Court concludes that this interest cannot be achieved through means significantly less restrictive of associational freedoms. ***HN30***[] The Union Defendants must be able to communicate directly with all employees, and access to employee contact information is "fundamental to the entire expanse of a union's **[**51]** relationship with the employees," permitting the union to "perform its broad range of statutory duties in a truly representative fashion and in harmony with the employees' desires and interests." *NLRB v. CJC Holdings, Inc., 97 F.3d 114, 117 (5th Cir. 1996)*. Plaintiffs quibble that the disclosures are too broad because they include employees' personal addresses and phone numbers. (*Martin* Union Opp. at 25-26.) However, the Union Defendants must be able to communicate *directly* with all employees and having employees' personal information furthers this interest. Further, in the context of heated negotiations with school districts, the Union Defendants need a method to communicate with employees outside of work. ***HN31***[] Moreover, any associational freedom restriction presented by *§ 3558* is significantly minimized by the fact that employees can opt out of the disclosures.

Accordingly, the Court concludes that *§ 3558* does not violate the *Martin* Plaintiffs' *First Amendment* rights. The *Martin* Plaintiffs admit that their "privacy-tort claims cannot survive unless this Court concludes that *section 3558* violates the federal Constitution." (*Martin* Union **[*885]** Opp. at 30.) Furthermore, Plaintiffs' claim for violation of California's right to privacy also fails because *§ 3558* merely codifies the California Supreme Court's ruling in *County of L.A.* Finally, Plaintiffs' **[**52]** claim for violation of *federal* privacy rights fails because "the scope and application of the [California] state constitutional right of privacy is broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts." *Am. Acad. of Pediatrics v. Lungren, 16 Cal. 4th 307, 326, 66 Cal. Rptr. 2d 210, 940 P.2d 797 (1997)*. Thus, the Court GRANTS the Union Defendants' Motion and DISMISSES WITH PREJUDICE Plaintiffs' claim challenging the constitutionality of *§ 3558*.

F. Constitutionality of *California Education Code § 45060* (*Martin*)

The Union Defendants argue that Plaintiff Martin lacks standing to challenge *California Education Code § 45060* and, even if he did not, *§ 45060* does not violate his *First Amendment* rights. (*Martin* Union Mem. at 30-31.)

HN32[] Education Code *§ 45060* provides, in relevant part:

> Employee requests to cancel or change authorizations for payroll deductions for employee organizations shall be directed to the employee organization rather than to the governing board. The employee organization shall be responsible for processing these requests.

Cal. Educ. Code § 45060(e). Further, *§ 45060* requires school employees to revoke their consent to payroll deductions "in writing." *Id.* *§§ 45060(a)*,*(c)*.

Martin alleges that *§45060* violates his *First Amendment* rights for two reasons: (1) it requires him to direct his request to cancel membership dues deductions to the union, rather than to his employer; **[**53]** and (2) it requires such requests to be in writing. (*Martin* First Amendment Complaint ¶¶ 58, 60-62.) Citing to *Janus*, Martin alleges that "[e]very public employer and every public-employee union must honor and implement the wishes of an employee who has withdrawn his 'affirmative consent' to union fees or assessments—regardless of how a public employee chooses to communicate his instructions." (*Id.* ¶ 57.) On July 6, 2018, Martin sent an email to his employer, Riverside Unified School district, asking that all union-related payroll deductions cease. (*Id.* ¶ 60.) However, Martin claims that *§ 45060(e)* "instructs the school district to continue diverting [his] paycheck toward the union—in violation of *Janus* and in violation of [his] *First Amendment* rights—because [he] chose to submit his e-mail directly to school officials rather than asking the union to take care of matters." (*Id.* ¶ 61.)

The Union Defendants argue that Martin does not have standing to challenge *§ 45060* because his request to cancel membership dues deductions has been processed. (*See Martin* Union Mem. at 31; Scott Decl. ¶¶ 3-8, Doc. 61-10.) Indeed, while the Union Defendants did not receive Martin's email, upon receipt of the Complaint on July 23, 2018, **[**54]** the Union Defendants wrote Martin a letter explaining that Riverside Unified did not have the authority to terminate the union membership of its employees. (*See* Scott Decl. ¶ 4.) On August 3, 2018, the Union Defendants informed Martin that they would consider this lawsuit a request to resign his membership and that he would be considered terminated as of July 23, 2018. (*Id.* ¶ 5.) Though this was fifteen days after Martin sent the email to Riverside Unified, the lapse is irrelevant because "dues deductions would have already ceased for the year as of June 30, and no further deductions were scheduled to be made in July." (*Id.* ¶ 7.)

[*886] In response, Martin argues that the Union Defendants are attempting to moot his claims by voluntarily deciding to halt payroll deductions after he sued. (*Martin* Union Opp. at 32.) Further, Martin argues that his claim is not moot "because California law requires the school district and the union to continue taking membership dues from Mr. Martin's paycheck—notwithstanding his resignation from membership—until Mr. Martin submits a request to the union 'in writing' that revokes his previous authorization for payroll deductions." (*Id.*)

Here, it appears that Martin's claim is moot. ***HN33***[] "A **[**55]** case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Yohn, 2018 U.S. Dist. LEXIS 209944, 2018 WL 5264076, at *2* (quoting *Rosebrock v. Mathis, 745 F.3d 963, 971 (9th Cir. 2014))*. Martin has resigned from his union and it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* Indeed, Martin would have to rejoin his union for his claim to be live, which, given his representations in this lawsuit, seems a remote possibility. Further, as the Union Defendants note, Martin has suffered no damages because of the fifteen-day delay in the processing of his resignation, and Martin does not allege otherwise. Moreover, there is no basis for Martin's contention that the Union Defendants are "required" to continue to deduct dues from his paycheck, nor does he allege that they are doing so.

However, even assuming that Martin's claim is *not* moot, the Court concludes that his claim fails as a matter of law. *Section 45060*, on its face, does not violate the *First Amendment*. Contrary to Martin's contention, *Janus* does not hold that employees have the right to resign from a union however they want, regardless of state laws that prescribe clear, **[**56]** common-sense procedures for doing so. Submitting a writing to the Union Defendants to halt payroll deductions is not a burdensome requirement. Because the deductions go to the Union Defendants, it makes sense that the halting of such deductions must be communicated to the Union Defendants rather than the school districts. Moreover, as the Union Defendants note, "[m]ost actions of legal significance, including registering to vote, voting itself, filing court papers, and the like, must be done in writing." (*Martin* Union Reply at 13.)

Accordingly, the Court GRANTS the Union Defendants' Motion to Dismiss and DISMISSES Martin's claim WITH PREJUDICE.

G. Antitrust Claim (*Martin*)

The Union Defendants next argue that Martin's antitrust claim fails. The *Crockett* court dismissed an indistinguishable claim with prejudice and the Court finds *Crockett*'s reasoning persuasive and applicable here. *See Crockett, 2019 U.S. Dist. LEXIS 42923, 2019 WL 1212082, at *8-9*.

As in *Crockett*, Martin's antitrust theory is that collective bargaining agreements stemming from California's exclusive representation system are anti-competitive because they "require compensation based on union-imposed pay scales and prevent individual employees from negotiating compensation based on **[**57]** individual performance and merits." *2019 U.S. Dist. LEXIS 42923, [WL] at *8*; *see Martin* First Amended Complaint ¶¶ 75-76.) ***HN34***[] The Court agrees with *Crockett* that "[f]ederal ***antitrust law***, which seeks to preserve competition in the private sector, simply does not encompass the way in which a state chooses to set employment **[*887]** terms for its public employees." 2019 U.S. Dist. LEXIS 42923, 2019 WL 1212082, at *8.

HN35[] More specifically, the state-action doctrine immunizes the Union Defendants from antitrust liability because federal antitrust laws do not "restrain a state or its officers or agents from activities directed by its legislature." Parker v. Brown, 317 U.S. 341, 350-51, 63 S. Ct. 307, 87 L. Ed. 315 (1943). To establish state-action immunity, "the challenged restraint . . . [must] be one clearly articulated and affirmatively expressed as state policy. . . [and] be actively supervised by the State." N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 135 S. Ct. 1101, 1110, 191 L. Ed. 2d 35 (2015). Martin argues that the Union Defendants cannot avail themselves of state-action immunity because he is challenging the actual terms of the collective bargaining agreements, not "the overall enterprise of collective bargaining." (*Martin* Union Opp. at 38.) Thus, Martin claims that the Union Defendants must show that the specific provisions he challenges have been "clearly articulated and affirmatively expressed as state policy." (*Id.*) **HN36**[] However, "it is indisputable that the challenged **[**58]** restraint—a collective bargaining agreement negotiated by a representative union—is 'clearly articulated and affirmatively expressed as state policy.'" Crockett, 2019 U.S. Dist. LEXIS 42923, 2019 WL 1212082, at *9. Martin further argues that nothing in his First Amended Complaint acknowledges "active supervision" by the state, so this issue cannot be resolved on a motion to dismiss. (*Martin* Union Opp. at 38.) **HN37**[] "The active supervision requirement, however, is inapplicable here because the other party to the challenged collective bargaining agreement is [a public-school district]." Crockett, 2019 U.S. Dist. LEXIS 42923, 2019 WL 1212082, at *9. "Unlike private parties, local government entities are not subject to the 'active state supervision requirement' because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies." *Id.* (quoting FTC v. Phoebe Putney Health Sys. Inc., 568 U.S. 216, 226, 133 S. Ct. 1003, 185 L. Ed. 2d 43 (2013) (alterations omitted)).

HN38[] Further, "[t]he labor of a human being is not a commodity or article of commerce." 15 U.S.C. §17. "Therefore, 'restraints on the sale of the employee's services to the employer'—those employment terms set forth in a collective bargaining agreement—'are not themselves combinations or conspiracies in the restraint of trade or commerce under the Sherman Act' even if they 'curtail the competition among employees.'" Crockett, 2019 U.S. Dist. LEXIS 42923, 2019 WL 1212082, at *9 (quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 503, 60 S. Ct. 982, 84 L. Ed. 1311 (1940)); *see also* Bodine Produce, Inc. v. U.F.W. Organizing Comm., 494 F.2d 541, 558 (9th Cir. 1974) **[**59]** (rejecting interpretation of labor exemption that "would invalidate collective bargaining").

HN39[] Finally, the *Noerr-Pennington* doctrine — by which efforts to convince the government to act in an anticompetitive manner are protected by the First Amendment — also bars Martin's antitrust claim. "Federal ***antitrust law*** . . . does not 'regulate the conduct of private individuals in seeking anticompetitive action from the government.'" Crockett, 2019 U.S. Dist. LEXIS 42923, 2019 WL 1212082, at *10 (quoting City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 379-80, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)).

Accordingly, the Court GRANTS the Union Defendants' Motion to Dismiss and DISMISSES WITH PREJUDICE Martin's antitrust claim.

[*888] H. Constitutionality of Exclusive Representation (*Few*)

Finally, United Teachers Los Angeles argues that Plaintiff Few's claim that California's exclusive representation system violates the First Amendment is foreclosed by the Supreme Court's decision in Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271, 104 S. Ct. 1058, 79 L. Ed. 2d 299 (1984). Indeed, the *Martin* Plaintiffs concede that their identical claim is barred by *Knight*. (*See Martin* Union Opp. at 35.)

HN40[] In *Knight*, the Supreme Court held that a system of exclusive union representation does not violate the speech or associational rights of individuals who are not members of the union. Knight, 465 U.S. at 271. As

Crockett noted in relation to a claim identical to Few's,[17] *Janus* essentially reaffirmed *Knight* because it distinguished between financial **[**60]** support for a union and the "underlying system of exclusive representation." *Crockett, 2019 U.S. Dist. LEXIS 42923, 2019 WL 1212082, at *8* (citing *Janus, 138 S. Ct. at 2465-67*.) Indeed, *Janus* explicitly noted that "[s]tates can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions." *Janus, 138 S. Ct. at 2485 n.27*. Moreover, the Ninth Circuit recently reaffirmed *Knight*'s validity in the wake of *Janus. See Mentele, 916 F.3d at 788*. Few attempts to distinguish *Mentele* on the basis that it holds that *Knight* "continues to apply" only to "partial" state employees, rather than full-fledged public employees such as himself. (Few Opp. at 12.) *Mentele*'s analysis of the impact of exclusive representation on non-member's associational rights contains no such limitation, however, and was based entirely on *Knight*'s analysis, which involved full-fledged public employees. *See Mentele, 916 F.3d at 788-90*.

Accordingly, the Court GRANTS United Teachers Los Angeles' Motion to Dismiss and DISMISSES Few's exclusive representation claim WITH PREJUDICE.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS all of the Motions to dismiss currently before it. As a result, this Order completely disposes of *Babb, Wilford*, and *Matthews*, and the Defendants in each case must submit a judgment to the **[**61]** Court no later than five (5) days from the date of this Order. In *Few*, Few's first claim for relief remains, and in *Martin*, Plaintiffs' second claim for relief remains.

DATED: May 08, 2019

/s/ Josephine L. Staton

JOSEPHINE L. STATON

UNITED STATES DISTRICT JUDGE

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[17] Just like the *Martin* Plaintiffs, the plaintiff in *Crockett* conceded that her claim was foreclosed by *Knight. See Crockett, 2019 U.S. Dist. LEXIS 42923, 2019 WL 1212082, at *8*.

Black Bear Sports Grp. Inc. v. Amateur Hockey Ass'n of Ill.

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

May 9, 2019, Decided; May 9, 2019, Filed

Case No. 18 C 8364

Reporter
2019 U.S. Dist. LEXIS 78770 *; 2019-2 Trade Cas. (CCH) P80,894; 2019 WL 2060934

BLACK BEAR SPORTS GROUP, INC and CENTER ICE ARENA, LLC, Plaintiffs, vs. AMATEUR HOCKEY ASSOCIATION OF ILLINOIS, INC., Defendant.

Subsequent History: Modified by, Affirmed by *Black Bear Sports Grp., Inc. v. Amateur Hockey Ass'n of Ill., Inc., 2020 U.S. App. LEXIS 19360 (7th Cir. Ill., June 22, 2020)*

Core Terms

Tier, hockey, alleges, teams, charter, affiliates, by-law, youth, rinks, documents, for-profit, amateur, motion to dismiss, facilities, programs, players, rules and regulations

Counsel: **[*1]** For Black Bear Sports Group, Inc., Center Ice Arena, LLC, Plaintiffs: Paula K. Jacobi, LEAD ATTORNEY, Paul T. Olszowka Barnes & Thornburg LLP, Chicago, IL.

For Amateur Hockey Association of Illinois, Inc., Defendant: James H. Mutchnik, LEAD ATTORNEY, Kirkland & Ellis LLP, Chicago, IL; Donna Peel, Erin Marie Reynolds, Kirkland & Ellis Llp, Chicago, IL; Jonathan J Faria, PRO HAC VICE, Kirkland & Ellis LLP, Los Angeles, CA.

Judges: MATTHEW F. KENNELLY, United States District Judge.

Opinion by: MATTHEW F. KENNELLY

Opinion

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Black Bear Sports Group, Inc. and its subsidiary Center Ice Arena, LLC sued the Amateur Hockey Association of Illinois alleging violations of federal and state ***antitrust law*** as well as a state-law claim for tortious interference with prospective business relations. The Association has moved to dismiss for lack of standing and for failure to state a claim upon which relief can be granted. For the reasons described below, the Court grants the motion to dismiss.

Background

For the purposes of this motion, the Court presumes the truth of the facts alleged in the plaintiffs' complaint. Black Bear and Center Ice, to which the Court will generally **[*2]** refer collectively as Black Bear unless the distinction is relevant, operate ice rinks. Black Bear operates ten rinks across the United States. Four of those rinks are in the

Chicago suburbs of Glen Ellyn, Woodridge, Lincolnwood, and Crestwood. Black Bear purchased these four rinks between 2016 and 2018 as part of its strategy of acquiring "undermanaged and underperforming" facilities and investing in capital improvements and professional management in order to create successful businesses. Compl., dkt. no. 1, ¶ 37. Black Bear also manages youth and junior hockey teams. Specifically, it manages teams affiliated with facilities it operates in New Jersey, Ohio, and Maryland. Black Bear's profit model relies on ice rental income from amateur hockey and figure skating, admission fees for public skating at its facilities, and amateur hockey club participation fees.

A brief primer on the structure of youth hockey is necessary. As a matter of federal statute, amateur sports in which the United States competes internationally are subject to a hierarchical regulatory scheme. *See Amateur Sports Act*, *36 U.S.C. §§ 220501*, *220503*. Amateur hockey is regulated by USA Hockey, Inc., which in turn sanctions state and regional **[*3]** affiliates. Since 1975 the Amateur Hockey Association of Illinois has been the affiliate regulator of amateur hockey in the state of Illinois.

The Association organizes amateur hockey by age and skill level. "Youth hockey" includes individuals under the age of 18. Youth players and teams are categorized on three tiers: Tier I teams are made up of the highest-skilled players and travel throughout the United States and Canada to compete with other elite teams; Tier II is intended for competitive but somewhat less skilled players who want to engage in regional competition; and Tier III is made up of beginners and recreational teams. According to the complaint, Tier II teams affiliated with the Association compete in either the Northern Illinois Hockey League or the Central States Developmental Hockey League, with the latter reserved for the most skilled Tier II players.

All youth hockey teams in Illinois are required to affiliate with the Association. Likewise, all participating teams are required to follow the Association's by-laws and rules and regulations. Those teams or players who do not comply with the Association's regulations or who participate in games with teams that are not registered **[*4]** with the Association or another USA Hockey-sanctioned governing body may face discipline, including loss of eligibility to participate in Association-sponsored tournaments, loss of insurance coverage, and revocation of membership.

Youth hockey is booming in Illinois. Nationally, participation has increased by nearly nine percent since 2013. The growth rate in Illinois has more than doubled that number, with a more than eighteen percent surge in participation during the same period. There are nearly fifty Tier II hockey clubs in what the plaintiffs describe as the "Northern Illinois region," each of which has between ten and thirty teams.[1] Each of these youth hockey clubs has a facility designated as its "home ice."

Black Bear wants the Association to grant it a charter to sponsor a Tier II club that would have its home ice at its Center Ice facility in Glen Ellyn, Illinois. Black Bear's rinks in Woodridge, Lincolnwood, and Crestwood already host Association-affiliated clubs.[2] But its Center Ice facility is underused. The facility has robust learn-to-skate and learn-to-play hockey programs. It does not, however, have a youth hockey club that calls the facility home. Black Bear says that **[*5]** it has "approached [the Association] about obtaining approval for a new Tier II club." Compl., dkt. no. 1, ¶ 53. But, according to Black Bear, the Association has moved to dash its hopes by "enact[ing] rules and . . . taking other actions to prevent [it] from entry into the relevant market." *Id.* ¶ 58. Specifically, it says that the Association "has told Black Bear that a Tier II club at Center Ice of DuPage is unnecessary and that there are already enough teams in the relevant market." *Id.* ¶ 59. Black Bear also alleges that someone—it does not say who—"told [Black Bear] that it cannot start a new Tier II club because it is a for-profit enterprise and [Association] rules require sponsors to be charitable organizations." *Id.* ¶ 61. According to Black Bear, these allegations, combined with the Association's reluctance to provide Black Bear with a copy of the application for a Tier II club charter, *id.* ¶ 65, amount to a predetermination by the Association that it will not grant a charter to Black Bear.

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[1] The plaintiffs also allege certain facts regarding participation levels in Tier I teams. Those allegations are not directly relevant to this motion because, as discussed below, Black Bear hopes to get a charter to organize a Tier II club.

[2] Importantly, Black Bear does not sponsor these three teams but rather simply provides them its ice rink facilities.

But Black Bear does not allege that its application has been rejected or even that it has actually applied for a Tier II club charter. Nor does Black Bear allege that the Association or relevant **[*6]** decisionmakers have told it, in so many words, that such an application would be rejected. Rather, Black Bear points to three "requirements" outlined in a publicly available Association document that it says preclude it from getting a charter. First, it points to the Association's requirement that member "club[s] must not be associated with a 'for-profit' organization . . . in accordance with [Association] Rules and Regulations Article 19[] and [the] USA Hockey Affiliate Agreement." Tier 2 Application Requirements, Ex. 2 to Compl., dkt. no. 1-2, ¶ 7. Black Bear also alleges that the Association's requirements that applicants identify any other youth hockey programs that granting a new charter application would affect, *id.* ¶ 13, and list any players and programs with which they were affiliated in the five years preceding their application, *id.* ¶¶ 5-6, "demonstrate" that that any attempt by Black Bear to get a Tier II club charter is hopeless, Compl. ¶¶ 67, 68. In Black Bear's view, these regulations preclude any application it might submit from succeeding, harm competition in the relevant market, and cause it injury.

Black Bear also alleges it has been injured by another rule recently adopted by the Association. **[*7]** Specifically, Black Bear says that it arranged for the Association-affiliated Tier II club that uses its Lincolnwood rink as its home ice to retain the Center Ice facility in Glen Ellyn as "additional ice," for which the team would have paid Black Bear rental fees. But, Black Bear alleges, "upon learning that the [team] intended to use the Center Ice Facility, [the Association] promulgated a new by-law (1.2.5) that prevents a Tier II team from using ice facilities more than fifteen miles from its home rink."[3] *Id.* ¶ 72. In Black Bear's view, this rule further demonstrates the Association's intent to maintain its monopoly power and to injure Black Bear.

Black Bear filed a four-court complaint. Count 1 alleges monopolization under *section 2* of the *Sherman Antitrust Act*, *15 U.S.C. § 2*; count 2 alleges a violation of the corresponding state law provision, *740 Ill. Comp. Stat. 10/3(3)*; and count 3 alleges Illinois common-law tortious interference with prospective business relations. Count 4 purports to plead a separate request for injunctive relief based on the first two counts.

The Association has filed a motion to dismiss Black Bear's complaint.

Discussion

To survive a motion to dismiss under *Federal Rules of Civil Procedure 12(b)(1)* and *12(b)(6)*, a plaintiff's complaint "must contain sufficient **[*8]** factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. For a claim to be plausible on its face, the plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* It must provide more than "labels and conclusions or a formulaic recitation of the elements of a cause of action . . . ." *Id.* (internal quotation marks omitted). The Court is "not obliged to accept as true legal conclusions or unsupported conclusions of fact." *St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 633 (7th Cir. 2007)* (internal quotation marks omitted).

Typically, a court's assessment of a motion to dismiss must be made on the complaint alone. *See* *Rosenblum v. Travelbyus.com Ltd., 299 F.3d 657, 661 (7th Cir. 2002)*. But where, as in this case, significant documents are referenced in the complaint and attached by the defendant to its motion to dismiss, those documents are considered to be incorporated into the pleadings and a court may consider them. *See id.*; *see also* *Orgone Capital III, LLC v. Daubenspeck, 912 F.3d 1039, 1044 (7th Cir. 2019)* ("We may also . . . consider documents incorporated by reference in the pleadings."); *Reed v. Palmer, 906 F.3d 540, 548 (7th Cir. 2018)* ("A motion under *Rule 12(b)(6)* can be based only on the complaint itself, documents attached to the complaint, documents that are critical to the complaint and referred **[*9]** to in it, and information that is subject to proper judicial notice."). And, indeed, "[t]he court is not bound to accept the pleader's allegations as to the effect of the [documents], but can independently

[3] Black Bear's citation is not quite correct. It is not by-law 1.2.5 but rather paragraph 1.2.5 of the Association's rules and regulations that sets out the relevant additional ice limitation.

examine [them] and form its own conclusions as to the proper construction and meaning to be given the material." Rosenblum, 299 F.3d at 661. In this case, the Association's by-laws, rules and regulations, and "Tier 2 Application Requirements" document—all of which were attached as exhibits to the complaint or the motion or both—are appropriately before the Court to the extent that they "are critical to the complaint and referred to in it." Reed, 905 F.3d at 548.

The Association's motion to dismiss rests principally on its contention that Article III standing is lacking. "The jurisdiction of federal courts is limited by Article III of the Constitution to 'Cases' and 'Controversies.'" Freedom from Religion Found., Inc. v. Lew, 773 F.3d 815, 819 (7th Cir. 2014) (quoting U.S. Const. art. III, § 2.). The Supreme Court has explained that "the irreducible constitutional minimum of standing consists of three elements." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* At the pleading stage, the **[*10]** plaintiff "must clearly allege facts demonstrating" each element. *Id.* (internal quotation marks and alteration omitted).

The Association disputes whether Black Bear has suffered an injury in fact. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized and 'actual or imminent, not conjectural or hypothetical.'" Id. at 1548 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). "When an injury is threatened in the future, the risk of harm must be substantial and more than speculative." Otrompke v. Hill, 592 F. App'x 495, 498 (7th Cir. 2014); *see also* Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014); *Freedom from* Religion Found., 773 F.3d at 821-22, 824-25.

Black Bear alleges two types of injury. First, it alleges that it has effectively been denied a Tier II club charter by the Association due to the Association's purported requirement that clubs be non-profit organizations. The Court will refer to this as the alleged exclusion injury. Second, Black Bear alleges that it has been injured by the Association's adoption of the additional ice rule in early 2018. The Court addresses each in turn.

A. Exclusion injury

Black Bear's first and primary argument rests on its alleged exclusion by the Association from youth hockey. Specifically, it alleges that the Association has adopted policies **[*11]** that effectively shut the door to any application Black Bear might make for a youth hockey club charter. Black Bear dedicates most of its argument to the Association's purported requirement that youth hockey "club[s] must not be associated with a 'for-profit' organization." Tier 2 Application Requirements, Ex. 2 to Compl., dkt. no. 1-2, ¶ 7. Black Bear, as a for-profit company, says that this exclusion effectively bars it from receiving a charter—and, indeed, that it so clearly precludes it that any application would be futile and thus unnecessary to establish an injury that is sufficiently concrete and imminent to satisfy Article III's standing requirements.

Because this allegation rests on the interpretation of key documents, the Court undertakes an independent assessment of those documents. *See* Rosenblum, 299 F.3d at 661. The clearest flaw in the interpretation underlying Black Bear's argument is that it seeks to read the short informational sheet the Association provides prospective applicants in isolation. Critically, however, the document incorporates Association "Rules and Regulations Article 19[] and [the] USA Hockey Affiliate Agreement." Tier 2 Application Requirements, Ex. 2 to Compl., dkt. no. 1-2, ¶ 7. One relevant portion of **[*12]** Article 19 indeed states that "[e]xcept as set out in the [Association] By-Laws, Rules and Regulations, each Affiliate shall have a corporate structure and at all times maintain a tax exempt status under Section 501(c)(3) of the Internal Revenue Code . . . ." Association Rules & Regs., Ex. 2 to Mot. to Dismiss, dkt. no. 20-3, § 19.7.2. But Article 19 then sets out exceptions to this general rule for (1) affiliates associated with for-profit learn-to-skate programs or "house league affiliates" and (2) affiliates that operate a for-profit rink owned by the affiliate. *Id.* § 19.7.3. Black Bear, as described above, operates multiple for-profit ice rinks and learn-to-skate programs, including at the Center Ice facility where it hopes to organize a new Tier II youth club. Without determining whether these exceptions are necessarily applicable in this situation, the Court observes that they create significant uncertainty about whether the non-profit rule actually would bar Black Bear's application for a club charter.

In addition to Article 19's exceptions, the defendant also points out that the relevant by-law governing applications for Tier II club charters gives the reviewing Association committee nearly boundless discretion. Specifically, by-law 8.3.4 sets out **[*13]** that, when faced with a request for Tier II membership, "[t]he Tier II Committee may deny the request, postpone consideration of the request, grant probationary status as a Tier II Member Association, grant full status as a Tier II Member Association, or take any other action that it determines to be in the best interest of hockey in Illinois." Association By-Laws, Ex. 1 to Mot. to Dismiss, dkt. no. 20-2, § 8.3.4. This broad discretion suggests that neither the non-profit rule nor the other application "requirements" alleged by Black Bear—that the applicant must identify clubs that would be affected by the grant of a new club charter and list any athletes and programs with which it has previously affiliated—might not doom its application.

Taken together, these provisions of the governing documents render Black Bear's allegations of injury too speculative to confer Article III standing. *Cf. Otrompke, 592 F. App'x at 498* (concluding standing was lacking where a plaintiff sought to challenge bar admission criteria but failed to apply for membership). As noted previously, Black Bear has not alleged that the Association or relevant decisionmakers have unequivocally stated that the Association would reject an application by **[*14]** Black Bear for a Tier II club charter. It has alleged, in relevant part, only that the "Association has told Black Bear that a Tier II club at Center Ice of DuPage is unnecessary," Compl., dkt. no. 1, ¶ 59, and that someone "told [Black Bear] that it cannot start a new Tier II club because it is a for-profit enterprise," *id.* ¶ 61. Even taking these allegations as true, it is not reasonable to infer—particularly in light of the questions raised by the controlling rules and by-laws—that it is a foregone conclusion that an application would be denied. Black Bear's alleged injury is thus too conjectural to support the injury-in-fact requirement for constitutional standing.

The bottom line is that, on the present allegations, Black Bear cannot proceed with this lawsuit without having actually applied for a Tier II club charter. But, contrary to the Association's contention, Black Bear likely would not need to exhaust the appeals provided for in the Association's rules if it did apply and was rejected. *See generally* Association Rules & Regs., Ex. 2 to Mot. to Dismiss, dkt. no. 20-3, art. 10. (describing appeals procedures). The language of the rule that sets out the appeals process is precatory; **[*15]** it states that "[a]ppeals of any [Association] Committee decision . . . *may* be made" to the Association board of directors. *Id.* (emphasis added). Nor does it appear that Black Bear would have to pursue the arbitration process outlined in the Association's by-laws. The by-law on dispute resolution applies only to "person[s] and entit[ies] within the jurisdiction of [the Association] . . . by virtue of their membership, affiliation or participation, at any time, in an [Association] program or sponsored event." Association By-Laws, Ex. 2 to Mot. to Dismiss, dkt. no. 20-2, § 14.0.2. If the Association were to deny Black Bear's application for a Tier II club charter—as Black Bear contends is inevitable—then Black Bear likely would not be within the Association's jurisdiction as defined by its own arbitration by-law. The defendant's arguments about mandatory appeals and arbitration therefore appear, at least at this stage, to lack merit.

B. Additional ice injury

Black Bear's other alleged injury arises from the additional ice rule. Specifically, Black Bear alleges that it has lost rental fees it otherwise would have garnered from renting its Center Ice facility in Glen Ellyn as additional ice for **[*16]** a team that has its home ice at Black Bear's Lincolnwood facility. It alleges that this loss was caused by the Association's adoption in early 2018 of a rule that, in Black Bear's characterization, "prevents a Tier II team from using ice facilities more than fifteen miles from its home rink." Compl., dkt. no. 1, ¶ 72. Black Bear alleges that the adoption of this rule "demonstrates [the Association]'s intent to main its monopoly power and to injure Black Bear." *Id.* ¶ 73.

Again, however, the Court is not obliged to take Black Bear's interpretation of the Association by-law at face value. *See Rosenblum, 299 F.3d at 661*. And in fact Black Bear's characterization of the additional ice rule is significantly incomplete. Contrary to Black Bear's allegation, the rule does not categorically "prevent" Tier II teams from using additional ice at facilities more than fifteen miles from their home rink. Rather, it states that rinks within fifteen miles may be used without any prior approval but "[r]inks outside the designated area must be approved by the" relevant Association committee. Association Rules & Regs., Ex. 2 to Mot. to Dismiss, dkt. no. 20-3, § 1.2.5.

As with the exclusion injury discussed above, Black Bear has alleged **[*17]** neither that it applied for approval of its additional ice arrangement nor that such an application was rejected. Nor does it allege that the Association or any relevant decisionmaker has even so much as suggested that such an application would be rejected or would be a waste of time.[4] Even assuming that Black Bear's allegations regarding this injury provide more than the sort of "labels and conclusions" regularly deemed insufficient to survive a motion to dismiss for failure to state a claim, *see Twombly, 550 U.S. at 570*, the additional ice allegation runs afoul of the injury-in-fact requirement for many of same reasons as the exclusion injury, *see Otrompke, 592 F. App'x at 498*. That is, taking Black Bear's allegations as true, it has not "clearly allege[d] facts demonstrating" that it suffered an injury in fact from the Association's adoption of the additional ice rule. *Spokeo, 136 S. Ct. at 1547*.

Conclusion

For the foregoing reasons, the Court grants the defendant's motion to dismiss [dkt. no. 18] and directs the Clerk to enter judgment dismissing the case for lack of standing. The status hearing and ruling set for May 14, 2019 is vacated.

/s/ Matthew F. Kennelly

MATTHEW F. KENNELLY

United States District Judge

Date: May 9, 2019

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[4] The Court also notes that Black Bear has apparently not attempted to allege, as the Seventh Circuit has suggested may be sufficient, that the additional ice rule imposes an "additional burden" unique to particular group of plaintiffs sufficient to satisfy the injury-in-fact requirement. *See Freedom from Religion Found., 773 F.3d at 825*. That said, it is not clear to the Court that such an allegation **[*18]** would be sufficient to confer standing under that and subsequent cases. *See id.*; *see also Spokeo, 136 S. Ct. at 1548* (noting that concreteness is a separate requirement distinct from particularity and that the latter does not satisfy the former).

Powell v. Shelton

United States District Court for the Western District of Kentucky, Bowling Green Division

May 9, 2019, Decided; May 9, 2019, Filed

CIVIL ACTION NO. 1:18-CV-00128-GNS

Reporter
386 F. Supp. 3d 842 *; 2019 U.S. Dist. LEXIS 78531 **; 2019 WL 2061965

VALERIE POWELL, Administratrix of the Estate of Lenita Cole, PLAINTIFF v. MACKIE SHELTON; and BARRY DYER, DEFENDANTS

Core Terms

interstate commerce, Defendants', commerce, auction, bid, Sherman Act, subject matter jurisdiction, allegations, rigging, interstate, pleadings, deprived, motion to dismiss, anticompetitive, demonstrating, resident

Counsel: **[**1]** For Valerie Powell, Administratrix of the Estate of Lenita Cole, Plaintiff: Thomas B. Lowder, LEAD ATTORNEY, Lowder & McGill, PLLC, Bowling Green, KY.

For Mackie Shelton, Barry Dyer, Defendants: Frank Hampton Moore, III, Frank Hampton Moore, Jr., LEAD ATTORNEYS, Cole & Moore, PSC, Bowling Green, KY.

Judges: Greg N. Stivers, Chief United States District Judge.

Opinion by: Greg N. Stivers

Opinion

[*844] **MEMORANDUM OPINION AND ORDER**

This matter is before the Court on Defendants' Motion to Dismiss (DN 6). The motion is ripe for decision. For the reasons provided below, the motion is **GRANTED**.

I. BACKGROUND

This is an action arising under the *Sherman Antitrust Act ("the Sherman Act"), 15 U.S.C. § 1 et seq.*, concerning Defendants' alleged conduct at the public auction for the Estate of Lenita Cole ("the Estate") **[*845]** held on April 21, 2018, for real property located in Scottsville, Kentucky. (Compl. ¶¶ 3-6, DN 1). Plaintiff Valerie Powell ("Plaintiff"), who is the daughter of Lenita Cole and Administratrix of the Estate, alleges that "during the course of the auction, Defendants recognized that there was only one (1) competing bidder, namely Chris Shockley [("Shockley")] who was bidding on behalf of his farm partnership." (Compl. ¶ 8). Plaintiff claims that **[**2]** Defendant Barry Dyer ("Dyer") approached Shockley and demanded that Shockley pay Defendants $40,000 or else they would continue bidding on the property. (Compl. ¶ 8). Shockley and his farming partner, Jason Williams ("Williams"), allegedly agreed to pay $40,000 to acquire the property free of competing bids from Defendants. (Compl. ¶ 9).

Shockley and Williams ultimately paid $492,200 for the property upon placing the highest bid at the auction. (Compl. ¶ 10).

Afterward, "the [E]state investigated the matter and concluded that it was deprived of $158,200 as a result" of Defendants' conduct. (Pl.'s Resp. 2). Plaintiff reaches this conclusion because "Shockley and Williams were prepared to pay up to . . . $650,400" for the property, compared to the $492,200 they ultimately paid. (Compl. ¶ 10). As a result, Plaintiff alleges that she and her brother—who is also a beneficiary of the Estate and a resident of Tennessee—were each deprived of $79,100. (Pl.'s Resp. 2).

Plaintiff initiated the present action pursuant to *15 U.S.C. § 15* seeking to recover treble damages as well as reasonable attorneys' fees and litigation costs.[1] (Compl. ¶¶ 12-13). Defendants move to dismiss Plaintiff's Complaint on two grounds. **[**3]** First, Defendants argue the Court lacks subject matter jurisdiction because "Plaintiff must establish a nexus between [Defendants'] conduct and interstate commerce in order to bring a Sherman Act violation case." (Defs.' Mot. Dismiss 2, DN 6). Since the Estate was being probated in Kentucky, and because Defendants, Plaintiff, Shockley and Williams are all residents of Kentucky, Defendants "request this Court to dismiss this case for lack of subject matter jurisdiction [because] the transaction . . . was purely intrastate and did not have a substantial impact on interstate commerce." (Defs.' Mot. Dismiss 3). Second, Defendants contend Shockley and Williams are indispensable parties to this action under *Fed. R. Civ. P. 19(a)(1)* whose non-joiner warrants dismissal. (Defs.' Mot. Dismiss 3-4).

In her response, Plaintiff asserts that Defendants' conduct affects interstate commerce "given that the beneficiary residing in Tennessee was deprived of $79,000 or more as a result of Defendants' wrongdoing." (Pl.'s Resp. Defs.' Mot. Dismiss 4, DN 8 [hereinafter Pl.'s Resp.]). Regarding Defendants' motion to join Shockley and Williams as indispensable parties, Plaintiff argues "Defendants have merely made conclusory statements **[**4]** unsupported by any specific facts or legal arguments" and "the law is clear that potential joint tortfeasors are only permissive parties." (Pl.'s Resp. 6).

II. STANDARD OF REVIEW

Motions to dismiss for lack of subject matter jurisdiction under *Fed. R. Civ. P. 12(b)(1)* fall into two categories: facial attacks and factual attacks. *United States v. Ritchie, 15 F.3d 592, 598 (6th Cir. 1994)*. Facial attacks challenge subject **[*846]** matter jurisdiction as to the sufficiency of the pleadings, and a Court will consider the material allegations in the complaint as true and construe them in the light most favorable to the nonmoving party. *Id.* Factual attacks challenge subject matter jurisdiction as to the facts alleged in the pleadings, and in such situations, courts weigh conflicting evidence and resolve factual disputes in determining whether there is jurisdiction. *Id.* "Subject matter jurisdiction is always a threshold determination." *Am. Telecom Co. v. Republic of Lebanon, 501 F.3d 534, 537 (6th Cir. 2007)* (citation omitted). In most circumstances, the plaintiff bears the burden to survive *Fed. R. Civ. P. 12(b)(1)* motions to dismiss. *See* *Bell v. Hood, 327 U.S. 678, 681-82, 66 S. Ct. 773, 90 L. Ed. 939 (1946)*. "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." *Fed. R. Civ. P. 12(h)(3)*.

III. DISCUSSION

Because Defendants challenge the Court's subject matter jurisdiction over Plaintiff's claim based on the **[**5]** sufficiency of her pleadings, this is a facial attack. *See* *Ritchie, 15 F.3d at 598*. The Court will accordingly consider the material allegations in Plaintiff's Complaint as true and construe them in her favor. *See id.*

Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15*

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[1] Kentucky has a similar ***antitrust law***, *KRS 367.175*, but Plaintiff asserted only a federal claim.

U.S.C. § 1. In conjunction with this, Congress has created a private cause of action for "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . ." 15 U.S.C. § 15(a). To state such a private cause of action, Plaintiffs must plead facts demonstrating three elements: "(1) the existence of a contract, combination, or conspiracy (2) affecting interstate commerce (3) that imposes an unreasonable restraint on trade." Churchill Downs Inc. v. Thoroughbred Horsemen's Grp., LLC, 605 F. Supp. 2d 870, 887 (W.D. Ky. 2009) (citations omitted).

In this action, Plaintiff has alleged an oral contract formed between Defendants and Shockley in satisfaction of the first element. Plaintiff has also made allegations that satisfy the third element because she accuses Defendants of bid rigging—a practice which has long been barred as an unreasonable, horizontal **[**6]** restraint on trade and a *per se* violation of Section 1 of the Sherman Act. *See, e.g.*, Expert Masonry, Inc. v. Boone Cty., Ky., 440 F.3d 336, 344 (6th Cir. 2006) (citations omitted); United States v. W.F. Brinkley & Son Constr. Co., 783 F.2d 1157, 1161 (4th Cir. 1986) ("[W]here two or more persons agree that one will submit a bid for a project higher or lower than the others or that one will not submit a bid at all, then there has been an unreasonable restraint on trade which violates the Sherman Antitrust Act."); United States v. Koppers Co., 652 F.2d 290, 294 (2d Cir. 1981) ("[I]n cases involving behavior such as bid rigging, which has been classified by courts as a *per se* violation, the Sherman Act will be read as simply saying: "'An agreement among competitors to rig bids is illegal.'"" (citation omitted)).

In their motion, Defendants do not challenge Plaintiff's allegations under either the first or third prongs but focus instead on the second. Thus, the disputed issue presently before this Court is whether Plaintiff has alleged facts indicating that Defendants' alleged bid rigging conspiracy affected interstate commerce. *See* McLain v. Real Estate Bd. of New Orleans, Inc., **[*847]** 444 U.S. 232, 241-42, 100 S. Ct. 502, 62 L. Ed. 2d 441 (1980).

"In every federal antitrust case, the critical threshold inquiry is whether a sufficient nexus existed between the parties' activities and interstate commerce, thus bringing the claim within the Sherman Act's parameters." Stone v. William Beaumont Hosp., 782 F.2d 609, 613 (6th Cir. 1986). There are two avenues through which a plaintiff may satisfy **[**7]** this threshold inquiry: "either . . . defendants' activity is itself in interstate commerce or, if it is local in nature, . . . it has an effect on some other appreciable activity demonstrably in interstate commerce." McLain, 444 U.S. at 242 (citation omitted). The first avenue has come to be known as the "in commerce" test, while the second is known as the "effect on commerce" test. *Id. at 241*.

Plaintiff seems to make arguments under both tests. First, Plaintiff posits that because her brother—who is also a beneficiary of the Estate—is a resident of Tennessee, Defendants' conduct had a direct impact on interstate commerce insofar as they deprived him of $79,100 in auction proceeds that would have crossed state lines. (Pl.'s Resp. 4). Under the "effect on commerce" test, Plaintiff points to *McLain v.* Real Estate Board of New Orleans, Inc. and United States v. Romer, 148 F.3d 359 (4th Cir. 1998) (abrogated on other grounds by United States v. Strassini, 59 F. App'x 550 (4th Cir. 2003)) to support the proposition that Defendant's intrastate conduct "nevertheless substantially affect[s] interstate commerce." (Pl.'s Resp. 3).

A. In Commerce Test

"The conceptual distinction between activities 'in' interstate commerce and those which 'affect' interstate commerce has been preserved in the cases, for Congress has seen fit to preserve that distinction in the antitrust and related **[**8]** laws by limiting the applicability of certain provisions to activities demonstrably 'in commerce.'" McLain, 444 U.S. at 241-42 (citations omitted). Examples of this can be found in provisions of the Clayton Act and the Robinson-Patman Act which apply only to activities occurring in commerce, and the Supreme Court has developed its "in commerce" test for the Sherman Act through analyzing these provisions. *See, e.g.*, *id.*; Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195, 95 S. Ct. 392, 42 L. Ed. 2d 378 (1974) ("[T]he distinct 'in commerce' language of the Clayton and Robinson-Paton Act provisions . . . appears to denote only persons or activities within the flow of interstate commerce . . . ."); United States v. Am. Bldg. Maint. Indus., 422 U.S. 271, 276, 95 S. Ct. 2150, 45 L. Ed. 2d 177 (1975) (finding Section 7 of the Clayton Act "cannot be satisfied merely by showing that allegedly anticompetitive . . . activities affect commerce." (internal quotation marks omitted) (quoting Gulf Oil, 419 U.S. at

195)). Therefore, to pass the "in commerce" test, the activity must be directly "within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." *Gulf Oil, 419 U.S. at 195*.

The conduct at issue here—Defendants' alleged bid rigging surrounding the purchase of Kentucky real estate—is entirely intrastate and does not involve "the generation **[**9]** of goods and services for interstate markets." Nor does the auction, sale or purchase of real estate involve "transport and distribution to the consumer" considering that a defining characteristic of real property is that it is immovable. Moreover, Plaintiff's brother is not a consumer **[*848]** of any goods but rather a beneficiary allegedly denied proceeds from the Estate. Because the auction of real estate does not involve the generation of goods or services transported across state lines for consumers, Defendants activities cannot be said to be within the flow of interstate commerce under the "in commerce" test. *See id.*

This conclusion is further supported by the Supreme Court's discussion in *McLain* implicitly accepting the lower courts' conclusions that "[r]ealty [is] viewed as a quintessentially local product, and the brokerage activity described in the pleadings was found to occur wholly intrastate." *McLain, 444 U.S. at 240, 242* (citation omitted). Accordingly, Plaintiff's claim fails to satisfy the "in commerce" test for establishing subject matter jurisdiction under the Sherman Act.

B. Effect on Commerce Test

To satisfy the "effect on commerce" test, Plaintiff must plead facts demonstrating that "as a matter of practical **[**10]** economics," Defendants' activities "have a not insubstantial effect on the interstate commerce involved." *McLain, 444 U.S. at 242* (citations omitted). This does not mean Plaintiff bears the burden of making a "more particularized showing of an effect on interstate commerce caused by the alleged conspiracy," because if there was such a requirement, "jurisdiction would be defeated by a demonstration that the alleged restraint fail[ed] to have its intended anticompetitive effect." *Id.* (citation omitted). In the Sixth Circuit, a plaintiff cannot merely allege "that some aspects of a defendant's business have a relationship to interstate commerce[]" to establish jurisdiction. *Stone, 782 F.2d at 614* (citation omitted). Instead, "[t]he requisite showing will vary with the type of unlawful conduct alleged" and "the allegedly unlawful conduct itself must be shown to 'infect' those general business activities of the defendant which do, or are likely to, effect [sic] interstate commerce." *Id. at 613-14* (adopting the Second Circuit's holding in *Furlong v. Long Island College Hospital, 710 F.2d 922 (2d Cir. 1983))*.

The conduct at issue here is Defendants' alleged bid rigging activity at the subject auction. Plaintiff argues that her brother's status as a resident of Tennessee and his deprivation of $79,100 in proceeds from **[**11]** the estate sale shows that Defendants' conduct had a not insubstantial effect on interstate commerce. Plaintiff contends this is analogous to the conduct deemed to have had a substantial effect on interstate commerce in *McLain* and *Romer*.

In *McLain*, the Supreme Court considered claims against real estate firms and trade associations in the Greater New Orleans area alleging that they had, among other anticompetitive conduct, fixed commission prices in violation of *Section 1* of the Sherman Act. *McLain, 444 U.S. at 234-35*. In determining whether defendants' conduct had an effect on interstate commerce for jurisdiction under the Sherman Act, the Court provided, "it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce." *Id. at 242*. Instead, a plaintiff must plead a "critical relationship between defendants' conduct and interstate commerce and, if those pleadings are controverted, must submit additional evidence demonstrating defendants' conduct has an effect on an "appreciable activity demonstrably in interstate commerce." *Id.* (citing *Gulf Oil, 419 U.S. at 202*).

[*849] The Supreme Court concluded that the plaintiffs there met this threshold in light of **[**12]** several aspects of defendants' brokerage activity that impacted interstate commerce. For one, "an appreciable amount of commerce [was] involved in the financing of residential property in the Greater New Orleans area and in the insuring of titles to such property." *Id. at 511*. Loans were provided from interstate financial institutions and out-of-state investors contributed funding. *Id.* "Multistate lending institutions took mortgages insured under federal programs which entailed interstate transfers of premiums and settlements. Mortgage obligations physically and constructively were traded as financial instruments in the interstate secondary mortgage market." *Id.* When viewing the supplemented pleadings in the light most favorable to plaintiffs, the Supreme Court concluded the facts could support the inference that defendants' activities impacted interstate commerce and accordingly found jurisdiction under the Sherman Act. *Id.*

In *Romer*, the Fourth Circuit also found jurisdiction for the United States' bid rigging claims under the Sherman Act. *Romer, 148 F.3d at 365*. The United States alleged there that the defendants conspired to rig bids at real estate foreclosure auctions. *Id. at 363*. Although the auctions involved Virginia **[**13]** property, took place entirely within Virginia, and were between Virginian bidders only, the Fourth Circuit found an effect on interstate commerce where "[t]he driving force behind each auction was the financial interest of an out-of-state lender, who initiated the auction to recover the balance of an outstanding debt." *Id.*

In the present case, although Plaintiff's claims involve real estate transactions like *McLain* and *Romer*, her Complaint is devoid of allegations relating the subject transaction to interstate commerce sufficient to establish subject matter jurisdiction. Plaintiff pleads nothing regarding the likes of title insurance, lending institutions or any other aspect of the real estate transaction which have been found in other cases to constitute an adequate nexus between anticompetitive conduct and interstate commerce. *See McLain, 444 U.S. at 245*; *Romer, 148 F.3d at 363*.

Moreover, Plaintiff's Complaint contains no allegations relating to Defendants' business activities or how they have been infected by the allegedly anticompetitive conduct. In her reply, Plaintiff mentions in passing that Dyer is a licensed auctioneer and real estate broker, but provides no explanation how this status impacts the connection between Dyer's **[**14]** role and interstate commerce. *See Stone, 782 F.2d at 614*. Further, the Complaint contains no allegations relating to the interstate features of Dyer's business. Regarding Shelton, Plaintiff has offered absolutely nothing regarding his role in this transaction, how this bid-rigging conduct relates to his general business activities, or even the general nature of his business.

Plaintiff's argument that her brother's status as a citizen of Tennessee is also unavailing for establishing jurisdiction under the Sherman Act because the interstate commerce affected under this argument is undoubtedly insubstantial. In *Stone*, the Sixth Circuit considered claims that a hospital and various staff members acted in concert to deprive the physician plaintiff of staff privileges in an unreasonable restraint on trade. *Stone, 782 F.2d at 610*. Because the gravamen of plaintiff's complaint was that he was excluded from using a local facility to perform catheterizations two or three times a month, the Sixth Circuit concluded that any effect on interstate commerce stemming from his denial of staff privileges was *de minimis* **[*850]** and insufficient for jurisdiction under the Sherman Act. *Id. at 614-15*. When viewed in light of the Sixth Circuit's conclusion that the few **[**15]** monthly operations in *Stone* have an insubstantial effect on interstate commerce, indirectly depriving Plaintiff's brother of auction proceeds as an heir to the Estate has even less of an effect on interstate commerce where the auction transaction at issue was a singular, one-time event. *See id.*

Where the conduct at issue here involved the auction of real property, Plaintiff has not satisfied the "in commerce" test. *See McLain, 444 U.S. at 240, 242*. Because Plaintiff fails to identify any aspect of Defendants' businesses that affect interstate commerce and because the gravamen of her Complaint—that her brother in Tennessee was denied $79,100 in auction proceeds—involves a one-time transaction, Plaintiff has failed to plead conduct which has a substantial effect on interstate commerce. *See id. at 245*; *Stone, 782 F.2d at 614-15*. With this, Plaintiff has failed to plead facts which could satisfy the "effects on commerce" test for subject matter jurisdiction under the Sherman Act.

Even considering her allegations as true, Plaintiff has failed to plead facts demonstrating Defendants' conduct has a substantial effect on interstate commerce under either the "in commerce" or the "effect on commerce" tests. *See McLain, 444 U.S. at 242*; *see also Bell, 327 U.S. at 681-82*. Accordingly, Plaintiff's claim **[**16]** is dismissed for lack of subject matter jurisdiction pursuant to *Fed. R. Civ. P. 12(b)(1)*. In light of this, the Court finds it unnecessary to address Defendants' joinder arguments under *Fed. R. Civ. P. 12(b)(7)*.

V. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss (DN 6) is **GRANTED**, and Plaintiff's Complaint (DN 1) is **DISMISSED WITHOUT PREJUDICE**.

/s/ Greg N. Stivers

Greg N. Stivers, Chief Judge

United States District Court

May 9, 2019

IQ Dental Supply, Inc. v. Henry Schein, Inc.

United States Court of Appeals for the Second Circuit

September 13, 2018, Argued; May 10, 2019, Decided

No. 18-175-cv

Reporter

924 F.3d 57 *; 2019 U.S. App. LEXIS 14011 **; 2019-1 Trade Cas. (CCH) P80,767

IQ DENTAL SUPPLY, INC., Plaintiff-Appellant, v. HENRY SCHEIN, INC., PATTERSON COMPANIES, INC., BENCO DENTAL SUPPLY COMPANY, Defendants-Appellees.

Prior History: [1]** Appeal from the United States District Court for the Eastern District of New York. No. 17-cv-4834 - Brian M. Cogan, Judge. This case involves allegations that three large dental-supply distributors—Henry Schein, Inc., Patterson Companies, Inc., and Benco Dental Supply Company, Inc. ("the Defendants")—conspired to violate the antitrust laws by engineering the boycott of an online distribution portal, SourceOne, Inc. ("SourceOne"), and dental manufacturers and suppliers associated with SourceOne. The Plaintiff, IQ Dental Supply, Inc. ("IQ"), is a competitor dental-supply distributor that sold dental products through SourceOne's online portals. IQ sued the Defendants in the United States District Court for the Eastern District of New York alleging violations of federal and state antitrust laws and asserting common law tort claims. The district court (Cogan, Judge) dismissed IQ's antitrust claims for lack of antitrust standing and IQ's tort claims for failure to state a claim. IQ appeals that decision. We affirm the district court's dismissal of IQ's claim that it has antitrust standing to challenge the boycott of SourceOne and the state dental associations ("SDAs") that had partnered with **[**2]** SourceOne. As to IQ's claim that it has standing to challenge injury inflicted by the direct boycott of its business, however, we find that IQ's antitrust and tort claims may go forward on these direct boycott allegations only. Accordingly, we vacate in part the judgment of the district court and remand the case for further proceedings consistent with this opinion.

IQ Dental Supply, Inc. v. Henry Schein, Inc., 2017 U.S. Dist. LEXIS 211070 (E.D.N.Y., Dec. 21, 2017)

Core Terms

antitrust, boycott, allegations, anti trust law, dental, district court, Defendants', damages, websites, indirect, tortious interference, distributor, supplies, anticompetitive, speculative, enforcer, antitrust violation, efficient-enforcer, manufacturers, profits, sales, antitrust claim, actual injury, competitors, portal, anticompetitive conduct, products, online, duplicative, quotation

LexisNexis® Headnotes

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

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

Civil Procedure > Preliminary Considerations > Justiciability > Standing

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

Appellate courts review the district court's grant of a motion to dismiss de novo; they accept as true all factual claims and draw all reasonable inferences in the nonmovant's favor. Questions of standing are also reviewed de novo.

Antitrust & Trade Law > Regulated Practices > Private Actions > Standing

HN2[] **Private Actions, Standing**

To survive the pleading stage, an antitrust plaintiff must demonstrate that it has antitrust standing. The antitrust standing requirement reflects the judgment that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. To satisfy antitrust standing at the pleading stage a plaintiff must plausibly allege two things: (1) that it suffered a special kind of antitrust injury, and (2) that it is a suitable plaintiff to pursue the alleged antitrust violations and thus is an efficient enforcer of the antitrust laws.

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

HN3[] **Standing, Requirements**

A plaintiff raising an antitrust claim must demonstrate antitrust injury to ensure that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place.

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

HN4[] **Standing, Requirements**

Jurisprudence culminating in Gatt Communications, Inc. v. PMC Associates, L.L.C. establishes a three-part test for determining whether the plaintiff has alleged an antitrust injury: (1) the court must identify the practice complained of and the reasons such a practice is or might be anticompetitive; (2) the court must identify the actual injury the plaintiff alleges which requires courts to look to the ways in which the plaintiff claims it is in a worse position as a consequence of the defendant's conduct; and (3) the court compares the anticompetitive effect of the specific practice at issue to the 'actual injury the plaintiff alleges.

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

HN5[] **Standing, Requirements**

At the first step of the Gatt analysis, a plaintiff need allege only that the defendants have engaged in unlawful anticompetitive conduct. The bar for such a showing is a low one. Group boycotts have long been held to be in the forbidden category under the antitrust laws.

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

HN6[] **Standing, Requirements**

The second Gatt step requires courts to isolate and identify the plaintiff's actual injury or the ways in which the plaintiff claims it is in a worse position as a consequence of the defendant's conduct.

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

HN7[] **Standing, Requirements**

Plaintiffs must show that their injury is of the type the antitrust laws were intended to prevent. ***Antitrust law*** is concerned with market conditions.

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

HN8[] **Standing, Requirements**

At Gatt's third step a plaintiff must demonstrate that the defendants' anticompetitive behavior caused its actual injury, the plaintiff must show that the injury flows from that which makes defendants' acts unlawful.

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

HN9[] **Standing, Requirements**

An antitrust plaintiff must also show that it is an efficient enforcer of the antitrust laws. A four-factor test is employed to determine whether an antitrust plaintiff is an efficient enforcer; thus courts must evaluate: (1) the directness or indirectness of the asserted injury, (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement, (3) the speculativeness of the alleged injury, and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.

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

HN10[] **Standing, Requirements**

The infliction of a derivative injury does not always render an antitrust plaintiff's injury too indirect under the efficient-enforcer standing test.

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

HN11[] **Standing, Requirements**

Under the third efficient-enforcer antitrust standing factor courts must consider whether the plaintiff's asserted damages are speculative. Although some degree of uncertainty stems from the nature of ***antitrust law***, a high degree of speculation in a damages calculation suggests that a given plaintiff is an inefficient engine of enforcement.

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

HN12[] **Standing, Requirements**

The efficient-enforcer factors for antitrust standing are concerned with finding the plaintiffs best suited to serve as private attorneys general, and not with identifying every plaintiff who might sue. Whether external or practical considerations, such as the statute of limitations, may eliminate a duplicative damages concern, therefore, is not substantially material. The efficient-enforcer factor asks, in the overall scheme of antitrust enforcement, whether a potential antitrust plaintiff stands within that scheme as someone well positioned to enforce the antitrust laws. The existence of other plaintiffs who could lay claim to precisely the same damages, whether in theory or in actuality, indicates that the would-be antitrust plaintiff might not be well positioned to vindicate the antitrust laws for the benefit of the public.

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

HN13[] **Standing, Requirements**

Courts decide questions of antitrust standing under both New York and New Jersey ***antitrust law*** in conformity with federal ***antitrust law***.

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

HN14[] **Intentional Interference, Elements**

Under New York law, a plaintiff claiming tortious interference with prospective business relations must show the defendant's interference with business relations existing between the plaintiff and a third party, either with the sole purpose of harming the plaintiff or by means that are dishonest, unfair, or in any other way improper. But where the defendant's interference is intended, at least in part, to advance its own competing interests, the claim will fail unless the means employed include criminal or fraudulent conduct.

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Judges: Before: WALKER, JACOBS, and POOLER, Circuit **[**3]** Judges.

Opinion by: JOHN M. WALKER, JR.

Opinion

[*60] JOHN M. WALKER, JR., *Circuit Judge*.

This case involves allegations that three large dental-supply distributors—Henry Schein, Inc., Patterson Companies, Inc., and Benco Dental Supply Company, Inc. ("the Defendants")—conspired to violate the antitrust laws by engineering the boycott of an online distribution portal, SourceOne, Inc. ("SourceOne"), and of dental manufacturers and suppliers associated with SourceOne. The Plaintiff, IQ Dental Supply, Inc. ("IQ"), is a competitor dental-supply distributor that sold dental products through SourceOne's online portals. IQ sued the Defendants in the United States District Court for the Eastern District of New York alleging violations of federal and state antitrust laws and asserting common law tort claims. The district court (Cogan, *Judge*) dismissed IQ's antitrust claims for lack of antitrust standing and IQ's tort claims for failure to state a claim. IQ appeals that decision.

We affirm the district court's dismissal of IQ's claim that it has antitrust standing to challenge the boycott of SourceOne and the state dental associations ("SDAs") that had partnered with SourceOne. As to IQ's claim that it has standing to challenge **[**4]** injury inflicted by the direct boycott of its business, however, we find that IQ's antitrust and tort claims may go forward on these direct boycott allegations only. Accordingly, we vacate in part the judgment of the district court and remand the case for further proceedings consistent with this opinion.

BACKGROUND

There are only a small number of dental-supply companies that distribute products to dental practices. Three of those companies, the Defendants, occupy approximately **[*61]** 80% of the dental-supply distribution market.[1] They purchase dental supplies and equipment from different manufacturers, and then sell the products to dental practices nationwide. This one-stop-shop model obviates the need for dental practices to purchase their dental equipment from each manufacturer.

IQ is also a distributor of dental supplies, albeit one with considerably less market share than any of the Defendants. IQ entered the market in 2009. Beginning in 2014, IQ adopted a new distribution model. Instead of distributing dental supplies through the traditional method of deploying on-the-ground sales teams around the country (the model used by the Defendants) IQ distributed dental supplies through an online **[**5]** portal hosted by SourceOne.

SourceOne's online portal is a website where dental practices can purchase their supplies. SourceOne itself does not sell any dental supplies through the website but serves as the platform through which dental-supply distributors, such as IQ, sell products to dental offices. The distributors that used SourceOne's portals pay SourceOne a commission for each sale made through the website. In 2013, SourceOne launched additional distribution websites in partnership with the SDAs in Texas, Arizona, and Nevada. These SDA-specific sites operated much like SourceOne's own portal, but each SDA had its own unique domain name. SourceOne remitted a portion of their commission to the SDA for each sale made through an SDA-specific website.

IQ was not SourceOne's first distribution partner. Two other distributors—DDS Dental Supply and Arnold Dental Supply ("DDS and Arnold")—distributed products through SourceOne before IQ reached its agreement with SourceOne. But sometime around April 2014 both DDS and Arnold stopped selling through SourceOne because the Defendants pressured dental-supply manufacturers to stop supplying DDS and Arnold due to their arrangement with SourceOne. **[**6]** After losing DDS and Arnold as distribution partners, SourceOne tried to enlist a third distributor to supply dental products, but that distributor declined, allegedly because of the same anticompetitive behavior by the Defendants that had caused DDS and Arnold to withdraw.

SourceOne's need for a distributor to supply its online portals opened the door for IQ. In May of 2014, IQ signed a contract to distribute through SourceOne-affiliated websites, and, since then, IQ has supplied 90% of the dental supplies sold through SourceOne's website and its affiliated SDA websites. But IQ soon encountered the same

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[1] As we must at this stage, we take all of IQ's well-pleaded facts as true. *See Gelboim v. Bank of Am. Corp., 823 F.3d 759, 769 (2d Cir. 2016)*.

problem that DDS and Arnold had faced: pressure from the Defendants intended to disrupt SourceOne's online sales portals began to affect IQ's business.

IQ alleged that the Defendants engaged in this campaign to force SourceOne out of business by conspiring to organize a boycott of: (1) SourceOne and SourceOne-affiliated SDA websites, (2) participating SDAs and SDA trade shows, and (3) IQ directly by pressuring the manufacturers to stop supplying IQ. It also alleged that the Defendants engaged in a price-fixing conspiracy, which is not part of this appeal. These unlawful boycotts allegedly **[**7]** frightened off dental manufacturers, SDAs, and dental practices from doing business with companies connected to SourceOne, and, as a result, ultimately dealing with IQ. These boycotts "severely limited and inhibited **[*62]** IQ's growth and sales, and has cost IQ many millions of dollars in lost profits." Appellant's Br. at 13.

In August 2017, IQ sued the defendants in the Eastern District of New York, under the *Sherman Act, 15 U.S.C. § 1*, and corresponding state antitrust laws—the *Donnelly Act, N.Y. Gen. Bus. Law §§ 340 et seq.*, and the *New Jersey Antitrust Act, N.J. Stat. Ann. §§ 56:9-1 et seq.* IQ also brought common-law claims for tortious interference with prospective business relations, civil conspiracy, and aiding and abetting.

The district court granted the Defendants' motion to dismiss IQ's complaint. It determined that IQ failed to establish antitrust standing because it had neither alleged an antitrust injury, nor shown that it was an efficient enforcer of the antitrust laws. The remaining state law claims were dismissed for failure to state a claim. IQ now appeals that decision.

DISCUSSION

HN1[] We review the district court's grant of a motion to dismiss *de novo*; we accept as true all factual claims and draw all reasonable inferences in IQ's favor. *Gelboim v. Bank of Am. Corp., 823 F.3d 759, 769 (2d Cir. 2016)*. Questions of standing **[**8]** are also reviewed *de novo. In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 688 (2d Cir. 2009)*.

I. Antitrust Standing

HN2[] To survive the pleading stage, an antitrust plaintiff must demonstrate that it has "antitrust standing." *See Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 436-37 (2d Cir. 2005)*. Only antitrust standing is at issue here. The antitrust standing requirement reflects the judgment that "'Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.'" *Id.* (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters (AGC), 459 U.S. 519, 534, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*.

To satisfy antitrust standing at the pleading stage a plaintiff must plausibly allege two things: (1) "that it suffered a 'special kind of antitrust injury,'" and (2) "that it is a suitable plaintiff to pursue the alleged antitrust violations and thus is an 'efficient enforcer' of the antitrust laws." *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68, 76 (2d Cir. 2013)* (internal quotation marks omitted) (quoting *Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 121-22 (2d Cir. 2007))*. We address both these antitrust-standing imperatives in turn.

A. Antitrust Injury

HN3[] A plaintiff raising an antitrust claim must demonstrate antitrust injury to "'ensure[] that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place.'" *Gatt, 711 F.3d at 76* (quoting *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990))*.

HN4[] Our jurisprudence culminating in *Gatt Communications, Inc. v. PMC Associates, L.L.C.* established a three-part **[**9]** test for determining whether the plaintiff has alleged an antitrust injury: (1) the court "must 'identify[] the practice complained of and the reasons such a practice is or might be anticompetitive,'" *Id.* (quoting Port Dock, 507 F.3d at 122); (2) the court must "identify the 'actual injury the plaintiff alleges' . . . [which] requires us to look to the ways in which the plaintiff claims it is in a 'worse position' as a consequence of the defendant's conduct," *id.* (quoting Port Dock, 507 F.3d at 122, and Brunswick **[*63]** Corp. v. Pueblo Bowl—O-Mat, Inc., 429 U.S. 477, 486, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)); and (3) the court compares the "'anticompetitive effect of the specific practice at issue' to the 'actual injury the plaintiff alleges,'" *id.* (quoting Port Dock, 507 F.3d at 122). IQ has adequately pleaded an antitrust injury in accordance with our decision in Gatt.

1. *Gatt* Step One

HN5[] At the first step of the *Gatt* analysis, IQ need allege only that the Defendants have engaged in unlawful anticompetitive conduct. *Id.* The bar for such a showing is a low one. *See* Port Dock, 507 F.3d at 122. IQ has satisfied this requirement by plausibly alleging that the Defendants conspired to boycott the SourceOne-affiliated websites, the SDAs, and IQ itself, and engaged in a price-fixing campaign.[2] These allegations easily satisfy Gatt's initial requirement that IQ allege unlawful **[**10]** anticompetitive conduct by the Defendants. *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959) ("Group boycotts . . . have long been held to be in the forbidden category [under the antitrust laws].").

2. *Gatt* Step Two

HN6[] The second *Gatt* step requires us to isolate and identify IQ's "actual injury" or the "ways in which the plaintiff claims it is in a 'worse position' as a consequence of the defendant's conduct." Gatt, 711 F.3d at 76.

The Defendants argue that IQ is in no "worse position" due to their conduct because the demise of DDS and Arnold provided IQ with the opportunity to do business through SourceOne. But for their alleged anticompetitive behavior, the Defendants claim, IQ would not have made a single sale through SourceOne's online portals—and therefore IQ cannot allege that it has been made any worse off than it would have been absent the Defendants' anticompetitive scheme. Essentially, the argument goes, every sale IQ has made through SourceOne-affiliated websites is a "bonus" sale that IQ would not have made in an undistorted market because DDS and Arnold would still be SourceOne's primary distributors, and IQ has not alleged that it would have partnered with SourceOne were that the case.

To support this argument, the Defendants rely on **[**11]** cases where courts have denied antitrust standing to a competitor that benefitted from a market distorted by anticompetitive conduct, *see* Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 583, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (no antitrust standing for competitors who would benefit from a price-fixing conspiracy to raise prices); Sprint Nextel Corp. v. AT&T Inc., 821 F. Supp. 2d 308, 319-20 (D.D.C. 2011) (no antitrust standing because an increase in market price did not harm competitors); MacPherson's Inc. v. Windermere Real Estate Services Co., 100 F. App'x 651, 654 (9th Cir. 2004) (no antitrust standing because the alleged price-fixing scheme would increase the plaintiff's profits), and **[*64]** where courts have denied antitrust standing to a competitor that alleged it would have experienced an increase in its profits but for the anticompetitive conduct, Alberta Gas Chemicals Ltd. v. E.I. Du Pont de Nemours and Co., 826

[2] The district court dismissed IQ's price-fixing claims because competitors cannot claim injury from supracompetitive prices. *See* Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 582-83, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) ("Nor can respondents recover damages for any conspiracy by petitioners to charge higher than competitive prices . . . . Such conduct would indeed violate the Sherman Act, but it could not injure respondents: as petitioners' competitors, respondents stand to gain from any conspiracy to raise the market prices . . . " (internal citations omitted)). IQ does not pursue a price-fixing antitrust conspiracy claim on appeal.

F.2d 1235, 1243 (3d Cir. 1987) (no antitrust standing for plaintiffs denied access to "windfall profits" as a result of antitrust conspiracy).

But the plaintiff's position in each of these cases is distinguishable from IQ's. In three of the cases—*Matsushita*, *MacPherson's*, and *Sprint*—the would-be antitrust plaintiffs enjoyed continuing benefits as a direct result of the antitrust violations. The plaintiffs in these cases were competitors benefiting from the supracompetitive pricing that the conspiracy had produced. *Matsushita, 475 U.S. at 583*; *MacPherson's, 100 F. App'x at 654*; *Sprint, 821 F. Supp. 2d at 319-20*. IQ, however, is not receiving a continuing benefit from the Defendants' alleged antitrust violations **[**12]** because the Defendants' conduct is not producing an ongoing competitive advantage for IQ.[3] Instead, IQ alleges that the Defendants' actions have decreased the number of sales it has been able to make through SourceOne-affiliated websites.

Alberta Gas is distinguishable for a different reason: in that case the plaintiffs claimed antitrust losses "stemming from the failure of a competitor to bring about an increase in demand and price." *Alberta Gas, 826 F.2d at 1243*. The Third Circuit held that a lost "windfall profit" is not an antitrust injury. *Id.* But IQ does not claim an actual injury based on the loss of windfall profits such as that disallowed in *Alberta Gas*. IQ's alleged losses do not stem from the denial of profits that would have resulted from an increased demand or new market absent the Defendants' anticompetitive conduct.

We agree with IQ that its role as a "replacement supplier" for SourceOne after the demise of DDS and Arnold does not defeat its claim of actual injury under the antitrust laws. Regardless of how IQ entered the market, once IQ was in the market it had a right to do business in a market undistorted by unlawful anticompetitive conduct. *See* *Brunswick, 429 U.S. at 489* (***HN7***[] plaintiffs must show that their injury **[**13]** is "of the type the antitrust laws were intended to prevent").

Antitrust law is concerned with market conditions. *See* *Gelboim, 823 F.3d at 773*. Assuming that IQ is operating in a market affected by anticompetitive conduct, the question of actual injury becomes whether IQ is worse off than it would be if the market were free of anticompetitive forces. IQ has alleged that the Defendants' anticompetitive conduct affected the market, and that, after it entered the market, its sales through SourceOne suffered as a result. The manner of IQ's entrance into the SourceOne agreement notwithstanding, it is entitled to conduct its business in a market that is not infected with an anticompetitive distortion. Moreover, this is the type of injury the antitrust laws were designed to prevent. We conclude that IQ has adequately alleged an actual injury.

3. *Gatt* Step Three

Finally,***HN8***[] at *Gatt*'s third step IQ must demonstrate that the Defendants' anticompetitive **[*65]** behavior caused its actual injury. *Gatt, 711 F.3d at 76*. IQ has satisfied this requirement. Assuming that IQ has suffered an actual injury as we determined in step two, there is no substantial dispute that IQ has adequately alleged that the Defendants' anticompetitive behavior caused the injury. **[**14]** *See* *Brunswick, 429 U.S. at 489* (the plaintiff must show that the injury "flows from that which makes defendants' acts unlawful").

B. Efficient-Enforcer Test

Even if IQ has cleared the antitrust-injury hurdle, there is more to the antitrust standing requirement. ***HN9***[] An antitrust plaintiff must also show that it is an "efficient enforcer" of the antitrust laws. *Daniel, 428 F.3d at 443*.

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[3] The Defendants maintain that because their anticompetitive behavior is the but-for cause of IQ's agreement with SourceOne, any IQ sale made through SourceOne-affiliated websites constitutes an ongoing benefit to IQ. But the cases cited by the Defendants deny standing to plaintiffs who experience an ongoing beneficial market *condition* as a result of the defendants' conduct—not a one-time market opportunity. By contrast, the Defendants' ongoing boycotts have the continuing effect of restricting the number of sales IQ makes through SourceOne-affiliated websites.

A four-factor test is employed to determine whether an antitrust plaintiff is an efficient enforcer; thus we must evaluate: (1) "the directness or indirectness of the asserted injury," (2) "the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement," (3) "the speculativeness of the alleged injury," and (4) "the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries." *Id.* (internal quotations marks and citations omitted). These four factors need not be given equal weight: the relative significance of each factor will depend on the circumstances of the particular case. *Id.*

To determine whether IQ is an efficient enforcer of the antitrust laws, we must first distinguish the different types of **[**15]** antitrust violations IQ seeks to enforce. There are three types of antitrust violations at issue in this appeal: organizing boycotts of (1) SourceOne-affiliated websites, (2) the SDAs, and (3) IQ. The first two violations allege instances of unlawful pressure placed on IQ's business indirectly due to a boycott of SourceOne and the SDAs ("the indirect boycott allegations"), and the third violation alleges a direct boycott of IQ ("the direct boycott allegations").

1. The Indirect Boycott Allegations

Directness of the injury. The first efficient-enforcer factor requires a direct injury: "Directness in the antitrust context means close in the chain of causation." *Gatt, 711 F.3d at 78* (internal citation and quotation marks omitted); *see also* *Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc., 467 F.3d 283, 293 (2d Cir. 2006)* (finding the plaintiff's injury too indirect when it "flowed from the injuries" suffered by other parties).

As to IQ's allegations that the Defendants engaged in an unlawful campaign to boycott the SourceOne-affiliated websites and the SDAs themselves, the violation is too remote to satisfy this first factor. We agree with the district court that IQ's claims with respect to these allegations are derivative and indirect: the harm to IQ resulted from injury to SourceOne and **[**16]** the SDAs.

To be sure, ***HN10***[] the infliction of a derivative injury does not always render an antitrust plaintiff's injury too indirect under the efficient-enforcer test. *See* *In re DDAVP, 585 F.3d at 688* (derivative harm is sufficiently direct when "harming competitors [is] simply a means for the defendants to charge the plaintiffs higher prices"). Thus, in *In re DDAVP*, the ultimate goal of the anticompetitive scheme to harm competitors was to charge the consumers higher prices. *Id. at 682*. By contrast, the Defendants here sought to put SourceOne—not IQ—out of business by undermining SourceOne's new and disruptive online sales model. IQ was not the target of annihilation; **[*66]** it was simply collateral damage.[4] IQ's alleged injury is therefore too indirect.

Sufficiently motivated plaintiff. Under the second efficient-enforcer factor, IQ has failed to adequately allege that it is a sufficiently motivated plaintiff such that it is part of "an identifiable class . . . whose self-interest would normally motivate [it] to vindicate the public interest in antitrust enforcement." *Gatt, 711 F.3d at 79* (quoting *AGC, 459 U.S. at 542*). In this case, several plaintiffs have already sued the Defendants and have alleged these same antitrust violations. *See SourceOne Dental, Inc. v. Patterson Cos., Inc., et al.*, No. 15-cv-05440 (BMC) (E.D.N.Y filed Sept. 21, 2015) (suit brought by SourceOne); **[**17]** *In re Dental Supplies Antitrust Litig.*, No. 16-cv-00696 (BMC) (E.D.N.Y. filed Feb. 9, 2016) (suit brought by dental offices). Although the existence of more-motivated plaintiffs is not dispositive, the presence of plaintiffs who are better situated to vindicate the antitrust laws is relevant to this second factor. *See* *In re DDAVP, 585 F.3d at 688-89*. With respect to the challenged boycotts, SourceOne is a

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[4] IQ argues that the district court erred by applying the "target area test." We abandoned that test over thirty years ago in *Crimpers Promotions Inc. v. Home Box Office, Inc., 724 F.2d 290, 292-93 (2d Cir. 1983)*. In any event, the district court did not apply the "target area test" when it found that IQ had not suffered a direct injury under the first efficient-enforcer factor. The "target area test" used to ask whether a plaintiff was within "that sector of the economy which is endangered by a breakdown of competitive conditions in the particular industry." *Id. at 292* (internal quotation marks omitted). The district court did not ask that question. It properly asked whether IQ was a "target" of the Defendants' unlawful conspiracy in the context of assessing whether that injury was sufficiently direct.

better-positioned plaintiff than IQ because SourceOne has been more directly injured by the alleged antitrust conspiracy than IQ. And SourceOne has in fact sued the Defendants seeking to enforce the antitrust laws.

IQ argues that it is sufficiently motivated because none of the parties that have already sued (or could sue) the Defendants stand to recover lost profits. This is IQ's most promising claim that it is a properly motivated plaintiff: while SourceOne and the SDAs earn a commission on the sales, neither earns a profit. But this alone will not qualify IQ as a sufficiently motivated plaintiff. The antitrust laws recognize that "not every victim of an antitrust violation needs to be compensated under the antitrust **[**18]** laws in order for the antitrust laws to be efficiently enforced." *Gelboim, 823 F.3d at 779*. IQ's (highly speculative, as discussed below) lost profits do not tip the scales.

In short, "[t]he justification for permitting [IQ] 'to perform the office of a private attorney general' is greatly diminished because '[d]enying [IQ] a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied.'" *Paycom, 467 F.3d at 294* (quoting *AGC, 459 U.S. at 542*). Given that IQ is further removed from the harm caused by the Defendants than the parties directly affected by the boycott that have already sued the Defendants, the second efficient-enforcer factor weighs against IQ's antitrust standing.

Speculative Damages. ***HN11***[] Under the third efficient-enforcer factor we must consider whether IQ's "asserted damages are speculative." *Gatt, 711 F.3d at 76*. Although "some degree of uncertainty stems from the nature of ***antitrust law***," a high degree of speculation in a damages calculation suggests that "a given plaintiff is an **[*67]** inefficient engine of enforcement." *Gelboim, 823 F.3d at 779*.

The derivative nature of IQ's alleged injuries renders its potential recovery highly speculative. As the district court correctly ascertained, calculating IQ's damages essentially **[**19]** would require the creation of an "alternative universe." *IQ Dental Supply, Inc. v. Henry Schein, Inc., No. 17-cv-4834, 2017 U.S. Dist. LEXIS 211070, 2017 WL 6557482, at *10 (E.D.N.Y. Dec. 21, 2017)*. IQ would have to model far more than basic lost sales and lost profits. It would need to first show how many additional SDAs would have partnered with SourceOne but for the Defendants' conduct, second demonstrate the types of agreements SourceOne and IQ would have had with each of those SDAs, and finally show how many SDA customers would have purchased IQ-supplied products through a SourceOne-affiliated website. Thus, IQ's damages calculation rests on multiple layers of speculation. *See id.* ("Any damages estimate would require evidence to 'support a just and reasonable estimate of damages,' and it is difficult to see how appellants would arrive at such an estimate, even with the aid of expert testimony." (internal quotation marks omitted) (quoting *U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1378 (2d Cir. 1988))*). No amount of expert testimony can adequately ameliorate the highly speculative nature of IQ's alleged losses.

Duplicative and difficult to apportion damages. The fourth factor, duplicative recovery, also cuts against IQ. The damages to which IQ lays claim—lost profits from sales it would have made through SourceOne-affiliated **[**20]** websites absent the Defendants' anticompetitive conduct—are exactly the same damages SourceOne's initial suppliers, DDS and Arnold, could have claimed.

IQ argues that the potential for duplicative recovery has become irrelevant to the efficient-enforcer analysis because any antitrust claims DDS and Arnold might have against the Defendants are now time-barred. But we reiterate that ***HN12***[] the efficient-enforcer factors are concerned with finding the plaintiffs best suited to serve as "private attorney[s] general," *AGC, 459 U.S. at 542*, and not with identifying every plaintiff who might sue. Whether external or practical considerations (such as the statute of limitations) may eliminate a duplicative damages concern, therefore, is not substantially material. The efficient-enforcer factor asks, in the overall scheme of antitrust enforcement, whether a potential antitrust plaintiff stands within that scheme as someone well positioned to enforce the antitrust laws. The existence of other plaintiffs who could lay claim to precisely the same damages, whether in theory or in actuality, indicates that the would-be antitrust plaintiff might not be well positioned to vindicate the antitrust laws for the benefit of the public. **[**21]** *See id.* Indeed, it would be strange and unworkable if new efficient enforcers sprang up simply by operation of the statute of limitations on the other enforcers.

In sum, we agree with the district court that because IQ is not positioned to efficiently enforce the claims that the Defendants harmed it by conspiring to boycott SourceOne-affiliated websites and the SDAs, IQ does not have antitrust standing to bring these claims.

2. The Direct Boycott Allegations

IQ also alleges that the Defendants injured it by means of a direct boycott. IQ claims that the Defendants pressured the manufacturers to stop supplying IQ, frightened manufacturers away from supplying IQ in the first place, and otherwise disparaged IQ's business to its customers and potential customers.

[*68] We find, with respect to these particular allegations, that IQ is an efficient enforcer and thus has antitrust standing to proceed with its direct boycott claim against the Defendants.

Directness of the injury. The direct boycott injury IQ alleges is neither indirect nor derivative. IQ claims that the Defendants directly pressured manufacturers to stop selling their products to IQ, and that the Defendants sought to damage IQ's business **[**22]** reputation with its customers. Because IQ was the Defendants' target, these are direct injuries.

Sufficiently motivated plaintiff. Second, IQ is the most-motivated plaintiff with respect to the Defendants' alleged direct boycott of IQ. *See* *Gatt, 711 F.3d at 78*. Unlike the claims of injury from the indirect pressure on SourceOne and the SDAs, IQ is the "immediate victim[]" of any direct boycott of IQ. *AGC, 459 U.S. at 541*. It has suffered a direct loss of sales. By contrast, none of the plaintiffs best positioned to enforce IQ's claims of indirect boycott are well positioned to enforce IQ's allegations of direct boycott.

Speculative damages. The damages that flow from the Defendants' alleged direct boycott of IQ would not necessarily be speculative—such damages would relate to instances of potentially ascertainable business losses. The value of each lost opportunity might be calculated based on IQ's historical sales data without undue speculation.

Duplicative recovery. IQ's recovery of damages related to the direct boycott of IQ would not be duplicative. *See* *Gatt, 711 F.3d at 79-80*. Unlike the indirect claims, any damages in connection with the Defendants' direct boycott of IQ could not also be claimed by Arnold and DDS. These injuries are specific **[**23]** to IQ alone.

The Defendants argue that IQ fails to state plausible claims for relief for direct injury because "the complaint does not contain factual allegations that Defendants engaged in any joint conduct to boycott IQ." Appellees' Br. at 55. This argument fails to recognize that the allegations of direct boycott are part of the Defendants' vast and multipronged attack on SourceOne's platforms, the SDAs, the distributors, and dental offices. In other words, IQ has not alleged that it has suffered an antitrust injury from the Defendants' direct boycott in isolation. Although, as the Defendants note, "complaints about price-cutters are natural—and from the manufacturer's perspective, unavoidable—reactions by distributors to the activities of their rivals," *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* (internal citation and quotation marks omitted), IQ's complaint here is not limited to price cutting. IQ has alleged that the Defendants, as part of their elaborate and extensive scheme to force SourceOne and associated entities out of business, exerted pressure on some of IQ's suppliers to boycott IQ.

***

In sum, IQ is an efficient enforcer of the antitrust laws solely with respect to IQ's allegations that it has been directly boycotted **[**24]** by the actions of the Defendants. As to these allegations, we vacate the district court's judgment and remand for further proceedings on IQ's claim.

II. IQ'S STATE LAW CLAIMS

A. New York and New Jersey Antitrust Claims

IQ brought parallel antitrust claims under *New York's Donnelly Act, N.Y. Gen. Bus. Law § 340 et seq.*, and the *New Jersey Antitrust Act, N.J. Stat. Ann. §§ 56:9-1 et seq.* ***HN13***[] We decide questions of antitrust standing under both New York and New **[*69]** Jersey ***antitrust law*** in conformity with federal ***antitrust law***. *Gatt, 711 F.3d at 81-82* (holding that the Donnelly Act should generally be interpreted consistently with federal ***antitrust law*** (citing *X.L.O. Concrete Corp. v. Rivergate Corp., 83 N.Y.2d 513, 634 N.E.2d 158, 161, 611 N.Y.S.2d 786 (N.Y. 1994))*); *see also* *State v. Lawn King, Inc., 84 N.J. 179, 417 A.2d 1025, 1032 (N.J. 1980)* ("[T]he New Jersey act is to be construed in harmony with ruling judicial interpretations of comparable Federal antitrust statutes and to effectuate, insofar as practicable, a uniformity in the laws of those states which enact it." (internal quotation marks omitted)).

Therefore, our holding with respect to IQ's state law antitrust claims mirrors our federal antitrust holding discussed above. IQ's indirect allegations—the boycott of SourceOne and the SDAs—fail because IQ is not an efficient enforcer. IQ's state-law antitrust claims that the Defendants directly boycotted IQ's business, however, may proceed.

B. IQ's State [**25] Law Tort Claims

Our final task is to determine the fate of IQ's remaining state law claims. IQ asserted common-law claims of tortious interference with prospective business relations, civil conspiracy, and aiding and abetting.

1. Tortious Interference with Prospective Business Relations

HN14[] Under New York law, a plaintiff claiming tortious interference with prospective business relations must "show the defendant's interference with business relations existing between the plaintiff and a third party, *either* with the sole purpose of harming the plaintiff *or* by means that are dishonest, unfair, or in any other way improper." *PPX Enters., Inc. v. Audiofidelity Enters., Inc., 818 F.2d 266, 269 (2d Cir. 1987)* (internal citation and quotation marks omitted), *abrogated on other grounds by* *Hannex Corp. v. GMI, Inc., 140 F.3d 194, 206 n.9 (2d Cir. 1998)*. But where, as it does here, "the defendant's interference is intended, at least in part, to advance its own competing interests, the claim will fail unless the means employed include criminal or fraudulent conduct." *Id.*

The district court dismissed IQ's tortious interference claim because IQ failed to allege a "viable antitrust claim" and therefore could not plausibly allege that it had suffered criminal or tortious behavior. Second, the district court determined, consistent with the efficient-enforcer **[**26]** analysis, that IQ had not plausibly alleged that the Defendants' conduct was the proximate cause of its injuries because IQ had suffered only indirect harm. Finally, with respect to IQ's allegations that the Defendants directly boycotted its business, the district court found them too "threadbare" to sustain a tortious interference claim.

We agree with the district court that IQ's claims of tortious interference with respect to IQ's allegations of indirect pressure by the Defendants (the boycott of SourceOne and the SDAs) should be dismissed because IQ failed to plausibly allege the underlying criminal or tortious conduct on which the tortious interference claim must be based.

We disagree with the district court, however, that IQ's claims of direct tortious interference are too scant to survive a motion to dismiss. As discussed above, IQ has plausibly alleged that it suffered an antitrust injury resulting from the Defendants causing a direct boycott of its business. Accordingly, this allegation is sufficient to allow IQ's tortious interference claim to proceed. Therefore, to the extent that the district court's dismissal of IQ's tortious interference claim rested on a **[*70]** misapprehension **[**27]** of the distinction between IQ's claims of indirect and direct pressure on its business by the Defendants, the judgment of the district court is vacated and remanded to allow the tortious interference claims premised on the direct boycott of IQ to proceed.

2. Civil Conspiracy and Aiding and Abetting

IQ also asserted claims for state civil conspiracy and aiding and abetting.[5] Because IQ's civil conspiracy and aiding and abetting claims were derivative of its tortious interference claim, the district court dismissed these claims as tag-along claims. Consistent with our analysis above, we vacate in part the judgment of the district court as to these claims with respect to IQ's direct boycott allegations.

***

To recap, we conclude that while IQ has alleged an antitrust injury, it is not an efficient enforcer with respect to its allegations that the Defendants unlawfully caused the boycotts of SourceOne and the SDAs. We therefore affirm the judgment of the district court dismissing those claims. With respect to IQ's allegations that the Defendants directly brought about a boycott of IQ, however, we find that IQ is best positioned to enforce those antitrust violations. Accordingly, we vacate the **[**28]** judgment and remand the case to the district court on IQ's allegations of direct boycott only. IQ's state law antitrust claims and common law tort claims are also vacated and remanded, but only to the extent that they rely on IQ's allegations that it suffered harm as a result of the direct boycott.

CONCLUSION

The judgment of the district court is AFFIRMED in part and VACATED in part. We REMAND this case to the district court for further proceedings consistent with this opinion.

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[5] We express no opinion at this stage as to the district court's finding that the existence of an independent tort of civil conspiracy in New Jersey did not raise a question of conflict of laws. IQ has properly pleaded a tortious interference claim from which its claim for civil conspiracy (under the law of either jurisdiction) can be derived.

Maui Jim, Inc. v. SmartBuy Guru Enters.

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

May 10, 2019, Decided; May 10, 2019, Filed

No. 1:16 CV 9788

Reporter
386 F. Supp. 3d 926 *; 2019 U.S. Dist. LEXIS 78937 **; 2019 WL 2076366

MAUI JIM, INC., Plaintiff and Counterclaim Defendant, v. SMARTBUY GURU ENTERPRISES, MOTION GLOBAL LTD., SMARTBUYGLASSES SOCIETA A RESPONSABILITA LIMITATA, SMARTBUYGLASSES OPTICAL LIMITED, Defendants and Counterclaimants.

Subsequent History: Reconsideration denied by, Summary judgment granted by, in part, Summary judgment denied by, in part *Maui Jim v. Smartbuy Guru Enters., 2020 U.S. Dist. LEXIS 209608 (N.D. Ill., Feb. 7, 2020)*

Prior History: *Maui Jim, Inc. v. Smartbuy Guru Enters., 2017 U.S. Dist. LEXIS 194411, 2017 WL 5895143 (N.D. Ill., Nov. 27, 2017)*

Core Terms

alleges, counterclaim, sunglasses, affirmative defense, antitrust, motion to dismiss, antitrust claim, retailers, argues, trademark, forum non conveniens, anti trust law, products, customers, lawsuit, competitors, disparagement, comity, brand, courts, consumers, unjust enrichment, press release, fails, defamation per se, Cartwright Act, asserts, public interest factors, Sherman Act, counterfeit

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For SmartBuy Guru Enterprises, a Cayman Island Company, Motion Global Ltd., a Hong Kong Company, Smartbuyglasses Societa a Responsabilita Limitata, an Italian company, SmartBuyGlasses Optical Limited, a Hong Kong company, Defendants: Stephen J. Rosenfeld, LEAD ATTORNEY, Jacob Daniel Radecki, McDonald Hopkins LLC, Chicago, IL; Dan Leonard Makee, PRO HAC VICE, Jennifer D Armstrong, Mcdonald Hopkins Llc, Cleveland, OH.

For Smartbuyglasses Societa a Responsabilita Limitata, an Italian company, Motion Global Ltd., a Hong Kong Company, SmartBuy Guru Enterprises, a Cayman Island Company, SmartBuyGlasses Optical Limited, a Hong Kong company, Counter Claimants: Stephen J. Rosenfeld, LEAD ATTORNEY, McDonald Hopkins LLC, Chicago, IL.

For Motion Global Ltd., a Hong Kong Company, SmartBuy Guru Enterprises, a Cayman Island Company, Smartbuyglasses Societa a Responsabilita Limitata, an Italian company, SmartBuyGlasses Optical Limited, a Hong Kong company, **[**2]** Counter Claimants: Stephen J. Rosenfeld, LEAD ATTORNEY, Jacob Daniel Radecki, McDonald Hopkins LLC, Chicago, IL; Jennifer D Armstrong, Mcdonald Hopkins Llc, Cleveland, OH.

Judges: Honorable Marvin E. Aspen, United States District Judge.

Opinion by: Marvin E. Aspen

Opinion

[*935] MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

Before us is Plaintiff and Counterclaim Defendant Maui Jim, Inc.'s ("Maui Jim") motions to dismiss Defendants and Counterclaimants SmartBuy Guru Enterprises, Motion Global Ltd., SmartBuyGlasses Societá a Responsabilitá Limitata, and SmartBuyGlasses Optical Limited's (collectively "SBG") amended counterclaims. (Dkt. Nos. 184, 196, 278.)[1] Maui Jim also moves to strike two of SBG's affirmative defenses. (Dkt. No. 278.) For the reasons stated below, we grant Maui Jim's motions to dismiss Counts I, III, IV, V, and VI of SBG's second amended counterclaim, grant in part and deny in part Maui Jim's motion to dismiss Count II, and deny Maui Jim's motion to dismiss Count VII. In addition, we grant Maui Jim's motion to strike SBG's first affirmative defense (inequitable restraint of trade) with prejudice and fourth affirmative defense (unclean hands) without prejudice.

BACKGROUND

Much of this case's background can be found in our memorandum and order on Maui Jim's earlier motion to dismiss SBG's prior counterclaims. (Order (Dkt. No. 89).) We assume familiarity with that opinion and repeat here only as necessary. At the motion to dismiss stage, we accept all well-pleaded factual allegations in the counterclaim as true and draw all inferences in the plaintiff's favor. *Cole v. Milwaukee Area **[*936]** Tech. Coll. Dist., 634 F.3d 901, 903 (7th Cir. 2011)*. Maui Jim is a designer, manufacturer, and provider of prescription and non-prescription sunglasses. (2d Am. Compl. (Dkt. No. 257) ¶ 16.) SBG is an online retailer of luxury designer eyewear. (2d Am. Countercl. (Dkt. No. 259) ¶ 13.) It sells products from more than 180 designer brands, including Maui Jim, on its websites in twenty countries. (*Id.* ¶¶ 13, 16.)

Maui Jim alleges SBG entities have never been authorized retailers of Maui Jim sunglasses, yet they sold and offered for sale counterfeit sunglasses under Maui Jim's trademarks. (2d Am. Compl. ¶ 2.) Maui Jim brought suit against SBG, asserting (as amended) claims of trademark counterfeiting and infringement, unfair competition, false advertising, and trademark dilution in violation of the *Lanham Act, 15 U.S.C. § 1051, et seq.* (Counts I—III);

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[1] We previously terminated Maui Jim's first two motions to dismiss as moot. (Dkt. No. 310.) We did so because, after Maui Jim filed these motions, SBG filed a second amended counterclaim. (2d Am. Countercl. (Dkt. No. 259).) It is generally black letter law that an "amended pleading supersedes the original pleading." *Wellness Cmty.-Nat'l v. Wellness House, 70 F.3d 46, 49 (7th Cir. 1995)* (citing *Lubin v. Chi. Title and Trust Co., 260 F.2d 411, 413 (7th Cir. 1958)*; *Nisbet v. Van Tuyl, 224 F.2d 66, 71 (7th Cir. 1955)*; *Fry v. UAL Corp., 895 F. Supp. 1018 (N.D. Ill. 1995))*. "Once an amended pleading is interposed, the original pleading no longer performs any function in the case." *Id.* (quoting 6 C. Wright, A. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1476 at 556-57, 559 (1990)). Although Maui Jim refers to its first two motions to dismiss in its latest motion to dismiss, (Dkt. No. 278 at 1), it does not expressly renew its prior motions on what had become superseded pleadings. The parties now jointly move to reinstate Maui Jim's first two motions, either by vacating our earlier termination of the motions, or by treating those motions and the briefing on them as renewed *instanter*. (Dkt. No. 311 at 4.) The parties argue that SBG's second amended counterclaim was filed "without change" from its previous version, and that Maui Jim incorporated by reference its arguments to dismiss SBG's other counterclaims in its latest motion on the second amended counterclaim. (*Id.* at 3-4.) Of course, the amended and second amended counterclaims are not identical. (*Compare* Am. Countercl. (Dkt. No. 131) ¶ 9, *with* 2d Am. Countercl. ¶ 8 (stating same information at different paragraph number, with discrepancy continuing throughout the remainder of the documents).) While we do not wish to foster "needlessly duplicative pleadings and make-work for district courts" or for litigants, *Scott v. Chuhak & Tecson, P.C., 725 F.3d 772, 782 (7th Cir. 2013)*, the parties' previous submissions on now-superseded claims have required us to hold the various pleadings up to the light to compare their content and ensure accurate exposition of the operative allegations and arguments. However, the parties' general argument is well taken that the issues remain the same and the briefing adequate to address them. Accordingly, we grant the parties' joint motion to reinstate Maui Jim's prior motions to dismiss *instanter* ***[**3]*** , and we consider those motions and arguments in this opinion.

copyright infringement **[**4]** in violation of the *Copyright Act of 1976, 17 U.S.C. § 101, et seq.* (Count IV); unfair trade practices in violation of the *Illinois Uniform Deceptive Trade Practices Act, 815 ILCS 5/10, et seq.* (Count V); and tortious interference with contract (Count VI). (*Id.* ¶¶ 85-127.)

SBG alleges it procures genuine Maui Jim sunglasses primarily through affiliates and distributors that purchase directly from Maui Jim. (2d Am. Countercl. ¶ 17.) SBG does not contest that it sells Maui Jim prescription sunglasses without the genuine Maui Jim prescription lenses. (*Id.* ¶ 21.) Instead, SBG asserts that the Maui Jim frames and non-prescription lenses SBG sells are "100% genuine," and that SBG customers also receive prescription lenses "fabricated through [SBG] by a premium optical laboratory." (*Id.*)

SBG's amended responsive pleading asserts counterclaims against Maui Jim for trade disparagement (Count I); defamation (Count II); violation of the *Sherman Antitrust Act, 15 U.S.C. § 1, et seq.* (Count III); violation of *California's Cartwright Act, Cal. Bus. & Prof. Code § 16700, et seq.* (Count IV), and California's Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200, et seq.* (Count V); violation of Article 101 of the Treaty on the Functioning of the European Union (Count VI); and in the alternative, unjust enrichment (Count VII). (*Id.* ¶¶ 33-94.)

[5]** SBG alleges it brings its counterclaims "to compensate it for, and put an end to, Maui Jim's ongoing illegal campaign to stifle competition." (*Id.* ¶ 1.) According to SBG, Maui Jim "seeks to eradicate lawful competition and monopolize control over its worldwide supply chain, allowing it to illegally prop up prices of its eyewear." (*Id.* ¶ 2.) SBG further alleges Maui Jim's efforts to stifle competition from discount retailers include Maui Jim's alleged attempt to "exploit recent xenophobia by engaging in a negative public relations campaign that painted SmartBuyGlasses as a dishonest, foreign counterfeiter." (*Id.* ¶¶ 2, 26.) In furtherance of its efforts, SBG alleges Maui Jim issued a press release dated January 23, 2017, which included the following statement from Maui Jim's Vice President of Global Marketing:

> Companies that utilize these types of disingenuous and misleading sales practices undermine the integrity of the Maui Jim brand and the quality and technology it has come to represent . . . . [Maui Jim] simply cannot allow our brand to be harmed by the sale of counterfeit or non-genuine Maui Jim products that do not live up to our— and most importantly our customers'—expectations.

(*Id.* ¶ 28.) SBG also alleges that Maui Jim's corporate headquarters and customer service representatives falsely instructed potential customers that SBG sells "fake" or inauthentic products, and that **[*937]** SBG is "not an authentic website." (*Id.* ¶ 29.) Maui Jim has allegedly made the same claims of inauthenticity to United States customs officials. (*Id.* ¶ 30.) Moreover, SBG asserts Maui Jim "used this case to discover and then attempt to eviscerate SmartBuyGlasses' supply chain" by cancelling accounts with certain SBG suppliers after they were confidentially disclosed in discovery. (*Id.* ¶ 31.) SBG alleges that it has been harmed in the marketplace as a result of Maui Jim's actions. (*Id.* ¶ 32.)

Separately, SBG alleges that Maui Jim has entered into anticompetitive agreements with its distributors to maintain minimum retail prices and to restrict to whom distributors can sell. (*Id.* ¶ 52.) Maui Jim has allegedly threatened to terminate and has actually terminated retailers that have sold authentic goods to SBG. (*Id.* ¶¶ 56, 68.) As a result of these agreements, SBG claims that consumers paid artificially high prices for Maui Jim sunglasses and that SBG's business was injured by Maui Jim's efforts to eliminate SBG's supply of Maui Jim sunglasses. (*Id.* ¶ 58.)

In addition, SBG alleges that it "sources the vast majority of its Maui Jim **[**6]** product from Member States within the European Union, and the alleged restrictive contracts at issue (particularly with respect to Maui Jim's tortious interference with contract claims) all involve retailers in the European Union." (*Id.* ¶ 88.) SBG claims that these contracts and Maui Jim's "actions to discover and close the accounts of [SBG's] suppliers within the European Union" caused SBG damage and violate European ***antitrust law***. (*Id.* ¶¶ 89, 90.)

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) governs a motion to dismiss for failure to state a claim upon which relief may be granted. We accept "the allegations in the complaint as true unless they are 'threadbare recitals of a cause of action's elements, supported by mere conclusory statements.'" Katz-Crank v. Haskett, 843 F.3d 641, 646 (7th Cir. 2016) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)). The pleading must state a claim that is plausible on its face to survive a motion to dismiss. Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949; Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007); St. John v. Cach, LLC, 822 F.3d 388, 389 (7th Cir. 2016). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949. The plausibility standard "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. at 1949 (quoting Twombly, 550 U.S. at 555, 127 S. Ct. at 1964-65). That **[**7]** is, while the plaintiff need not plead "detailed factual allegations," the counterclaim must allege facts sufficient "to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555, 127 S. Ct. at 1964-65.

Maui Jim's motion to strike is governed by Federal Rule of Civil Procedure 12(f), which states that "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Motions to strike are generally disfavored because they "potentially serve only to delay," and so affirmative defenses "will be stricken only when they are insufficient on the face of the pleadings." Heller Fin., Inc. v. Midwhey Powder Co., Inc., 883 F.2d 1286, 1294 (7th Cir. 1989). To survive a motion to strike, an affirmative defense must satisfy a three-part test: "(1) the matter must be properly **[*938]** pleaded as an affirmative defense; (2) the matter must be adequately pleaded under the requirements of Federal Rules of Civil Procedure 8 and 9; and (3) the matter must withstand a Rule 12(b)(6) challenge." Sarkis' Cafe, Inc. v. Sarks in the Park, LLC, 55 F. Supp. 3d 1034, 1039 (N.D. Ill. 2014) (citation omitted). We follow the majority view of district court decisions in this circuit, which apply the pleading standard set forth in Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929, and Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868, to affirmative defenses. *See* Edwards v. Mack Trucks, Inc., 310 F.R.D. 382, 386 (N.D. Ill. 2015) ("aligning with the majority of courts in this district" in applying the *Twombly-Iqbal* standard); Sarkis' Cafe, 55 F. Supp. 3d at 1040; Shield Techs. Corp. v. Paradigm Positioning, LLC, No. 11 C 6183, 2012 U.S. Dist. LEXIS 134115, 2012 WL 4120440, at *8 (N.D. Ill. Sept. 19, 2012) ("[W]e believe that the test applicable to affirmative defenses should **[**8]** reflect current pleading standards, and therefore adopt the majority view that *Twombly* and *Iqbal* apply to affirmative defenses."); Riemer v. Chase Bank USA, N.A., 274 F.R.D 637, 639-40 (N.D. Ill. 2011) (collecting cases).

ANALYSIS

Maui Jim moves to dismiss with prejudice four counts in SBG's amended counterclaim. Specifically, Maui Jim argues SBG fails to allege the required elements of a trade disparagement claim (Count I); fails to plead defamation (Count II) with particularity or fails to state a claim because some of the allegedly defamatory statements are substantially true or constitute non-actionable opinion statements; does not allege an antitrust injury or a plausible relevant market in its federal antitrust claim (Count III); and fails to identify which counterclaimant has standing to sue under European ***antitrust law*** (Count VI). (Dkt. No. 184 at 1.)

In addition, Maui Jim moves to dismiss SBG's counterclaims under California law (Counts IV and V) for failure to allege the requisite elements or connection to California, and argues they are barred by the statute of limitations. (Dkt. No. 278 ¶ 1.) Maui Jim moves to dismiss SBG's European antitrust claim (Count VI) under *forum non conveniens* and principles of international comity. (Dkt. No. 196 at **[**9]** 1-2.) Maui Jim moves to dismiss SBG's unjust enrichment counterclaim (Count VII) under the *Noerr-Pennington* doctrine. (Dkt. No. 278 ¶ 2.) Finally, Maui Jim moves to strike SBG's first and fourth affirmative defenses. (*Id.* ¶¶ 3-4.)

I. TRADE DISPARAGEMENT (COUNT I)

SBG alleges Maui Jim published "false, disparaging, and highly damaging messages about the products and services that SmartBuyGlasses sells, namely that SmartBuyGlasses is selling and servicing counterfeit and non-genuine products." (2d Am. Countercl. ¶ 34.) Maui Jim argues this counterclaim must be dismissed because SBG fails to allege any connection to Illinois—a required element for bringing a trade disparagement claim in this forum. (Mem. in Support of Mot. to Dismiss ("Mem.") (Dkt. No. 186) at 6-10.) Maui Jim contends SBG fails to allege the circumstances related to the disputed transaction occurring "primarily and substantially in Illinois." (*Id.* at 6-9.) Nor has SBG alleged any injury in Illinois, according to Maui Jim. (*Id.* at 9-10.)

SBG argues "there are no territorial limits to common law claims." (SBG's Opp'n to Pl.'s Mot. to Dismiss Countercls. I—IV in Defs.' Am. Countercl. ("Resp.") (Dkt. No. 231) at 3.) However, as a federal court exercising **[**10]** supplemental jurisdiction over state law claims, we apply the governing state law—here, Illinois. Illinois **[*939]** has codified the common law tort of trade disparagement in the Uniform Deceptive Trade Practices Act ("UDTPA"), *815 ILCS 510/2(8)*. *Am. Wheel & Eng'g Co. v. Dana Molded Prod., Inc., 132 Ill. App. 3d 205, 211, 476 N.E.2d 1291, 1295, 87 Ill. Dec. 299 (1st Dist. 1985)* ("*Section 2(8)* of the Uniform Act substantially embodies the common law tort of commercial disparagement."). Consequently, both common law trade disparagement and statutory UDTPA claims "are subject to the same analysis: in order to state a claim for trade disparagement and under the UDTPA a plaintiff must allege that defendant published untrue or misleading statements that disparaged the plaintiff's goods or services." *Morton Grove Pharms., Inc. v. Nat'l Pediculosis Ass'n, 494 F. Supp. 2d 934, 943 (N.D. Ill. 2007)*.

Furthermore, as Maui Jim correctly observes, many courts have held that claims that a defendant made false and misleading representations concerning the quality of plaintiff's goods must have a nexus to Illinois. *Underground Sols., Inc. v. Palermo, No. 13 C 8407, 2014 U.S. Dist. LEXIS 132441, 2014 WL 4703925, at *10 (N.D. Ill. Sept. 22, 2014)*. Thus, as we previously explained, "the circumstances that relate to the disputed transaction [must] occur primarily and substantially in Illinois." *Avery v. State Farm Mut. Auto. Ins. Co., 216 Ill. 2d 100, 187, 835 N.E.2d 801, 854, 296 Ill. Dec. 448 (Ill. 2005)*; *Green Light Nat'l, LLC v. Kent, No. 17 C 6370, 2018 U.S. Dist. LEXIS 156656, 2018 WL 4384298, at *5 (N.D. Ill. Sept. 14, 2018)* ("The [U]DTPA does not expressly confine its application to events or circumstances arising in Illinois. However, a 'long-standing rule of construction in Illinois holds that a statute is without extraterritorial **[**11]** effect unless a clear intent in this respect appears from the express provisions of the statute.'" (quoting *Avery, 216 Ill. 2d at 184-85, 835 N.E.2d at 852*)); *Underground Sols., 2014 U.S. Dist. LEXIS 132441, 2014 WL 4703925, at *10* (collecting cases applying the reasoning in *Avery* to UDTPA claims); *LG Elecs. U.S.A., Inc. v. Whirlpool Corp., 809 F. Supp. 2d 857, 859 (N.D. Ill. 2011)* (holding the rule stated in *Avery* applies to the UDTPA). There is "no single formula or bright-line test" for determining whether a transaction occurs within Illinois. *Avery, 216 Ill. 2d at 187, 835 N.E.2d at 854*; *accord* *Phillips v. Bally Total Fitness Holding Corp., 372 Ill. App. 3d 53, 58, 865 N.E.2d 310, 315, 309 Ill. Dec. 947 (1st Dist. 2007)*. Several factors, however, are relevant to determining whether a transaction occurred "primarily and substantially" in Illinois: "(1) the plaintiff's residence, (2) where the misrepresentation was made, (3) where the damage to the plaintiff occurred, and (4) whether the plaintiff communicated with the defendant in Illinois." *Specht v. Google, Inc., 660 F. Supp. 2d 858, 866 (N.D. Ill. 2009)*; *see also* *In re Sears Roebuck & Co. Tools Mktg. & Sales Practices Litig., No. 05 C 2623, 2005 U.S. Dist. LEXIS 28064, 2005 WL 3077606, at *1 (N.D. Ill. Nov. 14, 2005)*.

SBG makes no attempt to show any connection to Illinois, and for the same reasons we previously dismissed its trade disparagement claim, we do so again for failure to allege a nexus to Illinois. It is undisputed that none of the SmartBuy entities are residents of Illinois, but are rather foreign businesses organized and with principal places of business in the Cayman Islands, Hong Kong, and Italy. (2d Am. Countercl. ¶¶ 8-11.) While the second amended counterclaim alleges that both this lawsuit and **[**12]** Maui Jim are located in Illinois, SBG fails to connect any of Maui Jim's alleged action forming the basis of its trade disparagement claim to Illinois. *Avery, 216 Ill. 2d at 189, 835 N.E.2d at 855* (holding claims of non-Illinois plaintiffs insufficient where the **[*940]** only connection to Illinois is the headquarters of the defendant and the fact that a scheme "was disseminated" from Illinois); *Van Tassell v. United Mktg. Grp., LLC, 795 F. Supp. 2d 770, 782 (N.D. Ill. 2011)* (dismissing claim where "Illinois is implicated only because [one defendant] is headquartered in Illinois," despite the fact it was alleged to have carried out its part of the deceptive conduct there); *Phillips, 372 Ill. App. 3d at 58, 865 N.E.2d at 315* ("The fact that a scheme to defraud was disseminated from a company's headquarters in Illinois is insufficient."). Furthermore, a plaintiff's claims are insufficient to state a claim under the UDTPA where, as here, the plaintiff "exclusively offers evidence of . . . nationwide, as opposed to Illinois-specific, conduct." *LG Elecs., 809 F. Supp. 2d at 862*. Nor does the counterclaim contain allegations permitting a plausible inference that SBG has suffered any damage in Illinois. (*See* 2d Am. Countercl. ¶¶ 32, 39 (alleging broadly that SBG has been damaged "in the marketplace" or in "global commerce").)

Accordingly, SBG has not alleged facts that, if true, establish a factual nexus **[**13]** with Illinois as required to entitle it to the relief it seeks in its trade disparagement claim. Count I is therefore dismissed, with prejudice.

II. DEFAMATION (COUNT II)

Maui Jim also moves to dismiss SBG's defamation counterclaim. (Mem. at 10-16.) To state a defamation claim in Illinois, a claimant "must present facts showing that the defendant made a false statement about [it], that the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages." *Ludlow v. Nw. Univ., 79 F. Supp. 3d 824, 836 (N.D. Ill. 2015)* (quoting *Green v. Rogers, 234 Ill. 2d 478, 491, 917 N.E.2d 450, 459, 334 Ill. Dec. 624 (Ill. 2009))*. Certain categories of defamatory statements are considered so damaging on their face that a plaintiff need not plead or prove damages. *Bryson v. News Am. Publications, Inc., 174 Ill. 2d 77, 87, 672 N.E.2d 1207, 1214, 220 Ill. Dec. 195 (Ill. 1996)*. Among those categories of defamation *per se* are defamatory statements that "impute a person is unable to perform or lacks integrity in performing her or his employment duties" and words that "otherwise prejudice[] that person in her or his profession." *Solaia Tech., LLC v. Specialty Publ. Co., 221 Ill. 2d 558, 580, 852 N.E.2d 825, 839, 304 Ill. Dec. 369 (Ill. 2006)*.

SBG identifies five paragraphs in its counterclaim that constitute its claim for defamation *per se* because they either impute a want of integrity in SBG's professional duties or prejudice SBG's business. (2d Am. Countercl. ¶¶ 26-30, 43.)[2] Maui Jim argues SBG fails to plead some of the **[**14]** allegedly defamatory statements with the required specificity and argues the claim is foreclosed because other alleged statements are substantially true or are not defamatory *per se* under Illinois' innocent construction rule. (Mem. at 10-16.)

A. Paragraphs 29 and 30: Pleading Defamation *Per Se*

Maui Jim argues that paragraphs 29 and 30 of SBG's defamation *per se* counterclaim is not pleaded with **[*941]** the required particularity. (Mem. at 10.)[3] Maui Jim argues that these paragraphs constitute "disjointed snippets" that are insufficient to meet Illinois' standard for pleading defamation *per se*. (Mem. at 11 (referring to 2d Am. Countercl. ¶¶ 29, 30).)

A claim in federal court for defamation *per se* is held to "the usual rules for notice pleading established by *Rule 8*." *Muzikowski v. Paramount Pictures Corp., 322 F.3d 918, 926 (7th Cir. 2003)*. "The complaint must 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *McGreal v. AT & T Corp., 892 F. Supp. 2d 996, 1016-17 (N.D. Ill. 2012)* (quoting *Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512, 122 S. Ct. 992, 995, 152 L. Ed. 2d 1 (2002))*. The complaint need not report the allegedly defamatory statement verbatim, "but its substance must be pleaded with 'sufficient precision and particularity so as to permit initial judicial review of its defamatory content.'" *Ludlow v. Nw. Univ., 79 F. Supp. 3d 824, 836 (N.D. Ill. 2015)* (quoting *Green, 234 Ill. 2d at 492, 917 N.E.2d at 459*). This standard does not amount to a heightened **[**15]** pleading requirement, but instead constitutes the requirements to plead substantive elements for defamation *per se* under Illinois law. *Id.*

The relevant paragraphs in SBG's counterclaim sufficiently plead defamation *per se* under the *Rule 8* standard. SBG's counterclaim alleges that, in responding to consumer questions about SBG, "Maui Jim's corporate

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[2] The parties' briefs refer to paragraph numberings in SBG's amended counterclaim, which are off by one from the paragraph numberings in the second amended counterclaim. (*Compare* Am. Countercl. (Dkt. No. 131) ¶ 27, *with* 2d Am. Countercl. ¶ 26 (identical).) This opinion uses the second amended counterclaim, as the operative pleading, *see supra* n.1, to reference the relevant paragraphs and the parties' arguments pertaining to them.

[3] The parties' arguments center on four paragraphs in SBG's counterclaims. (*See* 2d Am. Countercl. ¶¶ 26, 27, 29, 30.) The parties agree that paragraphs 26 and 27 of SBG's second amended counterclaim are not defamatory statements, and we thus do not consider them in our analysis. (*See* Mem. at 11; Resp. at 3 (clarifying that these paragraphs are not defamatory statements, but provide context in which defamatory statements are made).)

headquarters and customer service representatives have falsely instructed potential SmartBuyGlasses' customers that SmartBuyGlasses sells counterfeit goods, that the Maui Jim sunglasses SmartBuyGlasses sells are 'fake' or 'not authentic,' and that SmartBuyGlasses 'is not an authentic website.'" (2d Am. Countercl. ¶ 29.) SBG also alleges that Maui Jim "contacted SmartBuyGlasses' customers directly and claimed that the sunglasses the customers purchased through SmartBuyGlasses are not genuine." (*Id.*) SBG claims that Maui Jim's communications with SBG consumers cause SBG to "lose substantial business from potential customers and to refund existing customers who returned Maui Jim sunglasses solely because of Maui Jim's false claims that the product SmartBuyGlasses sold was counterfeit." (*Id.*) These allegations detail who was speaking (Maui Jim representatives), **[**16]** to whom (potential SBG customers), and what made the statements defamatory (that Maui Jim sunglasses sold by SBG are fakes). Similarly, SBG alleges that "Maui Jim has falsely claimed to customs officials that Maui Jim sunglasses shipped by SmartBuyGlasses to U.S. consumers were 'not genuine,' causing the authentic sunglasses to be seized by U.S. customs." (2d Am. Countercl. ¶ 30.) Here too, SBG pleads who spoke (Maui Jim), to whom (U.S. customs officials), and what was said (sunglasses were "not genuine") with sufficient precision to allow for initial judicial review. *Ludlow, 79 F. Supp. 3d at 836*.

Maui Jim relies primarily on *McGreal v. AT & T Corp.* to argue that SBG's claims are mere "snippets" of quotes that amount to "words or phrases without any context." (Mem. at 11-12 (quoting *McGreal, 892 F. Supp. 2d at 1017*).) The comparison is inapposite. In *McGreal*, the plaintiff generally **[*942]** alleged the defendant made public statements against her veracity and integrity by stating she made misrepresentations, concealed lies, schemed, had been untruthful, made false statements, engaged in a conspiracy, was disingenuous, and made "dishonest attempt." *892 F. Supp. 2d at 1016*. The plaintiff did not otherwise clarify who made these statements or how they were published. *Id. at 1017*. She also **[**17]** failed to tie the statements to her integrity in performing her employment duties beyond abstractly reciting that "veracity and integrity are two required traits" for her profession. *Id.* By contrast, SBG alleges who made the defamatory statements, how they were published, and the substance of those statements with enough specificity to provide notice of its claim. *See* *Ludlow, 79 F. Supp. 3d at 836-37*. Furthermore, SBG's allegations tie the defamatory statements into categories of defamation *per se*, namely words that impute lack of integrity in employment duties or that prejudice a person in his or her profession. *Green, 234 Ill. 2d at 492, 917 N.E.2d at 459*.

Accordingly, SBG's allegations in paragraphs 29 and 30 of its second amended counterclaim are sufficiently pleaded. *See* *Gehrls v. Gooch, No. 09 C 6338, 2010 U.S. Dist. LEXIS 44734, 2010 WL 1849400, at *3 (N.D. Ill. May 7, 2010)* ("[A]t the motion to dismiss stage, plaintiff is entitled to all reasonable inferences and the exact details and substance of the statements made will be discerned through discovery.") Maui Jim's motion to dismiss SBG's defamation claim is denied as to these paragraphs.

B. Paragraph 28: Innocent Construction

Paragraph 28 of SBG's counterclaim alleges that Maui Jim's Vice President of Global Marketing made defamatory statements in a press release issued by Maui Jim. (2d Am. Compl. ¶ 28.) **[**18]** [4] The press release, which publicized Maui Jim's present suit against SBG, contains five paragraphs. (Press Release (Dkt. No. 131-1).) The first four paragraphs discuss Maui Jim's allegations against SBG. (*Id.*) The fifth paragraph contains the allegedly defamatory quotes, as follows:

> "Companies that utilize these types of disingenuous and misleading sales practices undermine the integrity of the Maui Jim brand and the quality and technology it has come to represent," said Jay Black, Maui Jim Vice President, Global Marketing. "This lawsuit was filed to protect our brand and the inherent value of its earned

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[4] Paragraph 28 indicates that the press release is "[a]ttached hereto as Exhibit A." (2d Am. Countercl. ¶ 28.) While the full press release was attached as an exhibit to SBG's first amended counterclaim, (*see* Dkt. No. 131-1), it is not attached to SBG's second amended counterclaim. Nonetheless, "pleadings may incorporate earlier pleadings by reference, *Fed. R. Civ. P. 10(c)*," *Macklin v. Butler, 553 F.2d 525, 528 (7th Cir. 1977)*. Accordingly, we consider the full press release attached to SBG's prior pleading as incorporated by reference in SBG's second amended counterclaim.

> reputation, as well as our customers and our authorized retailers. We simply cannot allow our brand to be harmed by the sale of counterfeit or non-genuine Maui Jim products that do not live up to our—and most importantly, our customers'—expectations."

(*Id.*)

Maui Jim argues that these statements fall under Illinois' innocent construction rule and thus are not actionable as defamation *per se*. (Mem. at 14.) In Illinois, a statement that is allegedly defamatory "will not be actionable *per se* if it is reasonably capable of an innocent construction." *Tuite v. Corbitt, 224 Ill. 2d 490, 502, 866 N.E.2d 114, 121,* ***[*943]*** *310 Ill. Dec. 303 (Ill. 2006)*; *see also* *Bryson, 174 Ill. 2d at 90, 672 N.E.2d at 1215* ("Only *reasonable* innocent **[**19]** constructions will remove an allegedly defamatory statement from the *per se* category."). "Whether a statement is reasonably susceptible to an innocent interpretation is a question of law for the court to decide." *Bryson, 174 Ill. 2d at 90, 672 N.E.2d at 1215*. In so deciding, "courts must interpret the words 'as they appeared to have been used and according to the idea they were intended to convey to the reasonable reader.'" *Tuite, 224 Ill. 2d at 512, 866 N.E.2d at 127* (quoting *Bryson, 174 Ill. 2d at 93, 672 N.E.2d at 1217*).

The parties agree that the first four paragraphs of the press release are not defamatory because they refer to Maui Jim's allegations against SBG. (Mem. at 14; Resp. at 9 (distinguishing fifth paragraph from remainder of press release).) However, SBG argues that "the fifth paragraph—which includes the defamatory statements—does not signal to the reader that Maui Jim is referring to allegations in its complaint." (Resp. at 9.)

On this score, SBG is incorrect: SBG's second amended counterclaim excises a sentence in the middle of the supposedly offending paragraph that refers to the lawsuit. (*Compare* Press Release at 1 (including sentence that states "*This lawsuit was filed* to protect our brand and the inherent value of its earned reputation, as well as our customers and our authorized retailers." (emphasis added), **[**20]** *with* 2d Am. Countercl. ¶ 28 (replacing this sentence with ellipses).) What is more, the fifth paragraph is devoid of any reference to SBG. The only way the fifth paragraph refers to SBG is if it is read in the context of the entire press release, the remainder of which deals entirely with Maui Jim's lawsuit against SBG. (*Id.*) When the press release is "read as a whole and the words given their natural and obvious meaning," the statements in the fifth paragraph refer to Maui Jim's lawsuit and its allegations against SBG, instead of a defamatory attack that can be separated from the bulk of the press release. *Tuite, 224 Ill. 2d at 502, 866 N.E.2d at 121*.

Accordingly, Maui Jim's motion to dismiss SBG's defamation *per se* counterclaim is granted as to the allegations in paragraph 28 of SBG's second amended counterclaim, with prejudice.

III. ANTITRUST COUNTERCLAIM (COUNT III)

In Count III, SBG alleges Maui Jim has violated *Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1*. (2d Am. Countercl. ¶¶ 47-60.) SBG asserts Maui Jim enters into contracts with authorized distributors, setting minimum retail prices and restricting resale "for the express purpose of eliminating or suppressing price competition among retailers of Maui Jim sunglasses." (*Id.* ¶¶ 52, 55.) **[**21]** SBG further alleges Maui Jim has threatened to terminate retailers that "failed to adhere to this anticompetitive policy, including retailers that sold authentic products to SmartBuyGlasses." (*Id.* ¶ 56.) As a result, SBG alleges Maui Jim's anticompetitive conduct caused consumers to pay artificially high prices for Maui Jim sunglasses and be deprived of free and open competition in the market and caused injury to SBG's business through the restriction and elimination of its supply of Maui Jim sunglasses. (*Id.* ¶ 58.)

"The purpose of the Sherman Act is to protect consumers from injury that results from diminished competition." *Agnew v. NCAA, 683 F.3d 328, 334-35 (7th Cir. 2012)*. "To state a *Section 1* claim, a plaintiff must **[*944]** plead facts plausibly suggesting: (1) a contract, combination, or conspiracy (meaning, an agreement); (2) a resulting unreasonable restraint of trade in a relevant market; and (3) an accompanying injury." *In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d 931, 949 (N.D. Ill. 2018)*. Maui Jim does not take issue with the first element, but argues that SBG's counterclaim fails the second and third elements as it does not allege a "relevant market" and fails to assert a cognizable injury. (Mem. at 17-21.)

A. Antitrust Injury

Maui Jim argues SBG's *Section 1* claim must be dismissed because SBG has not alleged an antitrust **[**22]** injury necessary to bring the claim as a beneficiary of the alleged antitrust violation. (Mem. at 17-19.) To maintain a claim under the Sherman Act, "Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977)*.

"A competitor may not 'recover damages for any conspiracy . . . to charge higher than competitive prices," because although "[s]uch conduct would indeed violate the Sherman Act," it cannot injure a claimant competitor because competitors "'stand to gain from any conspiracy to raise the market price.'" *O.K. Sand & Gravel, Inc. v. Martin Marietta Techs., Inc., 36 F.3d 565, 573 (7th Cir. 1994)* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 582, 106 S. Ct. 1348, 1354, 89 L. Ed. 2d 538 (1986))*; *see also* *JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775, 778 (7th Cir. 1999)* (holding that there was no injury and stating, "You want your competitors to charge high prices."). SBG squarely characterizes itself as a "direct competitor of Maui Jim." (2d Am. Countercl. ¶ 54.) SBG's allegations claim that Maui Jim eliminated other competitors that did not adhere to Maui Jim's alleged artificially high price restraints. (2d Am. Countercl. ¶¶ 55-56, 58.) SBG's antitrust claim therefore does not allege antitrust injury because, as a "direct competitor of Maui Jim," Maui Jim's alleged contracts resulted in "artificially **[**23]** high prices for Maui Jim sunglasses." (*Id.* ¶¶ 54, 58.) *See* *In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d at 954* (finding no antitrust injury where "the alleged market allocation [plaintiff] complains of would have *helped* [it] by eliminating its alleged competitors and, after they raised prices, allowing it to undercut them"). On this ground alone, SBG's Sherman Act claim should be dismissed.

SBG nevertheless alleges it was harmed "because Maui Jim has unlawfully restricted and seeks to eliminate [SBG's] supply of Maui Jim sunglasses." (2d Am. Countercl. ¶ 58.) SBG's brief characterizes this injury as impacting SBG's business model and forcing SBG out of the market because SBG "can no longer source [Maui Jim sunglasses] from certain distributors or buy in bulk at a certain price." (Resp. at 14.) SBG's elucidation of this injury conflicts with SBG's clear framing of itself as Maui Jim's direct competitor. (*See* 2d Am. Countercl. ¶ 54.) *O.K. Sand & Gravel, Inc., 36 F.3d 565, 572-73* ("Clearly, price increases could not be considered an antitrust injury to competitors.") Moreover, SBG cites no authority tying its claimed harm to a recognized antitrust injury. (*See* Resp. at 14-15.) *United States v. Cisneros, 846 F.3d 972, 978 (7th Cir. 2017)* ("'[P]erfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, **[**24]** are waived.'" (quoting *United States v. Berkowitz, 927 F.2d 1376, 1384* ***[*945]*** *(7th Cir. 1991))*; *see also* *Dunkin' Donuts Inc. v. N.A.S.T., Inc., 428 F. Supp. 2d 761, 775 (N.D. Ill. 2005)* ("It is not this Court's job to make parties' arguments for them, and it will not do so in this case.").

B. Single-Brand Market

In addition, Maui Jim argues that SBG's antitrust claim cannot survive because SBG improperly alleges a single-brand market. (Mem. at 19-21.) SBG identifies the alleged relevant antitrust market as the "Maui Jim sunglasses market, specifically Maui Jim sunglasses that are marketed and sold throughout the United States either online or through retail stores." (2d Am. Countercl. ¶ 50.) To establish a *Section 1* claim, a plaintiff has the burden of identifying the existence of a relevant product market. *Agnew, 683 F.3d at 337*. A relevant product market is defined by "the reasonable interchangeability of the products and the cross-elasticity of demand for those products." *Nucap Indus., Inc. v. Robert Bosch LLC, 273 F. Supp. 3d 986, 1011 (N.D. Ill. 2017)* (quoting *Ploss v. Kraft Foods Grp., Inc., 197 F. Supp. 3d 1037, 1070 (N.D. Ill. 2016))*; *see also* *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig., 767 F. Supp. 2d 880, 901 (N.D. Ill. 2011)* ("In other words, the products in a market must have unique attributes that allow them to be substituted for one another, but make them difficult to replace with substitute products from outside the market.").

"When a complaint limits the relevant market to a 'single brand, franchise, institution, or comparable entity that competes with potential substitutes,' a court should **[**25]** dismiss the complaint unless the complaint contains sufficient factual allegations that make it plausible there is no substitute." *Int'l Equip. Trading, Ltd. v. AB SCIEX LLC, No. 13 C 1129, 2013 U.S. Dist. LEXIS 123109, 2013 WL 4599903, at *4 (N.D. Ill. Aug. 29, 2013)* (quoting *Todd v. Exxon Corp., 275 F.3d 191, 200 (2d Cir. 2001))*. The requirement that a relevant product market for antitrust purposes comprises more than a single brand "stems from the principle that ***antitrust law*** serves to protect competition, not competitors." *House of Brides, Inc. v. Alfred Angelo, Inc., No. 11 C 07834, 2014 U.S. Dist. LEXIS 1850, 2014 WL 64657, at *6 (N.D. Ill. Jan. 8, 2014)* (citing *42nd Parallel N. v. E St. Denim Co., 286 F.3d 401, 405 (7th Cir. 2002)* ("Antitrust laws protect competition and not competitors.")). In limited circumstances, a relevant single-brand market has been found where consumers were "locked in" to purchasing a future product or service or where the product is so unique that there is no substitute. *Right Field Rooftops, LLC v. Chi. Cubs Baseball Club, LLC, 136 F. Supp. 3d 911, 917 (N.D. Ill. 2015)*, *aff'd*, *870 F.3d 682 (7th Cir. 2017)* (citing *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 461-79, 112 S. Ct. 2072, 2079-89, 119 L. Ed. 2d 265 (1992))*; *In re Dealer Mgmt. Sys. Antitrust Litig., 313 F. Supp. 3d 931, 961 (N.D. Ill. 2018)* ("In rare circumstances, a single brand of a product or service can constitute a relevant market for antitrust purposes." (quoting *PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 615 F.3d 412, 418 (5th Cir. 2010))*.

Although a single-brand market may exist, SBG has not pleaded facts demonstrating that Maui Jim's sunglasses are unique and cannot be substituted with other manufacturers' sunglasses. SBG's minimal allegations say nothing regarding cross-elasticities of supply or demand. *Int'l Equip. Trading, 2013 U.S. Dist. LEXIS 123109, 2013 WL 4599903, at *4*; *see also* *House of Brides, 2014 U.S. Dist. LEXIS 1850, 2014 WL64657, at * 6* (finding allegations that the brand had "an inelasticity of demand, and little cross-elasticity of demand" between the product and competing **[**26]** products, along with allegations that customers do not consider **[*946]** other brands suitable substitutes even in the face of a "significant, non-transitory increase in the price," fell short of "rendering it plausible that there exist no interchangeable substitutes"). Consumer preferences do not create a single-brand market. *House of Brides, 2014 U.S. Dist. LEXIS 1850, 2014 WL 64657, at *6* (citing *Spahr v. Leegin Creative Leather Prods., Inc., 2008 U.S. Dist. LEXIS 90079, 2008 WL 3914461 at *9-10 (E.D. Tenn. 2008)* ("While Brighton-brands may enjoy some market loyalty, it cannot reasonably be argued that other handbags, wallets, shoes, jewelry and the like do not serve the same purpose and have the same use as Brighton-brand products."); *Global Discount Travel Servs., LLC v. Trans World Airlines, Inc., 960 F. Supp. 701, 705 (S.D.N.Y. 1997)* ("The plaintiff's argument is analogous to a contention that a consumer is 'locked into' Pepsi because she prefers the taste, or NBC because she prefers 'Friends,' 'Seinfeld,' and 'E.R.' A consumer might choose to purchase a certain product because the manufacturer has spent time and energy differentiating his or her creation from the panoply of products in the market, but at base, Pepsi is one of many sodas, and NBC is just another television network.")). SBG's counterclaim includes no allegation creating a plausible inference that this is the rare case in which a single-brand market is actionable. *See, e.g.,* *Nucap Indus., Inc. v. Robert Bosch LLC, 273 F. Supp. 3d 986, 1012 (N.D. Ill. 2017)* (dismissing antitrust claim **[**27]** for lack of plausible relevant market, explaining "the counterclaims leave the matter to speculation, which they cannot do"). The asserted single-brand market in Maui Jim sunglasses is all the more implausible in light of SBG's allegation that it sells "products from more than 180 of the world's best-selling designer brands at attractive prices." (2d Am. Countercl. ¶ 13.) SBG's counterclaim thus "contradicts its narrow market definition" by revealing that upward of 179 other sunglasses brands are competitive alternatives to Maui Jim sunglasses. *Int'l Equip. Trading, 2013 U.S. Dist. LEXIS 123109, 2013 WL 4599903, at *4*. SBG's failure to plead a plausible relevant market renders dismissal appropriate.

SBG argues that we cannot determine there are no interchangeable substitutes for Maui Jim sunglasses without the aid of discovery. (Resp. at 13-14.) In support, SBG points to Maui Jim's allegation in its amended complaint that its sunglasses incorporate "patented, color-infused lens technology" and this proprietary technology "distinguishes [Maui Jim] Sunglasses from its competitors." (*Id.; see also* Am. Compl. ¶ 20.) SBG's only other allegation that Maui Jim sunglasses constitute a market unto themselves states, "Maui Jim's products are differentiated by virtue **[**28]** of their labeling and design." (2d Am. Countercl. ¶ 49.) "Although market definition is a deeply fact-intensive inquiry, failure to offer a plausible relevant market is a proper ground for dismissing an antitrust claim." *Right Field Rooftops, LLC v. Chi. Baseball Holdings, LLC, 87 F. Supp. 3d 874, 886 (N.D. Ill. 2015)* (quotations omitted) (citing *Todd v. Exxon Corp., 275 F.3d 191, 199-200 (2d Cir. 2001)*; *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 719-20 (6th Cir. 2003)*; *Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)*; *Int'l Equip. Trading, 2013 U.S. Dist. LEXIS 123109, 2013 WL 4599903, at *3)*. "That market definition is often, or even usually, a fact-intensive exercise, however, says nothing about whether the plaintiffs' allegations of a single brand market in this case warrant further discovery." *House of Brides, 2014 U.S. Dist. LEXIS 167887, 2014 WL 6845862, at *4*. Even though Maui Jim has alleged some basis for the uniqueness of its sunglasses and the proprietary technology used therein, our conclusion remains the **[*947]** same that the counterclaims do not permit an inference the sunglasses are not interchangeable or that consumers are at all "locked in" to purchasing sunglasses only from Maui Jim.

As SBG's antitrust allegations fail on two essential elements of a Sherman Act claim and further amendment would be futile, we grant Maui Jim's motion to dismiss Count III of SBG's second amended counterclaim with prejudice.

IV. CALIFORNIA COUNTERCLAIMS (COUNTS IV & V)

SBG's second amended counterclaim asserts two violations of California law against Maui Jim. Count IV of SBG's counterclaim alleges **[**29]** that Maui Jim violated California's ***antitrust law***, the *Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq.* (2d Am. Countercl. ¶¶ 61-76.) Count V alleges that Maui Jim violated California's unfair competition law, *Cal. Bus. & Prof. Code § 16720 et seq.* (2d Am. Countercl. ¶¶ 77-85.) Maui Jim moves to dismiss these counterclaims under *Rule 12(b)(6)*. (Dkt. No. 278 at 1.)

A. Cartwright Act Counterclaim

Count IV of SBG's counterclaims alleges Maui Jim violated California's Cartwright Act. (2d. Am. Countercl. ¶ 71.) Maui Jim argues that SBG has no standing to bring the claim because it has not adequately alleged injury under the Cartwright Act. (Dkt. No. 280 ("MJ Cal. Mem.") at 8-10.) As with the Sherman Act claim, Maui Jim argues that SBG benefits, as a competitor, from allegedly higher prices of Maui Jim's product. (*Id.* at 9-10.) SBG counters that standing under the Cartwright Act is broader than under the federal Sherman Act. (Dkt. No. 289 ("SBG Cal. Resp.") at 5.)

SBG is correct that federal and California antitrust standing are not coterminous. "Interpretations of federal ***antitrust law*** are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's **[**30]** sister states around the turn of the 20th century." *Aryeh v. Canon Bus. Solutions, Inc., 55 Cal. 4th 1185, 1195, 151 Cal. Rptr. 3d 827, 292 P.3d 871, 877 (Cal. 2013)*. The Cartwright Act is broader in that it allows one whose business or property is injured by prohibited conduct to sue "regardless of whether such injured person dealt directly or indirectly with the defendant." *Cal. Bus. & Prof. Code § 16750(a)*; *see also* *Cellular Plus, Inc. v. Superior Court, 14 Cal. App. 4th 1224, 1233-34, 18 Cal. Rptr. 2d 308 (Cal. Ct. App. 1993)* (analyzing Cartwright Act antitrust standing under *§ 16750(a)*.) Nonetheless, to establish standing under the Cartwright Act, SBG must still show actionable injury, which has four requirements: "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 987 (9th Cir. 2000)* (quoting *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1055 (9th Cir. 1999))*.

SBG does not allege that it was overcharged by retailers of Maui Jim sunglasses because of Maui Jim's alleged price fixing, which is a typical form of injury. *See, e.g.,* *Clayworth v. Pfizer, Inc., 49 Cal. 4th 758, 784, 111 Cal. Rptr. 3d 666, 233 P.3d 1066 (Cal. 2010)* (characterizing a purchaser as injured by an initial overcharge, even if that purchaser passed on the overcharge to a downstream consumer); *Cellular Plus, Inc., 14 Cal. App. 4th at 1234-35* (finding consumers "injured directly by the alleged retail price fixing **[*948]** and indirectly by the alleged wholesale price fixing"). Nor does SBG allege that it ever tried to purchase Maui Jim sunglasses from its California distributors. **[**31]** Instead, SBG's claimed injury is more tenuous. It first alleges that Maui Jim required its distributors to agree to its General U.S. Policies, which contained within them a policy that Maui Jim retailers may not sell below the manufacturer's suggested retail price. (2d Am. Countercl. ¶¶ 65-67.) Then, SBG alleges that Maui Jim threatened to terminate, and did terminate, retailers who failed to adhere to the Policies, including retailers that sold to SBG. (*Id.* ¶ 68.) As a result, SBG claims it lost revenue from its inability to sell Maui Jim sunglasses. (*Id.* ¶ 73.)

SBG's claimed injury is insufficient for at least two reasons. First, as discussed above, SBG has alleged that it is Maui Jim's direct competitor (*id.* ¶ 54), and thus it would stand to gain by an agreement to raise Maui Jim prices. *Am. Ad Mgmt., Inc., 190 F.3d at 1056* ("There can be no antitrust injury if the plaintiff stands to gain from the alleged unlawful conduct. Competitors who challenge a rival's price-fixing are often unable to show injury." (citation omitted)). Even that aside, SBG does not claim that Maui Jim terminated retailers *because of* violations of its alleged price-fixing policy. (*See* MJ Cal. Reply at 2.) SBG in fact alleges that Maui Jim terminated **[**32]** retailers who sell to SBG for another reason: because of this litigation. (2d Am. Countercl. ¶ 31 (alleging that Maui Jim closed accounts of SBG suppliers disclosed in this litigation).) Injury under the Cartwright Act must "flow[] from that which makes the conduct unlawful," *Knevelbaard, 232 F.3d at 987*; *see also Am. Ad Mgmt., Inc., 190 F.3d at 1056* (describing this requirement); *Kolling v. Dow Jones & Co., 137 Cal. App. 3d 709, 723, 187 Cal. Rptr. 797, 807 (Cal. Ct. App. 1982)* (under the Cartwright Act, "[a]n 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful."). SBG fails to draw a plausible connection between Maui Jim's alleged price fixing and its reason for terminating retailers that sold product to SBG. *See Twombly, 550 U.S. at 557, 127 S. Ct. at 1966* (requiring antitrust allegations to cross the plausibility threshold).

Accordingly, we dismiss Count IV of SBG's second amended counterclaim. SBG seeks leave to amend to include additional facts produced in discovery. (SBG Cal. Resp. at 5.) SBG added its California counterclaims without leave of this Court after it had already amended its counterclaims against Maui Jim once. (Dkt. No. 131.) *See Fed. R. Civ. P. 15(a)* (a party may amend a pleading once as a matter of course, and further "only with the opposing party's **[**33]** written consent or the court's leave"). We see no reason to allow this claim to go to discovery only so that SBG may conduct a "fishing expedition" that may result in a viable antitrust claim. *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig., 801 F.3d 758, 766 (7th Cir. 2015)*; *see also Thompson v. Ill. Dep't of Prof'l Regulation, 300 F.3d 750, 759 (7th Cir. 2002)* ("It is well within the province of the district court to deny leave to amend if, among other things, there is undue delay or undue prejudice would result to the opposing party if the amendment were allowed."). We therefore dismiss Count IV with prejudice.

B. Unfair Competition Law Claim

Count V of SBG's second amended counterclaim asserts violations of California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof.Code § 17200 et seq.* (2d Am. Countercl. ¶¶ 77-85.) The UCL proscribes both "unlawful" and "unfair" **[*949]** business practices, and a claimant "can only assert an 'unlawful' practice insofar as it can assert violations of other laws." *Orchard Supply Hardware LLC v. Home Depot USA, Inc., 939 F. Supp. 2d 1002, 1011 (N.D. Cal. 2013)*. The factual allegations of Count V are the same as those of Count IV. (2d Am. Countercl. ¶ 78 ("The conduct of Maui Jim and the retailers set forth above in [SBG's] Cartwright Act claim (Count III [sic]) constitutes unlawful practices" under the UCL); *id.* ¶ 80 (same facts supporting "unfair" conduct under the UCL).)

The parties essentially agree that SBG's UCL claim must rise or fall with **[**34]** SBG's Cartwright Act claim. (*Compare* MJ Cal. Mem. at 14 (arguing failure to establish Cartwright Act claim requires dismissal of UCL claim), *with* SBG Cal. Resp. at 7 ("Because [SBG] sufficiently alleges a Cartwright Act claim, its UCL claim is proper.") As we have dismissed SBG's Cartwright Act claim, we also dismiss Count V. *See Cascades Computer Innovation LLC v. RPX Corp., No. 12 C 1143 YGR, 2013 U.S. Dist. LEXIS 10526, 2013 WL 316023, at *15 (N.D. Cal. Jan. 24, 2013)* ("[B]ecause [Plaintiff's] UCL claim is not materially different than its federal and state antitrust claims, its UCL claim necessarily fails as well."); *Ingels v. Westwood One Broad. Servs., Inc., 129 Cal. App. 4th 1050, 1060, 28 Cal.*

Rptr. 3d 933 (Cal. Ct. App. 2005) ("'If the [underlying] claim is dismissed, then there is no 'unlawful' act upon which to base . . . the derivative Unfair Competition claim.'") (second alteration in original)). For the reasons stated above, we do so with prejudice.

V. EUROPEAN ANTITRUST COUNTERCLAIM (COUNT VI)

Count VI of SBG's counterclaim ("EU Antitrust Claim") alleges that Maui Jim's contracts with "authorized" distributors and its actions to uncover and close accounts of suppliers of Maui Jim sunglasses to SBG violate Article 101(1)(a)-(c) of the Treaty on the Functioning of the European Union ("TFEU"). (2d Am. Countercl. ¶¶ 87-89.) Maui Jim mounts three attacks on this claim. First, **[**35]** in its Rule 12(b)(6) motion to dismiss, Maui Jim argues that SBG fails to plead with specificity which defendant brings the EU Antitrust Claim. (Mem. at 21-22.) Second and third, Maui Jim asserts in a separate motion that the EU Antitrust Claim should be dismissed based on the principle of *forum non conveniens*, or, in the alternative, international comity. (Dkt. No. 196.) Although principles of international comity are central to this claim, they are best considered within the doctrine of *forum non conveniens*, which here counsels dismissal. As we grant Maui Jim's motion to dismiss on *forum non conveniens* grounds, we do not consider its other 12(b)(6) arguments.

A. *Forum Non Conveniens* Standard

The doctrine of *forum non conveniens* allows a federal court to dismiss a claim when a foreign jurisdiction would provide a more convenient forum to adjudicate the matter, and dismissal would serve the ends of justice. Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 425, 127 S. Ct. 1184, 1188, 167 L. Ed. 2d 15 (2007); *Koster v.* (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 527, 67 S. Ct. 828, 833, 91 L. Ed. 1067 (1947). "Stated more simply, a district court may dismiss a case on *forum non conveniens* grounds when it determines that there are 'strong reasons for believing it should be litigated in the courts of another, normally a foreign, jurisdiction.'" Deb v. SIRVA, Inc., 832 F.3d 800, 805 (7th Cir. 2016) (quoting Fischer v. Magyar Allamvasutak Zrt., 777 F.3d 847, 866 (7th Cir. 2015)). District courts approach the **[**36]** doctrine with caution as it is "an exceptional one that a **[*950]** court must use sparingly." *Id.* As such, "[t]he exceptional nature of a dismissal for *forum non conveniens* means that a defendant invoking it ordinarily bears a heavy burden in opposing the plaintiff's chosen forum." Id. at 806 (citing Sinochem, 549 U.S. at 430, 127 S. Ct. at 1191).

To determine whether dismissal on *forum non conveniens* grounds is appropriate, a district court must decide whether there is an available and adequate alternative forum to hear the case and evaluate relevant private and public interest factors identified by the Supreme Court. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241, 102 S. Ct. 252, 258, 70 L. Ed. 2d 419 (1981); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09, 67 S. Ct. 839, 843, 91 L. Ed. 1055 (1947); Deb, 832 F.3d at 807 (7th Cir. 2016); Fischer, 777 F.3d at 867. The private interest factors to consider are:

> [1] the relative ease of access to sources of proof; [2] availability of compulsory process for attendance of unwilling, and [3] the cost of obtaining attendance of willing, witnesses; [4] possibility of view of premises, if view would be appropriate to the action; and [5] all other practical problems that make trial of a case easy, expeditious and inexpensive.

Clerides v. Boeing Co., 534 F.3d 623, 628 (7th Cir. 2008) (quoting Gilbert, 330 U.S. at 508, 67 S. Ct. at 843). The public interest factors to consider are:

> [1] the administrative difficulties stemming from court congestion; [2] the local interest in having localized disputes decided at home; [3] the interest in having the **[**37]** trial of a diversity case in a forum that is at home with the law that must govern the action; [4] the avoidance of unnecessary problems in conflicts of laws or in the application of foreign law; and [5] the unfairness of burdening citizens in an unrelated forum with jury duty.

Id. (citing *Gilbert, 330 U.S. at 508-09, 67 S. Ct. at 843*). "The *forum non conveniens* determination is committed to the sound discretion of the trial court. . . . [W]here the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Piper Aircraft Co., 454 U.S. at 257, 102 S. Ct. at 266*.

B. Available and Adequate Alternative Forum

As an initial matter, the parties do not dispute that a European Union member state would provide an available and adequate forum to adjudicate SBG's EU Antitrust Claim. (*See* Dkt. No. 233 ("SBG EU Resp.") at 4 ("SBG does not dispute that there are several available and adequate forums in EU member states that would possess jurisdiction over the TFEU claim.").) Thus, the first step in the *forum non conveniens* analysis is satisfied, leaving only the requisite balancing of private and public interest factors. *Sinochem Int'l Co., 549 U.S. at 429, 127 S. Ct. at 1190*; *Fischer, 777 F.3d at 867-68*.

C. Balancing of Factors

Turning to the balancing of factors, **[**38]** we first observe that, generally, "a plaintiff's choice of forum should be disturbed only if the balance of public and private interest factors strongly favors the defendant." *Clerides, 534 F.3d at 628*. Typically, the presumption in favor of the plaintiff's choice of forum "applies with less force when the plaintiff or real parties of interest are foreign." *Piper Aircraft Co., 454 U.S. at 255, 102 S. Ct. at 266*. In this case, Maui Jim's challenge to a sole SBG counterclaim for inconvenient forum is striking given that it was Maui Jim, not SBG, who chose to litigate in this forum. However, the practice is not unprecedented in this district. *See, e.g.,* **[*951]** *Nalco Co. v. Chen, No. 12 C 9931, 2013 U.S. Dist. LEXIS 119559, 2013 WL 4501425, at *7 (N.D. Ill. Aug. 22, 2013)* (considering and denying plaintiff's motion to dismiss counterclaims on *forum non conveniens* grounds). Moreover, our analysis of the relevant private interest factors—and in particular the public interest factors—leads us to conclude that dismissal of SBG's EU Antitrust Claim on *forum non conveniens* is appropriate here.

1. Private Interest Factors

Maui Jim argues that access to sources of proof and the availability of compulsory process in Europe both weigh in favor of dismissal. (Dkt. No. 199 ("MJ EU Mem.") at 8-9.)[5] *See* *Clerides, 534 F.3d at 628*. As Maui Jim points out, (MJ EU Mem. at 8-9), SBG's allegations reveal that the EU Antitrust **[**39]** Claim and underlying evidence are centered almost exclusively in Europe. SBG alleges that it "sources the vast majority of its Maui Jim product from Member States within the European Union, and the alleged restrictive contracts at issue . . . all involve retailers in the European Union." (2d Am Countercl. ¶ 88.) It also alleges that "Maui Jim's anticompetitive actions caused the restriction of trade between retailers in the European Union and [SBG]." (*Id.*)

SBG faults Maui Jim for failing to identify specific witnesses or documents that would be difficult to obtain outside of Europe. (SBG EU Resp. at 5-6.) SBG also argues that the availability of compulsory process in Europe is at best a neutral factor because the subject matter of Maui Jim's affirmative Lanham Act and tortious interference claims cover the same subject matter as SBG's EU Antitrust Claim and would produce overlapping evidence. (*Id.* at 6-8.) SBG contends further that documents concerning European supply chains and contractual arrangements "are not only accessible but have also been accessed and are being produced." (*Id.* at 8.)

[5] Maui Jim has filed two versions of its memorandum of law in support of its motion to dismiss SBG's EU Antitrust Claim, one public, the other under seal. (*See* Dkt. No. 199 (public); Dkt. No. 200 (under seal); *see also* Dkt. No. 323 (granting filing under seal).) The two versions are identical aside from select redactions in the text of the memorandum and three sealed exhibits. This opinion refers only to the public version unless otherwise specified.

In reply, Maui Jim vigorously disputes that any such production of evidence from SBG has occurred. (Dkt. **[**40]** No. 238 ("MJ EU Reply") at 10; *see also* Dkt. No. 234 (Order staying antitrust discovery).) Maui Jim also argues that while its tortious interference claim is limited to the United States and Italy, SBG's EU Antitrust Claim has a much wider potential scope covering several European countries or the whole of Europe, while not including the United States. (*Id.* at 3.) Maui Jim's Lanham Act claims, moreover, do not appear to require application of European law, and SBG does not explain how this subject matter would overlap with its EU Antitrust Claim. (*Id.* at 6.)

We agree with Maui Jim that, while its affirmative tortious interference claim may require evidence centered in Italy and the United States, the potential reach of SBG's EU Antitrust Claim weighs in favor of dismissal because most of the evidence regarding this claim is likely to be in Europe. SBG's point is well taken that compulsory process in Europe may be a wash, depending on the course of litigation of Maui Jim's claims regarding agreements in European countries. On balance, though, the private interest factors weigh slightly toward dismissal on *forum non conveniens* grounds.

[*952] 2. Public Interest Factors

Maui Jim and SBG also dispute relevant the **[**41]** public interest factors. Maui Jim contends that congestion in this district warrants dismissal, that Europe's local interest is better vindicated by hearing SBG's EU Antitrust Claim in a European Union member state, and that applying the governing European Union law and burdening a domestic jury with European Union law favors dismissal. (MJ EU Mem. at 10-11.) Maui Jim also advances an extended argument in the alternative that principles of international comity require dismissal. (*Id.* at 11-15.) SBG counters that Maui Jim does not analyze court congestion appropriately because it provides no information as to how fast a disposition might be reached in a European court. (SBG EU Resp. at 9.) SBG also argues that a domestic jury will be empaneled in any event should this case reach trial, and having that jury decide the additional matter of its EU Antitrust Claim would constitute a *de minimis* burden. (*Id.* at 11.) Moreover, SBG contends that its defenses to Maui Jim's counterclaims may require the Court to interpret European law, and that courts routinely apply matters of foreign law when called upon to do so. (*Id.* at 11-12.)

While we consider all of the above public interest concerns, we find that "the local interest in **[**42]** having localized disputes decided at home," "the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action," and "the avoidance of unnecessary problems in . . . the application of foreign law" weigh most heavily in favor of dismissal. *Clerides, 534 F.3d at 628*.

Maui Jim's persuasive comity arguments implicate each of these public interest factors. (*See* MJ EU Mem. at 11-15; MJ EU Reply at 11-13.) "Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 544 n.27, 107 S. Ct. 2542, 2556 n.27, 96 L. Ed. 2d 461 (1987)*. As usually stated, comity

> is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64, 16 S. Ct. 139, 143, 40 L. Ed. 95 (1895). Although some circuits consider international comity a form of abstention doctrine when adjudication would implicate sensitive matters of foreign law, *e.g., Royal & Sun All. Ins. Co. of Canada v. Century Int'l Arms, Inc., 466 F.3d 88, 92 (2d Cir. 2006)*, **[**43]** direct authority to decline to exercise jurisdiction on comity grounds has not been so clearly spelled out in this circuit. *See, e.g., Fischer, 777 F.3d at 854* (describing comity as incorporating a foreign exhaustion principle). However, the public interest factors of *forum non conveniens* overlap with many articulated comity concerns. William S. Dodge, *International Comity in American Law*, *115 Colum. L. Rev. 2071, 2109-10 (2015)* ("Because the doctrine of forum non conveniens allows U.S. courts to restrain their exercise of jurisdiction in deference to foreign courts, it is properly considered a doctrine of international comity."). As the Seventh Circuit has opined, "asking a

U.S. court to wade into an area of EU law that is fraught with uncertainty risks offending principles of international comity," **[*953]** and these "concerns can be more generally addressed under the auspices of the doctrine of forum non conveniens." *Volodarskiy v. Delta Airlines, Inc., 784 F.3d 349, 356 (7th Cir. 2015)*.

To our knowledge, no United States court has entertained a claim under the TFEU's antitrust provisions or its equivalent predecessors. *See* *In re Air Cargo Shipping Servs. Antitrust Litig., No. MD 06-1775JGVVP, 2008 U.S. Dist. LEXIS 107882, 2008 WL 5958061, at *31-34 (E.D.N.Y. Sept. 26, 2008)*, *report and recommendation adopted in part*, *2009 U.S. Dist. LEXIS 97365, 2009 WL 3443405 (E.D.N.Y. Aug. 21, 2009)*, *aff'd*, *697 F.3d 154 (2d Cir. 2012)* (reasoning that EU antitrust claims under TFEU predecessor be dismissed **[**44]** on *forum non conveniens* and international comity grounds, and observing that all other known U.S. courts to consider such claims have refused to exercise jurisdiction over them); *In re Urethane Antitrust Litig., 683 F. Supp. 2d 1214, 1223 (D. Kan. 2010)* (declining supplemental jurisdiction over EU antitrust claim and reporting the parties were "unable to identify any reported case in which a court in the United States exercised jurisdiction over antitrust claims asserted under European law"); 7 Callmann on Unfair Comp., Tr. & Mono. § 28:5 (4th Ed. Dec. 2018 Update) ("Several private antitrust claims based on EC [European Community] law have been filed in American courts, but those courts in their discretion have declined to exercise jurisdiction.").

Being the first U.S. court to adjudicate a TFEU antitrust claim would "undoubtedly raise unsettled issues of EU ***antitrust law***, because the private enforcement of EU ***antitrust law*** is underdeveloped." *In re Air Cargo, 2008 U.S. Dist. LEXIS 107882, 2008 WL 5958061, at *33*. Concurring with this view, Maui Jim submits by uncontested declaration an opinion on European Union law under *Rule 44.1*.[6] (Op. of Aidan Robertson, Queens Counsel (Dkt. No. 199-2).) The opinion states that the "interpretation of EU . . . competition law remains in a state of development," particularly because "development of online **[**45]** retailing and online marketplaces has posed questions as to the compatibility of restrictions on online activity imposed by suppliers on distributors and retailers." (*Id.* ¶ 27.)

Complicating matters is the dual-tiered system of adjudicating European antitrust claims, where unsettled questions of law are determined first in a member state's court, and then, sometimes mandatorily, by recourse to the European Court of Justice ("ECJ"), the highest European Union court. (*Id.* ¶ 28.) *See generally* *In re Air Cargo, 2008 U.S. Dist. LEXIS 107882, 2008 WL 5958061, at *32* (describing European antitrust litigation framework). As the well-reasoned report and recommendation in *In re Air Cargo Shipping Services Antitrust Litigation* similarly found, "This court would be forced to fly blind on these unsettled issues, because it does not have a mechanism by which to obtain an opinion from the ECJ on an unresolved issue of EU ***antitrust law***." *2008 U.S. Dist. LEXIS 107882, [WL] at *33*. That court also concluded that "adjudication, by this court, or any other United States Courts, of the EU claims asserted by plaintiffs could not operate within the framework described above, would disturb the uniformity of EC competition law, and would undermine the European interest in developing its own European ***antitrust law***." **[**46]** *Id.*

Applying the foregoing analysis to the relevant *forum non conveniens* public interest factors, dismissing SBG's EU Antitrust Claim would most saliently avoid **[*954]** "unnecessary problems in . . . the application of foreign law." *Clerides, 534 F.3d at 628*. And while there is a marginal interest in a court in this forum determining whether Maui Jim, an Illinois corporation, engaged in anticompetitive practices, the local interest in alleged European Union antitrust violations sits more comfortably in the European Union than here. *See id.* (enumerating public interest factor of "the local interest in having localized disputes decided at home"). Likewise, "the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action" also points toward adjudication in a European Union member state. *Id.; see* *Volodarskiy, 784 F.3d at 353* ("One good reason to dismiss a case based on forum non conveniens is to avoid the administrative or legal complications of interpreting

[6] Federal *Rule 44.1* states, in relevant part, "In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." *Fed. R. Civ. P. 44.1*.

and applying a foreign country's law. Relatedly, the doctrine permits dismissal in deference to a foreign sovereign's superior competence and public interest in adjudicating its own law." (citations omitted)).

Accordingly, because an available **[**47]** and adequate alternative forum for SBG's EU Antitrust Claim exists in European Union member states, and as the balance of private and public interest factors weighs in favor of dismissal, we grant Maui Jim's motion to dismiss this counterclaim on *forum non conveniens* grounds.

VI. UNJUST ENRICHMENT (COUNT VII)

Count VII of SBG's second amended counterclaim alleges unjust enrichment. (2d Am. Countercl. ¶¶ 91-94.) The claim is identical to that included in the first version of SBG's counterclaims (*see* Dkt. No. 20 ¶¶ 78-81), which we held survived a motion to dismiss in our memorandum opinion and order on an earlier Maui Jim 12(b)(6) motion. (Order at 14-16).

Maui Jim now moves to dismiss SBG's unjust enrichment claim under the *Noerr-Pennington* doctrine. (Dkt. No. 278 ¶ 2; *see* MJ Cal. Mem. at 21-22.) The *Noerr- Pennington* doctrine grants immunity from antitrust liability to those who petition the government through courts to enforce trademark laws against their competitors. *See E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; *Mine Workers v. Pennington, 381 U.S. 657, 670, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*; *BE&K Const. Co. v. N.L.R.B., 536 U.S. 516, 525, 122 S. Ct. 2390, 2396, 153 L. Ed. 2d 499 (2002)* ("These antitrust immunity principles were then extended to situations where groups 'use . . . *courts* to advocate their causes and points of view respecting resolution of their business and economic interests **[**48]** *vis-á-vis* their competitors.'" (quoting *Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511, 92 S. Ct. 609, 612, 30 L. Ed. 2d 642 (1972))*. SBG's counterclaim alleges in part that Maui Jim "knowingly and intentionally used the trademark and copyright laws for the improper use of stifling competition in the relevant market and therein enriched itself" to SBG's detriment. (2d Am. Countercl. ¶ 92.) Maui Jim argues that this allegation "seeks to penalize Maui Jim under an antitrust theory for filing this lawsuit" in contravention of *Noerr-Pennington*. (MJ Cal. Mem. at 21.)

SBG counters that its unjust enrichment counterclaim encompasses conduct well beyond Maui Jim's present suit, including that Maui Jim defamed SBG and thereby caused SBG to suffer harm in the marketplace. (SBG Cal. Resp. at 13; 2d Am. Countercl. ¶¶ 41.) Indeed, similar allegations in SBG's original counterclaims led us to conclude that its claim for unjust **[*955]** enrichment could survive the earlier motion to dismiss. As we stated then:

> Taking SmartBuyGlasses' allegations as true, it has set forth a plausible claim that Maui Jim publicized false allegations and commentary regarding SmartBuyGlasses' products in a press release, thereby wrongfully disparaging SmartBuyGlasses' business and falsely asserting it sells counterfeit **[**49]** products. (Counterclaim ¶¶ 2, 29, 34-35.) SmartBuyGlasses alleges it has suffered harm in the marketplace as a result. (*Id.* ¶ 35.) The counterclaim therefore connects Maui Jim's unjust benefit (increased prices of its products due to its allegedly anti-competitive and fraudulent conduct) to a detriment to SmartBuyGlasses (disparagement of its products as counterfeit). *Cleary [v. Philip Morris Inc.*], 656 F.3d [511,] 518-20 [(7th Cir. 2011)]. As a result, SmartBuyGlasses' allegations in Count VIII [for unjust enrichment] are sufficient to survive dismissal at this stage.

(Order at 16.) Although, in the present opinion, we grant in part Maui Jim's motion to dismiss SBG's defamation claim based on the press release referenced in the above passage, we also deny in part that motion based on other alleged defamation that goes beyond this suit, *see supra* Part II(A). "[I]f an unjust enrichment claim rests on the same improper conduct alleged in another claim, then the unjust enrichment claim will be tied to this related claim—and, of course, unjust enrichment will stand or fall with the related claim." *Cleary, 656 F.3d at 517*. SBG's unjust enrichment claim encompasses all of its allegations, including those that make up its defamation claim and which survive this opinion. (**[**50]** *See* 2d Am. Countercl. ¶¶ 29-30, 91.) The *Noerr*-*Pennington* doctrine thus does not bar this claim, because it covers allegations going beyond the current suit. We therefore deny Maui Jim's motion to dismiss Count VII.

VII. MOTION TO STRIKE AFFIRMATIVE DEFENSES

In addition to its motions to dismiss, Maui Jim also moves under *Rule 12(f)* to strike two affirmative defenses that SBG pleaded in its answer. (Dkt. No. 278 ¶¶ 3-4.) We consider each argument in turn.

A. First Affirmative Defense

Maui Jim moves to strike SBG's first affirmative defense, "inequitable restraint of trade." (*Id.* ¶ 3; Answer (Dkt. No. 259) at 31.) This affirmative defense reads:

> Maui Jim's use of its trademarks in violation of the antitrust laws precludes enforcement of the trademarks at issue on both equitable grounds and under *§ 33(b)(7) of Lanham Act. 15 U.S.C. § 1115(b)(7)*. Plaintiffs are attempting to misuse their trademarks to acquire a monopoly in violation of U.S. antitrust laws.

(Answer at 31.) Maui Jim argues first that this defense should be stricken because it depends on SBG's deficient Sherman Act claim. (MJ Cal. Mem. at 15.) Maui Jim also argues that under the *Noerr-Pennington* doctrine, SBG is foreclosed from arguing that Maui Jim is using its suit **[**51]** against SBG to violate antitrust laws. (*Id.* at 16-18.)

SBG agrees that its Sherman Act claim is "coterminous" with its first affirmative defense, and the allegation that Maui Jim is "attempting to misuse their trademarks to acquire a monopoly in violation of U.S. antitrust laws" refers to SBG's Sherman Act claim, not to Maui Jim's lawsuit. (SBG Cal. Resp. at 9; Answer at 31.) As SBG's Sherman Act claim is dismissed, *see supra* Part III, its "coterminous" defense also fails.

[*956] However, SBG argues that *Section 33(b)(7)* of the Lanham Act can operate as an independent affirmative defense. (SBG Cal. Resp. at 10-11.) *Section 33(b)(7)* allows a defense if a "mark has been or is being used to violate the antitrust laws of the United States." *15 U.S.C. § 1115(b)(7)*. Assuming only for purposes of this opinion that *Section 33(b)(7)* provides an affirmative defense, SBG has no surviving claim that Maui Jim's use of trademark violates the antitrust laws. SBG's affirmative defense alleges no ground for antitrust violation that we have not already addressed. And SBG implicitly admits that its defense could not be based on Maui Jim's lawsuit. (SBG Cal. Resp. at 9 (arguing *Noerr-Pennington* not implicated because the defense "relates to [SBG's] Sherman Act claim rather than the mere fact **[**52]** that Maui Jim filed the instant lawsuit" (citation omitted).) *BE&K Const. Co., 536 U.S. at 525, 122 S. Ct. at 2396*; *California Motor Transport Co., 404 U.S. at 511, 92 S. Ct. at 612*.

SBG's cited authority is not to the contrary. SBG relies on *Dell, Inc. v. 3K Computers, LLC, No. 08-80455-CIV, 2008 U.S. Dist. LEXIS 108398, 2008 WL 6600766, at *1 (S.D. Fla. Oct. 7, 2008)*, for the proposition that *Section 33(b)(7)* is an affirmative defense. (*See* SBG Cal. Resp. at 10.) But that case found an affirmative defense under *Section 33(b)(7)* could not stand because the defendant's only Sherman Act claim derived from the plaintiff's lawsuit, and the *Noerr-Pennington* doctrine barred the defense. *Dell, Inc., 2008 U.S. Dist. LEXIS 108398, 2008 WL 6600766, at *3* (because defendant's only ground for liability under the Sherman Act against plaintiff failed, "there is no longer a legal basis for [defendant's*] § 1115(b)(7)* affirmative defense"). Similarly, the other case SBG cites, *Phi Delta Theta Fraternity v. J.A. Buchroeder & Co., 251 F. Supp. 968, 975 (W.D. Mo. 1966)*, found that *Section 33(b)(7)* was an affirmative defense when a violation of antitrust laws had also been established. (SBG Cal. Resp. at 11.) Such is not the case here.

For these reasons, we strike SBG's first affirmative defense for failure to "withstand a 12(b)(6) challenge," with prejudice. *Sarkis' Cafe, Inc., 55 F. Supp. 3d at 1039*; *see also* *Thermos Co. v. Igloo Prods. Corp., No. 93 C 5826, 1995 U.S. Dist. LEXIS 18382, 1995 WL 745832, at *8 (N.D. Ill. Dec. 13, 1995)* (adopting Report and Recommendation that affirmative defense based on violation of antitrust laws be stricken because it relied on antitrust counterclaims that failed to state a claim).

B. Fourth Affirmative Defense

Maui Jim also moves to strike **[**53]** SBG's fourth affirmative defense. (Dkt. No. 278 ¶ 4.)[7] This defense reads:

> Maui Jim broadly asserts Lanham Act claims that unfairly and improperly intend to restrain legitimate competition in genuine Maui Jim products sold outside distribution channels that Maui Jim desires and the prosecution of these claims is undertaken with unclean hands, rendering Maui Jim's asserted rights unenforceable.

(Answer at 32.) Maui Jim argues that SBG's unclean hands defense cannot stand because it relies solely on the fact of Maui Jim's suit against SBG. (MJ Cal. Mem. at 20-21.)

"The unclean hands doctrine provides that a party to a lawsuit may not obtain the relief it seeks if it has engaged in wrongful conduct." *Smith v. United States, 293 F.3d 984, 988 (7th Cir. 2002)*. "The bad conduct constituting unclean **[*957]** hands must involve fraud, unconscionability or bad faith toward the party proceeded against, and must pertain to the subject matter involved and affect the equitable relations between the litigants." *Int'l Union, Allied Indus. Workers of Am., v. Local Union No. 589, Allied Indus. Workers of Am., 693 F.2d 666, 672 (7th Cir. 1982)* (internal quotations and citations omitted). Although unclean hands is not listed in the Lanham Act, "courts have recognized it as an affirmative defense to claims of trademark infringement." *Sarkis' Cafe, Inc. v. Sarks in the Park, LLC, No. 12 C 9686, 2016 U.S. Dist. LEXIS 22566, 2016 WL 723135, at *2 (N.D. Ill. Feb. 24, 2016)*; *see also* *R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc., No. 99 C 1174, 2001 U.S. Dist. LEXIS 8896, 2001 WL 747422, at *2 (N.D. Ill. June 29, 2001)* ("In appropriate cases, 'unclean hands can constitute **[**54]** a bar to some or all of the relief sought for trademark infringement or unfair competition.'" (quoting J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 31.47 (5th ed. 2001) ("*McCarthy on Trademarks*"))).

"The allegedly unfair or improper filing of a trademark infringement lawsuit cannot itself constitute a basis for an unclean hands defense to that lawsuit." 6 *McCarthy on Trademarks* § 31:51 (5th ed. March 2019 Update). This is because "[t]he act of bringing the lawsuit is not the subject matter concerning which plaintiff seeks relief. Unclean hands must relate to the getting or using the alleged trademark rights." *Id.; see also* *Coach, Inc. v. Kmart Corps., 756 F. Supp. 2d 421, 429 (S.D.N.Y. 2010)* ("Filing a trademark or trade dress infringement lawsuit, therefore, cannot be a basis for an unclean hands defense to that lawsuit because any bad faith or inequitable conduct in filing the lawsuit is unrelated to the plaintiff's acquisition or use of the trademark or trade dress rights."); *Ty, Inc. v. Publ'n Int'l, Ltd.*, No. 99 C 5565, 2004 WL 1588256, at *1-2 (N.D. Ill. July 16, 2004) (citing *McCarthy on Trademarks* § 31:51 and finding that a trademark misuse defense based on the plaintiff's filing the present lawsuit could not stand).

SBG contends that its defense is not limited to Maui Jim's filing of the instant suit, but instead refers to Maui Jim's "use" **[**55]** of its trademarks and its "intent" in filing the current suit. (SBG Cal. Resp. at 12.) We do not agree. SBG's defense states that "Maui Jim broadly asserts Lanham Act claims that unfairly and improperly intend to restrain legitimate competition," and that Maui Jim's "prosecution of these claims is undertaken with unclean hands." (Answer at 32.) The defense squarely alleges that Maui Jim has unclean hands because of its law suit, and as such, it fails as a matter of law. *Coach, Inc., 756 F. Supp. 2d at 429*. We therefore grant Maui Jim's motion to strike this affirmative defense. However, because it may be possible for SBG to adequately plead an unclean hands defense that relates to Maui Jim's use of trademark beyond this suit, we do so without prejudice.

CONCLUSION

For the foregoing reasons, we grant Maui Jim's motion to dismiss Counts I, III, IV, V, and VI of SBG's second amended counterclaim. (Dkt. No. 184, 196, 278.) We grant in part and deny in part Maui Jim's motion to dismiss SBG's Count II. (Dkt. No. 184.) We deny Maui Jim's motion to dismiss Count VII. (Dkt. No. 278.) Finally, we grant Maui Jim's motion to strike SBG's first affirmative defense with prejudice, and fourth affirmative defense (unclean hands) without **[**56]** prejudice. (*Id.*) It is so ordered.

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[7] Two of SBG's affirmative defenses are labeled "Fourth Defense," one for exhaustion and the other for unclean hands. (Answer at 31-32.) Maui Jim's motion to strike is directed at SBG's unclean hands defense. (MJ Cal. Mem. at 20.)

/s/ Marvin E. Aspen

Honorable Marvin E. Aspen

United States District Judge

Dated: May 10, 2019

Chicago, Illinois

Apple Inc. v. Pepper

Supreme Court of the United States

November 26, 2018, Argued; May 13, 2019, Decided

No. 17-204.

Reporter
139 S. Ct. 1514 *; 203 L. Ed. 2d 802 **; 2019 U.S. LEXIS 3397 ***; 2019-1 Trade Cas. (CCH) P80,762; 27 Fla. L. Weekly Fed. S 796; 2019 WL 2078087

APPLE INC., Petitioner v. ROBERT PEPPER, et al.

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Subsequent History: Remanded by, Motion denied by *Pepper v. Apple Inc. (In re Apple iPhone Antitrust Litig.), 2019 U.S. App. LEXIS 21057 (9th Cir. Cal., July 16, 2019)*

Prior History: [*1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Pepper v. Apple Inc. (In re Apple iPhone Antitrust Litig.), 846 F.3d 313, 2017 U.S. App. LEXIS 577 (9th Cir. Cal., Jan. 12, 2017)

Disposition: Affirmed.

Core Terms

retailer, consumers, antitrust, monopolistic, developers, iPhone, manufacturer, overcharge, purchasers, prices, damages, violator, supplier, chain, monopoly, pass-on, anti trust law, higher-than-competitive, suits, proximate cause, markup, complicated, customers, upstream, Shoe, buy, statutory text, intermediary, contractors, monopolize

LexisNexis® Headnotes

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

***HN1*[]** **Scope, Monopolization Offenses**

Section 2 of the Sherman Act, *15 U.S.C.S. § 2*, makes it unlawful for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations. *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Scope

HN2[] Clayton Act, Claims

Section 4 of the Clayton Act, *15 U.S.C.S. § 15*, provides that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue the defendant and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. *15 U.S.C.S. § 15(a)*. The broad text of *§ 4*—any person who has been injured by an antitrust violator may sue—readily covers consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Scope

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

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

HN3[] Clayton Act, Claims

Applying *§ 4 of the Clayton Act*, *15 U.S.C.S. § 15*, the U.S. Supreme Court has consistently stated that the immediate buyers from the alleged antitrust violators may maintain a suit against the antitrust violators. At the same time, incorporating principles of proximate cause into *§ 4*, the U.S. Supreme Court has ruled that indirect purchasers who are two or more steps removed from the violator in a distribution chain may not sue. The U.S. Supreme Court's decision in Illinois Brick established a bright-line rule that authorizes suits by direct purchasers but bars suits by indirect purchasers.

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

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

HN4[] Purchasers, Direct Purchasers

The bright-line rule of the U.S. Supreme Court's decision in Illinois Brick means that indirect purchasers who are two or more steps removed from the antitrust violator in a distribution chain may not sue. By contrast, direct purchasers—that is, those who are the immediate buyers from the alleged antitrust violators—may sue. For example, if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A. But B may sue A if A is an antitrust violator. And C may sue B if B is an antitrust violator. That is the straightforward rule of Illinois Brick.

Antitrust & Trade Law > Clayton Act > Claims

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

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

Antitrust & Trade Law > Clayton Act > Scope

HN5[] Clayton Act, Claims

The U.S. Supreme Court's precedent in Illinois Brick established a bright-line rule where direct purchasers may sue antitrust violators from whom they purchased a good or service. Illinois Brick was not based on an economic theory about who set the price. Rather, Illinois Brick sought to ensure an effective and efficient litigation scheme in antitrust cases. To do so, the Court drew a bright line that allowed direct purchasers to sue but barred indirect purchasers from suing. When there is no intermediary between the purchaser and the antitrust violator, the purchaser may sue. The Illinois Brick bright-line rule is grounded on the belief that simplified administration improves antitrust enforcement. To the extent that Illinois Brick leaves any ambiguity about whether a direct purchaser may sue an antitrust violator, the court should resolve that ambiguity in the direction of the statutory text. And under the text, direct purchasers from monopolistic retailers are proper plaintiffs to sue those retailers.

Lawyers' Edition Display

Decision

[802]** Where only place at which owners of particular brand of cell phone lawfully could buy apps for their phones was at brand manufacturer's retail app store, owners were direct apps purchasers who were allowed to sue manufacturer for alleged monopolization.

Summary

Overview: HOLDINGS: [1]-The cellphone owners were proper plaintiffs for an antitrust suit, which alleged that the corporation exercised monopoly power in the retail market for the sale of applications (hereinafter, apps) and had unlawfully used its monopoly power to force cellphone owners to pay the corporation higher-than-competitive prices for the apps, because, under *Illinois Brick Co. v. Illinois (1977) 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707, 1977 U.S. LEXIS 105*, the owners were direct purchasers who might have sued the corporation for alleged monopolization since the owners bought the apps directly from the corporation.

Outcome: Judgment affirmed. 5-4 Decision; 1 Dissent.

Headnotes

[803]**

Restraints of Trade, Monopolies, and Unfair Trade Practices § 5 > MONOPOLIZATION -- SHERMAN ACT > Headnote:
LEdHN1.[] 1.

Section 2 of the Sherman Act (*15 U.S.C.S. § 2*) makes it unlawful for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations. *15 U.S.C.S. § 2*. (Kavanaugh, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices § 67.6 > MONOPOLISTIC RETAILER -- SUITS BY CONSUMERS -- CLAYTON ACT > Headnote:
LEdHN2.[] 2.

Section 4 of the Clayton Act (*15 U.S.C.S. § 15*) provides that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue the defendant and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. *15 U.S.C.S. § 15(a)*. The broad text of *§ 4*--any person who has been injured by an antitrust violator may sue--readily covers consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer. (Kavanaugh, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices § 67.6 > SUITS -- IMMEDIATE AND INDIRECT BUYERS -- CLAYTON ACT > Headnote:
LEdHN3.[] 3.

Applying *§ 4* of the Clayton Act (*15 U.S.C.S. § 15*), the U.S. Supreme Court has consistently stated that the immediate buyers from the alleged antitrust violators may maintain a suit against the antitrust violators. At the same time, incorporating principles of proximate cause into *§ 4*, the U.S. Supreme Court has ruled that indirect purchasers who are two or more steps removed from the violator in a distribution chain may not sue. The U.S. Supreme Court's decision in *Illinois Brick Co. v. Illinois (1977) 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707, 1977 U.S. LEXIS 105*, established a bright-line rule that authorizes suits by direct purchasers but bars suits by indirect purchasers. (Kavanaugh, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices § 67.6 > SUITS -- DIRECT AND INDIRECT PURCHASERS > Headnote:
LEdHN4.[] 4.

The bright-line rule of the U.S. Supreme Court's decision in *Illinois Brick Co. v. Illinois (1977) 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707, 1977 U.S. LEXIS 105*, means that indirect purchasers who are two or more steps removed from the antitrust violator in a distribution chain may not sue. By contrast, direct purchasers--that is, those who are the immediate buyers from the alleged antitrust violators--may sue. For example, if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A. But B may sue A if A is an antitrust violator. And C may sue B if B is an antitrust violator. That is the straightforward rule of Illinois Brick. (Kavanaugh, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

[804]**

Restraints of Trade, Monopolies, and Unfair Trade Practices § 67.6 > SUITS -- DIRECT AND INDIRECT PURCHASERS > Headnote:
LEdHN5.[] 5.

The U.S. Supreme Court's precedent in *Illinois Brick Co. v. Illinois (1977) 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707, 1977 U.S. LEXIS 105*, established a bright-line rule where direct purchasers may sue antitrust violators from whom they purchased a good or service. Illinois Brick was not based on an economic theory about who set the price. Rather, Illinois Brick sought to insure an effective and efficient litigation scheme in antitrust cases. To do so, the court drew a bright line that allowed direct purchasers to sue but barred indirect purchasers from suing. When there is no intermediary between the purchaser and the antitrust violator, the purchaser may sue. The Illinois Brick bright-line rule is grounded on the belief that simplified administration improves antitrust enforcement. To the extent that Illinois Brick leaves any ambiguity about whether a direct purchaser may sue an antitrust violator, the court should resolve that ambiguity in the direction of the statutory text. And under the text, direct purchasers from monopolistic retailers are proper plaintiffs to sue those retailers. (Kavanaugh, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

Syllabus

[*1517] Apple Inc. sells iPhone applications, or apps, directly to iPhone owners through its App Store--the only place where iPhone owners may lawfully buy apps. Most of those apps are created by independent developers under contracts with Apple. Apple charges the developers a $99 annual membership fee, allows them to set the retail price of the apps, and **[**805]** charges a 30% commission on every app sale. Respondents, four iPhone owners, sued Apple, alleging that the company has unlawfully monopolized the aftermarket for iPhone apps. Apple moved to dismiss, arguing that the iPhone owners could not sue because they were not direct purchasers from Apple under *Illinois Brick Co. v. Illinois, 431 U. S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707*. The District Court agreed, but the Ninth Circuit reversed, concluding that the iPhone owners were direct purchasers because they purchased apps directly from Apple.

Held: Under *Illinois Brick*, the iPhone owners were direct purchasers who may sue Apple for alleged monopolization. *Pp. ___ - ___, 203 L. Ed. 2d, at 808-814*.

(a) This straightforward conclusion follows from the text of the antitrust laws and from this Court's precedent. *Section 4* of the Clayton Act provides that "any person who shall **[***2]** be injured in his business or property by reason of anything forbidden in the antitrust laws may sue." *15 U. S. C. §15(a)*. That broad text readily covers consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer. Applying *§4*, this Court has consistently stated that "the immediate buyers from the alleged antitrust violators" may maintain a suit against the antitrust violators, *Kansas v. UtiliCorp United Inc., 497 U. S. 199, 207, 110 S. Ct. 2807, 111 L. Ed. 2d 169*, but has ruled that *indirect* purchasers who are two or more steps removed from the violator in a distribution chain may not sue. Unlike the consumer in *Illinois Brick*, the iPhone owners here are not consumers at the bottom of a vertical distribution chain who are attempting to sue manufacturers at the top of the chain. The absence of an intermediary in the distribution chain between Apple and the consumer is dispositive. *Pp. ___ - ___, 203 L. Ed. 2d, at 808-809*.

(b) Apple argues that *Illinois Brick* allows consumers to sue only the party who sets the retail price, whether or not the party sells the good or service directly to the complaining party. But that theory suffers from three main problems. First, it contradicts statutory text and precedent by requiring the Court to rewrite the rationale of *Illinois **[***3]** Brick* and to gut its longstanding bright-line rule. Any ambiguity in *Illinois Brick* should be resolved in the direction of the statutory text, which states that "any person" injured by an antitrust violation may sue to recover damages. Second, Apple's theory is not persuasive economically or legally. It would draw an arbitrary and unprincipled line among retailers based on their financial arrangements with their manufacturers or suppliers. And it would permit a consumer to sue a monopolistic retailer when the retailer set the retail price by marking up the price it had paid the manufacturer or supplier for the good or service but not when the manufacturer or supplier set the retail price and the retailer took a commission on each sale. Third, Apple's theory would provide a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade antitrust **[*1518]** claims by consumers and thereby thwart effective antitrust enforcement. *Pp. ___ - ___, 203 L. Ed. 2d, at 809-812*.

(c) Contrary to Apple's argument, the three *Illinois Brick* rationales for adopting the direct-purchaser rule cut **[**806]** strongly in respondents' favor. First, Apple posits that allowing only the upstream app developers--and not **[***4]** the downstream consumers--to sue Apple would mean more effective antitrust enforcement. But that makes little sense, and it would directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases. Second, Apple warns that calculating the damages in successful consumer antitrust suits against monopolistic retailers might be complicated. But *Illinois Brick* is not a get-out-of-court-free card for monopolistic retailers to play any time that a damages calculation might be complicated. Third, Apple claims that allowing consumers to sue will result in "conflicting claims to a common fund--the amount of the alleged overcharge." *Illinois Brick, 431 U. S., at 737, 97 S. Ct. 2061, 52 L. Ed. 2d 707*. But this is not a case where multiple parties at different levels of a distribution chain are trying to recover the same passed-through overcharge initially levied by the manufacturer at the top of the chain, cf. *id., at 726-727, 97 S. Ct. 2061, 52 L. Ed. 2d 707*. *Pp. ___ - ___, 203 L. Ed. 2d, at 812-814*.

846 F.3d 313, affirmed.

Counsel: Daniel M. Wall argued the cause for petitioner.

Noel J. Francisco argued the cause for the United States, as amicus curiae, by special leave of court.

David C. Frederick argued the cause for respondents.

Judges: Roberts, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh. **[***5]**

Opinion by: KAVANAUGH

Opinion

Justice **Kavanaugh** delivered the opinion of the Court.

In 2007, Apple started selling iPhones. The next year, Apple launched the retail App Store, an electronic store where iPhone owners can purchase iPhone applications from Apple. Those "apps" enable iPhone owners to send messages, take photos, watch videos, buy clothes, order food, arrange transportation, purchase concert tickets, donate to charities, and the list goes on. "There's an app for that" has become part of the 21st-century American lexicon.

In this case, however, several consumers contend that Apple charges too much for apps. The consumers argue, in particular, that Apple has monopolized the retail market for the sale of apps and has unlawfully used its monopolistic power to charge consumers higher-than-competitive prices.

[*1519] A claim that a monopolistic retailer (here, Apple) has used its monopoly to overcharge consumers is a classic antitrust claim. But Apple asserts that the consumer-plaintiffs in this case may not sue Apple because they supposedly were not "direct purchasers" from Apple under our decision in *Illinois Brick Co. v. Illinois, 431 U. S. 720, 745-746, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. We disagree. The plaintiffs purchased apps directly from Apple and therefore are direct purchasers under ***[***6]*** *Illinois Brick*. At this early pleadings stage of the litigation, we do not assess the merits of the plaintiffs' antitrust claims against Apple, nor do we consider any other defenses Apple might have. We merely hold that the *Illinois Brick* direct-purchaser rule does not bar these plaintiffs from suing Apple under the antitrust laws. We affirm the **[**807]** judgment of the U. S. Court of Appeals for the Ninth Circuit.

I

In 2007, Apple began selling iPhones. In July 2008, Apple started the App Store. The App Store now contains about 2 million apps that iPhone owners can download. By contract and through technological limitations, the App Store is the only place where iPhone owners may lawfully buy apps.

For the most part, Apple does not itself create apps. Rather, independent app developers create apps. Those independent app developers then contract with Apple to make the apps available to iPhone owners in the App Store.

Through the App Store, Apple sells the apps directly to iPhone owners. To sell an app in the App Store, app developers must pay Apple a $99 annual membership fee. Apple requires that the retail sales price end in $0.99, but otherwise allows the app developers to set the retail price. **[***7]** Apple keeps 30 percent of the sales price, no matter what the sales price might be. In other words, Apple pockets a 30 percent commission on every app sale.

In 2011, four iPhone owners sued Apple. They allege that Apple has unlawfully monopolized "the iPhone apps aftermarket." App. to Pet. for Cert. 53a. The plaintiffs allege that, via the App Store, Apple locks iPhone owners "into buying apps only from Apple and paying Apple's 30% fee, even if" the iPhone owners wish "to buy apps elsewhere or pay less." *Id.,* at 45a. According to the complaint, that 30 percent commission is "pure profit" for Apple and, in a competitive environment with other retailers, "Apple would be under considerable pressure to substantially lower its 30% profit margin." *Id.,* at 54a-55a. The plaintiffs allege that in a competitive market, they would be able to "choose between Apple's high-priced App Store and less costly alternatives." *Id.,* at 55a. And they allege that they have "paid more for their iPhone apps than they would have paid in a competitive market." *Id.,* at 53a.

Apple moved to dismiss the complaint, arguing that the iPhone owners were not direct purchasers from Apple and therefore may not sue. In *Illinois Brick*, this Court held that direct **[***8]** purchasers may sue antitrust violators, but also ruled that indirect purchasers may not sue. The District Court agreed with Apple and dismissed the complaint. According to the District Court, the iPhone owners were not direct purchasers from Apple because the app developers, not Apple, set the consumers' purchase price.

The Ninth Circuit reversed. The Ninth Circuit concluded that the iPhone owners were direct purchasers under *Illinois Brick* because the iPhone owners purchased apps directly from Apple. According to the Ninth Circuit, *Illinois Brick* means that a consumer may not sue an alleged monopolist who is two or more **[*1520]** steps removed from the consumer in a vertical distribution chain. See *In re Apple iPhone Antitrust Litig., 846 F. 3d 313, 323 (2017)*. Here, however, the consumers purchased directly from Apple, the alleged monopolist. Therefore, the Ninth Circuit held that the iPhone owners could sue Apple for allegedly monopolizing the sale of iPhone apps and charging higher-than-competitive **[**808]** prices. *Id., at 324*. We granted certiorari. *585 U. S. ___, 138 S. Ct. 2647, 201 L. Ed. 2d 1049 (2018)*.

II

A

The plaintiffs' allegations boil down to one straightforward claim: that Apple exercises monopoly power in the retail market for the sale of apps and has unlawfully used its monopoly power to force iPhone **[***9]** owners to pay Apple higher-than-competitive prices for apps. According to the plaintiffs, when iPhone owners want to purchase an app, they have only two options: (1) buy the app from Apple's App Store at a higher-than-competitive price or (2) do not buy the app at all. Any iPhone owners who are dissatisfied with the selection of apps available in the App Store or with the price of the apps available in the App Store are out of luck, or so the plaintiffs allege.

The sole question presented at this early stage of the case is whether these consumers are proper plaintiffs for this kind of antitrust suit—in particular, our precedents ask, whether the consumers were "direct purchasers" from Apple. *Illinois Brick, 431 U. S., at 745-746, 97 S. Ct. 2061, 52 L. Ed. 2d 707*. It is undisputed that the iPhone owners bought the apps directly from Apple. Therefore, under *Illinois Brick*, the iPhone owners were direct purchasers who may sue Apple for alleged monopolization.

That straightforward conclusion follows from the text of the antitrust laws and from our precedents.

First is text: ***HN1***[] ***LEdHN[1]***[] [1] *Section 2 of the Sherman Act* makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade **[***10]** or commerce among the several States, or with foreign nations." *26 Stat. 209*, *15 U. S. C. §2*. ***HN2***[] ***LEdHN[2]***[] [2] *Section 4 of the Clayton Act* in turn provides that "*any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . the defendant . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 38 Stat. 731, *15 U. S. C. §15(a)* (emphasis added). The broad text of *§4*—"any person" who has been "injured" by an antitrust violator may sue—readily covers consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer.

Second is precedent: **HN3**[] **LEdHN[3]**[] [3] Applying §4, we have consistently stated that "the immediate buyers from the alleged antitrust violators" may maintain a suit against the antitrust violators. *Kansas v. UtiliCorp United Inc., 497 U. S. 199, 207, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990)*; see also *Illinois Brick, 431 U. S., at 745-746, 97 S. Ct. 2061, 52 L. Ed. 2d 707*. At the same time, incorporating principles of proximate cause into §4, we have ruled that *indirect* purchasers who are two or more steps removed from the violator in a distribution chain may not sue. Our decision in *Illinois Brick* established a bright-line rule that authorizes suits by *direct* **[**809]** purchasers but bars suits by *indirect* purchasers. *Id., at 746, 97 S. Ct. 2061, 52 L. Ed. 2d 707*. [1]

[*1521] The facts of *Illinois* ***[***11]*** *Brick* illustrate the rule. Illinois Brick Company manufactured and distributed concrete blocks. Illinois Brick sold the blocks primarily to masonry contractors, and those contractors in turn sold masonry structures to general contractors. Those general contractors in turn sold their services for larger construction projects to the State of Illinois, the ultimate consumer of the blocks.

The consumer State of Illinois sued the manufacturer Illinois Brick. The State alleged that Illinois Brick had engaged in a conspiracy to fix the price of concrete blocks. According to the complaint, the State paid more for the concrete blocks than it would have paid absent the price-fixing conspiracy. The monopoly overcharge allegedly flowed all the way down the distribution chain to the ultimate consumer, who was the State of Illinois.

This Court ruled that the State could not bring an antitrust action against Illinois Brick, the alleged violator, because the State had not purchased concrete blocks directly from Illinois Brick. The proper plaintiff to bring that claim against Illinois Brick, the Court stated, would be an entity that had purchased directly from Illinois Brick. *Ibid*.

HN4[] **LEdHN[4]**[] [4] The bright-line rule **[***12]** of *Illinois Brick*, as articulated in that case and as we reiterated in *UtiliCorp*, means that indirect purchasers who are two or more steps removed from the antitrust violator in a distribution chain may not sue. By contrast, direct purchasers—that is, those who are "the immediate buyers from the alleged antitrust violators"—may sue. *UtiliCorp, 497 U. S., at 207, 110 S. Ct. 2807, 111 L. Ed. 2d 169*.

For example, if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A. But B may sue A if A is an antitrust violator. And C may sue B if B is an antitrust violator. That is the straightforward rule of *Illinois Brick*. See *Loeb Industries, Inc. v. Sumitomo Corp., 306 F. 3d 469, 481-482 (CA7 2002)* (Wood, J.). [2]

In this case, unlike in *Illinois Brick*, the iPhone owners are not consumers at the bottom of a vertical distribution chain who are attempting to sue manufacturers at the top of the chain. There is no intermediary in the distribution chain between Apple and the consumer. The iPhone owners purchase apps directly from the retailer Apple, who is the alleged antitrust violator. The iPhone owners pay the alleged overcharge directly to Apple. The absence of an intermediary is dispositive. Under *Illinois Brick*, the iPhone owners are direct purchasers from Apple **[***13]** and are proper plaintiffs to maintain this antitrust suit.

B

All of that seems simple enough. **[**810]** But Apple argues strenuously against that seemingly simple conclusion, and we address its arguments carefully. For this kind of retailer case, Apple's theory is that *Illinois Brick* allows consumers to sue only the party who sets the retail price, whether or not that party sells the good or service directly to the complaining party. Apple says that its theory accords with the economics of the transaction. Here, Apple argues that the app developers, not Apple, set the retail price charged to consumers, **[*1522]** which according to Apple means that the consumers may not sue Apple.

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[1] *Illinois Brick* held that the direct-purchaser requirement applies to claims for damages. *Illinois Brick* did not address injunctive relief, and we likewise do not address injunctive relief in this case.

[2] Thirty States and the District of Columbia filed an *amicus* brief supporting the plaintiffs, and they argue that C should be able to sue A in that hypothetical. They ask us to overrule *Illinois Brick* to allow such suits. In light of our ruling in favor of the plaintiffs in this case, we have no occasion to consider that argument for overruling *Illinois Brick*.

We see three main problems with Apple's "who sets the price" theory.

First, Apple's theory contradicts statutory text and precedent. As we explained above, the text of *§4* broadly affords injured parties a right to sue under the antitrust laws. And ***HN5***[] ***LEdHN[5]***[] [5] our precedent in *Illinois Brick* established a bright-line rule where direct purchasers such as the consumers here may sue antitrust violators from whom they purchased a good or service. *Illinois Brick*, as we read the opinion, was not based on an economic theory about who set the price. Rather, **[***14]** *Illinois Brick* sought to ensure an effective and efficient litigation scheme in antitrust cases. To do so, the Court drew a bright line that allowed direct purchasers to sue but barred indirect purchasers from suing. When there is no intermediary between the purchaser and the antitrust violator, the purchaser may sue. The *Illinois Brick* bright-line rule is grounded on the "belief that simplified administration improves antitrust enforcement." 2A P. Areeda, H. Hovenkamp, R. Blair, & C. Durrance, ***Antitrust Law*** ¶346e, p. 194 (4th ed. 2014) (Areeda & Hovenkamp). Apple's theory would require us to rewrite the rationale of *Illinois Brick* and to gut the longstanding bright-line rule.

To the extent that *Illinois Brick* leaves any ambiguity about whether a direct purchaser may sue an antitrust violator, we should resolve that ambiguity in the direction of the statutory text. And under the text, direct purchasers from monopolistic retailers are proper plaintiffs to sue those retailers.

Second, in addition to deviating from statutory text and precedent, Apple's proposed rule is not persuasive economically or legally. Apple's effort to transform *Illinois Brick* from a direct-purchaser rule to a "who **[***15]** sets the price" rule would draw an arbitrary and unprincipled line among retailers based on retailers' financial arrangements with their manufacturers or suppliers.

In the retail context, the price charged by a retailer to a consumer is often a result (at least in part) of the price charged by the manufacturer or supplier to the retailer, or of negotiations between the manufacturer or supplier and the retailer. Those agreements between manufacturer or supplier and retailer may take myriad forms, including for example a markup pricing model or a commission pricing model. In a traditional markup pricing model, a hypothetical monopolistic retailer might pay $6 to the manufacturer and then sell the product for $10, keeping $4 for itself. In a commission pricing model, the retailer might pay nothing to the manufacturer; agree with the manufacturer that the retailer will sell the product for $10 and keep 40 percent of the sales price; and then sell the product for $10, send $6 back to the manufacturer, **[**811]** and keep $4. In those two different pricing scenarios, everything turns out to be economically the same for the manufacturer, retailer, and consumer.

Yet Apple's proposed rule would allow a **[***16]** consumer to sue the monopolistic retailer in the former situation but not the latter. In other words, under Apple's rule a consumer could sue a monopolistic retailer when the retailer set the retail price by marking up the price it had paid the manufacturer or supplier for the good or service. But a consumer could not sue a monopolistic retailer when the manufacturer or supplier set the retail price and the retailer took a commission on each sale.

Apple's line-drawing does not make a lot of sense, other than as a way to gerrymander Apple out of this and similar **[*1523]** lawsuits. In particular, we fail to see why the form of the upstream arrangement between the manufacturer or supplier and the retailer should determine whether a monopolistic retailer can be sued by a downstream consumer who has purchased a good or service directly from the retailer and has paid a higher-than-competitive price because of the retailer's unlawful monopolistic conduct. As the Court of Appeals aptly stated, "the distinction between a markup and a commission is immaterial." *846 F. 3d, at 324*. A leading antitrust treatise likewise states: "Denying standing because 'title' never passes to a broker is an overly lawyered approach that **[***17]** ignores the reality that a distribution system that relies on brokerage is economically indistinguishable from one that relies on purchaser-resellers." 2A Areeda & Hovenkamp ¶345, at 183. If a retailer has engaged in unlawful monopolistic conduct that has caused consumers to pay higher-than-competitive prices, it does not matter how the retailer structured its relationship with an upstream manufacturer or supplier—whether, for example, the retailer employed a markup or kept a commission.

To be sure, if the monopolistic retailer's conduct has not caused the consumer to pay a higher-than-competitive price, then the plaintiff's damages will be zero. Here, for example, if the competitive commission rate were 10 percent rather than 30 percent but Apple could prove that app developers in a 10 percent commission system would always set a higher price such that consumers would pay the same retail price regardless of whether Apple's commission was 10 percent or 30 percent, then the consumers' damages would presumably be zero. But we cannot assume in all cases—as Apple would necessarily have us do—that a monopolistic retailer who keeps a commission does not ever cause the consumer to pay a higher-than-competitive **[***18]** price. We find no persuasive legal or economic basis for such a blanket assertion.

In short, we do not understand the relevance of the upstream market structure in deciding whether a downstream consumer may sue a monopolistic retailer. Apple's rule would elevate form (what is the precise arrangement between manufacturers or suppliers and retailers?) over substance (is the consumer paying a higher price because of the monopolistic retailer's actions?). If the retailer's unlawful monopolistic conduct caused a consumer to pay the retailer a higher-than-competitive price, the **[**812]** consumer is entitled to sue the retailer under the antitrust laws.

Third, if accepted, Apple's theory would provide a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade antitrust claims by consumers and thereby thwart effective antitrust enforcement.

Consider a traditional supplier-retailer relationship, in which the retailer purchases a product from the supplier and sells the product with a markup to consumers. Under Apple's proposed rule, a retailer, instead of buying the product from the supplier, could arrange to sell the product for the supplier without purchasing **[***19]** it from the supplier. In other words, rather than paying the supplier a certain price for the product and then marking up the price to sell the product to consumers, the retailer could collect the price of the product from consumers and remit only a fraction of that price to the supplier.

That restructuring would allow a monopolistic retailer to insulate itself from antitrust suits by consumers, even in situations where a monopolistic retailer is using its monopoly to charge higher-than-competitive prices to consumers. We decline to green-light monopolistic retailers to exploit their market position in that way. We refuse to rubber-stamp such a blatant evasion **[*1524]** of statutory text and judicial precedent.

In sum, Apple's theory would disregard statutory text and precedent, create an unprincipled and economically senseless distinction among monopolistic retailers, and furnish monopolistic retailers with a how-to guide for evasion of the antitrust laws.

C

In arguing that the Court should transform the direct-purchaser rule into a "who sets the price" rule, Apple insists that the three reasons that the Court identified in *Illinois Brick* for adopting the direct-purchaser rule apply to this case—even **[***20]** though the consumers here (unlike in *Illinois Brick*) were direct purchasers from the alleged monopolist. The *Illinois Brick* Court listed three reasons for barring indirect-purchaser suits: (1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants.

As we said in *UtiliCorp*, however, the bright-line rule of *Illinois Brick* means that there is no reason to ask whether the rationales of *Illinois Brick* "apply with equal force" in every individual case. *497 U. S., at 216, 110 S. Ct. 2807, 111 L. Ed. 2d 169*. We should not engage in "an unwarranted and counterproductive exercise to litigate a series of exceptions." *Id., at 217, 110 S. Ct. 2807, 111 L. Ed. 2d 169*.

But even if we engage with this argument, we conclude that the three *Illinois Brick* rationales—whether considered individually or together—cut strongly in the plaintiffs' favor here, not Apple's.

First, Apple argues that barring the iPhone owners from suing Apple will better promote effective enforcement of the antitrust laws. Apple posits that allowing only the upstream app developers—and not the downstream consumers—to sue Apple would mean more effective enforcement of the antitrust laws. We do not agree. Leaving **[**813]** **[***21]** consumers at the mercy of monopolistic retailers simply because upstream suppliers could *also* sue the retailers makes little sense and would directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases.

Second, Apple warns that calculating the damages in successful consumer antitrust suits against monopolistic retailers might be complicated. It is true that it may be hard to determine what the retailer would have charged in a competitive market. Expert testimony will often be necessary. But that is hardly unusual in antitrust cases. *Illinois Brick*is not a get-out-of-court-free card for monopolistic retailers to play any time that a damages calculation might be complicated. *Illinois Brick* surely did not wipe out consumer antitrust suits against monopolistic retailers from whom the consumers purchased goods or services at higher-than-competitive prices. Moreover, the damages calculation may be just as complicated in a retailer markup case as it is in a retailer commission case. Yet Apple apparently accepts consumers suing monopolistic retailers in a retailer markup case. If Apple accepts that kind of suit, then Apple should also **[***22]** accept consumers suing monopolistic retailers in a retailer commission case.

Third, Apple claims that allowing consumers to sue will result in "conflicting claims to a common fund—the amount of the alleged overcharge." *Illinois Brick, 431 U. S., at 737, 97 S. Ct. 2061, 52 L. Ed. 2d 707*. Apple is incorrect. This is not a case where multiple parties at different levels of a distribution chain are trying to all recover the same passed-through overcharge initially levied by the manufacturer at the top of the **[*1525]** chain. Cf. *id., at 726-727, 97 S. Ct. 2061, 52 L. Ed. 2d 707*; *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U. S. 481, 483-484, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*. If the iPhone owners prevail, they will be entitled to the *full amount* of the unlawful overcharge that they paid to Apple. The overcharge has not been passed on by anyone to anyone. Unlike in *Illinois Brick*, there will be no need to "trace the effect of the overcharge through each step in the distribution chain." *431 U. S., at 741, 97 S. Ct. 2061, 52 L. Ed. 2d 707*.

It is true that Apple's alleged anticompetitive conduct may leave Apple subject to multiple suits by different plaintiffs. But *Illinois Brick* did not purport to bar multiple liability that is unrelated to passing an overcharge down a chain of distribution. Basic ***antitrust law*** tells us that the "mere fact that an antitrust violation produces two different classes of victims hardly entails that their injuries are duplicative **[***23]** of one another." 2A Areeda & Hovenkamp ¶339d, at 136. Multiple suits are not atypical when the intermediary in a distribution chain is a bottleneck monopolist or monopsonist (or both) between the manufacturer on the one end and the consumer on the other end. A retailer who is both a monopolist and a monopsonist may be liable to different classes of plaintiffs—both to downstream consumers and to upstream suppliers—when the retailer's unlawful conduct affects both the downstream and upstream markets.

Here, some downstream iPhone consumers have sued Apple on a monopoly theory. And it could be that **[**814]** some upstream app developers will also sue Apple on a monopsony theory. In this instance, the two suits would rely on fundamentally different theories of harm and would not assert dueling claims to a "common fund," as that term was used in *Illinois Brick*. The consumers seek damages based on the difference between the price they paid and the competitive price. The app developers would seek lost profits that they could have earned in a competitive retail market. *Illinois Brick* does not bar either category of suit.

In short, the three *Illinois Brick* rationales do not persuade us to remake *Illinois* ***[***24]*** *Brick* and to bar direct-purchaser suits against monopolistic retailers who employ commissions rather than markups. The plaintiffs seek to hold retailers to account if the retailers engage in unlawful anticompetitive conduct that harms consumers who purchase from those retailers. That is why we have ***antitrust law***.

***

Ever since Congress overwhelmingly passed and President Benjamin Harrison signed the *Sherman Act* in 1890, "protecting consumers from monopoly prices" has been "the central concern of antitrust." 2A Areeda & Hovenkamp ¶345, at 179. The consumers here purchased apps directly from Apple, and they allege that Apple used its monopoly power over the retail apps market to charge higher-than-competitive prices. Our decision in *Illinois Brick* does not bar the consumers from suing Apple for Apple's allegedly monopolistic conduct. We affirm the judgment of the U. S. Court of Appeals for the Ninth Circuit.

It is so ordered.

Dissent by: GORSUCH

Dissent

Justice **Gorsuch**, with whom The Chief Justice, Justice **Thomas**, and Justice **Alito** join, dissenting.

More than 40 years ago, in *Illinois Brick Co. v. Illinois, 431 U. S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, this Court held that an antitrust plaintiff can't sue a defendant for overcharging *someone else* who might (or might not) have passed **[***25]** on all (or some) of the overcharge to him. *Illinois Brick* held that these convoluted **[*1526]** "pass on" theories of damages violate traditional principles of proximate causation and that the right plaintiff to bring suit is the one on whom the overcharge immediately and surely fell. Yet today the Court lets a pass-on case proceed. It does so by recasting *Illinois Brick* as a rule forbidding only suits where the plaintiff does not contract directly with the defendant. This replaces a rule of proximate cause and economic reality with an easily manipulated and formalistic rule of contractual privity. That's not how ***antitrust law*** is supposed to work, and it's an uncharitable way of treating a precedent which—whatever its flaws—is far more sensible than the rule the Court installs in its place.

I

To understand *Illinois Brick*, it helps to start with the case that paved the way for that decision: *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U. S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*. Hanover sued **[**815]** United, a company that supplied machinery Hanover used to make shoes. Hanover alleged that United's illegal monopoly in the shoe-making-machinery market had allowed it to charge supracompetitive prices. As damages, Hanover sought to recover the amount it had overpaid United for machinery. United **[***26]** replied that Hanover hadn't been damaged at all because, United asserted, Hanover had not absorbed the supposedly "illegal overcharge" but had "passed the cost on to its customers" by raising the prices it charged for shoes. *Id., at 487-488, and n. 6, 88 S. Ct. 2224, 20 L. Ed. 2d 1231*. This Court called United's argument a "'passing-on' defense" because it suggested that a court should consider whether an antitrust plaintiff had "passed on" the defendant's overcharge to its own customers when assessing if and to what degree the plaintiff was injured by the defendant's anticompetitive conduct. *Id., at 488, 88 S. Ct. 2224, 20 L. Ed. 2d 1231*.

This Court rejected that defense. While *§4 of the Clayton Act* allows private suits for those injured by antitrust violations, we have long interpreted this language against the backdrop of the common law. See, *e.g.*, *Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U. S. 519, 529-531, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. And under ancient rules of proximate causation, the "'general tendency of the law, in regard to damages at least, is not to go beyond the first step.'" *Hanover Shoe, 392 U. S., at 490, n. 8, 88 S. Ct. 2224, 20 L. Ed. 2d 1231* (quoting *Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U. S. 531, 533, 38 S. Ct. 186, 62 L. Ed. 451 (1918))*. In *Hanover Shoe*, the first step was United's overcharging of Hanover. To proceed beyond that and inquire whether Hanover had passed on the overcharge to its customers, the Court held, would risk the sort of problems traditional principles of proximate cause were designed **[***27]** to avoid. "[N]early insuperable" questions would follow about whether Hanover had the capacity and incentive to pass on to its customers in the shoe-making market United's alleged monopoly rent from the separate shoe-making-machinery market. *392 U. S., at 493, 88 S. Ct. 2224, 20 L. Ed. 2d 1231*. Resolving those questions would, in turn, necessitate a trial within a trial about Hanover's power and conduct in its own market, with the attendant risk that proceedings would become "long and complicated" and would "involv[e] massive evidence and complicated theories." *Ibid.*

Illinois Brick was just the other side of the coin. With *Hanover Shoe* having held that an antitrust *defendant* could not rely on a pass-on theory to avoid damages, *Illinois Brick* addressed whether an antitrust *plaintiff* could rely on a pass-on theory to recover damages. The State of Illinois had sued several manufacturers of concrete blocks, alleging that the defendants' **[*1527]** price-fixing conspiracy had enabled them to overcharge building contractors, who in turn had passed on those charges to their customers, including the State. Recognizing that *Hanover Shoe* had already prohibited antitrust violators from using a "pass-on theory" defensively, the Court declined to "permit offensive **[***28]** use of a pass-on theory against an alleged violator that could not use the same theory as a defense." *431 U. S., at 735, 97 S. Ct. 2061, 52 L. Ed. 2d 707*. "Permitting the use of pass-on theories under *§4*," the Court **[**816]** reasoned, would require determining how much of the manufacturer's monopoly rent was absorbed by intermediary building contractors and how much they were able and chose to pass on to their customers like the State. *Id., at 737, 97 S. Ct. 2061, 52 L. Ed. 2d 707*. Allowing pass-on theories would, as well, allow "plaintiffs at each level in the distribution chain" to "assert conflicting claims to a common fund," which would require "massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers." *Ibid.* Better again, the Court decided, to adhere to traditional rules of proximate causation and allow only the first affected customers—the building contractors—to sue for the monopoly rents they had directly paid.

There is nothing surprising in any of this. Unless Congress provides otherwise, this Court generally reads statutory causes of action as "limited to plaintiffs whose injuries are proximately caused by violations of the statute." *Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U. S. 118, 132, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)*. That proximate **[***29]** cause requirement typically bars suits for injuries that are "derivative of misfortunes visited upon a third person by the defendant's acts." *Id., at 133, 134 S. Ct. 1377, 188 L. Ed. 2d 392* (internal quotation marks omitted). So, for example, if a defendant's false advertising causes harm to one of its competitors, the competitor can sue the false advertiser under the *Lanham Act*. But if the competitor is unable to pay its rent as a result, the competitor's landlord can't sue the false advertiser, because the landlord's harm derives from the harm to the competitor. *Id., at 134, 134 S. Ct. 1377, 188 L. Ed. 2d 392*; see also, *e.g.*, *Bank of America Corp. v. Miami, 581 U. S. ___, ___-___, 137 S. Ct. 1296, 197 L. Ed. 2d 678, 693-694 (2017)*; *Dura Pharmaceuticals, Inc. v. Broudo, 544 U. S. 336, 346, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005)*; *Holmes v. Securities Investor Protection Corporation, 503 U. S. 258, 268-270, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)*. This Court has long understood *Illinois Brick* as simply applying these traditional proximate cause principles in the antitrust context. See *Associated Gen. Contractors, 459 U. S., at 532-535, 544-545, 103 S. Ct. 897, 74 L. Ed. 2d 723*. [1]

II

The lawsuit before us depends on just the sort of pass-on theory that *Illinois Brick* forbids. The plaintiffs bought apps from third-party app developers (or manufacturers) in Apple's retail Internet App Store, at prices set by the developers. The lawsuit alleges that Apple is a monopolist retailer and that the 30% commission it **[*1528]** charges developers for the right to sell through its platform represents an anticompetitive price. The problem is that the 30% commission falls **[***30]** initially on the developers. So if the **[**817]** commission is in fact a monopolistic overcharge, the *developers* are the parties who are directly injured by it. Plaintiffs can be injured *only* if the developers are able and choose to pass on the overcharge to them in the form of higher app prices that the developers alone control. Plaintiffs admitted as much in the district court, where they described their theory of injury this way: "[I]f Apple tells the developer . . . we're going to take this 30 percent commission . . . what's the developer going to do? The developer is going to increase its price to cover Apple's . . . demanded profit." App. 143.

Because this is *exactly* the kind of "pass-on theory" *Illinois Brick* rejected, it should come as no surprise that the concerns animating that decision are also implicated. Like other pass-on theories, plaintiffs' theory will necessitate a complex inquiry into how Apple's conduct affected third-party pricing decisions. And it will raise difficult questions about apportionment of damages between app developers and their customers, along with the risk of duplicative damages awards. If anything, plaintiffs' claims present these difficulties even more starkly **[***31]** than did the claims at issue in *Illinois Brick*.

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[1] For this reason, it's hard to make sense of the suggestion that *Illinois Brick* may not apply to claims for injunctive relief, *ante, at ___, n. 1, 203 L. Ed. 2d, at 809*. Under our normal rule of construction, a plaintiff who's not proximately harmed by a defendant's unlawful conduct has no cause of action to sue the defendant for any type of relief. *Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U. S. 118, 135, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)* (although a plaintiff that "cannot quantify its losses with sufficient certainty to recover damages . . . may still be entitled to injunctive relief," the requirement of proximate causation "must be met in every case").

Consider first the question of causation. To determine if Apple's conduct damaged plaintiffs at all (and if so, the magnitude of their damages), a court will first have to explore whether and to what extent each individual app developer was able—and then opted—to pass on the 30% commission to its consumers in the form of higher app prices. Sorting this out, if it can be done at all, will entail wrestling with "'complicated theories'" about "how the relevant market variables would have behaved had there been no overcharge." Illinois Brick, 431 U. S., at 741-743, 97 S. Ct. 2061, 52 L. Ed. 2d 707. Will the court hear testimony to determine the market power of each app developer, how each set its prices, and what it might have charged consumers for apps if Apple's commission had been lower? Will the court also consider expert testimony analyzing how market factors might have influenced developers' capacity and willingness to pass on Apple's alleged monopoly overcharge? And will the court then somehow extrapolate its findings to all of the tens of thousands of developers who sold apps through the App Store at different prices and times over the course of years?

This causation inquiry will be complicated further **[***32]** by Apple's requirement that all app prices end in $0.99. As plaintiffs acknowledge, this rule has caused prices for the "vast majority" of apps to "cluster" at exactly $0.99. Brief for Respondents 44. And a developer charging $0.99 for its app can't raise its price by just enough to recover the 30-cent commission. Instead, if the developer wants to pass on the commission to consumers, it has to more than double its price to $1.99 (doubling the commission in the process), which could significantly affect its sales. In short, because Apple's 99-cent rule creates a strong disincentive for developers to raise their prices, it makes plaintiffs' pass-on theory of injury even harder to prove. Yet the court will have to consider all **[**818]** of this when determining what damages, if any, plaintiffs suffered as a result of Apple's allegedly excessive 30% commission. [2]

[*1529] Plaintiffs' claims will also necessitate "massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge," including both consumers and app developers. Illinois Brick, 431 U. S., at 737, 97 S. Ct. 2061, 52 L. Ed. 2d 707. If, as plaintiffs contend, Apple's 30% commission is a monopolistic overcharge, then the app developers have a claim against **[***33]** Apple to recover whatever portion of the commission they did not pass on to consumers. Before today, *Hanover Shoe* would have prevented Apple from reducing its liability to the developers by arguing that they had passed on the overcharge to consumers. But the Court's holding that *Illinois Brick* doesn't govern this situation surely must mean *Hanover Shoe* doesn't either. So courts will have to divvy up the commissions Apple collected between the developers and the consumers. To do that, they'll have to figure out which party bore what portion of the overcharge in every purchase. And if the developers bring suit separately from the consumers, Apple might be at risk of duplicative damages awards totaling more than the full amount it collected in commissions. To avoid that possibility, it may turn out that the developers are necessary parties who will have to be joined in the plaintiffs' lawsuit. See Fed. Rule Civ. Proc. 19(a)(1)(B); Illinois Brick, 431 U. S., at 739, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (explaining that "[t]hese absent potential claimants would seem to fit the classic definition of 'necessary parties,' for purposes of compulsory joinder"). [3]

III

The United States and its antitrust regulators agree with all of this, so how does the Court reach **[***34]** such a different conclusion? Seizing on *Illinois Brick*'s use of the shorthand phrase "direct purchasers" to describe the parties immediately injured by the monopoly overcharge in that case, the Court (re)characterizes *Illinois Brick* as a

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[2] Plaintiffs haven't argued (and so have forfeited in this Court any argument) that Apple's imposition of the 99-cent rule was *itself* an antitrust violation that injured consumers by raising the price of apps above competitive levels. They didn't mention the 99-cent rule in their complaint in district court or in their briefs to the court of appeals. And, as I've noted, they concede that they are seeking damages "based solely on" the 30% commission. Brief in Opposition 5.

[3] The Court denies that allowing both consumers and developers to sue over the same allegedly unlawful commission will "result in 'conflicting claims to a common fund'" as *Illinois Brick* feared. Ante, at ___, 203 L. Ed. 2d, at 813. But Apple charged only one commission on each sale. So even assuming for argument's sake that the 30% commission was entirely illegal, Apple can only be required to pay out in damages, at most, the full amount it received in commissions. To their credit, even plaintiffs have conceded as much, acknowledging that because "there is only *one 30% markup*," any claim by the developers against Apple would necessarily be seeking "a piece of the same 30% pie." Brief in Opposition 12. It's a mystery why the Court refuses to accept that sensible concession.

rule that anyone who purchases goods directly from an alleged antitrust violator can sue, while anyone who doesn't, can't. Under this revisionist version of *Illinois Brick*, the dispositive question becomes whether an "intermediary in the distribution chain" stands between the plaintiff and the defendant. *Ante, at ___, 203 L. Ed. 2d, at 809*. And because the plaintiff app purchasers in this case **[**819]** happen to have purchased apps directly from Apple, the Court reasons, they may sue.

This exalts form over substance. Instead of focusing on the traditional proximate cause question where the alleged overcharge is first (and thus surely) felt, the Court's test turns on who happens to be in privity of contract with whom. But we've long recognized that ***antitrust law*** should look at "the economic reality of the relevant transactions" rather than "formal conceptions of contract law." **[*1530]** *United States v. Concentrated Phosphate Export Assn., Inc., 393 U. S. 199, 208, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968)*. And this case illustrates why. To evade the Court's test, all Apple must do is amend its contracts. Instead **[***35]** of collecting payments for apps sold in the App Store and remitting the balance (less its commission) to developers, Apple can simply specify that consumers' payments will flow the other way: directly to the developers, who will then remit commissions to Apple. No antitrust reason exists to treat these contractual arrangements differently, and doing so will only induce firms to abandon their preferred—and presumably more efficient—distribution arrangements in favor of less efficient ones, all so they might avoid an arbitrary legal rule. See *Copperweld Corp. v. Independence Tube Corp., 467 U. S. 752, 763, 772-774, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (rejecting an "'artificial distinction'" that "serves no valid antitrust goals but merely deprives consumers and producers of the benefits" of a particular business model).

Nor does *Illinois Brick* come close to endorsing such a blind formalism. Yes, as the Court notes, the plaintiff in *Illinois Brick* did contract directly with an intermediary rather than with the putative antitrust violator. But *Illinois Brick*'s rejection of pass-on claims, and its explanation of the difficulties those claims present, had nothing to do with privity of contract. Instead and as we have seen, its rule and reasoning grew from the "general tendency of the law . . . not **[***36]** to go beyond" the party that first felt the sting of the alleged overcharge, and from the complications that can arise when courts attempt to discern whether and to what degree damages were passed on to others. *Supra, at ___ - ___, 203 L. Ed. 2d, at 815-816*. The Court today risks replacing a cogent rule about proximate cause with a pointless and easily evaded imposter. We do not usually read our own precedents so uncharitably.

Maybe the Court proceeds as it does today because it just disagrees with *Illinois Brick*. After all, the Court not only displaces a sensible rule in favor of a senseless one; it also proceeds to question each of *Illinois Brick*'s rationales—doubting that those directly injured are always the best plaintiffs to bring suit, that calculating damages for pass-on plaintiffs will often be unduly complicated, and that conflicting claims to a common fund justify limiting who may sue. *Ante, at ___ - ___, 203 L. Ed. 2d, at 812-814*. The Court even tells us that any "ambiguity" about the permissibility of pass-on damages should be resolved "in the direction of the statutory text," *ante, at ___, 203 L. Ed. 2d, at 810*—ignoring that *Illinois Brick* followed the well-trodden path of construing the statutory text in light of background common law principles of **[**820]** proximate cause. Last **[***37]** but not least, the Court suggests that the traditional understanding of *Illinois Brick* leads to "arbitrary and unprincipled" results. *Ante, at ___, 203 L. Ed. 2d, at 810*. It asks us to consider two hypothetical scenarios that, it says, prove the point. The first is a "markup" scenario in which a monopolistic retailer buys a product from a manufacturer for $6 and then decides to sell the product to a consumer for $10, applying a supracompetitive $4 markup. The second is a "commission" scenario in which a manufacturer directs a monopolistic retailer to sell the manufacturer's product to a consumer for $10 and the retailer keeps a supracompetitive 40% commission, sending $6 back to the manufacturer. The two scenarios are economically the same, the Court asserts, and forbidding recovery in the second for lack of proximate cause makes no sense.

But there is nothing arbitrary or unprincipled about *Illinois Brick*'s rule or results. The notion that the causal chain must stop somewhere is an ancient and venerable one. As with most any rule of proximate cause, reasonable people can debate **[*1531]** whether *Illinois Brick* drew exactly the right line in cutting off claims where it did. But the line it drew is intelligible, principled, **[***38]** administrable, and far more reasonable than the Court's artificial rule of contractual privity. Nor do the Court's hypotheticals come close to proving otherwise. In the first scenario, the markup falls initially on the consumer, so there's no doubt that the retailer's anticompetitive conduct proximately caused the consumer's injury. Meanwhile, in the second scenario the commission falls initially on the manufacturer, and the consumer won't feel the pain unless the manufacturer can and does recoup some or all of the elevated commission by raising its own prices. In *that* situation, the manufacturer is the directly injured party, and the difficulty of disaggregating damages between those directly and indirectly harmed means that the consumer can't establish proximate cause under traditional principles.

Some *amici* share the Court's skepticism of *Illinois Brick*. They even urge us to overrule *Illinois Brick*, assuring us that "modern economic techniques" can now mitigate any problems that arise in allocating damages between those who suffer them directly and those who suffer them indirectly. Brief for State of Texas et al. as *Amici Curiae* 25. Maybe there is something to these arguments; maybe **[***39]** not. But there's plenty of reason to decline any invitation to take even a small step away from *Illinois Brick* today. The plaintiffs have not asked us to overrule our precedent—in fact, they've disavowed any such request. Tr. of Oral Arg. 40. So we lack the benefit of the adversarial process in a complex area involving a 40-year-old precedent and many hard questions. For example, if we are really inclined to overrule *Illinois Brick*, doesn't that mean we must do the same to *Hanover Shoe*? If the proximate cause line is no longer to be drawn at the first injured party, how far down the causal chain can a plaintiff be and still recoup damages? Must all potential claimants to the single monopoly rent be gathered in a single lawsuit as necessary parties (and if not, why **[**821]** not)? Without any invitation or reason to revisit our precedent, and with so many grounds for caution, I would have thought the proper course today would have been to afford *Illinois Brick* full effect, not to begin whittling it away to a bare formalism. I respectfully dissent.

References

15 U.S.C.S. §§2, *15*

8 Antitrust Laws and Trade Regulation § 161.02 (Matthew Bender 2d ed.)

11 Federal ***Antitrust Law*** § 78.7 (Matthew Bender)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices § 67.6

L Ed Index, Restraints of **[***40]** Trade, Monopolies, and Unfair Trade Practices

Standing to sue, under § 4 of the Clayton Act (*15 U.S.C.S. § 15*) and predecessor statute, to recover treble damages for antitrust violation--Supreme Court cases. *73 L. Ed. 2d 1427*.

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Jain Irrigation, Inc. v. Netafim Irrigation, Inc.

United States District Court for the Eastern District of California

May 13, 2019, Decided; May 14, 2019, Filed

No. 1:18-cv-01311-DAD-BAM

Reporter

386 F. Supp. 3d 1308 *; 2019 U.S. Dist. LEXIS 81408 **; 2019-1 Trade Cas. (CCH) P80,785; 2019 WL 2106225

JAIN IRRIGATION, INC., et al., Plaintiffs, v. NETAFIM IRRIGATION, INC., Defendant.

Core Terms

conspiracy, manufacturers, distributors, boycott, rule of reason, allegations, Sherman Act, vertical, horizontal, plaintiffs', Irrigation, amended complaint, leave to amend, Cartwright Act, courts, join, per se rule, competitors, antitrust

Counsel: **[**1]** For Jain Irrigation, Inc., a Delaware Corporation, Agri-Valley Irrigation, a Delaware Limited Liability Company, Irrigation Design & Construction LLC, a Delaware Limited Liability Company, Plaintiffs: Andrew Peter Rausch, Jr., LEAD ATTORNEY, Law Offices of A. Peter Rausch, Jr., Lodi, CA; Jennifer Young, Law office of Peter A. Rausch, Jr., Lodi, CA; Joseph Ferraro, Ferraro Mediation Group, Copperopolis, CA.

For Netafim Irrigation, Inc., a New York Corporation, Defendant: Kendall H. MacVey, LEAD ATTORNEY, Best Best & Krieger LLP, Riverside, CA; Kenneth Reinker, PHV, Leah Brannon, PHV, LEAD ATTORNEYS, PRO HAC VICE, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC.

Judges: Dale A. Drozd, UNITED STATES DISTRICT JUDGE.

Opinion by: Dale A. Drozd

Opinion

[*1310] ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITH LEAVE TO AMEND

(Doc. No. 18)

This matter is before the court on defendant Netafim Irrigation, Inc.'s motion to dismiss the first amended complaint. (Doc. No. 18.) On May 7, 2019, that motion came before the court for hearing. Attorney A. Peter Rausch, Jr. appeared on behalf of plaintiffs Jain Irrigation, Inc. ("Jain"), Agri-Valley Irrigation ("AVI"), and Irrigation Design & Construction LLC ("IDC"). Attorneys Kendall H. **[**2]** MacVey and Kenneth Reinker appeared on behalf of defendant. Having considered the parties' briefing, and for the reasons that follow, defendant's motion will be granted with leave to amend.

[*1311] **BACKGROUND**

In the first amended complaint, plaintiffs allege as follows. Jain manufactures and sells a wide variety of drip and micro-irrigation equipment throughout the United States, and as of 2017 has sales of approximately

$80,000,000.00. (Doc. No. 14 ("FAC") at ¶ 10.) IDC is in the business of designing, engineering, fabricating, installing, and maintaining agricultural irrigation systems and selling irrigation supplies and parts at seven retail locations serving the Central and Salinas Valleys of California. (*Id.* at ¶ 11.) AVI does similar work throughout the Central Valley. (*Id.* at ¶ 12.) Like Jain, defendant Netafim also manufactures and sells drip and micro-irrigation products. (*Id.* at ¶ 14.)

On or about April 19, 2017, IDC and AVI announced that they had each entered into an agreement to provide equity to a newly formed company, Jain Distribution Holdings, Inc. ("Jain Distribution"), funded by Jain. (*Id.* at ¶ 13.) Although Jain Distribution became an investor and part owner of AVI and IDC, **[**3]** each continued to be managed and operated as an independent distributor. (*Id.*) Beginning that same month, plaintiffs allege that Netafim began to form and enter into a conspiracy with other companies to boycott IDC and AVI. (*Id.* at ¶ 28.) These companies include, but are not limited to, Rivulis Irrigation, Inc. ("Rivulis"), Eurodrip U.S.A., Inc. ("Eurodrip"), The Toro Company ("Toro"), Bowsmith, Inc. ("Bowsmith"), Rain Bird Corporation ("Rain Bird"), Landmark Irrigation, Inc. ("Landmark"), and Hydratec, Inc. ("Hydratec"). (*Id.* at ¶¶ 15-22, 28.) In furtherance of the conspiracy, each of these companies (collectively, the "Conspiring Manufacturers") terminated their prior business relationships with IDC and AVI and refused to supply any further products to either company. (*Id.* at ¶ 28.) That same month, and pursuant to the same conspiracy, the Conspiring Manufacturers agreed with an unknown number of distributors (including at least Landmark and Hydratec) that in exchange for the Conspiring Manufacturers' agreement to boycott AVI and IDC, the distributors would boycott Jain by reducing or terminating their purchases of Jain products. (*Id.* at ¶ 29.)

The FAC describes Netafim as the "instigator" **[**4]** of the conspiracy and alleges that it sought to recruit other manufacturers to join. (*Id.* at ¶ 30.) The FAC also alleges that following the announcement of Jain Distribution's formation, Netafim's president telephoned an executive of Fresno Valve & Casting ("Fresno Valve"), a manufacturer of irrigation equipment and a direct competitor of both Netafim and Jain, and stated in substance that Jain "broke the rule" prohibiting manufacturers from selling directly to growers. (*Id.*) The Netafim president then asked Fresno Valve to join Netafim to stop the violation of this "rule." (*Id.*) Fresno Valve did not agree to join, and after speaking to executives at AVI and IDC confirming their intention and ability to continue to act independently, Fresno Valve's executive advised that Fresno Valve would not cut off sales to them. (*Id.*) A few days after that phone call, Netafim publicly announced that it was terminating its relationship with IDC and AVI. (*Id.* at ¶ 31.) In May and June 2017, Rivulis, Toro, Rain Bird, and Bowsmith took similar action. (*Id.* at ¶¶ 32-35.)

Although Fresno Valve did not join the boycott of AVI and IDC, it remained under significant pressure to do so. (*Id.* at ¶ 36.) The **[**5]** FAC alleges that various distributors had direct discussions with Fresno Valve executives, stating in substance that "you are either with us or against us." (*Id.*) Representatives from Bowsmith visited Fresno Valve and suggested to their executives that it would be better to cut off AVI and IDC. (*Id.* at ¶ 37.) The FAC **[*1312]** further alleges that there was particular pressure on Fresno Valve because it was virtually the only source of filters for AVI and IDC. (*Id.* at ¶ 36.) Thus, if Fresno Valve could be persuaded to join the boycott, it would effectively "cripple" AVI and IDC. (*Id.*)

The FAC also describes an incident in which AVI and Rivulis representatives met over lunch to discuss the boycott. The Rivulis representative revealed that although Rivulis had projected a loss of 20% of its business due to the boycott, it turned out that the boycott had caused much greater losses. (*Id.* at ¶ 42.) The Rivulis representative went on to state that "Netafim started this whole thing" and was the "ring leader" of the arrangement. (*Id.*) The representative further stated that Netafim had asked Rivulis to "join them in cutting off Jain" for the purpose of hurting Jain because Jain had "crossed the line" **[**6]** by getting into the distribution market, that Netafim had been calling other "suppliers" and asking them not to sell to AVI or IDC, and that Netafim and Rivulis intended to cost AVI and IDC business. (*Id.*)

In August 2017, Netafim brought several distributors in California to a meeting in Washington State. (*Id.* at ¶ 43.) At the meeting, the distributors discussed strategies to "take out" AVI and IDC and agreed that they should work together to damage AVI and IDC. (*Id.*) The FAC lists numerous companies who had representatives present at this meeting. Ultimately, as a result of the conspiracy, or by reason of threats or pressure from the Conspiring Manufacturers, numerous companies have either reduced or eliminated their purchases from Jain. (*Id.* at ¶ 50.)

Plaintiffs seek both damages and injunctive relief under the Sherman Act, *15 U.S.C. § 1*, and the Cartwright Act, *California Business and Professions Code §§ 16720* and *16726*. In addition, plaintiffs assert that defendants have interfered with prospective economic relations. Defendant moved to dismiss the FAC on February 6, 2019. (Doc. No. 18.) On March 19, 2019, plaintiffs filed an opposition. (Doc. No. 23.) Defendant filed a reply on April 2, 2019. (Doc. No. 24.)

LEGAL STANDARD

The purpose of a motion **[**7]** to dismiss pursuant to *Rule 12(b)(6)* is to test the legal sufficiency of the complaint. *N. Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983)*. "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. A plaintiff is required to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

In determining whether a complaint states a claim on which relief may be granted, the court accepts as true the allegations in the complaint and construes the allegations in the light most favorable to the plaintiff. *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)*; *Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989)*. However, the court need not assume the truth of legal conclusions cast in the form of factual allegations. *U.S. ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th Cir. 1986)*. While *Rule 8(a)* does not require detailed factual allegations, "it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." **[*1313]** *Iqbal, 556 U.S. at 678*. A pleading is insufficient if it offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly, 550 U.S. at 555*; *see also* *Iqbal, 556 U.S. at 676* ("Threadbare recitals of the elements of a cause of action, supported **[**8]** by mere conclusory statements, do not suffice."). Moreover, it is inappropriate to assume that the plaintiff "can prove facts which it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*.

ANALYSIS

A. Sherman Act and Cartwright Act Claims

Plaintiffs' federal antitrust claims are brought pursuant to *§ 1* of the Sherman Act, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." *15 U.S.C. § 1*; *see also* *United States v. Joyce, 895 F.3d 673, 676 (9th Cir. 2018)* (noting that despite the seemingly broad language of this provision, courts have construed *§ 1* of the Sherman Act as prohibiting only agreements that *unreasonably* restrain trade) (citations omitted). To state a claim under that provision, a plaintiff must

> plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition.

Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008).

Broadly speaking, courts analyze such claims in two ways **[**9]** depending on the nature of the violation alleged. "Typically, the determination of whether a particular agreement in restraint of trade is unreasonable involves a factual inquiry commonly known as the 'rule of reason.'" *Joyce, 895 F.3d at 676*. The rule of reason "weighs legitimate justifications for a restraint against any anticompetitive effects." Paladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1156 (9th Cir. 2003); *see also* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918) (stating that in determining whether a particular agreement is permissible under the rule of reason, a court "must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable").

"The rule of reason inquiry, however, is inapplicable if 'the restraint falls into a category of agreements which have been determined to be per se illegal.'" Joyce, 895 F.3d at 676 (quoting United States v. Brown, 936 F.2d 1042, 1045 (9th Cir. 1991)). The per se rule, which "treat[s] categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work." Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007); *see also* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988) (noting that "per se rules are appropriate only for conduct that is manifestly anticompetitive, that is, conduct that would always or almost always **[**10]** tend to restrict competition and decrease output") (internal quotation marks and citation **[*1314]** omitted). *But see* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 n.26, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) ("There is often no bright line separating per se from Rule of Reason analysis. Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct."). The types of agreements or practices recognized by courts as per se unlawful include "horizontal price fixing, division of markets, group boycotts, tying arrangements, and output limitations." Am. Ad Mgmt., Inc. v. GTE Corp., 92 F.3d 781, 784 (9th Cir. 1996). When a per se violation of § 1 of the Sherman Act is at issue, courts "do not require evidence of any actual effects on competition because [the] the potential for harm [is] so clear and so great." Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1410 (9th Cir. 1991); *accord* In re Tableware Antitrust Litig., 363 F. Supp. 2d 1203, 1206 (N.D. Cal. 2005) (holding that in a per se case, "plaintiffs need not plead a relevant market (as they would need to do for a section 2 claim), nor do they need to plead the harm to competition, something which is presumed in a per se case").

The inquiry under the Cartwright Act is similar. The Cartwright Act is California's ***antitrust law***, and the analysis under that statute "mirrors the analysis under Federal Law because the Cartwright Act . . . was modeled after the Sherman Act." County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001) (citing **[**11]** Cal. Bus. & Prof. Code § 16700 et seq.).

As stated, whether to utilize a per se analysis or the rule of reason depends on the type of conspiracy alleged. To be sure, some courts have held that the decision of "whether per se or rule of reason analysis applies . . . is more appropriate on a motion for summary judgment." In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012). Here, however, plaintiffs specifically assert their antitrust claims exclusively on a per se theory of liability. (*See* FAC at ¶ 6 n.1.) The court will respect plaintiffs' decision and therefore confines its analysis to the question of whether the FAC adequately alleges a per se violation of the Sherman Act. *See* Bay Area Surgical Mgmt. LLC v. Aetna Life Ins. Co., 166 F. Supp. 3d 988, 994 (N.D. Cal. 2015) (declining to analyze the complaint on a per se theory because "[p]laintiffs' Complaint expressly states that 'Defendants' arrangements are unlawful under the antitrust laws when assessed under the Rule of Reason'"); United States v. eBay, Inc., 968 F. Supp. 2d 1030, 1037 (N.D. Cal. 2013) ("A plaintiff is the master of its complaint and may choose which claims to allege."); *cf.* Northshore Sheet Metal, Inc. v. Sheet Metal Workers Int'l Ass'n, Local 66, No. 15-CV-1349 BJR, 2018 U.S. Dist. LEXIS 163327, 2018 WL 4566049, at *4 (W.D. Wash. Sept. 24, 2018) (noting that "[i]t is . . . favorable to a plaintiff to allege a *per se* restraint to avoid the more searching analysis and economic impact requirements of the rule of reason standard"). **[**12]** Plaintiffs' opposition to the pending motion to dismiss fleshes out this theory and describes the alleged conspiracy as of the "hub and spoke" variety, in which Netafim and the Conspiring Manufacturers are the hub, the distributors are the spokes, and the rim is the agreement among the distributors to (a) refuse to make purchases from Jain and (b) to prevent AVI and IDC from obtaining the products of the Conspiring Manufacturers. (Doc. No. 23 at 21 n.3.)

The Ninth Circuit's approach to hub and spoke conspiracies was first discussed in *In re Musical Instruments & Equipment Antitrust Litigation, 798 F.3d 1186, 1192 (9th Cir. 2015)*. Notably, for present purposes, the Ninth Circuit recognized **[*1315]** that hub-and-spoke conspiracies frequently involve horizontal agreements among competitors (which are generally subject to per se scrutiny) as well as vertical agreements between firms at different levels of a supply chain (which are generally subject to a rule of reason analysis). *In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d at 1191-92* ("One conspiracy can involve both direct competitors and actors up and down the supply chain, and hence consist of both horizontal and vertical agreements."). Where a hub-and-spoke conspiracy involves both horizontal and vertical agreements, "the conspiracy is broken into its constituent parts," with the horizontal **[**13]** agreements analyzed under the per se rule and vertical agreements analyzed under the rule of reason. *Id. at 1192*; *see also* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998) ("[P]recedent limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors."); *In re NFL Sunday Ticket Antitrust Litig., No. ML 15-02668-BRO(JEMx), 2017 U.S. Dist. LEXIS 121354, 2017 WL 3084276, at *8 (C.D. Cal. June 30, 2017)* ("[T]he Ninth Circuit has instructed that where there are multiple agreements involved, the court is to analyze each separately."); *G.U.E. Tech, LLC v. Panasonic Avionics Corp., No. SACV 15-00789-CJC(DFMx), 2016 U.S. Dist. LEXIS 188759, 2016 WL 6138422, at *3 (C.D. Cal. Feb. 4, 2016)* ("Vertical refusals to deal—for example, between a manufacturer and a retailer—do not per se violate the Sherman Act and are instead subject to the 'rule of reason,' which examines an agreement for its anticompetitive effects.").

As applied here, this line of cases presents a quandary. On one hand, the structure of the conspiracy alleged appears quite similar to that in *In re Musical Instruments* since it involves both horizontal agreements between manufacturers (such as Netafim and Rivulis) and vertical agreements between manufacturers and distributors (such as Netafim and RDO). (FAC at ¶¶ 40, 42.) The proper approach under the decision in *In re Musical Instruments* would appear to be to analyze **[**14]** the horizontal agreements using a per se approach, and the vertical agreements under the rule of reason. On the other hand, plaintiffs in this case are explicit in their briefing that the entire conspiracy as alleged "is per se unlawful," (Doc. No. 23 at 23), and the FAC makes clear that plaintiffs are specifically alleging a per se violation of the Sherman Act. (FAC at ¶ 6 n.1.)

Based on the precedent discussed above, the court finds that the conspiracy alleged by plaintiffs, even if proven, does not amount to a per se violation of *§ 1* of the Sherman Act. Plaintiffs' theory of the case is that as part of the conspiracy, "the Conspiring Manufacturers agreed with an unknown number of dealer/distributors . . . that, in exchange for the Conspiring Manufacturers' agreement to boycott AVI and IDC, such dealer/distributors would engage in a group boycott or collective refusal to deal with Jain[.]" (FAC at ¶ 29.) Thus, the conspiracy alleged is premised upon vertical agreements between manufacturers and distributors, in which the manufacturers agree to boycott AVI and IDC in return for the distributors agreeing to boycott Jain.

At oral argument, plaintiffs for the first time advanced a new argument—namely, **[**15]** that rather than one single conspiracy, the FAC in fact alleges two entirely separate conspiracies. In this telling, the FAC alleges one horizontal conspiracy among manufacturers, and a second horizontal conspiracy among distributors, with some nebulous, unspecified connection running between them. This argument is belied by the FAC itself and the allegations therein which repeatedly refers to a single conspiracy. (*See, e.g.*, FAC at ¶¶ 30, 32-34, **[*1316]** 36-38.) The court is bound to accept the factual allegations of the FAC as true for purposes of resolving the pending motion.

Moreover, the law is clear that vertical agreements involving boycotts must be analyzed under the rule of reason. *See* *NYNEX Corp., 525 U.S. at 135*; *Calculators Haw., Inc. v. Brandt, Inc., 724 F.2d 1332, 1337 n.2 (9th Cir. 1983)* ("The district court properly found *per se* analysis inappropriate because Brandt and Hallett were not competitors. Any 'group boycott' therefore consisted of a vertical agreement, to which the rule of reason applies."); *Orchard Supply Hardware LLC v. Home Depot USA, Inc., 967 F. Supp. 2d 1347, 1357 (N.D. Cal. 2013)* (rejecting plaintiff's argument that a conspiracy involving "manufacturers, distributors, and a retailer" was per se unlawful because a manufacturer's agreements with its distributors are vertical agreements, to which per se analysis does not apply). The conspiracy alleged by plaintiff **[**16]** in the FAC simply is not susceptible to per se treatment under controlling law, because of which it must be dismissed. Moreover, because plaintiffs' Cartwright Act claims rise or fall depending on the success of its Sherman Act claim, plaintiffs' Cartwright Act claims must also be dismissed.

B. Claim for Interference with Prospective Economic Relations

Next, the court addresses plaintiffs' state law claim for interference with prospective economic relations. Defendant argues that such a claim requires an underlying violation of law, and that because plaintiffs' antitrust claims must fail, this claim does as well. (Doc. No. 18 at 23.) "[A] plaintiff seeking to recover for an alleged interference with prospective contractual or economic relations must plead and prove as part of its case-in-chief that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." *Della Penna v. Toyota Motor Sales, U.S.A., Inc., 11 Cal. 4th 376, 393, 45 Cal. Rptr. 2d 436, 902 P.2d 740 (1995)*. Plaintiffs do not dispute this point of law but contend that they have satisfied their burden in this regard by adequately alleging violations of the Sherman and Cartwright Acts. (Doc. No. 23 at 25.) Because **[**17]** the court disagrees with plaintiff's contention for the reasons discussed above, this claim will also be dismissed.

C. Leave to Amend

In addition to asserting that the FAC should be dismissed, defendant argues that any dismissal should be with prejudice. (Doc. No. 18 at 23-24.) Defendant argues that because plaintiffs have already filed one amended complaint and have failed to state a claim for relief, any further amendment would be futile. (*Id.*)

Federal Rule of Civil Procedure 15 instructs courts to "freely give leave when justice so requires" and that rule is "to be applied with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003)*. Nevertheless, leave to amend need not be granted where the amendment: (1) prejudices the opposing party; (2) is sought in bad faith; (3) produces an undue delay in litigation; or (4) is futile. *See* *Amerisource Bergen Corp. v. Dialysist W., Inc., 465 F.3d 946, 951 (9th Cir. 2006)* (citing *Bowles v. Reade, 198 F.3d 752, 757 (9th Cir. 1999))*. "Prejudice to the opposing party is the most important factor." *Jackson v. Bank of Haw., 902 F.2d 1385, 1387 (9th Cir. 1990)* (citing *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330-31, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971))*.

[*1317] Here, the court does not find that granting further leave to amend would be futile. As discussed above, the undersigned has concluded that the FAC is deficient because of the particular legal theory plaintiffs have elected to proceed under, not necessarily due to the insufficiency of the factual allegations as contained within the FAC to state **[**18]** any cognizable claim. Indeed, while the court expresses no opinion on the matter, it is at least conceivable that the conspiracy alleged in the FAC could survive a motion to dismiss if premised on the rule of reason. Accordingly, plaintiffs will be granted twenty-one days from the date of service of this order in which to file a second amended complaint, should they wish to do so.

CONCLUSION

For the reasons set forth above,

1. Defendant's motion to dismiss filed on February 6, 2019 (Doc. No. 18) is granted;
2. Plaintiffs' first amended complaint (Doc. No. 14) is dismissed with leave to amend; and
3. Any amended complaint plaintiffs wish to file shall be due within twenty-one days from the date of service of this order.

IT IS SO ORDERED.

Dated: **May 13, 2019**

/s/ Dale A. Drozd

UNITED STATES DISTRICT JUDGE

Dockery v. Heretick

United States District Court for the Eastern District of Pennsylvania

May 14, 2019, Decided; May 14, 2019, Filed

CIVIL ACTION NO. 17-4114

Reporter
2019 U.S. Dist. LEXIS 81748 *; 2019 WL 2122988

LARRY G. DOCKERY, on behalf of himself and all others similarly situated, Plaintiffs v. STEPHEN E. HERETICK, et al., Defendants And NEW YORK LIFE INSURANCE COMPANY, et al., Nominal Defendants

Subsequent History: Motion denied by *Dockery v. Heretick, 2019 U.S. Dist. LEXIS 129375, 2019 WL 3530873 (E.D. Pa., Aug. 1, 2019)*

Motion granted by, in part, Motion denied by, in part *Dockery v. Heretick, 2021 U.S. Dist. LEXIS 15014, 2021 WL 268497 (E.D. Pa., Jan. 27, 2021)*

Class certification denied by *Dockery v. Heretick, 2021 U.S. Dist. LEXIS 166240 (E.D. Pa., Sept. 1, 2021)*

Summary judgment granted by *Dockery v. Heretick, 2021 U.S. Dist. LEXIS 166663 (E.D. Pa., Sept. 1, 2021)*

Core Terms

state-court, alleges, enterprise, Purchaser, state court, Annuity, unjust enrichment, motion to dismiss, proceedings, res judicata, orders, petitions, plaintiff's claim, additional person, federal court, parties, streams, advice, conspiracy, judgments, Defendants', Counts, venue, fiduciary duty, litigated, cases, state law, injuries, independent advice, class action

Counsel: [*1] For LARRY G. DOCKERY, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiff: JEROME M. MARCUS, JONATHAN AUERBACH, LEAD ATTORNEYS, MARCUS & AUERBACH LLC, SPRING HOUSE, PA; DAVID S. PEGNO, LEE LARSON HULSEBUS, THOMAS E.L. DEWEY, DEWEY PEGNO & KRAMARSKY LLP, NEW YORK, NY.

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For 321 HENDERSON RECEIVABLES LLC, J.G. WENTWORTH ORIGINATIONS LLC, Defendants: A. CHRISTOPHER YOUNG, JOSEPH C. CRAWFORD, SAMUEL D. HARRISON, PEPPER HAMILTON LLP, PHILADELPHIA, PA; CHARLES S. MARION, BLANK ROME LLP, PHILADELPHIA, PA.

For SENECA ONE FINANCE, INC., Defendant: SAMUEL W. CORTES, LEAD ATTORNEY, MELISSA E. SCOTT, FOX ROTHSCHILD LLP, EXTON, PA.

For NEW YORK LIFE INSURANCE COMPANY, METROPOLITAN LIFE INSURANCE COMPANY, Nominal Defendants: STEPHEN R. HARRIS, LEAD ATTORNEY, SUSAN J. STAUSS, COZEN O'CONNOR, PHILADELPHIA, PA.

Judges: MICHAEL M. BAYLSON, United States District Judge.

Opinion by: MICHAEL M. BAYLSON

Opinion

MEMORANDUM RE: DEFENDANTS' MOTIONS TO DISMISS

I. Introduction

In this Second Amended Class Action Complaint, Plaintiff Larry G. Dockery alleges the existence of a scheme between an attorney, companies in the **[*2]** business of purchasing payment streams from Structured Settlement Annuities, and additional persons to obtain annuities from unsuspecting and unsophisticated annuitants without meaningful judicial review, as required by state and federal law. (ECF 99, "SAC"). Plaintiff seeks to represent a class of annuitants who sold their annuities to financial institutions in exchange for lump sum cash payments, and, in so doing, received far less than the present value of their annuities. Defendants 321 Henderson Receivables LLC, J.G. Wentworth Originations LLC, Stephen Heretick, and Seneca One Finance, Inc. have filed Motions to Dismiss pursuant to *Federal Rules of Civil Procedure 12(b)(1)*, *12(b)(3)*, and *12(b)(6)*. (ECF 78-80, 100-02). For the following reasons, Defendants' Motions to Dismiss are GRANTED IN PART AND DENIED IN PART.

II. Factual Background

For the purposes of these Motions to Dismiss (the "Motions"), the following facts are taken as true from the SAC.

In March, 1988, Plaintiff's left arm was severed in a piece of machinery. (SAC ¶ 30). Plaintiff brought a tort action against the manufacturer of the equipment, which settled for an initial payment of $407,757, plus periodic payments to Plaintiff throughout his life. (Id.). As a result, Plaintiff **[*3]** became the beneficiary of a Structured Settlement Annuity ("SSA") which provided for the following future payments:

- Monthly payments in the original amount of $1,200, increasing annually at a rate of 3%, to be paid through the span of Plaintiff's life but in no event for less than 30 years
- A payment of $15,000 in 1994
- A payment of $30,000 in 1999
- A payment of $45,000 in 2004
- A payment of $60,000 in 2009
- A payment of $75,000 in 2014
- A payment of $90,000 in 2019
- A payment of $105,000 in 2024
- A payment of $120,000 in 2029
- A payment of $135,000 in 2034

(Id. ¶ 32). Plaintiff alleges that several of the above payment streams were improperly purchased by Defendants in Virginia commonwealth court proceedings that did not comport with federal and state law.

Defendants 321 Henderson Receivables LLC ("321 Henderson"), J.G. Wentworth Originations LLC ("Wentworth"), Seneca One Finance ("Seneca"), and Structured Settlement Purchaser John Doe Inc. 1-100, are companies that purchase SSA payment streams (altogether "Purchaser Defendants").[1] (Id. ¶¶ 34-37). Each of the Purchaser Defendants purchased payment streams from SSAs issued to Plaintiff. In connection with such purchases,

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[1] The SAC alleges that Defendants 321 Henderson and Wentworth maintain their respective principal places of business in the Eastern District of Pennsylvania, while Defendant Seneca maintains its principal place of business in Maryland. (Id. ¶¶ 34-36).

Purchaser Defendants **[*4]** were each represented by Defendant Heretick, an attorney in Virginia who serves in the Virginia House of Delegates. (Id. ¶¶ 33-36).[2]

Several "Nominal Defendants" are also the subject of Plaintiff's lawsuit. New York Life Insurance Company ("New York Life") and MetLife Insurance Company ("MetLife") are Nominal Defendants currently making payments on annuities which are the subject of this case. (Id. ¶¶ 39-41).[3]

Plaintiff further alleges that several persons not named as defendants participated in Heretick's scheme. These persons include attorneys who falsely claimed to have provided independent legal advice to beneficiaries. (SAC ¶¶ 43, 50).

According to the SAC, at the center of the alleged scheme to obtain SSAs was Defendant Stephen E. Heretick, the aforementioned Virginia attorney, who worked with the Purchaser Defendants and others to evade state and federal requirements governing the judicial review of transactions involving SSAs. (Id. ¶¶ 12-16, 42). Specifically, the SAC alleges that SSA annuitants were exploited by Heretick's clients, the Purchaser Defendants, in a process by which:

- The Purchaser Defendants would identify vulnerable SSA beneficiaries through court records and **[*5]** gain their trust so that the beneficiaries would agree to sell their streams of monthly payments on terms that were as low as possible; (Id. ¶¶ 87-89).

- Heretick would file petitions seeking judicial approval of the SSA payments in Portsmouth Circuit Court, where he had been granted permission to submit his petitions in batches and where he knew that the petitions would not be carefully scrutinized for misrepresentations, errors, or other defaults; (Id. ¶ 98)

- The petitions would include representations by interested persons, paid on a contingent basis by the Purchaser Defendants, who purported to provide independent legal and financial advice to the SSA beneficiaries even though they did not do so; (Id. ¶ 42-50)

- Heretick and the Purchaser Defendants prevented the SSA beneficiaries from obtaining independent legal or professional advice, which was their right, by telling the beneficiaries that the transaction would not occur if they did not waive their right to counsel or by providing a financial adviser who was not, in fact, independent; and (Id. ¶¶ 100-101, 110, 112, 114)

- Heretick then filed petitions and represented to the court, in the absence of an appearance by the SSA beneficiaries, **[*6]** that each beneficiary had been advised by the Purchaser Defendants to seek independent professional advice and that each beneficiary had either received such advice or knowingly waived such advice in writing. (Id. ¶ 101).

According to the SAC, Defendants would also bring SSA beneficiaries to Virginia from outside the Commonwealth and then arrange for them to execute papers falsely stating that they resided in Virginia so that their petitions could be filed in Portsmouth County. (Id. ¶ 124). The scheme allegedly took place between 2000 and 2016, during which time Heretick filed approximately 375 petitions per year. (Id. ¶¶ 91, 93). Defendants also took steps to prevent their scheme from becoming public, such as sealing cases, preventing the seller's names from appearing on the court docket (instead using only their initials), preventing sellers from retaining counsel or from obtaining independent financial advice, and urging sellers not to appear in court proceedings. (Id. ¶¶ 147-150).

A. Alleged Issues Regarding State Law

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[2] The SAC alleges that Defendant Heretick is a "citizen" of the Commonwealth of Virginia. (Id. ¶ 33).

[3] The SAC also names Symmetra Life Insurance Company as a Nominal Defendant, however Symmetra was dismissed by stipulation on April 8, 2019. (ECF 107).

Virginia law requires judicial approval for the transfer of SSA payment streams. Specifically *Virginia Code § 59.1-476* requires findings that:

> a. The transfer is in the best interest of the **[*7]** payee, taking into account the welfare and support of the payee's dependents;
> b. The payee has been advised in writing by the transferee to seek independent professional advice regarding the transfer and has either received such advice or knowingly waived in writing the opportunity to seek and receive such advice; and
> c. The transfer does not contravene any applicable statute or order of any court or other government authority

(Id. ¶ 54).

Plaintiff claims that Defendants fraudulently circumvented the above state law requirements designed to protect SSA beneficiaries by inducing the beneficiaries into selling annuity payment streams on terms on which no rational, well-informed, or well-advised person would sell, and with terms that would never be approved of by any court that engaged in any meaningful review of the transaction or in any proceeding in which the beneficiary was represented by counsel. (Id. ¶¶ 66-69).

Among the allegations in the SAC regarding evasion of state law requirements are that: (1) Plaintiff and the putative class members were advised the SSA transfer would not take place if Plaintiff sought independent professional advice, and (2) numerous "anomalies" in the petitions **[*8]** filed by Heretick would have put a careful reviewer on notice that the transactions were not in the best interest of the beneficiaries. (Id. ¶¶ 114, 145).

B. Alleged Issues Involving Federal Law

Federal law, codified at *26 U.S.C. § 5891*, also requires SSA approval consistent with Virginia state law, or else a 40% tax on the sale of the payment stream is imposed. (Id. ¶ 57). Under the regime established by *26 U.S.C. §5891*, to avoid the 40% tax penalty, SSA payment transfers must be approved by a court of the state in which the seller of the income stream (e.g., Plaintiff) is domiciled. (Id. ¶ 63). Plaintiff in this case claims in his SAC that the domicile requirement of *26 U.S.C. §5891* was fraudulently circumvented as part of the alleged scheme. Specifically, Plaintiff alleges that Defendants violated federal law by inducing many SSA beneficiaries to falsely state that they were domiciled in Virginia. (Id. ¶ 66).

Among the allegations in the SAC regarding evasion of federal domiciliary requirements are that: (1) evidence presented to the Virginia court of a beneficiary's domicile was often recently created (such as driver's licenses or leases); and (2) the law in Virginia was changed to require SSA transfers only in the county of **[*9]** the beneficiary's residence after a Washington Post article in 2015 revealed the "flawed system." (Id. ¶¶ 128, 136).

III. Procedural Background

A. Original Class Action Complaint

Plaintiff first filed this putative class action on September 14, 2017. (ECF 1). The original Complaint alleged a scheme between Heretick, the Purchaser Defendants,[4] and "complicit judges" sitting on the Circuit Court of Portsmouth County, Virginia. The Complaint also named several insurance companies making payments on the annuities as "Nominal Defendants." The Complaint was comprised of the following ten counts:

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[4] The original Complaint also alleged claims against Defendant Structured Settlement Investments LP ("SSILP"). Plaintiff told the Court that he would not pursue claims against that Defendant and dropped the company as a Defendant in the Amended Complaint. (ECF 75).

Counts I through V of the Complaint alleged violations of RICO, *18 U.S.C. § 1962(c)*, by SSILP, Seneca, Wentworth, 321 Henderson, and Heretick.

Count VI alleged conspiracy to violate RICO, *18 U.S.C. § 1962(d)* against Defendants. Count VII alleged unjust enrichment against all Defendants.

Count VIII alleged violation of Due Process against Defendants, pursuant to *42 U.S.C. § 1983*.

Count IX sought a constructive trust against all Defendants and all Nominal Defendants.

Count X alleged breach of fiduciary duty as well as aiding and abetting breach of fiduciary duty against all Defendants.

Defendants previously filed motions to dismiss in the fall of 2017. (ECF 12, **[*10]** 22, 24). The Court then ordered Plaintiff to file a RICO Case Statement, which he did in March of 2018. (ECF 36, 37). The Defendants then separately filed new *Rule 12* motions (ECF 39, 40, 41), which were fully briefed. Defendants moved pursuant to:

1. *FRCP 12(b)(1)*, arguing that the Court did not have jurisdiction to hear the case because of the Rooker-Feldman doctrine, the Anti-Injunction Act, and preclusion and estoppel principles under the Full Faith and Credit Statute;

2. *FRCP 12(b)(3)*, arguing that venue in the Eastern District of Pennsylvania was improper; and

3. *FRCP 12(b)(6)* and *9(b)*, arguing that Plaintiff failed to sufficiently state a claim for relief on any of his counts.

The Court held oral argument in August 2018, after which it granted Plaintiff leave to file an Amended Complaint that removed his previous "complicit judges" theory. (ECF 67).

B. Amended Class Action Complaint

Plaintiff filed his Amended Class Action Complaint on October 22, 2018. (ECF 75, "Amended Complaint" or "Am. Compl."). A second RICO Case Statement was filed on November 6, 2018. (ECF 77). The Amended Complaint is largely premised on the same scheme, although Plaintiff removed allegations related to the "complicit judges" and replaced them with allegations **[*11]** that Heretick and the Purchaser Defendants engaged with "[a]dditional persons, including but not limited to those persons identified herein, . . . including persons who falsely represented themselves to have provided independent advice to the sellers of SSA payments, and at least one other person who falsely portrayed herself as a notary public." Am. Compl. ¶ 185.[5] The Amended Complaint is comprised of the following eight counts:

Count I of the Amended Complaint alleges violations of RICO, *18 U.S.C. § 1962(c)*, by Seneca, Wentworth, 321 Henderson, and Heretick.

Counts II through IV also allege violations of RICO, *18 U.S.C. § 1962(c)*, but only against Heretick.

Count V alleges conspiracy to violate RICO, *18 U.S.C. § 1962(d)* against Defendants. Count VI alleges unjust enrichment against Defendants.

Count VII seeks a constructive trust against all Defendants and all Nominal Defendants.

Count VIII alleges breach of fiduciary duty as well as aiding and abetting breach of fiduciary duty against Defendants.

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[5] Plaintiff also names several insurance companies making payments on the annuities as "Nominal Defendants."

Defendants again filed motions to dismiss on November 20, 2018. (ECF 78, "Wentworth Br."; ECF 79, "Heretick Br."; ECF 80, "Seneca Br."; collectively, the "Motions"). The Motions are premised on the same arguments Defendants made in response to the previous **[*12]** Complaint. Plaintiff responded in opposition on December 4, 2018, (ECF 82, "Opp'n"), and Defendants replied in support on December 10 and 11, 2018. (ECF 84, "Heretick Reply"; ECF 85, "Seneca Reply"; ECF 86, "Wentworth Reply"). The Court again held oral argument on February 19, 2019, and ordered Plaintiff to amend Count I. The Court also allowed the parties to file supplemental letter briefing and allowed supplemental motions to dismiss in response to Plaintiff's amendment. (ECF 91).

C. Second Amended Class Action Complaint

Plaintiff filed the SAC on March 6, 2019. (ECF 99). The SAC amended only Count I, in accordance with the Court's order. (ECF 91).[6] The SAC makes clear that Count I is pled against "all Defendants," and specifies that Plaintiff is alleging three different association-in-fact enterprises (collectively, the "Annuity Fraud Enterprises") between Heretick, each of the three Purchaser Defendants, and "[a]dditional persons, including but not limited to those persons identified herein, . . . including persons who falsely represented themselves to have provided independent advice to the sellers of SSA payments, and others who performed other services, including without limitation **[*13]** notarization services." (SAC ¶ 184). The SAC also identifies some of those additional persons. (Id.).

In response to the Court's order and the filing of the SAC, the parties filed supplemental letter briefs (ECF 90, 93-96) and supplemental motions to dismiss (ECF 100-102), which largely adopt the arguments made in prior briefing. Plaintiff again responded in opposition on March 26, 2019. (ECF 105).

This Memorandum Opinion takes into account all arguments made in the briefing on the Amended Complaint and SAC, to the extent those arguments remain valid as to the amendments made in the SAC.

IV. Legal Standards

A. Federal *Rule 12(b)(1)*

In considering a motion to dismiss under *Rule 12(b)(1)*, the court "must grant" the motion if it "lacks subject-matter jurisdiction to hear [the] claim." *In re Schering Plough Corp. Intron/Temodar Consumer Class Action, 678 F.3d 235, 243 (3d Cir. 2012)*. A *Rule 12(b)(1)* motion to dismiss for lack of subject-matter jurisdiction may present either a facial or a factual attack. *CNA v. United States, 535 F.3d 132, 139 (3d Cir. 2008)*. A facial attack concerns "an alleged pleading deficiency," and a factual attack concerns "the actual failure of [a plaintiff's] claims to comport [factually] with the jurisdictional prerequisites." Id. (alteration in original) (internal quotation marks and citation omitted).

Defendants' challenge here is factual, **[*14]** not facial, because the Motion challenges whether the district court has actual jurisdiction to hear the case. Id. The fact that the *Rule 12(b)(1)* motion makes a factual attack has three important procedural consequences for this Court: (1) "no presumption of truthfulness attaches to the allegations of the plaintiff"; (2) the plaintiff has the burden of proving subject matter jurisdiction; and (3) the court has the authority to review evidence outside the pleadings and make factual findings that are decisive to determining jurisdiction. *Id. at 139, 145*.

B. Federal *Rule 12(b)(3)*

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[6] The SAC also removed a remaining allegation that the Virginia state court judges participated in the alleged fraudulent scheme. (Compare Am. Compl. ¶ 150, with SAC ¶ 150).

Under *Federal Rule of Civil Procedure 12(b)(3)*, a court must grant a motion to dismiss if venue is improper. *Leone v. Cataldo, 574 F. Supp. 2d 471, 483 (E.D. Pa. 2008)*. When deciding a *Rule 12(b)(3)* motion, the court must "accept as true all of the allegations in the complaint, unless those allegations are contradicted by the defendants' affidavits." *Kimmel v. Phelan Hallinan & Schmieg, 847 F. Supp. 2d 753, 759 (E.D. Pa. 2012)* (citing *Bockman v. First Am. Mktg. Corp., 459 F. App'x 157, 158 n.1 (3d Cir. 2012))*. While the court may consider facts outside the complaint to determine the proper venue, all reasonable inferences must be drawn in the plaintiff's favor. *Fellner ex rel. Estate of Fellner v. Philadelphia Toboggan Coasters, Inc., No. 05-2052, 2005 U.S. Dist. LEXIS 23839, 2005 WL 2660351, at *1 (E.D. Pa. Oct. 18, 2005))*. In a motion to dismiss for improper venue, the defendant bears the burden of showing that venue is improper. *MacKay v. Donovan, 747 F. Supp. 2d 496, 502 (E.D. Pa. 2010)* (citing *Leone, 574 F. Supp. 2d at 483*).

C. Federal *Rule 12(b)(6)*

In considering a motion to dismiss under *Rule 12(b)(6)*, the Court "accept[s] all factual allegations as true [and] construe[s] the **[*15]** complaint in the light most favorable to the plaintiff." *Warren Gen. Hosp. v. Amgen, Inc., 643 F.3d 77, 84 (3d Cir. 2011)* (internal quotation marks and citation omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*.

The Court in Iqbal explained that, although a court must accept as true all the factual allegations contained in a complaint, that requirement does not apply to legal conclusions; therefore, pleadings must include factual allegations to support the legal claims asserted. *Iqbal, 556 U.S. at 678, 684*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id. at 678* (citing *Twombly, 550 U.S. at 555*); see also *Phillips v. Cty. of Allegheny, 515 F.3d 224, 232 (3d Cir. 2008)* (citing *Twombly, 550 U.S. at 556 n.3*) ("We caution that without some factual allegation in the complaint, a claimant cannot satisfy the requirement that he or she provide not only 'fair notice,' but also the 'grounds' on which the claim rests."). Accordingly, to survive a motion to dismiss, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678* (citing *Twombly, 550 U.S. at 556*).

D. Federal *Rule 9(b)*

All allegations of fraud must meet *Fed. R. Civ. P. 9(b)*'s heightened pleading standard **[*16]** (the "particularity" requirement). *Rule 9(b)*'s heightened pleading standard not only gives defendants notice of the claims against them, but also provides increased measure for protection of their reputation and reduces the number of frivolous lawsuits brought solely to extract settlements. *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1418 (3d Cir. 1997)*.

Rule 9(b) may be satisfied by describing "the circumstances of the alleged fraud with precise allegations of date, time, or place, or by using some means of injecting precision and some measure of substantiation into [the] allegations of fraud." *Bd. of Trs. of Teamsters Local 863 Pension Fund v. Foodtown, Inc., 296 F.3d 164, 172 n. 10 (3d Cir. 2002)* (internal quotation marks and citation omitted). Stated another way, the plaintiff must plead the who, what, when, where, and how of the fraud. *Institutional Investors Grp. v. Avava, Inc., 564 F.3d 242, 253 (3d Cir. 2009)*; see *Bonavitacola Elec. Constr. v. Boro Developers, Inc., No. 01-5508, 2003 U.S. Dist. LEXIS 2190, 2003 WL 329145, at *6 (E.D. Pa. Feb. 12, 2003)* (Baylson, J.).

However, "courts should be sensitive to the fact that application of [*Rule 9(b)*] prior to discovery may permit sophisticated defrauders to successfully conceal the details of their fraud. Accordingly, the normally rigorous particularity rule has been relaxed somewhat where the factual information is peculiarly within the defendant's knowledge or control." *In re Burlington, 114 F.3d at 1418* (internal quotation marks and citations omitted). Thus, plaintiffs may plead certain factual allegations based "upon information and belief" but must allege that the **[*17]** necessary information lies within the defendant's control, and their allegations must be accompanied by a statement of the facts upon which the allegations are based. *Craftmatic Sec. Litig. v. Kraftsow, 890 F.2d 628, 645 (3d Cir. 1989)*. Boilerplate and conclusory allegations will not suffice. *In re Burlington, 114 F.3d at 1418*.

V. Threshold Questions

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction—Rooker-Feldman Doctrine

The Rooker-Feldman doctrine engenders the principle that lower federal courts lack subject-matter jurisdiction to adjudicate cases stemming from state-court decisions if exercising jurisdiction would function as an appeal of those decisions. This doctrine receives its name from two United States Supreme Court cases, *Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923)*, and *District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983)*. In Feldman, the Supreme Court held that district courts "do not have jurisdiction[] . . . over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." *460 U.S. at 486*. A federal statute—*28 U.S.C. § 1257*—reserves review of final state-court decisions for the Supreme Court itself. Id. The Supreme Court also found the federal claims in Feldman to be "inextricably intertwined" with the state-court decisions at issue, suggesting that a lower federal court **[*18]** would not have subject-matter jurisdiction to adjudicate the action. *Id. at 486-87*. In its holding, the Supreme Court distinguished between a plaintiff challenging "the validity of a rule promulgated in a non-judicial proceeding" and "a final state court judgement in a particular case," and held that lower federal courts retain subject-matter jurisdiction over the former, but not the latter. *Id. at 486*.

Since the Feldman decision, the Supreme Court has refined the scope of the Rooker-Feldman doctrine on two occasions. First, in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005)*, the Supreme Court held that the doctrine is "confined" to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *544 U.S. at 284*. Second, in *Lance v. Dennis, 546 U.S. 459, 126 S. Ct. 1198, 163 L. Ed. 2d 1059 (2006)*, the Supreme Court reaffirmed the doctrine's underlying jurisdictional nature, warning not to conflate it with the preclusion principles stated in the Full Faith and Credit Act. It held that "Rooker-Feldman is not simply preclusion by another name." *546 U.S. at 466*. Thus, while a lower federal court may be precluded from adjudicating an action previously litigated in state court under the principles set forth **[*19]** in the Full Faith and Credit Act, this does not mean the court would be divested of subject-matter jurisdiction over the claim. *Exxon Mobil, 544 U.S. at 293*.

In interpreting the Supreme Court's decision in Exxon Mobil, the Third Circuit held in *Great Western Mining & Mineral Co. v. Fox Rothschild LLP, 615 F.3d 159 (3d Cir. 2010)* that there are four requirements to be met before the Rooker-Feldman doctrine applies:

1. the federal plaintiff lost in state court;
2. the plaintiff complains of injuries caused by the state-court judgments;
3. those judgments were rendered before the federal suit was filed; and
4. the plaintiff is inviting the district court to review and reject the state judgments.

Id. at 166 (citing *Exxon Mobil, 544 U.S. at 284*) (internal quotation marks and citations omitted). In Great Western, similar to the original complaint in this case, the plaintiff alleged a conspiracy among a law firm, an arbitration service provider, and various Pennsylvania state-court judges to engineer the plaintiff's defeat in state court on contract and tort claims filed after a conflict of interest was discovered between the arbitration parties and provider. *Id. at 161-63*. The Third Circuit explained that Rooker-Feldman does not bar federal jurisdiction when the "federal plaintiff present[s] some independent claim," even if that claim denies a legal conclusion **[*20]** reached by the state court. *Id. at 169* (quoting *Exxon Mobil, 544 U.S. at 293*). By reaching a conclusion contrary to the state-court judgment "without concerning itself with the bona fides of the prior judgment," a federal court "is not conducting appellate review, regardless of whether compliance with the second judgment would make it impossible to comply with the first judgment." *Id. at 169* (quoting *Bolden v. City of Topeka, Kan., 441 F.3d 1129, 1143 (10th Cir. 2006))*.

The Third Circuit also decided that, in accordance with the Supreme Court's express desire to limit the scope of the Rooker-Feldman doctrine, "[t]he phrase 'inextricably intertwined' does not create an additional legal test or expand the scope of Rooker-Feldman beyond challenges to state-court judgments," because "[w]hen a federal plaintiff brings a claim[] . . . that asserts injury caused by a state-court judgment and seeks review and reversal of that judgment, the federal claim is 'inextricably intertwined' with the state judgment." *Id. at 170*. Ultimately, the Court held that the plaintiff's claim of being forced to litigate in a rigged system, where he could not receive a fair hearing, did not assert an injury caused by state-court judgments, nor did it seek review and rejection of those judgments. *Id. at 171*. Rooker-Feldman thus did not bar federal **[*21]** jurisdiction in the case.

In their Motions to Dismiss, Defendants argue that Rooker-Feldman prevents this Court from exercising jurisdiction over Plaintiff's claims. Defendants contend that this case is essentially an improper federal appeal of the Virginia state court's decision to grant the SSA transfer petitions. In analyzing this argument, the Court addresses each of the *Great Western* elements below, in turn.

1. Plaintiff as state-court loser

The first element of Great Western requires that the federal plaintiff lost in state court. The determination is not straightforward in this case because the state-court proceedings were not adversarial. Pursuant to *Virginia Code § 59.1-476*, the state-court proceedings at issue here put the Virginia judge in a posture akin to a gatekeeper, ensuring the integrity of a mutually agreed upon private transaction. Plaintiff has not made a claim that was *rejected* by the state court—rather, he is seeking review of a judicial determination that he himself requested and that was *granted* by the state court.[7]

Still, the Rooker-Feldman doctrine has been applied to bar jurisdiction over other cases that arise out of non-adversarial state-court proceedings. **[*22]** For example, in *Hartford Life Ins. Co. v. Solomon, 910 F. Supp. 2d 1075 (N.D. Ill. 2012)* (Grady, J.), which Defendants rely on heavily, an SSA beneficiary sold his annuity stream to 321 Henderson and, after he died, his estate sued in probate court to recover the annuity assets because the transfer was allegedly tainted by misrepresentations. *Id. at 1078*. Judge Grady concluded that although the underlying proceedings were not adversarial, they were judicial; and although the plaintiff was not a loser in a conventional sense, he qualified as one because his estate was seeking to overturn the state-court order in federal court. *Id. at 1081-82*. The plaintiff could not seek to voice his second thoughts about the deal he struck with 321 Henderson and at the same time avoid Rooker-Feldman by claiming that he was not a state-court loser. *Id. at 1081*.

Hartford Life likened the SSA transfer order to an agreed-upon order in *Johnson v. Orr, 551 F.3d 564 (7th Cir. 2008)*, which involved an agreement regarding property taxes that the federal plaintiff later argued was erroneous. The Johnson court—and the Hartford Life court in turn—found that because the federal plaintiff was effectively seeking to overturn the agreed-upon state-court order in federal court, Rooker-Feldman barred the claim. *Johnson, 551 F.3d at 569*; *Hartford Life, 910 F. Supp. 2d at 1082*. Other federal courts have similarly applied the Rooker-Feldman **[*23]** doctrine to bar claims brought over consent orders or agreed-upon orders, even though the underlying state-court cases were not overtly adversarial. See, e.g., *Crawford v. Adair, No. 08-281, 2008 U.S. Dist. LEXIS 57283, 2008 WL 2952488, at *2 (E.D. Va. July 29, 2008)* (holding Rooker-Feldman barred plaintiff's federal claims seeking review and rejection of a consent order agreed to by the parties in an earlier state court proceeding).

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[7] Defendants make much ado of the fact that Plaintiff supposedly "admitted" that he was a state-court loser during oral argument on the previous motions to dismiss. At that argument, held on August 22, 2018, the Court asked Plaintiff's counsel whether this element of the Rooker-Feldman doctrine was met. (See ECF 70, Hrg. Tr., Aug. 22, 2018, at 7:5-9). Plaintiff's counsel replied, "I think it's accurate to say that for the purposes of this case, the plaintiff is a loser in the sense that . . . the injury that he sustained would not have been sustained if the court had denied the petition, and the court granted the petition." (Id. at 7:20-8:1). The Court is not persuaded that this response amounted to a concession or waiver of the first Great Western element.

In light of the foregoing, the Court is satisfied that Plaintiff qualifies as a state-court loser for purposes of this proceeding. Plaintiff complains of injuries he allegedly sustained in relation to the non-adversarial, state-court proceeding, which is enough to qualify him as the loser of that proceeding for purposes of this Court's Rooker-Feldman analysis.

The first Great Western element is therefore satisfied.

2. The origin of Plaintiff's injuries

The second element of Great Western requires Plaintiff to complain of injuries caused by the state-court judgment. This element is "closely related" to the fourth Great Western element, discussed below, and the parties' arguments largely conflate the two. Still, "a federal plaintiff who was injured by a state-court judgment is not invariably seeking review and rejection of that judgment," *Great Western, 615 F.3d at 168*, and the Court must discuss **[*24]** each element separately.

In Great Western, the Third Circuit concluded that Rooker-Feldman did not bar federal jurisdiction because, although the plaintiff was attacking the state-court judgments, it was not "merely contending that the state-court decisions were incorrect or that they were themselves in violation of the Constitution." *615 F.3d at 172*. Rather, the plaintiff was claiming violations of an independent right—the right to an impartial forum. Id. This separate constitutional violation caused the adverse state decision and the plaintiff's harm, and the state-court judgments themselves did not cause the plaintiff's injuries. *Id. at 172-73*.

The Third Circuit has since made similar determinations in two notable cases. In *Williams v. BASF Catalysts LLC, 765 F.3d 306 (3d Cir. 2014)*, a plaintiff filed a putative class action alleging conspiracy to prevent asbestos-injury victims from obtaining fair tort recoveries for their injuries. The plaintiff alleged that the conspirators—chemical companies and their attorneys—worked together for years to mislead claimants about the presence of asbestos in talc mined and sold by the defendant companies. Through false discovery responses and official representations, they induced class members to dismiss or settle claims that were, **[*25]** in reality, meritorious. *Id. at 311-14*. The Third Circuit held that Rooker-Feldman did not apply, finding that the plaintiff's alleged injuries arose from defendants' misconduct, not the state-court judgments themselves. *Id. at 315* ("Because this suit does not concern state-court judgments, but rather independent torts committed to obtain them, the Rooker-Feldman doctrine does not apply.").

In *Philadelphia Entertainment & Dev. Ptnrs LP v. Dep't of Revenue, 879 F.3d 492 (3d Cir. 2018)*, a debtor paid $50 million for a license to operate slot machines, which was eventually revoked. *Id. at 495-96*. In subsequent bankruptcy proceedings, the debtor liked the revocation to a fraudulent transfer and requested the return of the $50 million fee. *Id. at 496*. The bankruptcy court applied Rooker-Feldman, finding that the claim for the value of the license was barred because "the right to be compensated for the value of the license is the 'functional equivalent' of the right to retain the license." *Id. at 497*. But the Third Circuit reversed, holding that the fraudulent transfer claim was independent of the state-court revocation orders. *Id. at 500-01*. The Court explained that "a federal court can address the same issue 'and reach[] a conclusion contrary to a judgment by the first court,' as long as the federal court does not reconsider the legal conclusion **[*26]** reached by the state court." *Id. at 501-02* (quoting *Great Western, 615 F.3d at 169*). It further held that, although the plaintiff sought to recapture exactly the relief that the state court had denied, the federal claim could be prosecuted so long as the claim arose out of an independent right and was not simply a request that the federal court re-assess the merits of the claim that had been resolved in state court. *Id. at 501-02*. In so holding, the Third Circuit presumed that "the correct result [was reached] under state law" and therefore found that it did not have to review the merits of the state court's order. *Id. at 501*.

The question this Court must consider, then, is whether Plaintiff alleges an injury that arises from the state-court orders or from his purportedly independent RICO and state-law claims. Defendants partially argue that Plaintiff's injury must arise from the state-court orders because Plaintiff seeks the return of the exact amounts that were at issue in the transfer petitions. However, that argument is unpersuasive in light of the Third Circuit's decision in *Philadelphia Entertainment*, which allowed federal jurisdiction over claims that sought to recapture exactly the relief that had been denied by the state court. 879 F.3d at 502-03. Moreover, **[*27]** like in Williams, this case does not concern the state-court orders themselves, "but rather independent torts"—and the alleged enterprise's racketeering activity—"committed to obtain them." 765 F.3d at 315. Although recent decisions in this district have rejected a fraud exception to Rooker-Feldman, Plaintiff has alleged more than fraud on the state court. He has alleged a full RICO scheme, involving conspiracy and fraud on the state court as well as on Plaintiff and the putative class members. The injuries discussed in the SAC arise from this scheme. This Court will thus defer to the precedential authority, discussed above, that advises a cautious and narrow application of the doctrine.

The second element of the Great Western test is not satisfied here.

3. The timing of the state-court orders

The third element of Great Western is that the state-court judgments at issue must have been rendered before the federal suit was filed. The parties do not dispute that the state-court orders approving the transfer of Plaintiff's SSA payments were entered in state court and were entered prior to the commencement of this case. Indeed, the SAC alleges that the last order at issue in Plaintiff's case was entered **[*28]** by the Portsmouth Circuit Court in 2010, seven years before Plaintiff filed this action.

The third Great Western element is therefore satisfied.

4. Review/rejection of the state-court orders

The final Great Western element requires that Plaintiff seek federal review and rejection of a state-court judgment. Even if Plaintiff had alleged injuries that arose from the state-court orders, in satisfaction of the second Great Western element, the Court would not apply Rooker-Feldman because Plaintiff's claims are not seeking review and rejection of those orders.

As noted above, Great Western states that "a federal plaintiff who was injured by a state-court judgment is not invariably seeking review and rejection of that judgment." 615 F.3d at 168. This fourth element of the Great Western test "seeks to discern whether the plaintiff's suit requires the district court to conduct appellate review of the previous state-court decision." *King v. Burr, No. 17-2315, 2017 U.S. Dist. LEXIS 135754, 2017 WL 3705872, at *4 (E.D. Pa. Aug. 24, 2017)* (Baylson, J.).

In Philadelphia Entertainment, the Third Circuit held that Rooker-Feldman did not apply because the plaintiff's federal claim seeking compensation for the value of an operating license was independent of the plaintiff's state-court claim to retain that same license. **[*29]** 879 F.3d 492, 500-01. In doing so, the Third Circuit reversed the bankruptcy court, which determined that the doctrine applied because the two claims were functionally equivalent. *Id. at 497*. The Third Circuit explained that "a federal court can address the same issue 'and reach[] a conclusion contrary to a judgment by the first court,' as long as the federal court does not reconsider the legal conclusion reached by the state court." *Philadelphia Entertainment, 879 F.3d at 501-02* (quoting *Great Western, 615 F.3d at 169*). "[I]f the federal court's review does not concern the bona fides of the prior judgment, the federal court is not conducting appellate review, regardless of whether compliance with the second judgment would make it impossible to comply with the first judgment. In that situation, the Rooker-Feldman doctrine would not apply because the plaintiff is not complaining of legal injury caused by a state court judgment because of a legal error committed by the state court." *Id. at 500* (internal citations and quotation marks omitted).

The thrust of Plaintiff's SAC is that Defendants engaged in a pattern of racketeering activity meant to induce Plaintiff to sell his SSA payment streams for unfair rates and meant to convince the state court that the requirements of *Virginia Code § 59.1-476* were met. Plaintiff is not **[*30]** asking the Court to review the bona fides of the state-court orders, nor is he appealing some legal error committed to obtain them.[8] Rather, his claims turn on a determination of whether Defendants acted in concert to pursue a pattern of racketeering activity that ultimately mistreated Plaintiff, the putative class members, and the state court itself. Although Plaintiff's RICO and state-law claims may raise issues that were considered by the state court, they do not require this Court to decide the state judges' decisions anew. This Court can fairly adjudicate the claims in the SAC without expressly deciding whether the requirements of *Virginia Code § 59.1-476* were met. Such review is not barred by Rooker-Feldman under the narrow application espoused by *Philadelphia Entertainment*.

The fourth and final element of Great Western is also not satisfied. Because both the second and fourth elements have not been satisfied, the *Rooker-Feldman* doctrine does not apply to this case. The Court may continue to exercise jurisdiction over the claims in Plaintiff's SAC.

B. Anti-Injunction Act

The Anti-Injunction Act, *28 U.S.C. § 2283*, was originally passed by Congress as part of the Judiciary Act of 1793 to protect federalism **[*31]** in the American judiciary. The statute provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." *28 U.S.C. § 2283*.

In *Hill v. Martin, 296 U.S. 393, 403, 56 S. Ct. 278, 80 L. Ed. 293 (1935)*, the Supreme Court defined the term "proceedings" liberally, stating "[t]hat term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies . . . not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective." *296 U.S. at 403* (internal citations omitted). Thus, where a plaintiff asks a federal court to enjoin the enforcement of a state-court judgment, the federal court is barred from doing so unless one of the three statutory exceptions apply. Furthermore, the Supreme Court has reasoned that "[i]t is settled that the prohibition of *§ 2283* cannot be evaded by addressing the order to the parties [as opposed to the state court] or prohibiting utilization of the results of a completed state proceeding." *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 287, 90 S. Ct. 1739, 26 L. Ed. 2d 234 (1970)*.

Williams, 765 F.3d 306, provides **[*32]** clear precedent, on which this Court relies to find that the Anti-Injunction Act does not apply to this case. In Williams, as discussed above, the plaintiffs alleged that the defendant manufacturing corporation and its counsel defrauded litigants by suppressing evidence favorable to their state asbestos cases. The Third Circuit allowed the federal case to proceed, despite the fact that a judgment in the plaintiffs' favor would contradict earlier state court judgments regarding the plaintiffs' settlements. The Third Circuit's reasoning, which applies with equal force to the present case, was that "because there are no ongoing proceedings in a state court with which the District Court's judgment would interfere . . . [the Anti-Injunction Act] has no application. . . . [T]he named plaintiffs in this case have no other proceedings pending anywhere." *Id. at 325-26* (citation omitted).

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[8] Plaintiff is also not claiming that the state-court orders were simply procured by fraud. As noted above, the Third Circuit has yet to adopt a fraud exception to the Rooker-Feldman doctrine. Defendants argue that claims contesting state-court judgments on the basis that those judgments were allegedly procured by fraud are more appropriately brought in state court. See *Johnson, 551 F.3d at 569* ("If [the plaintiff] believes the state court was wrong [in its legal determination] or that he was induced fraudulently to sign away his rights . . . , his remedy is to ask the state circuit court to set aside the agreed order [between the parties.]"); *Campbell, 2017 U.S. Dist. LEXIS 115722, 2017 WL 3142118, at *4* ("[W]hether a state court judgment should be subject to collateral attack or review is an issue best left to the state courts." (citing *Fielder v. Credit Acceptance Corp., 188 F.3d 1031, 1035-36 (8th Cir. 1999))*). It appears that there is a vehicle to bring such a claim in Virginia state court. See Va. Code § 8:01-428 ("This section does not limit the power of the court to entertain at any time an independent action to relieve a party from any judgment or proceedings, . . . or to set aside a judgment or decree for fraud upon the court."). Plaintiff here has alleged a complicated, years-long scheme meant to take advantage of annuitants and subvert the review of state-court judges. These allegations raise claims wholly separate from an appeal of the state-court orders, and present more for this Court to consider than a plain lie or fraud on the state court.

It is clear that Williams applies to the case now before the Court. Defendants are correct that Plaintiff's SSA payments continue to be paid—albeit not to Plaintiff. However, the state court proceedings determining that such payments should be made to Defendants rather than Plaintiff are already completed. Therefore, because **[*33]** no state court proceeding remains "ongoing," there is no possibility of this Court issuing any "injunction to stay proceedings in a State court." *28 U.S.C. § 2283*.

C. Full Faith and Credit Statute

In their motions to dismiss, Defendants Wentworth, 321 Henderson, and Seneca contend that the Full Faith and Credit statute, *28 U.S.C. § 1738*, and Virginia state law on *res judicata* and collateral estoppel require this Court to dismiss Plaintiff's Complaint with prejudice. However, the Court finds that Defendants have not met their burden of establishing that Virginia *res judicata* law or collateral estoppel law mandate such an outcome.

The Full Faith and Credit statute, *28 U.S.C. § 1738*, provides that "[s]uch Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." *28 U.S.C. § 1738*. Thus, Virginia state law on *res judicata* applies to the question of whether the claims outlined in Plaintiff's Complaint are precluded by the previous state-court orders Virginia state law on collateral estoppel applies to the question **[*34]** of whether this Court may consider issues that were already litigated in the previous state-court proceeding. The Court finds that Virginia law on *res judicata* and collateral estoppel do not require a finding that Plaintiff's claims are precluded.

There are two different standards for determining the application of *res judicata* under Virginia state law: The common-law standard (predating the July 1, 2006 effective date of Va. Sup. Ct. R. 1:6), and the transactional standard (resulting from the adoption of *Va. Sup. Ct. R. 1:6*). In order for the transactional approach to apply, "both the original action yielding final judgment and the subsequent action must have been filed after July 1, 2006." *Coleman v. Pascarella, 81 Va. Cir. 167, 169 (Chesapeake Cty., 2010)*. Plaintiff's allegations make clear that Virginia judges issued several relevant state-court orders prior to July 1, 2006, and several after July 1, 2006. Therefore, analysis under both standards is required.

Under the common-law standard, there are four elements that a defendant must establish in order to demonstrate that a plaintiff's claims are barred by *res judicata*: "(1) identity of the remedies sought; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the **[*35]** quality of the persons for or against whom the claim is made." *Rhoten v. Commonwealth, 286 Va. 262, 750 S.E.2d 110, 114 (Va. 2013)*.

Under the common-law approach, in order to demonstrate that the causes of action of the two (or more) actions are identical, the defendant must demonstrate that the same evidence is required in both (or all) of the actions to establish the claims. *Id.* This approach was abandoned with the adoption of *Virginia Supreme Court Rule 1:6 ("Rule 1:6")*, which instead provides that *res judicata* will bar "any claim or cause of action that arises from the same conduct, transaction or occurrence, whether or not the legal theory or rights asserted in the second or subsequent action were raised in the prior lawsuit, and regardless of the legal elements or the evidence upon which any claims in the prior proceeding depended, or the particular remedies sought." *Va. Sup. Ct. R. 1:6(a)*. Despite the differences between the two approaches, this Court holds that neither bars Plaintiff's claims.

1. For Virginia State-Court Orders Predating July 1, 2006, the Common-Law *Res Judicata* Standard Does Not Bar Plaintiff's Claims

For the reasons set forth below, the Court finds that Defendants have not established all of the elements under the common-law approach to *res* ***[*36]*** *judicata*. A party invoking *res judicata* must, by a preponderance of the evidence, establish four elements: "(1) identity of the remedies sought; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality of the persons for or against whom the claim is made." *Rhoten, 750 S.E.2d at 114*; see also *Mowry v. City of Virginia Beach, 198 Va. 205, 93 S.E.2d 323, 327 (Va. 1956)* (holding that "there must be a concurrence of [the] four" elements to succeed in asserting *res judicata*). Defendants assert that they have demonstrated the existence of all four elements as they pertain to the state-court orders issued before July 1, 2006. Although the Court finds that the fourth element, identity of the quality of the parties, has been satisfied, it also finds that Defendants have failed to establish the first three elements of *res judicata*.

a. Defendants Fail to Demonstrate an Identity of Remedies

Defendants argue that the remedies in the Virginia state-court orders and in this litigation are identical. The Court disagrees.

Plaintiff's SAC seeks monetary damages for allegedly unlawful conduct violating RICO, facilitating unjust enrichment, and breaching fiduciary duties. It also seeks equitable relief via disgorgement and a constructive trust.

Insofar as the state-court **[*37]** orders can be considered to constitute a "remedy," the remedy would be the transfer of a right to SSA payment streams. Defendants do not speak to this element of *res judicata* in their most recent briefing. (See ECF 78-1, at 17-18). However, they reference their previous briefing, where they maintained that the remedies sought by Plaintiff and those provided via the SSA petitions are "functionally the same," because without the conduct of the Purchaser Defendants and Defendant Heretick, "the transfer orders never would have been approved and he would have retained the right to his SSA payment stream." (ECF 22-1, at 23). However, Defendants cited no authority demonstrating that "functionally equivalent" remedies satisfy this first element.

b. Defendants Fail to Demonstrate an Identity of Cause of Action

Under Virginia's common-law approach to *res judicata*, the second element is satisfied when the invoking party demonstrates that the same evidence is necessary to prove each claim. *Brown v. Haley, 233 Va. 210, 355 S.E.2d 563, 567, 3 Va. Law Rep. 2286 (Va. 1987)*. Here, the evidence proffered in the state-court proceedings was not aimed at establishing unlawful behavior on the part of Defendants. Defendants had the burden in the state court of demonstrating, through affidavits **[*38]** or other appropriate documentation, compliance with *Virginia Code § 59.1-476*. In the present case, Plaintiff bears the burden of demonstrating, among other things, the existence of an enterprise, a pattern of racketeering activity, the wrongful transfer of a benefit, and the assumption of a fiduciary duty.

c. Defendants Fail to Demonstrate Identity of Parties

To apply *res judicata*, Defendants must also show that the parties in this case are the same as those in the prior proceedings. However, Defendant Heretick was not a party to the state-court proceedings.

Therefore, this Court is not barred from adjudicating Plaintiff's claims that implicate state-court orders issued prior to July 1, 2006, because Defendants fail as to three elements of the common law *res judicata* standard.

2. For Virginia State-Court Orders Issued After July 1, 2006, *Rule 1:6*'s Transactional *Res Judicata* Standard Does Not Bar Plaintiff's Claims

While Virginia state-court orders issued before July 1, 2006 are analyzed under the common-law standard of *res judicata*, state-court orders issued after that date are analyzed under the standard set out in *Rule 1:6*, which adopted the transactional approach to *res judicata*. See *Va. Sup. Ct. R. 1:6*. *Rule 1:6(a)* provides that a **[*39]** plaintiff's claim is precluded when it "arises from that same conduct, transaction or occurrence" previously litigated, "whether or not the legal theory or rights asserted in the second or subsequent action were raised in the prior lawsuit, and regardless of the legal elements or the evidence upon which any claims in the prior proceeding depended, or the particular remedies sought." Id. The question, then, is whether the claims Plaintiff alleges in the

Complaint arise out of the same "conduct, transaction or occurrence" addressed by the state-court orders. Id. The Court finds that this is not the case, and thus, Plaintiff's claims pertaining to orders issued after July 1, 2006 are not precluded by *res judicata*.

Defendants previously asserted that the transaction at issue in the Virginia state-court proceedings is the transfer of rights to SSA income streams, effectuated by the issuance of the state-court orders. (ECF 22-1, at 25). Plaintiff alleges that the unlawful conduct giving rise to the claims occurred when Defendants "induce[d] the annuity beneficiaries to disarm themselves because they believed Defendants' claim that Defendants would protect them—so they did not need a lawyer, **[*40]** did not need to come to court, did not need independent financial advice, and could instead tell their story to Defendant's counsel in the Virginia proceeding, because all of these people would protect the beneficiaries and their interests." (ECF 82, "Opp'n", at 87). The alleged harm was not that the state court issued the orders leading to the SSA transfer; instead, it was the alleged prior agreement and cooperation among Defendants to reach that outcome, no matter the circumstances. Such conduct is distinct from the mere issuance of an order to that effect. Thus, the Court finds that for the orders issued after July 1, 2006, Plaintiff's claims are not barred by *res judicata*.

3. Collateral Estoppel Does Not Apply

Under Virginia law, "[t]he doctrine of collateral estoppel precludes the same parties to a prior proceeding from litigating in a later proceeding any issue of fact that actually was litigated and was essential to the final judgment in the first proceeding." *Whitley v. Commonwealth, 260 Va. 482, 538 S.E.2d 296, 299 (Va. 2000)*. The doctrine "applies even when the later proceeding asserts a different claim for relief." Id. The following requirements must be met in order to apply the doctrine: "(1) the parties to the two proceedings must be the **[*41]** same; (2) the factual issue sought to be litigated must have been actually litigated in the prior proceeding; (3) the factual issue must have been essential to the judgment rendered in the prior proceeding; and (4) the prior proceeding must have resulted in a valid, final judgment against the party to whom the doctrine is sought to be applied." Id.

First, and as addressed in the *res judicata* analysis above, the parties in this case are not the same as the parties in the state-court proceedings. Moreover, the factual issues presented by this case were not litigated in the state-court proceedings. For example, the following allegations were not litigated previously: how the putative class members were induced to sell their SSA streams; that the putative class members were actually advised against seeking independent counsel; that interested persons, paid on a contingent basis, falsely represented that they provided independent advice to the putative class members; how the petitions were fashioned to avoid meaningful judicial review; that Defendants and additional persons joined together, or conspired together, in order to take advantage of the putative class members; and that Defendants **[*42]** and additional persons agreed to use the mails in furtherance of their scheme. These are just some of the issues that will be addressed by this Court and that were not litigated in the previous, state-court proceedings.

Because the first two requirements have not been met, Plaintiff's claims are not barred by collateral estoppel.

D. Venue

Defendant Seneca has moved to dismiss for improper venue, pursuant to *Fed. R. Civ. P. 12(b)(3)*. This Court finds that venue is proper under RICO's venue provision, *18 U.S.C. § 1965(a)*, which states that venue is proper wherever a defendant "resides, is found, has an agent, or transacts his affairs." Defendants Wentworth and 321 Henderson are alleged to be located in the Eastern District of Pennsylvania, and do not dispute such allegations.

Although venue must generally be established for each cause of action, there is an exception known as "pendent venue," which applies "where claims arise out of the same operative facts." *Philadelphia Musical Soc., Local 77 v. Am. Fed'n of Musicians of U.S. & Canada, 812 F. Supp. 509, 517 n.3 (E.D. Pa. 1992)*; see *Neopart Transit, LLC v. Mgmt. Consulting, Inc., No. 16-3103, 2017 U.S. Dist. LEXIS 25255, 2017 WL 714043, at *8 (E.D. Pa. Feb. 23, 2017)* (Brody, J.). Because all RICO claims in this case are proper under *18 U.S.C. § 1965(a)*, and the other claims in this case (unjust enrichment, constructive trust, and breach of fiduciary duty) all arise out of the same operative facts, venue is proper.

VI. Merits of the Claims at Issue

A. [*43] Violations of RICO (Counts I through IV)

Counts I through IV of the Complaint allege violations of RICO, *18 U.S.C. § 1962(c)*, by Seneca, Wentworth, 321 Henderson, and Heretick. Defendants assert in their motions to dismiss that Plaintiff:

1. lacks standing to bring his RICO claim because he fails to plead a concrete injury to business or property
2. fails to allege facts sufficient to plead a purported association-in-fact enterprise;[9]
3. fails to plead the alleged predicate acts of mail and wire fraud with the specificity required by *Fed. R. Civ. P. 9(b)*; and
4. is barred from bringing RICO claims by the Noerr-Pennington Doctrine.

In response, Plaintiff contends that he:

1. properly alleges concrete pecuniary injury to demonstrate standing;
2. properly alleges association-in-fact RICO enterprises;
3. properly alleged mail fraud and other predicate acts; and
4. need not overcome the Noerr-Pennington doctrine because it does not apply here.

1. RICO Standing

A violation of *section 1962(c)* "requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*. To overcome a motion to dismiss for failure to state a claim, a plaintiff must also satisfy RICO's standing provision, which states that "[a]ny person injured in his business **[*44]** or property by reason of a violation of *section 1962* of this chapter," may file suit. *18 U.S.C. § 1964(c)*. *Section 1964(c)* requires the plaintiff to allege (1) an injury to the plaintiff's business or property that constitutes a "concrete financial loss," and (2) that the defendant's RICO violations proximately caused the plaintiff's injury. *Maio v. Aetna, Inc., 221 F.3d 472, 483 (3d Cir. 2000)*.

Here, Plaintiff alleges that he was the beneficiary of an SSA and that, as a result of a scheme amongst Defendants, he entered into an unfair settlement on terms substantially worse than he would have obtained if he had access to independent financial or legal advice. Therefore, Plaintiff has alleged (1) a concrete loss, i.e., the difference between a fair settlement and an unfair settlement, and (2) that the scheme caused this loss through a process in which Defendants induced Plaintiff to settle without financial or legal advice and obtained judicial approved in a manner that guaranteed a lack of meaningful judicial review. This suffices for purposes of RICO standing. See, e.g., *Mathews v. Kidder, Peabody & Co., Inc., 260 F.3d 239, 247-49 (3d Cir. 2001)* (RICO injury was the difference between the purchase price and actual value of the securities that the plaintiff was induced to purchase).

2. Enterprise

Counts I through IV of Plaintiff's complaint also require that **[*45]** Plaintiff allege the existence of an "enterprise." See *Boyle v. United States, 556 U.S. 938, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 (2009)*. An "enterprise" includes

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[9] Defendant Heretick also contends that Plaintiff cannot allege that he participated in conducting the affairs of an enterprise because the SAC simply alleges that he was acting in his professional capacity as an attorney.

"two categories of associations." *United States v. Turkette, 452 U.S. 576, 581, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981)*. The first category "encompasses organizations such as corporations and partnerships, and other 'legal entities,'" while the second "covers 'any union or group of individuals associated in fact although not a legal entity.'" *Id. at 578-82* (quoting *18 U.S.C. § 1961(4)*). For an enterprise in the second category to be considered an association-in-fact, the enterprise "must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle, 556 U.S. at 946*. Such an enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Turkette, 452 U.S. at 583*.

Counts II through IV of Plaintiff's complaint adequately plead the existence of an enterprise through the first category discussed above, because the three claims pertain to each of the Purchaser Defendants (321 Henderson, Wentworth, and Seneca), which are "legal entities" within the meaning of *section 1961*.

Count I pleads the existence of three different association-in-fact enterprises **[*46]** (the "Annuity Fraud Enterprises"), consisting of Heretick, each separate Purchaser Defendant, and "additional persons . . . including persons who falsely represented themselves to have provided independent advice to the sellers of SSA payments, and others who performed other services, including without limitation notarization services." (SAC ¶ 184(a)-(c)). Plaintiff goes on to name some of those "additional persons" involved in two of the three Annuity Fraud Enterprises.

Defendants argue that Count I fails to allege a relationship or common purpose among the members of each Annuity Fraud Enterprise. But Plaintiff alleges that the Annuity Fraud Enterprise members actively participated in a scheme that had the common purpose of exploiting the SSA beneficiaries by inducing them to transfer their payment streams on terms that would not otherwise have been accepted or approved after meaningful judicial review. (Id. ¶¶ 12, 42). Plaintiff also alleges that the additional persons who participated in the Annuity Fraud Enterprises knowingly made false representations that they provided independent counsel and legitimate notarization services and that they were paid by the Purchaser Defendants **[*47]** on a contingent basis. (Id. ¶¶ 43-44, 46, 184(b)). Each additional person was only paid, according to the SAC, if the transaction received judicial approval and was executed. (Id. ¶ 46). The SAC therefore contains sufficient basis to find a common relationship and purpose among the members of the Annuity Fraud Enterprises. Indeed, the Third Circuit has explained that the conspirators need not know each other's identities or be aware of all the details of the conspiracy to have been found to have agreed to participated in it. *United States v. DePeri, 778 F.2d 963, 975 (3d Cir. 1985)*.

Defendants also argue that the Annuity Fraud Enterprises do not satisfy the "continuing unit" requirement from Turkette because the SAC alleges that the "additional persons" were only involved in a "tiny minority" of cases. (SAC ¶ 50). In the "overwhelming majority" of petitions filed, the beneficiary allegedly did not purport to have received legal or financial advice. (SAC ¶ 49). But Plaintiff alleges that these additional persons were involved in more cases than just the ones where the beneficiaries purported to have received independent advice. (SAC ¶¶ 122-23) (alleging that at least three of Plaintiff's transfer petitions contained documents, signed by individuals **[*48]** representing themselves to be attorneys, asserting that Plaintiff had received independent legal advice, unbeknownst to Plaintiff). Although the "additional persons" involved may have changed among the various class members' petitions, they all maintained the same role of falsely representing themselves to have provided independent advice and legitimate notarization services. (SAC ¶ 184(a)-(c)). This is enough, at this stage of the proceedings, to satisfy the broad requirements of the RICO statute. See *Boyle, 556 U.S. at 944* (explaining that the RICO statute must be "liberally construed to effectuate its remedial purposes"); *In re Am. Inv'rs Life Ins. Co. Annuity Mktg. & Sales Practices Litig., No. 04-2535, 2007 U.S. Dist. LEXIS 64967, 2007 WL 2541216, at *17 (E.D. Pa. Aug. 29, 2007)* (McLaughlin, J.) (finding that enterprise members functioned as a continuing unit because, "[a]lthough the sales agents and attorneys involved in each annuity sale were not identical, their roles in the organizational structure of the alleged enterprise remained the same").

Defendant Seneca further argues that the Annuity Fraud Enterprises are insufficiently pled because the SAC fails to identify all of their members. Although the SAC includes the names of certain individuals who acted as additional persons involved in the Annuity Fraud Enterprises related to 321 Henderson and Wentworth, **[*49]** it does not identify any additional persons who participated in the Annuity Fraud Enterprise related to Seneca. (SAC ¶ 184(a)-

(c)). Other federal courts have determined that "a nebulous, open-ended description of the enterprise does not sufficiently identify this essential element of the RICO offense." *Richmond v. Nationwide Cassel L.P., 52 F.3d 640, 645 (7th Cir. 1995)*; see also *PortionPac Chemical Corp. v. Sanitech Sys., Inc., 210 F. Supp. 2d 1302, 1308 (M.D. Fla. 2002)* (quoting Richmond).

Plaintiff admittedly does not yet know each member's identity, but his SAC does more than allege a nebulous enterprise. The SAC specifically alleges that the Annuity Fraud Enterprises are comprised of Heretick, each Purchaser Defendant, and additional persons who falsely represented themselves as having provided independent advice or notarization services to bolster the transfer petitions. Where Plaintiff knows the identity of those additional persons, he specifically alleges it and provides details of how each individual furthered the goals of the enterprise. (SAC ¶¶ 145, 184, 198-99, 203-07). For the Annuity Fraud Enterprise involving Seneca, the SAC alleges that Seneca worked with an unidentified attorney who falsely represented that he or she gave independent advice to annuitants so that Seneca could purchase SSA streams in Maryland. (Id. ¶ 184(c)(i)). **[*50]** Plaintiff alleges that Seneca and Heretick engaged in the same practice in Virginia. (Id. ¶ 184(c)(ii)). These allegations are sufficient to identify the contours of the three alleged Annuity Fraud Enterprises and put Defendants on notice of the claims they must defend.

Although the Court finds that the Annuity Fraud Enterprises are sufficiently alleged to survive the Motions to Dismiss, Plaintiff should not take this decision as an invitation to expand the scope of these association-in-fact enterprises or to add more defendants to this case.[10] The "additional persons" comprising each Annuity Fraud Enterprise are limited to those persons specifically alleged in the SAC: (1) attorneys (or persons who represented themselves to be attorneys) who falsely represented that they provided independent advice to annuitants in order to bolster the SSA transfer petitions; and (2) persons who provided false or fraudulent notarizations on documents necessary for the passage of the transfer petitions.

3. Predicate Acts Constituting "Racketeering Activity"

To state a claim for RICO, a plaintiff must also allege that the defendants engaged in statutorily-defined "racketeering activity," i.e., "predicate **[*51]** acts." See *18 U.S.C. § 1961*. Here, Plaintiff alleges that the predicate acts are acts of mail fraud, *18 U.S.C. § 1341*.[11] (SAC ¶ 192).

Defendants assert that Plaintiff has failed to plead mail fraud with the particularity required by *Fed. R. Civ. P. 9(b)*.[12] The elements of mail fraud are: (1) a scheme to defraud; (2) use of the mails to further that scheme; and (3)

[10] Plaintiff has now had several years to investigate his claims, and the Court will not readily grant any requests to add new defendants as that would only further delay the start of trial.

[11] Plaintiff also alleges that, because the mail fraud statute was violated, the transferred funds violate *18 U.S.C. §§ 1956* and *1957* (money laundering). (SAC ¶¶ 163, 194(c)). However, if Defendants did not violate the mail fraud statute, the other two provisions cannot be predicate acts. Both provisions require that the underlying funds be criminally obtained and the only underlying criminal activity alleged by Plaintiff is mail fraud. Therefore, this Court need only determine whether the predicate acts of mail fraud are adequately pled.

The SAC references Defendants' use of wire transfers to effectuate their scheme. (SAC ¶¶ 162, 177(c), 194(c)). Because Plaintiff does not plead the predicate act of wire fraud, we do not address it here.

[12] Defendant Heretick also argues that the SAC fails to allege that his own mailings were themselves fraudulent or unlawful. But the mail fraud statute does not require that the mailings themselves be fraudulent. *Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1415 (3d Cir. 1991)* ("[C]ompletely 'innocent' mailings can satisfy the mailing element."). Moreover, "the use of the mails need not be an essential element of the scheme," *Schmuck v. United States, 489 U.S. 705, 710, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989)*, and "[t]he defendant does not have to send the mailing or wire communication personally." *In re Am Inv'rs Life Ins., 2007 U.S. Dist. LEXIS 64967, 2007 WL 2541216, at *22* (citing *Pereira v. United States, 347 U.S. 1, 8-9, 74 S. Ct. 358, 98 L. Ed. 435 (1954)*).

fraudulent intent. *United States v. Pharis, 298 F.3d 228, 234 (3d Cir. 2002)*. When mail fraud is asserted as a basis for RICO liability, "plaintiffs must plead with particularity the circumstances of the alleged fraud in order to place the defendant on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." *Lum v. Bank of America, 361 F.3d 217, 223 (3d Cir. 2004)*, abrogated in part on other grounds by *Twombly, 550 U.S. at 557*. A plaintiff may satisfy the heightened pleading requirement of *Rule 9(b)* "by pleading the date, place or time of the fraud, or through alternative means of injecting precision and some measure of substantiation into their allegations of fraud." *Id. at 224* (internal quotation marks and citation omitted). However, "the Third Circuit has cautioned against focusing too narrowly on *Rule 9(b)*'s particularity language." *Mendelsohn, Drucker & Assocs. v. Titan Atlas Mfg., Inc., 885 F. Supp. 2d 767, 786 (E.D. Pa. 2012)* (Baylson, J.).

Here, Plaintiff has clearly alleged a fraudulent scheme, the use of the mails to further that scheme, **[*52]** and fraudulent intent. Although the details of each mailing may not be spelled out day-by-day, Plaintiff describes the mailings at issue as: (1) those notices that were sent out to interested parties, as required by law, at least twenty days prior to each transfer petition hearing; and (2) those payments made by mail or wire transfer to the Purchaser Defendants or their designees pursuant to the state-court orders. (SAC ¶¶ 192-94). Plaintiff alleges the dates that his transfer petitions were approved, the dates that his SSA transfers were scheduled to take place, and the time period that other transfer petitions were approved for members of the putative class. (Id. ¶¶ 165-74, 194(b)). These allegations are sufficient to put Defendants on notice of the contours of Plaintiff's claim for a pattern of racketeering activity and particular enough to meet the requirements of *Rule 9(b)*.[13]

The Motions to Dismiss will be denied as to Counts I through IV.

B. Conspiracy to Violate RICO (Count V)

Count V alleges conspiracy to violate RICO, *18 U.S.C. § 1962(d)* against Defendants. Specifically, Plaintiff alleges that "Defendant Heretick conspired with each of Defendants 321 **[*53]** Henderson, Wentworth, Seneca One, the other individuals alleged to have been part of the association in fact enterprises alleged herein and who participated in the affairs of the enterprises otherwise alleged herein, and with Structured Settlement Purchaser John Doe Inc. Purchaser Defendants 1-100, and John Doe Individual Defendants 1-100 to violate *18 U.S.C. § 1962(c)* by creating and operating the Enterprises alleged herein and by committing, or causing the commission of, the predicate acts identified herein." (SAC ¶ 213).

"[A] defendant may be held liable for conspiracy to violate *section 1962(c)* if he knowingly agrees to facilitate a scheme which includes the operation or management of a RICO enterprise." *Smith v. Berg, 247 F.3d 532, 538 (3d Cir. 2001)*. Each conspirator need not "agree to commit or facilitate each and every part of the substantive offense." *Salinas v. United States, 522 U.S. 52, 63, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997)*. Rather, the allegations supporting the conspiracy claim "must be sufficient to describe the general composition of the conspiracy, some or all of its broad objectives, and the defendant's general role in that conspiracy." *Rose v. Bartle, 871 F.2d 331, 366 (3d Cir. 1989)*.

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[13] Defendant Heretick argues that he is immune from liability because the Noerr-Pennington doctrine, which derives from ***antitrust law***, protects "[t]hose who petition government for redress." *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*; see also *Giles v. Phelan, Hallinan & Schmieg, LLP, No. 11-6239, 2013 U.S. Dist. LEXIS 78161, 2013 WL 2444036, at *6-8 (D.N.J. June 4, 2013)* (applying the Noerr-Pennington doctrine in a RICO context). But Plaintiff's claims are not based solely on Heretick's petitioning activities before the Virginia state court. Rather, the SAC alleges that Heretick took part in an ongoing scheme meant to induce annuitants to sell their SSA streams on unfavorable terms, strip annuitants of their rights to independent counsel, and fashion transfer petitions in such a way that they would be granted despite procedural safeguards. The Noerr-Pennington doctrine therefore does not shield Heretick from Plaintiff's claims.

Here, Plaintiff has alleged a tripartite conspiracy consisting of Heretick, the Purchaser Defendants, and the additional persons discussed in detail above. The parties allegedly joined **[*54]** together to ensure the approval of SSA transfer petitions on favorable terms for the purchasers, without objection from annuitants, and in a manner that would evade judicial detection. Their scheme was "in every instance consummated using the United States mails." (SAC ¶ 190). There are sufficient allegations to support a claim that the members agreed to facilitate the scheme, (see, e.g., id. ¶¶ 45-48, 88-89, 98, 103, 142-45), and each member's role in the conspiracy is clearly alleged. Plaintiff has therefore satisfactorily alleged a claim for conspiracy to violate *§ 1962(c)*.

The Motions to Dismiss Count V are denied.

C. Breach of Fiduciary Duty and Aiding and Abetting Said Breach (Count VIII)

Count VIII alleges breach of fiduciary duty against Purchaser Defendants as well as aiding and abetting breach of fiduciary duty against Defendants Heretick. To allege a breach of fiduciary duty or aiding and abetting said breach, under either Pennsylvania or Virginia law, Plaintiff must first plead the existence of a fiduciary duty. See *Sun Hotel v. SummitBridge Credit Invs. III, LLC, 86 Va. Cir. 189, 195, 2013 WL 8019584, at *4 (Fairfax Cty. 2013)*; *Basile v. H & R Block, 2001 PA Super 136, 777 A.2d 95, 101 (Pa. Super. Ct. 2001)*.

Plaintiff contends that he has demonstrated the existence of a fiduciary duty, citing Pennsylvania law. For purposes of this claim, the Court will apply Plaintiff's **[*55]** choice of law.

Plaintiff relies heavily on Basile for the proposition that "a confidential relationship may be established by evidence of either overmastering influence or of weakness, dependence or trust." *Basile, 777 A.2d at 103* (internal quotation marks and citation omitted). "[T]hose who purport to give advice in business may engender confidential relations if others, by virtue of their own weakness or inability, the advisor's pretense of expertise, or a combination of both, invest such a level of trust that they seek no other counsel." *Id. at 102*.

In Basile, the defendant, an accounting corporation that advertised heavily on television, was found to have a fiduciary duty to plaintiff, who had sought the defendant's assistance with her taxes. In that case, the Superior Court specifically noted that "[the plaintiff] sought [the defendant's] assistance with her taxes in response to [the defendant's] ads, of which she was keenly aware, because she wanted to get money back as soon as possible." *Id. at 105*.

In this case, Plaintiff seeks to demonstrate that, because he graduated from high school with the assistance of special education classes, and because Purchaser Defendants advertised heavily, Purchaser Defendants should be viewed **[*56]** as owing a fiduciary duty to Plaintiff. However, nothing in Plaintiff's complaint has connected Purchaser Defendants' advertising and solicitation materials to Plaintiff. Unlike in *Basile*, where the plaintiff was "keenly aware" of the defendant's television advertisements, Plaintiff here has not alleged that he was influenced by, or even merely aware of, any Defendant's advertising.

Therefore, no Defendant in this case can be said to have "solicit[ed] another to trust him in matters in which he represents himself to be expert as well as trustworthy." *Id. at 102* (citing *Burdett v. Miller, 957 F.2d 1375, 1381 (7th Cir. 1992))*. As a result, no fiduciary duty existed between the Purchaser Defendants or Heretick and Plaintiff.[14]

Count VIII must be dismissed.

D. Unjust Enrichment (Count VI)

[14] Because Plaintiff has failed to allege the existence of a fiduciary duty, it follows that he has failed to allege "aiding and abetting" the breach of said duty.

Count VI alleges unjust enrichment against all Defendants, and Plaintiff cites Pennsylvania law in his briefs. For purposes of this claim, the Court will apply Plaintiff's choice of law.

Unjust enrichment claims under Pennsylvania law fall into one of two categories: (1) a quasi-contract theory of liability, in which case the unjust enrichment claim is brought as an alternative to a breach of contract claim; or (2) a theory based on unlawful or improper conduct established **[*57]** by an underlying claim, such as fraud, in which case the unjust enrichment claim is a companion to the underlying claim. See, e.g., *Zafarana v. Pfizer, Inc., 724 F. Supp. 2d 545, 561 (E.D. Pa. 2010)* (dismissing the plaintiff's unjust enrichment claim because (1) the plaintiff did not allege that the defendant refused to provide a service or good after securing a benefit, and (2) the plaintiff did not "plead a separate tort, the damages from which could be supported by a theory of unjust enrichment"); *Torchia v. Torchia, 346 Pa. Super. 229, 233, 499 A.2d 581 (1985)* ("To sustain a claim of unjust enrichment, a claimant must show that the party against whom recovery is sought either wrongfully secured or passively received a benefit that it would be unconscionable for her to retain." (internal quotation marks and citation omitted)). Under either theory, the requisite circumstances do not exist to establish that the defendant has been "unjustly enriched."

As to the first theory, an unjust enrichment claim based on a theory of quasi-contract may be pled as an alternative to a breach of contract claim. *Lugo v. Farmers Pride, Inc., 2009 PA Super 5, 967 A.2d 963, 970 (Pa. Super. Ct. 2009)*. A quasi-contract theory is "typically invoked . . . when [the] plaintiff seeks to recover from [the] defendant for a benefit conferred under an unconsummated or void contract." *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 936 (3d Cir. 1999)*. As such, the doctrine does not apply **[*58]** where a written or express contract exists. *Lackner v. Glosser, 2006 PA Super 14, 892 A.2d 21, 34 (Pa. Super. Ct. 2006)*. Such is the case here.

With respect to the second theory, an unjust enrichment claim may be pled as a companion, not an alternative, to a claim of unlawful or improper conduct as defined by law—e.g., a tort claim. "in the tort setting, an unjust enrichment claim is essentially another way of stating a traditional tort claim (i.e., if defendant is permitted to keep the benefit of his tortious conduct, he will be unjustly enriched)." *Steamfitters, 171 F.3d at 936*. Where the unjust enrichment claim rests on the same improper conduct as the underlying tort claim, the unjust enrichment claim will rise or fall with the underlying claim. See, e.g., *id. at 937* (dismissing the plaintiff's unjust enrichment claim because it was based on the same improper conduct as the plaintiff's traditional tort claims, which were dismissed for lack of proximate cause). In other words, unlike the quasi-contract theory of unjust enrichment, which acts as an equitable stand-in for a failed breach of contract claim, an unjust enrichment claim based on wrongful conduct cannot stand alone as a substitute for the failed tort claim. *Zafarana, 724 F. Supp. 2d at 561*; see also *In re Avandia Mktg., Sales, Practices & Prods. Liab. Litig., No. 07-md-1871, 2013 U.S. Dist. LEXIS 96869, 2013 WL 3486907, at *3 (E.D. Pa. July 10, 2013)*; **[*59]** *Tatum v. Takeda Pharm. N. Am., Inc., No. 12-1114, 2012 U.S. Dist. LEXIS 151031, 2012 WL 5182895, at *4 (E.D. Pa. Oct. 19, 2012)*.

Here, it is clear that Plaintiff's claim for unjust enrichment is based on an underlying tort claim of breach of fiduciary duty, because there is no allegation of breach of contract. Therefore, because Plaintiff's underlying tort claim for breach of fiduciary duty will be dismissed for the reasons discussed above, Plaintiff's claim for unjust enrichment, Count VI, must also be dismissed.

E. Constructive Trust (Count VII)

Count VII seeks a constructive trust against all Defendants and all Nominal Defendants. "[T]he ultimate test for whether to grant such a trust is whether it is necessary to prevent unjust enrichment." *Spinner v. Fulton, 777 F. Supp. 398, 402 (M.D. Pa. 1991)* (citing *Stauffer v. Stauffer, 465 Pa. 558, 568, 351 A.2d 236, 241 (1976)* ("The imposition of a constructive trust . . . is an equitable remedy designed to prevent unjust enrichment.")), aff'd sub nom. *Spinner v. Hartford Acc. & Indem. Co., 947 F.2d 937 (3d Cir. 1991)*.

As discussed above, Plaintiff's claim for unjust enrichment will be dismissed. Thus, the basis for a constructive trust is absent. Count VII must therefore also be dismissed.

V. Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss (ECF 78, 79, 80, 100, 101, 102) are GRANTED IN PART AND DENIED IN PART. An appropriate Order follows.

ORDER RE: DEFENDANTS' MOTIONS TO DISMISS, GRANTING IN PART AND DENYING IN PART [*60]

AND NOW, this 14th day of May, 2019, upon consideration of Defendants' Motions to Dismiss Plaintiff's Amended Class Action Complaint (ECF 78, 79, 80) and Defendants' Supplemental Motions to Dismiss Plaintiff's Second Amended Class Action Complaint (ECF 100, 101, 102), and all memoranda and letter briefs filed relating to those Motions, after holding oral argument on the Motions on February 19, 2019, and for the reasons set out in the accompanying Memorandum, it is hereby ORDERED that:

1. Defendants' Motions are DENIED as to Counts I, II, III, IV, and V; and
2. Defendants' Motions are GRANTED as to Counts VI, VII, and VIII; Plaintiff's claims under Counts VI, VII, and VIII are DISMISSED WITHOUT PREJUDICE.

BY THE COURT:

/s/ Michael M. Baylson

MICHAEL M. BAYLSON, U.S.D.J.

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Holmes v. Harris

United States District Court for the Central District of California

May 15, 2019, Decided; May 15, 2019, Filed

CV 18-3739 PSG (Ex)

Reporter

2019 U.S. Dist. LEXIS 136640 *; 2019 WL 2895632

Crystal Holmes v. Rosalina Harris, et al.

Subsequent History: Motion for new trial denied by, Request denied by *Holmes v. Harris, 2019 U.S. Dist. LEXIS 208427, 2019 WL 12070347 (C.D. Cal., Oct. 4, 2019)*

Motion granted by, Costs and fees proceeding at *Holmes v. Harris, 2019 U.S. Dist. LEXIS 208429 (C.D. Cal., Oct. 4, 2019)*

Related proceeding at *In re Harris, 2020 Bankr. LEXIS 1982, 2020 WL 6930806 (Bankr. C.D. Cal., July 23, 2020)*

Related proceeding at *In re Harris, 2020 Bankr. LEXIS 1983, 2020 WL 6928621 (Bankr. C.D. Cal., July 23, 2020)*

Later proceeding at *Holmes v. Harris, 2020 U.S. Dist. LEXIS 231743 (C.D. Cal., Dec. 8, 2020)*

Later proceeding at *Holmes v. Harris, 2021 U.S. Dist. LEXIS 76376 (C.D. Cal., Mar. 10, 2021)*

Motion granted by *Holmes v. Harris, 2021 U.S. Dist. LEXIS 76386, 2021 WL 1523451 (C.D. Cal., Mar. 10, 2021)*

Related proceeding at *In re Harris, 2021 Bankr. LEXIS 1348, 2021 WL 2917243 (Bankr. C.D. Cal., May 18, 2021)*

Appeal dismissed by, Motion denied by, As moot *Holmes v. Harris, 2021 U.S. App. LEXIS 26891 (9th Cir. Cal., Sept. 7, 2021)*

Core Terms

arrest, color of law, malicious prosecution claim, summary judgment, cause of action, law enforcement, arrived, rights, law enforcement officer, factual innocence, conspired, neighbor, genuine, invoke, street, grant summary judgment, malicious prosecution, genuine dispute, state law, petitioned, nonmoving, prosecute, charges, scene

Counsel: **[*1]** Attorneys Present for Plaintiff(s): Not Present.

Attorneys Present for Defendant(s): Not Present.

Judges: Philip S. Gutierrez, United States District Judge.

Opinion by: Philip S. Gutierrez

Opinion

Proceedings (In Chambers): The Court GRANTS in part and DENIES in part Defendants' motion for summary judgment

Before the Court is Defendants Rosalina Harris, Dean Harris, and Arlani Harris's (collectively "Defendants") motion for summary judgment, or in the alternative, partial summary judgment. *See* Dkt. # 58 ("*Mot*."). Plaintiff Crystal Holmes ("Plaintiff") opposes the motion, *see* Dkt. # 66 ("*Opp*."), and Defendants replied, *see* Dkt. # 69 ("*Reply*"). The Court finds the matter appropriate for decision without oral argument. *Fed. R. Civ. P. 78*; *L.R. 7-15*. Having considered the moving papers, the Court **GRANTS** in part and **DENIES** in part the motion.

I. Background

The Court recounts the facts in this case in the light most favorable to Plaintiff as the non-moving party.[1]

A. Factual History

Defendant Rosalina Harris is a Los Angeles Sheriff's Department ("LASD") Detective. *See Defendants' Statement of Uncontroverted Facts*, Dkt. # 59 ("*Defs. SUF*"), ¶ 4. Defendant Dean Harris is her husband, and the two are Defendant **[*2]** Arlani Harris's parents. *Id.* ¶ 7. Plaintiff has been a next-door neighbor of Defendants since 1998. *Id.* ¶ 8. Plaintiff and Defendants have been engrossed in a decade-old feud, which eventually culminated in the incident that gives rise to this lawsuit. The animosity between the neighbors had escalated through the years, and in October 2016, Plaintiff filed a petition seeking a restraining order prohibiting Dean Harris from contacting her, but the petition was denied in January 2017. *Plaintiff's Statement of Genuine Disputes of Facts*, Dkt. # 67 ("*Pl. SGF*"), ¶ 75.

At approximately noon on February 25, 2017, Dean and Arlani Harris arrived home in Dean Harris's truck and parked the vehicle directly across the street from their residence. *Defs. SUF* ¶ 9. Plaintiff, who was driving just a few cars behind Dean and Arlani Harris, drove past Dean Harris's parked vehicle so that she could eventually make a U-turn, drive back past the properties, and back the car into her driveway. *See id.* ¶ 10.

Dean and Arlani Harris exited the truck after Plaintiff passed the parked vehicle. *Id.* ¶ 11. First, Dean Harris crossed the street from the truck to his driveway, while Arlani Harris waited by the parked **[*3]** vehicle for cars to pass. *Id.* ¶ 12. At this point, Plaintiff had made a U-turn and pulled over to the curb to allow cars to pass her. *Id.* ¶ 13. As Arlani Harris began to cross the street, Plaintiff began driving back towards her residence. *Id.* ¶ 14.

What happened next is largely disputed by the parties. The videotape of the incident shows that Plaintiff drove behind Arlani Harris as she walked towards her home. *See Exhibits C—E to Declaration of Scott L. Menger*, Dkt. # 65 ("*Video*"), at 12:01:24-12:01:34. Plaintiff contends that she was traveling at approximately 11 miles per hour and decelerating as she passed two to three feet from Arlani Harris. *Pl. SGF* ¶ 93; *Declaration of Douglas Carner*, Dkt. # 66-2, ¶ 13. She further contends that Arlani Harris had a smile on her face as she crossed the street and that Dean and Arlani Harris did not display any signs of alarm or concern. *Pl. SGF* ¶¶ 94-95. Defendants believe that Plaintiff accelerated as she drove within a foot of Arlani Harris. *Defs. SUF* ¶ 15. Moreover, Defendants contend that the videotape shows that both Dean and Arlani Harris were concerned and "in disbelief" when the incident happened. *Defendants' Response and Objections to **[*4]** Plaintiff's Facts*, Dkt. # 70, ¶¶ 94-95.

After successfully crossing the street, Arlani Harris approached Dean Harris on the driveway, and the two watched Plaintiff as she backed her vehicle into her driveway. *Id.* ¶ 23. Moments after, Arlani Harris called Rosalina Harris to discuss "the gist" of the incident. *Pl. SGF* ¶ 99. Rosalina Harris instructed Arlani to "call the sheriff." *Id.*

At 12:03 PM, Dean Harris called the LASD Altadena Station's non-emergency line. *Id.* ¶ 100. He told the LASD personnel on the phone his name and address, then added, "[m]y wife is Detective Harris." *Id.* He went on to

[1] To the extent that the Court relies on objected-to evidence, it relies only on admissible evidence, and therefore the objections are **OVERRULED**. *See Godinez v. Alta-Dena Certified Dairy LLC, No. CV 15-01652 RSWL (SSx), 2016 U.S. Dist. LEXIS 187253, 2016 WL 6915509, at *3 (C.D. Cal. Jan. 29, 2016)*.

explain that his family had been having issues with Plaintiff and that when Arlani Harris was crossing the street, Plaintiff "came very, very, very close to hitting her." *Id.* ¶ 101. He requested that LASD dispatch officers to his home. *See id.*

At 12:10 PM, Arlani Harris called Rosalina Harris a second time, asking why the officers had not yet appeared. *Id.* ¶ 102. Rosalina Harris then called the non-emergency line herself and spoke with Deputy Klyver, whom she knew and had worked with a few times. *Id.* ¶ 103. She identified herself as "Detective Harris, special victims bureau," explained that her **[*5]** husband had called regarding "[her] neighbor trying to hit [her] daughter," and asked to confirm that LASD personnel were in fact going to respond, to which Deputy Klyver informed her that they would. *Id.* ¶ 104. Rosalina Harris then immediately called Arlani Harris back, though the details of that conversation are unclear. *See id.* ¶ 105.

Approximately twenty minutes after the incident, LASD officers arrived at the scene. *See Defs. SUF* ¶¶ 26-28. Deputy Arthur Evans ("Deputy Evans") arrived first, and Sergeant Thomas Crosswhite ("Sgt. Crosswhite") and Deputy Elizabeth Cano ("Deputy Cano") arrived soon after. *Id.* The officers investigated the incident by separately interviewing Plaintiff, Dean Harris, and Arlani Harris.

Dean Harris told the officers that he saw Plaintiff's vehicle accelerate towards Arlani and that he believed Plaintiff had intentionally tried to run over her daughter, but also claimed that he had not witnessed the incident. *Pl. SGF* ¶¶ 108, 112. Arlani Harris stated that Plaintiff "nearly ran her over," that she heard Plaintiff revving her engine as she approached, and that she was scared during the incident. *Id.* ¶¶ 109-10. Plaintiff alleges that these statements were false **[*6]** and that Dean and Arlani Harris intentionally embellished the narrative to set her up to be arrested. When Sgt. Crosswhite and Deputy Evans convened to discuss the Harrises' statements, Deputy Evans told Sgt. Crosswhite that he did not think any crime had been committed. *Id.* ¶ 114.

Rosalina Harris arrived on scene at 12:36 PM. *Id.* ¶ 117. She did not know Deputy Evans or Sgt. Crosswhite, and only knew Deputy Cano "in passing." *Id.* ¶ 115. She began to speak with Sgt. Crosswhite and Deputy Evans and explained her history with Plaintiff. *Id.* ¶ 117. Deputy Evans recalls that she identified herself as a deputy sheriff and told them the station she worked out of and that "she was extremely upset with her neighbor." *Id.* ¶ 118. At a later point, Sgt. Crosswhite informed Rosalina Harris that he did not intend arrest Plaintiff. *See id.* ¶ 123.

At 1:13 PM, Sergeant Joel Nebel ("Sgt. Nebel") arrived to relieve Sgt. Crosswhite of his duties. *See id.* ¶ 125. Sgt. Nebel and Rosalina Harris were acquaintances, though the length of their relationship is in dispute. *See id.* Before Sgt. Nebel could speak with anyone else at the scene, Rosalina Harris intercepted him on the sidewalk. *See id.* ¶¶ 126, 132. She **[*7]** told Sgt. Nebel that "this girl tried [to] run over my daughter," that Plaintiff "swerved" her car at Arlani Harris, and that she was glad Sgt. Nebel showed up because Sgt. Crosswhite was not going to arrest Plaintiff. *Id.* Sgt. Nebel has testified that he was under the impression from this conversation that Rosalina Harris was physically present and had witnessed the purported incident. *Id.* ¶ 127. Rosalina Harris further expressed to Sgt. Nebel her frustration that she thought Sgt. Crosswhite was being too cautious because she worked for the LASD. *See id.* ¶ 130; *Deposition of Joel Nebel, Ex. N to Decl. of Scott L. Menger*, Dkt. # 64-3 ("*Nebel Decl.*"), 108:25-109:5.

Sgt. Nebel then spoke with Sgt. Crosswhite. *Pl. SGF* ¶ 113. Based on his interviews of the witnesses at the scene, Sgt. Crosswhite had already decided, before he spoke with Sgt. Nebel, not to arrest Plaintiff, but instead to write an incident report and leave whether to prosecute up to the District Attorney's Office. *Id.* ¶ 128. Sgt. Nebel told Sgt. Crosswhite what Rosalina Harris had told him and that he believed, based on her statements, that a felony had been committed. *Id.* ¶ 129. Sgt. Crosswhite eventually agreed with Sgt. **[*8]** Nebel. *Nebel Dep.* 110:13-16. At 1:20 PM, Plaintiff was arrested under *California Penal Code § 245(a)(1)*, assault with a deadly weapon. *Defs. SUF* ¶ 48.

In addition to causing great stress, the arrest caused significant consequences for Plaintiff. On the day of the incident, Plaintiff was about to begin a consulting project in Hawaii, where she was to live full-time for two years. *Pl. SGF* ¶ 135. After the arrest, Plaintiff spent the rest of the day in jail and missed a deadline related to her new consulting project. *Id.* ¶¶ 136-37. Her job performance suffered from the stress caused by the arrest, and she was eventually fired by her employer in October 2017. *Id.* at ¶ 137.

The criminal investigation over the incident was assigned to LASD Detective Derric Taylor ("Det. Taylor"). *Id.* ¶ 142. He obtained video evidence from Plaintiff, reviewed it, and presented it to Deputy District Attorney Robert Dver ("DDA Dver"). *Id.* DDA Dver decided not to pursue charges against Plaintiff, stating that the video of the event did not support Defendants' claims. *Id.* Det. Taylor agreed with Dver's decision. *Id.*

Plaintiff later petitioned the LASD and the District Attorney's Office to make a finding of factual innocence pursuant to *California Penal Code § 851.8(a)*. *Id.* ¶ **[*9]** 143. Both offices opposed the petition, and Plaintiff filed her petition in Los Angeles County Superior Court pursuant to *California Penal Code § 851.8(b)*. *Id.* On August 11, 2017, the Superior Court reviewed the evidence and granted Plaintiff's petition, declaring her "factually innocent of all charges in the above entitled case." *Id.* ¶ 145.

B. Procedural History

On May 3, 2018, Plaintiff filed a complaint against Defendants in this Court. *See Complaint*, Dkt. # 1 ("*Compl*."), ¶ 1. She asserts three causes of action:

First Cause of Action: Malicious prosecution, against all Defendants. *Id.* ¶¶ 67-73.

Second Cause of Action: Violation of civil rights, *42 U.S.C. § 1983*, against Rosalina Harris. *Id.* ¶¶ 74-81.

Third Cause of Action: Violation of civil rights, *42 U.S.C. § 1983*, against Dean and Arlani Harris. *Id.* ¶¶ 82-89.

Plaintiff bases both of her *§ 1983* claims on the theory that Rosalina Harris acted jointly and conspired with Dean and Arlani Harris to act under the color of law to violate Plaintiff's *Fourth Amendment* right against wrongful arrest and to retaliate against her for exercising her *First Amendment* right to petition the courts for a restraining order against Dean Harris. *See id.* ¶¶ 79, 83 & nn.1-2.

Defendants now move for summary judgment on all claims. *See generally Mot.*

II. Legal **[*10]** Standard

"A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*.

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. If the nonmoving party will have the burden of proof at trial, the movant can prevail by pointing out that there is an absence of evidence to support the moving party's case. *See id.* If the moving party meets its initial burden, the nonmoving party must set forth, by affidavit or as otherwise provided in *Rule 56*, "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. Rather, it draws all reasonable inferences in the light most favorable to the nonmoving party. *See* *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987)*. The evidence **[*11]** presented by the parties must be capable of being presented at trial in a form that would be admissible in evidence. *See* *Fed. R. Civ. P. 56(c)(2)*. Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See* *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 738 (9th Cir. 1979)*.

III. Discussion

A. First Cause of Action: Malicious Prosecution Claim

"In order to establish a cause of action for malicious prosecution of either a criminal or civil proceeding, a plaintiff must demonstrate that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in . . . plaintiff's[] favor; (2) was brought without probable cause; and (3) was initiated with malice." *Casa Herrera, Inc. v. Beydoun, 32 Cal. 4th 336, 341, 9 Cal. Rptr. 3d 97, 83 P.3d 497 (2004)*. Here, Defendants contend that Plaintiff cannot succeed on a malicious prosecution claim because Plaintiff was never prosecuted. The Court agrees.

Van Audenhove v. Perry, 11 Cal. App. 5th 915, 217 Cal. Rptr. 3d 843 (2017), *as modified* (June 14, 2017), *review denied* (Aug. 9, 2017), is instructive. Similar to the facts in this case, the defendant in *Van Audenhove* contacted the Sheriff's Department and falsely accused his neighbor of stalking both him and his wife. *Id. at 917*. When the officer responded, the defendant made additional false statements with the intent to cause the **[*12]** plaintiff to be arrested, prosecuted, and convicted. *Id.* As a result, the police arrested the plaintiff for felony stalking. *Id.* The plaintiff was booked, held in jail overnight, and then released. *Id.* Eventually, the district attorney's office declined to prosecute the plaintiff, concluding that the incident involved a neighbor dispute, not a stalking. *Id.* The plaintiff subsequently sued the defendant for malicious prosecution, but the trial court sustained the defendant's demurrer without leave to amend. *Id. at 918*.

The California Court of Appeal affirmed the trial court's ruling, holding that "a cause of action for malicious prosecution cannot be premised on an arrest that does not result in formal charges (at least when the arrest is not pursuant to a warrant)." *Id. at 917*. It noted that a malicious prosecution claim requires a prosecution in the form of an "action" or a "proceeding" which must have been first "commenced" and then "favor[ably]" "terminat[ed]." *See id. at 920*. An arrest alone did not qualify as a prosecution because "an arrest is not a proceeding." *Id.*

Like the plaintiff in *Van Audenhove*, Plaintiff cannot bring a malicious prosecution claim under California law because although she was arrested, **[*13]** charges were never filed against her. *See id.*

Plaintiff asserts that she should nonetheless be able to present her malicious prosecution claim at trial because she successfully petitioned for a finding of factual innocence in Los Angeles Superior Court. *Opp*. 14:5-28. Under *California Penal Code § 851.8*, an arrestee can request to be found factually innocent either by law enforcement, the district attorney, or a judge in the jurisdiction of the arrest. The effect of such a finding is that the arrestee's arrest records are immediately sealed and then destroyed three years after the arrest. *Cal. Penal Code § 851.8(b)*. Plaintiff contends that her finding of factual innocence distinguishes this case from *Van Audenhove*, because in that case, the plaintiff did not move for a finding of factual innocence and was pursuing his malicious prosecution claim based solely on the prosecutor's decision not to prosecute. *Opp*. 14:16-28. In support, Plaintiff points to the *Van Audenhove* court's explanation that whether a proceeding was favorably terminated "turns on whether a court gets involved." *11 Cal. App. 5th at 924*. Because a *court* declared Plaintiff to be factually innocent of the crime that was the basis of her arrest, she asserts that she has satisfied the favorable termination **[*14]** element of her malicious prosecution claim. *Opp*. 14:26-28.

However, Plaintiff's finding of factual innocence cannot serve as a favorable termination for purposes of her malicious prosecution claim because there was no proceeding initiated against her in the first place. The *Van Audenhove* court stated, in no uncertain terms, that an arrest was *not* a proceeding and that without formal charges filed against a party, there was no proceeding initiated against that party. *11 Cal. App. 5th at 920*. Plaintiff's argument that the *§ 851.8* proceeding qualifies as a prior "action" to establish the prosecution element is unpersuasive, *Opp*. 15:21-25, because this proceeding was never "commenced by or at the direction of the defendant," *see* *Casa Herrera, 32 Cal. 4th at 341*; it was initiated by Plaintiff herself. Plaintiff attempts to sidestep this distinction by characterizing the *§ 851.8* petition as a "part of the same proceeding as the arrest," *see Opp*. 15 n.1, but she does not cite to a single case that supports this proposition. Her reliance on the fact that an arrest is a *prerequisite* of *§ 851.8* is equally flawed, as having *standing* to bring a petition for factual innocence after an arrest does not render an arrest a "proceeding," and the *§ 851.8* petition an extension of that **[*15]** proceeding, within the meaning of a malicious prosecution claim.

Therefore, the Court concludes that Plaintiff cannot succeed on a malicious prosecution claim against Defendants because her arrest does not satisfy the "prosecution" element.[2] Accordingly, the Court **GRANTS** summary judgment in favor of Defendant on the first cause of action for malicious prosecution.

B. Second & Third Causes of Action: § 1983 Claims

In order to prevail on a § 1983 claim, a plaintiff must prove "(1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of State law." *Long v. Cty. of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006)* (citing *West v. Atkins, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988))*. A plaintiff must also demonstrate that "the defendant's conduct was the actionable cause of the claimed injury" by establishing both actual and proximate causation. *Harper v. City of Los Angeles, 533 F.3d 1010, 1026 (9th Cir. 2008)*.

Here, Defendants contend that they are entitled to summary judgment on Plaintiff's § 1983 claims because (1) Defendants did not act under color of law, (2) Defendants did not violate Plaintiff's rights, and (3) Defendants' statements to and interactions with the LASD personnel are privileged and non-actionable under the *Noerr-Pennington* doctrine. *See Mot.* 13:24-26:8. **[*16]** The Court addresses each argument in turn.

i. Color of Law

A defendant has acted under color of state law if she has "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Atkins, 487 U.S. at 49*. Because Rosalina Harris is a law enforcement officer, whereas Dean and Arlani Harris are private citizens, different standards apply when determining whether they acted under the color of law. The Court first discusses Rosalina Harris's conduct, and then moves on to Dean and Arlani Harris's actions.

1. Defendant Rosalina Harris

The Supreme Court has interpreted "color of law" to mean "under pretense of law." *Screws v. United States, 325 U.S. 91, 111, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945)*. Therefore, "acts of officers in the ambit of their personal pursuits are plainly excluded." *Id.* However, the Ninth Circuit has explained that an off-duty state employee nevertheless acts under color of law when

> (1) the employee purports to or pretends to act under color of law, (2) his pretense of acting in the performance of his duties had the purpose and effect of influencing the behavior of others, and (3) the harm inflicted on plaintiff related in some meaningful way either to officer's governmental status or to the performance **[*17]** of his duties.

Naffe v. Frey, 789 F.3d 1030, 1037 (9th Cir. 2015). "It is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State." *Atkins, 487 U.S. at 49-50*.

Defendants contend that Rosalina Harris was not acting under the color of law during the incident because she was not on-duty that day and was instead acting in her capacity as a concerned wife and mother. *Mot*. 17:11-14. It is undisputed that Rosalina Harris arrived home in her personal vehicle, in civilian clothing, and did not display her badge to Plaintiff. *Id.* 17:14-15. Further, Rosalina Harris did not arrest, order the arrest, or write or approve any reports pertaining Plaintiff's arrest. *Id.* 17:17-19.

[2] Because the Court determines that the § 851.8 petition does not qualify as a "proceeding" against Plaintiff, it need not address Defendant's argument that the § 851.8 petition is inadmissible. *See Mot.* 9:4-10:15

Nonetheless, the Court finds that Plaintiff has presented sufficient evidence to create a genuine issue of triable fact as to whether Rosalina Harris acted under color of law. After Dean Harris had already called the police, Rosalina Harris called the Sheriff's Department and identified herself as "Detective Harris" rather than by name. *Pl. SGF* ¶¶ 103-05. When she arrived home, she again invoked her rank and status with the responding officers. *See id.* ¶ 188. A reasonable jury could find that by identifying herself as "Detective **[*18]** Harris," Rosalina Harris purported to act as a law enforcement officer and that invoking her status had the purpose and effect of influencing the behavior of her fellow officers. *See* *Jones v. City of Hillsboro, No. 3:14-cv-1934-ST, 2015 U.S. Dist. LEXIS 131098, 2015 WL 5737647, at *7 (D. Or. Sept. 29, 2015)* (holding that a defendant acted under color of law when he identified himself as a deputy and thereby induced other law enforcement officers to make a traffic stop). After she was informed by Sgt. Crosswhite that he did not intend to arrest Plaintiff, Rosalina Harris intercepted Sgt. Nebel, an officer she knew and who came to relieve Sgt. Crosswhite and take over the investigation, and expressed her frustration that Plaintiff was not being arrested. *Pl. SGF* ¶¶ 126-32. A reasonable jury could find based on the evidence that Rosalina Harris directly intervened in the decision-making process of the officers by "adamantly" insisting that Plaintiff "need[ed] to be arrested," and that Sgt. Crosswhite's decision was wrong. *See id.*

Defendants object to this inference, arguing that it "assumes that officers are incapable of responding to calls neutrally." *See Mot.* 17:23-26. They point to Sgt. Nebel's testimony that he instructed the responding officers to "take out the **[*19]** fact that [Rosalina Harris is] a detective or a deputy working for our department and just weigh the scenes" under the circumstances. *Defs. SUF* ¶ 47. However, at the motion for summary judgment stage, the Court does not weigh the credibility of the evidence. *See* *T.W. Elec. Serv., Inc., 809 F.2d at 630-31*. It is up to the jury to hear Nebel's testimony and weigh it against the conflicting evidence (i.e., that the officers changed their decision not to arrest Plaintiff after Rosalina Harris intervened).

In sum, construing the facts in the light most favorable to Plaintiff, she has presented genuine issues of material fact as to whether Detective Harris purported to act under color of law, her pretense had the purpose and effect of influencing others, and the harm inflicted on Plaintiff was a direct result of her invocation of rank. *See* *Naffe, 789 F.3d at 1037*.

2. Defendants Dean and Arlani Harris

Unlike Rosalina Harris, neither Dean nor Arlani Harris are state actors. Even so, private persons can be liable under *§ 1983* under certain circumstances, including when they "jointly engage[] with state officials in [a] prohibited action." *Adickes v. S.H. Kress & Co., 398 U.S. 144, 152, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)*. A plaintiff can show such concerted action by showing that the private party is a "willful participant" with the state actor **[*20]** by proving the existence of a conspiracy or by showing that the private party's actions are "inextricably intertwined" with those of the government. *See* *Brunette v. Humane Soc'y of Ventura Cty., 294 F.3d 1205, 1211 (9th Cir. 2002)*.

Here, Plaintiff theorizes that Dean and Arlani Harris conspired with Detective Harris to invoke her law enforcement status to violate Plaintiff's constitutional rights. For Plaintiff to prevail on her conspiracy claim, she must show "an agreement or meeting of the minds to violate constitutional rights." *See* *Franklin v. Fox, 312 F.3d 423, 441 (9th Cir. 2002)* (citing *United Steelworkers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1540-41 (9th Cir. 1989)* (en banc)). Yet she has not presented sufficient facts to create a genuine dispute of fact as to the existence of such conspiracy among Defendants.

Plaintiff first points to the decade-long feud between the parties as support that the entire Harris family "bore a grudge" against Plaintiff. *Opp*. 22:6-8. However, this fact only serves as evidence that Dean and Arlani Harris had the motive to conspire against Plaintiff, not that they actually conspired against her. Further, although there is enough evidence in the record to lead a reasonable jury to find that Dean and Arlani Harris fabricated accusations against Plaintiff, it is nevertheless insufficient to show a "meeting of the minds" with Rosalina Harris *to invoke her* ***[*21]*** *law enforcement status* to procure Plaintiff's arrest. The fact that Dean and Arlani Harris called Detective Harris before calling law enforcement, without more, is only indicative of an opportunity for, not the existence of, a conspiracy. *Opp*. 22:23-26.

Plaintiff arguably has a better claim against Dean Harris. It is undisputed that during his family's escalating feud with Plaintiff, he explicitly told Plaintiff that law enforcement would not protect her because of Rosalina Harris's status as a detective. *See Pl. SGF* ¶ 74. Further, on the day of the incident, he invoked his wife's status again during his call to the LASD. *See id.* ¶ 100. However, the fact that Dean Harris, on his own, decided to invoke his wife's status is still insufficient to show that he and Rosalina Harris conspired to get *her* to act under the color of law.

Even viewing all this evidence as a whole and in the light most favorable to Plaintiff as the non-moving party, the Court finds that a reasonable jury would not be able to find that Dean and Arlani Harris acted as state actors by conspiring with Rosalina Harris to act under the color of law to deprive Plaintiff of her constitutional rights. Therefore, the Court **[*22]** **GRANTS** summary judgment in favor of Defendants as to the third cause of action for a *§ 1983* violation as to Dean and Arlani Harris.

ii. Causation

Defendants argue that Plaintiff's *§ 1983* claim against Rosalina Harris still fails because she did not violate Plaintiff's constitutional rights or cause the alleged violation. However, the fact that Rosalina Harris did not have direct contact with Plaintiff is irrelevant. Plaintiff's claim is rooted in the theory that if not for Detective's invocation of her law-enforcement status, Plaintiff would not have been unlawfully arrested. Therefore, although it may be true that Rosalina Harris did not directly exercise authority over Plaintiff or personally put the handcuffs on Plaintiff, there remains a genuine issue of fact as to whether Rosalina Harris's involvement induced the officers to arrest Plaintiff and whether she used her authority as a law enforcement officer to so induce them. As such, the Court finds that there remains a triable issue of fact as to whether Rosalina Harris violated Plaintiff's rights.

iii. Noerr-Pennington *Doctrine*

Defendants assert that Plaintiff's theory of liability against them is necessarily curtailed by the fact that their **[*23]** interactions with the LASD are privileged and non-actionable under the *Noerr-Pennington* Doctrine. The *Noerr-Pennington* Doctrine states that "those who petition the government for redress are immune from statutory liability for their petitioning conduct." *Empress LLC v. City & Cty. of San Francisco, 419 F.3d 1052, 1056 (9th Cir. 2005)*. Although originally rooted in ***antitrust law***, the Supreme Court has extended this doctrine to civil suits, *see* *Cal. Motor Transp. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*, and the Ninth Circuit has further clarified that the doctrine applies to *§ 1983* claims, *see* *Empress LLC, 419 F.3d at 1052*.

Having found that there remains a genuine dispute of fact as to whether Rosalina was acting under the color of law, the Court finds that the *Noerr-Pennington* Doctrine does not apply to the communications and interactions she had with the law enforcement officers. Because she was allegedly acting in her capacity as a law enforcement officer during her interactions with the LASD officers, she was not "petitioning the government for redress" and therefore is not subject to the doctrine. *See* *Empress LLC, 419 F.3d at 1056*.

Even if the *Noerr-Pennington* Doctrine applies here, petitions to the government that involve fraud are not covered by the doctrine under the so-called "sham exception." This exception applies to cases involving bad-faith reports to law enforcement. ***[*24]*** *See* *Forro Precision, Inc. v. Int'l Bus. Machines Corp., 673 F.2d 1045, 1061 (9th Cir. 1982)* ("If . . . [the defendant] had provided the police with deliberately false information, solely for the purpose of harassing [the plaintiff] or of achieving other ends unrelated to law enforcement, its conduct would unquestionably come within the sham exception."). Defendants claim that there is no allegation that they used the process of reporting a crime as a tool against Plaintiff. To the contrary, Plaintiff has presented enough evidence to create genuine disputes of fact about whether Defendants lied to law enforcement, which deprived the arrest of its legitimacy.

iv. *Conclusion*

The Court **DENIES** summary judgment as to Plaintiff's second cause of action for a *§ 1983* violation against Rosalina Harris. However, the Court **GRANTS** summary judgment in Defendants' favor as to the third cause of action for *§ 1983* violations against Dean and Arlani Harris, because they were not acting under the color of law.

IV. Conclusion

The Court **GRANTS** summary judgment in Defendants' favor as to Plaintiff's malicious prosecution claim and the *§ 1983* claim against Defendants Dean and Arlani Harris. The Court **DENIES** summary judgment as to Plaintiff's *§ 1983* claim against Defendant Rosalina Harris.

IT IS SO ORDERED.

AlterG, Inc. v. Boost Treadmills LLC

United States District Court for the Northern District of California

May 20, 2019, Decided; May 20, 2019, Filed

Case No. 18-cv-07568-EMC

Reporter

388 F. Supp. 3d 1133 *; 2019 U.S. Dist. LEXIS 84671 **; 2019 WL 2191342

ALTERG, INC., Plaintiff, v. BOOST TREADMILLS LLC, et al., Defendants.

Core Terms

trade secret, customers, Defendants', allegations, Woodway, technology, chamber, treadmill, user, confidential information, confidentiality agreement, products, cause of action, misappropriation, height, air pressure, prong, proprietary, motion to dismiss, Patents, trade libel, damages, unfair, Differential, confidential, vendors, sales, false advertising, infringement, Calibration

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For Boost Treadmills LLC, a California Limited Liability Company, Sean Whalen, Michael James Bean, Thomas Allen, Defendants: Rick C. Chang, LEAD ATTORNEY, Morgan Franich Fredkin Siamas & Kays, San Jose, CA; Duane H. Mathiowetz, MORGAN FRANICH FREDKIN SIAMAS & KAYS LLP, San Jose, CA.

Judges: EDWARD M. CHEN, United States District Judge.

Opinion by: EDWARD M. CHEN

Opinion

[*1139] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Docket No. 15

Plaintiff AlterG, Inc. ("AlterG") brings this action against three of its former employees, Sean Whalen, Thomas Allen, and Michael James Bean (the "Individual Defendants") and the competing company they founded, Boost Treadmills LLC ("Boost") (collectively, "Defendants"). AlterG alleges that Defendants infringed its patents and misused its trade secret information to create Boost products. AlterG's complaint pleads ten causes of action: (1) patent infringement; (2) breach of contract; (3) trade secret misappropriation; (4) breach of fiduciary duty; (5) interference **[**2]** with contract; (6) interference with prospective economic advantage; (7) false advertisement; (8) trade libel; (9) unfair competition; and (10) conspiracy. Pending before the Court is Defendants' motion to dismiss all counts of the complaint. Docket No. 15 ("Mot.").

For the reasons stated on the record at the hearing on May 9, 2019 and discussed below, the motion to dismiss is **GRANTED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

The complaint alleges the following. Plaintiff AlterG is a "medical device company" that is the "leading provider of impact reduction treadmills," also known as "Anti-Gravity Treadmills," that are used for "orthopedic rehabilitation and training." Docket No. 1 ("Compl.") ¶ 14. "One of the keys [*sic*] drivers of AlterG's success is its patented Differential Air Pressure ('DAP') technology," which works by "us[ing] a pressurized bag to provide a counterforce to the subject's body weight, reducing their effective weight on the treadmill surface." *Id.* ¶ 15. From 2012 to 2015, AlterG devoted substantial resources to develop "a lower cost, bare bones AlterG machine" in response to "potential competitors who wanted to develop anti-gravity training and rehab machines using mechanical **[**3]** unweighting and other options, and at a lower price point than AlterG." *Id.* ¶ 22. AlterG calls this project the "Low-Cost Platform Project," or "LCPP." *Id.* AlterG ultimately decided not to commercialize or sell any products developed as part of the LCPP. *Id.* ¶ 23.

The Individual Defendants are three former employees of AlterG. "Whalen was the founder of AlterG" as well as "the initial **[*1140]** and primary inventor . . . principally involved in developing the technology and products of the company." *Id.* ¶ 19. He therefore "had intimate access to and knowledge of AlterG products, technology, business plans, intellectual property strategy, marketing strategy, financial data, vendors, suppliers, customers, and confidential research and development." *Id.* In 2012, Whalen relinquished his former positions at AlterG but continued working for the company as a consultant until he stopped working for AlterG altogether on March 31, 2015. *Id.* ¶¶ 21, 24. During this consultancy period, "Whalen was the principal consultant and engineer" on the LCPP. *Id.* ¶ 22.

Allen joined AlterG in 2007 and has "held numerous jobs at AlterG in sales, business development, and in international sales." *Id.* ¶ 25. Through those **[**4]** positions, he became "intimately familiar with the products of AlterG and specifically the costing, bill of materials (BOM), sales and financial information, customer acquisition, marketing projections, and business strategy for AlterG products." *Id.* Like Whalen, Allen worked closely with the LCPP team from 2012 through 2015. *Id.* ¶ 27. Allen was also AlterG's "principal liaison" to Woodway USA ("Woodway"), a longtime supplier of treadmills for AlterG. *Id.* ¶¶ 25, 28. He resigned from AlterG on April 28, 2015. *Id.* ¶ 29.

Bean joined AlterG in 2008 and worked in various sales roles at the company. *Id.* ¶ 34. He resigned from AlterG in April 2017. *Id.* ¶ 35. "Since Bean's departure from AlterG in April 2017, AlterG has discovered communications between Bean and Allen about Allen's work on a competing anti-gravity unit while Bean was still an employee of AlterG." *Id.*

Each of the Individual Defendants signed various confidentiality and non-disclosure agreements with AlterG during their employment with the company, which provided that they would "not use or disclose AlterG's proprietary and confidential information in any way contrary to the benefit of AlterG." *Id.* ¶¶ 20, 25, 34. AlterG and Woodway **[**5]** also "entered into various confidentiality agreements whereby AlterG would provide to Woodway proprietary and confidential information to assist Woodway to build and supply AlterG with anti-gravity units." *Id.* ¶ 31.

Boost was formed at the end of 2016 and registered in April 2017. *Id.* ¶ 36. Allen and Bean are founders of Boost, and Whalen worked for the company in product development. *Id.* AlterG believes that "Defendants conspired almost immediately [upon leaving AlterG] to create a competing machine incorporating AlterG intellectual property," and that "Boost was developing an unweighting treadmill well prior to the company's registration." *Id.* ¶¶ 36, 39. As part of this process, Whalen and Allen started "secretly" working with Woodway and "utilized confidential, proprietary, and trade secret information from the [LCPP], and other AlterG intellectual property, to shortcut the research and development time to come to market with a lower cost unweighting treadmill." *Id.* ¶ 33. "At the end of 2017, Boost introduced its first product—the Boost One," which "infringes AlterG patents" and "incorporates numerous technology features developed by AlterG in connection with the [LCPP]." *Id.* ¶ 38. **[**6]**

AlterG further alleges that Defendants "falsely claim that the problematic Boost One is a superior product over the AlterG DAP systems 'at a fraction of the cost.'" *Id.* ¶ 44. Defendants have also "told customers and prospects false statements to denigrate AlterG and its superior technology, falsely claiming that AlterG was going out of business, is in poor financial health and will not be able to get Woodway treadmills **[*1141]** anymore." *Id.* ¶ 45. The upshot of Defendants' allegedly unlawful practices is that Defendants have been able to "sell over 20 units [of Boost products] to date to customers considering an AlterG unit." *Id.* ¶ 46.

II. LEGAL STANDARD

For a plaintiff to survive a *Rule 12(b)(6)* motion to dismiss after *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* and *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, his factual allegations "must . . . suggest that the claim has at least a plausible chance of success." *Levitt v. Yelp! Inc., 765 F.3d 1123, 1134-35 (9th Cir. 2014)*. In other words, the complaint "must allege 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (citations omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal, 556 U.S. at 678*. Where a complaint pleads **[**7]** facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility 'of entitlement to relief.'" *Id.*

The Ninth Circuit has outlined a two-step process for evaluating pleadings against this standard. "First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Levitt, 765 F.3d at 1135* (citations omitted).

III. DISCUSSION

A. Patent Infringement

AlterG alleges that Defendants directly, indirectly, and willfully infringed five of AlterG's patents. The '795 and '572 Patents (the "Weight Calibration Patents") relate to systems that adjust the air pressure inside the treadmill chamber in response to the body weight of the user. *See* Compl. ¶¶ 67-84. The complaint provides the following descriptions of the Weight **[**8]** Calibration Patents:

- [F]eatures of the technology claimed in the '795 Patent provide a system by applying pressure to a portion of a body of an individual in a chamber having an aperture along a vertical axis for receiving the portion of the body of the individual. A pressure sensor is coupled to the chamber for measuring a pressure inside the chamber. A negative feedback control system, calibrates, adjusts, and maintains the pressure inside the chamber. Compl. ¶ 67.
- Broadly speaking, the '572 Patents claims a system by applying pressure to a portion of a body of an individual in a chamber having an aperture along a vertical axis for receiving the portion of the body of the individual. A pressure sensor is coupled to the chamber for measuring a pressure inside the chamber. A negative feedback control system calibrates, adjusts, and maintains the pressure inside the chamber. Compl. ¶ 73.

The '716 Patent, '764 Patent, and '656 Patents (the "Height Adjustment Patents") relate to adjustable mechanisms that allow a treadmill to accommodate users of different **[*1142]** heights. Compl. ¶¶ 49-66. The complaint provides the following descriptions of the Height Adjustment Patents:

- Broadly speaking, the '716 Patent claims various embodiments of Differential Air **[**9]** Pressure systems and methods of using such systems. Without reference to the particular construction of any claim terms, features of the technology claimed in the '716 Patent include a Differential Air Pressure system that (1) may comprise a chamber configured to receive a portion of a user's lower body; (2) the Differential Air Pressure system may further comprise a user seal that seals the pressure chamber to the user's body; and (3) the height of the user seal may be adjusted to accommodate users with various body heights. Compl. ¶ 49.

• Broadly speaking, the '656 Patents claims various embodiments of Differential Air Pressure systems and components for Differential Air Pressure systems. Without reference to the particular construction of any claim terms, features of the technology claimed in the '656 Patents include (1) various methods and related structures for sealing a user into a pressurizable chamber; (2) various methods and related structures for changing the shape and/or height of the chamber; (3) various types and configurations of chambers and support structures for chambers; and (4) various methods and related systems for treating various conditions using the differential air pressure systems, including **[**10]** but not limited to obesity, cardiac disease, multiple sclerosis, cerebral palsy, or Down Syndrome. Compl. ¶ 55.

• Broadly speaking, the '764 Patent claims various embodiments of Differential Air Pressure systems and methods of using such systems. Without reference to the particular construction of any claim terms, features of the technology claimed in the '764 Patent include a Differential Air Pressure system that may comprise (1) a chamber configured to receive a portion of a user's lower body and to create an air pressure differential upon the user's body; (2) the Differential Air Pressure system may further comprise a user seal that seals the pressure chamber to the user's body; and (3) the height of the user seal may be adjusted to accommodate users with various body heights. Compl. ¶ 61.

1. Direct Infringement

The parties dispute the pleading standard that applies to claims of direct patent infringement. *See* Mot. at 6-7; Docket No. 19 ("Opp.") at 4. This dispute arises from a conflict between the general pleading standard set forth in *Twombly* and *Iqbal* and the more lenient standard formerly applied to direct infringement claims pursuant to Form 18 to the Federal Rules of Civil Procedure. Form 18 was abrogated **[**11]** in December 2015. *See* *Novitaz, Inc. v. inMarket Media, LLC, No. 16-CV-06795-EJD, 2017 U.S. Dist. LEXIS 81491, 2017 WL 2311407, at *1 (N.D. Cal. May 26, 2017)*. Since then, "the majority of district courts"—including this court—"have assessed the sufficiency of claims for direct patent infringement under the standard set forth in *Twombly* and *Iqbal*." *2017 U.S. Dist. LEXIS 81491, [WL] at *2* (collecting cases); *see* *Software Research, Inc. v. Dynatrace LLC, 316 F. Supp. 3d 1112, 1116 (N.D. Cal. 2018)*. The Court will continue to apply the same standard here.

A direct infringement claim "does not satisfy the standards of *Twombly* and *Iqbal* where it does not at least **[*1143]** contain factual allegations that the accused product practices every element of at least one exemplary claim." *Novitaz, 2017 U.S. Dist. LEXIS 81491, 2017 WL 2311407, at *3*. This requirement is animated by the principle that "the failure to meet a single limitation is sufficient to negate infringement of [a] claim." *Laitram Corp. v. Rexnord, Inc., 939 F.2d 1533, 1535 (Fed. Cir. 1991)*.

AlterG does not allege that Boost products practice every element of at least one exemplary claim. In particular, Defendants point out that the complaint contains no allegations that Boost products practice a key limitation of each of the two types of patents. The Weight Calibration Patents describe a mechanism that calibrates the pressure inside the treadmill chamber in response to the body weight of the user. *See* Compl., Exh. D ('795 Patent) (Claim 1 claiming a method of "generating a relationship **[**12]** between pressure and actual weight of the individual" and "regulating the pressure in the chamber with respect to the weight of the individual based on the relationship"); Exh. E ('572 Patents) (Claim 1 claiming an "exercise apparatus" that "is configured to receive an input of the individual's weight . . ., generate a measured weight and positive pressure relationship for the individual, and . . . to regulate the positive pressure in the chamber by referring to only the generated relationship."). The complaint does not allege that Defendants' products regulate chamber pressure by reference to a measured user weight. In fact, the complaint appears to say the opposite. *See* Compl. ¶ 44 ("[T]he Boost One [does] not calibrate to specific user's actual weight and volume dimensions like the AlterG DAP systems . . . .").

The Height Adjustment Patents describe adjustable mechanisms that accommodate treadmill users of various heights. *See* Compl., Exh. A ('716 Patent) (Claim 1 claiming "a height adjustment assembly attached to the chamber adjacent to the seal interface"); Exh. B ('656 Patents) (Claim 1 claiming "a height adjustable structure having a plurality of height adjustment slots in a front of the chamber and a plurality **[**13]** of height adjustment slots in a rear of the chamber"); Exh. C ('764 Patent) (Claim 1 claiming "a movable assembly comprising . . . a height adjustment bar attached to the seal frame . . . configured to provide a vertical position adjustment of the height of the user seal by vertically moving the seal frame"). The complaint does not allege that the Boost One contains any height adjustment mechanism. AlterG's direct infringement claim is therefore inadequately pled. *See* *Atlas IP LLC v. Pac. Gas & Elec. Co., No. 15-CV-05469-EDL, 2016 U.S. Dist. LEXIS 60211, 2016 WL 1719545, at *4 (N.D. Cal. Mar. 9, 2016)* (dismissing a direct infringement claim where "the complaint entirely fails to address [a] necessary element of claim 1").

2. Indirect Infringement

"[L]iability for indirect infringement of a patent requires direct infringement." *In re Bill of Lading Transmission & Processing Sys. Patent Litig., 681 F.3d 1323, 1333 (Fed. Cir. 2012)*. Because AlterG's direct infringement claims have not been adequately pled, its indirect infringement claims fail as well.

3. Willful Infringement

AlterG alleges that Defendants' infringement of its patents is willful and therefore warrants enhanced damages under *35 U.S.C. § 284*. However, this willful infringement claim must be dismissed because a finding of direct infringement is a prerequisite for willful infringement. *See* *Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923, 1930, 195 L. Ed. 2d 278 (2016)*.

[*1144] Defendants' motion to dismiss AlterG's patent **[**14]** infringement claims is **GRANTED** with leave for AlterG to amend its direct infringement claim.

B. Trade Secret Misappropriation

AlterG's third cause of action is trade secret misappropriation. To state a claim for trade secret misappropriation under the DTSA, a plaintiff must allege that: "(1) the plaintiff owned a trade secret; (2) the defendant misappropriated the trade secret; and (3) the defendant's actions damaged the plaintiff." *Alta Devices, Inc. v. LG Elecs., Inc., 343 F. Supp. 3d 868, 877 (N.D. Cal. 2018)* (citation omitted); *see* *18 U.S.C. § 1839(5)* (defining "misappropriation" in the context of trade secrets).

1. Alleging Trade Secrets with Sufficient Particularity

Defendants argue that AlterG fails to identify its allegedly misappropriated trade secrets with sufficient particularity to state a claim under the DTSA. Mot. at 13-15. The Court agrees.

"A plaintiff need not spell out the details of the trade secret," but must "describe the subject matter of the trade secret with sufficient particularity to separate it from matters of general knowledge in the trade or of special persons who are skilled in the trade, and to permit the defendant to ascertain at least the boundaries within which the secret lies."[1] *Alta Devices, 343 F. Supp. 3d at 881* (citations, internal quotation marks and alterations omitted). *Alta Devices* ***[**15]*** provides helpful guidance as to the degree of particularity that is required. The court there found that the plaintiff, a manufacturer of thin-film solar technology, adequately pleaded its trade secret claim based on a combination of factors. First, the plaintiff identified "the exact technology in question: thin-film GaAs solar technology." *Id.* Second, the plaintiff listed with specificity the types of trade secrets relating to the "thin-film GaAs solar technology": "[m]ethods of[] high throughput thin-film deposition; epitaxial lift-off of the thin-film; and GaAs substrate maintenance and re-use," as well as "confidential cost analysis; proofs and tests of manufacturing concepts and techniques; tool roadmaps; manufacturing process flows; and identification of equipment and

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[1] Plaintiff asserts that the "sufficient particularity" pleading standard applies only to claims under the *California Uniform Trade Secrets Act* ("CUTSA"), and not the DTSA. *See* Opp. at 9. Not so. The majority of courts in this district have held that the same standard is applied to both DTSA and CUTSA claims because "[t]he elements of misappropriation under the DTSA are similar to those under the CUTSA." *Alta Devices, 343 F. Supp. 3d at 877*; *see* *id. at 880-81* ("Courts have held that the DTSA and the CUTSA share the same pleading requirements for the identification of trade secrets."). *But see* *Physician's Surrogacy, Inc. v. German, No. 17CV0718-MMA (WVG), 2017 U.S. Dist. LEXIS 135325, 2017 WL 3622329, at *9 (S.D. Cal. Aug. 23, 2017)*.

equipment vendors; and information related to the foregoing." *Id.* In addition to the fact that the technology was described with specificity, a non-disclosure agreement between the parties described with further particularity the confidential information that was imparted to defendants, for example, "CVD technology and its commercial viability," including the "CVD (Alta 2T) chamber scheme," "growth rate," "thin **[**16]** film quality," "uniformity," "gas utilization efficiency," and "scalability and short cycle time feasibility." *Id.* Because the plaintiff's trade secret claims were based on the confidential information exchanged pursuant to the non-disclosure agreement, the court concluded that the defendant had fair notice of the scope of the trade secrets asserted. *Id.*

[*1145] In contrast, the court in *Vendavo, Inc. v. Price f(x) AG, No. 17-CV-06930-RS, 2018 U.S. Dist. LEXIS 48637, 2018 WL 1456697 (N.D. Cal. Mar. 23, 2018)* found that the plaintiff failed to allege its trade secret claim with sufficient particularity. The plaintiff, a provider of business software, claimed that the defendant had misappropriated trade secrets including "source code, customer lists and customer related information, pricing information, vendor lists and related information, marketing plans and strategic business development initiatives, 'negative know-how' learned through the course of research and development, and other information related to the development of its price-optimization software, including ideas and plans for product enhancements." *2018 U.S. Dist. LEXIS 48637, [WL] at *3*. The court determined that the plaintiff had "set out its purported trade secrets in broad, categorical terms, more descriptive **[**17]** of the types of information that generally *may* qualify as protectable trade secrets than as any kind of listing of particular trade secrets [it] has a basis to believe actually were misappropriated here." *2018 U.S. Dist. LEXIS 48637, [WL] at *4* (emphasis in original).

Here, AlterG alleges that Defendants misappropriated the following trade secrets:

- "[N]umerous learnings from AlterG's Low-Cost Platform Project that explored market alternatives that included positive and negative learnings of low cost mechanical unweighted systems, air pressure systems, and Differential Air Pressure systems under strict confidentiality and non-disclosure agreements. Compl. ¶ 40.

- Trade secrets "related to AlterG's development of anti-gravity rehabilitation products" and "mechanical unweighting mainframes," including "technology and negative information and learnings." *Id.* ¶¶ 95-96.

- "[T]rade secret information related to AlterG's design and development of its anti-gravity rehabilitation and training units, including, but not limited to its marketing and product strategy, cost strategies, customer needs, material selection and fabrication techniques, engineering and structural technology, selection and qualification of components, knowledge **[**18]** of vendors with appropriate, specialized skills, and technology innovation." *Id.* ¶ 102.

These allegations more closely resemble the broad categories of information in *Vendavo* than the specific descriptions provided in *Alta Devices*. The references in paragraphs 40 and 95-96 to "positive and negative learnings" and "technology and negative information and learnings" are vague. The types of information listed in paragraph 102 are somewhat more concrete, but are not tethered to a specific technology; it cannot be discerned which aspects of AlterG's "anti-gravity rehabilitation and training units" the information pertains to. And although AlterG, like the plaintiff in *Alta Devices*, has alleged that the trade secrets at issue are covered by confidentiality agreements between the parties, AlterG only summarizes rather broadly the categories of information protected by the agreements. *See* Compl. at 5 n.2 (defining "Confidential Information" to include "techniques, sketches, drawings, models, inventions, know-how, processes, apparatus, equipment, algorithms, software programs, software source documents, and formulae related to the current, future and proposed products and services of the Company, **[**19]** and includes, without limitation, its respective information concerning research, experimental work, development, design details, and specifications, engineering, financial information, procurement requirements, purchasing **[*1146]** manufacturing, customer lists, business forecasts, sales, and merchandising and marketing plans and information"). AlterG has not attached the agreements to the complaint, and its allegations fail to "describe the subject matter of the trade secret with sufficient particularity to separate it from matters of general knowledge in the trade or of special persons who are skilled in the trade." *Alta Devices, 343 F. Supp. 3d at 881*.

Accordingly, Defendants' motion to dismiss AlterG's trade secret claim is **GRANTED**. AlterG is granted leave to amend its complaint to allege with greater specificity the types of trade secrets that were misappropriated and the exact technology to which they pertain. Such allegations may be enhanced if the confidentiality agreements between the parties detail the protected information that AlterG imparted to Defendants. In amending its trade secret claim, AlterG should also take care to delineate the boundaries between its trade secrets and its information that has been made public **[**20]** through patents and patent applications. *See Aqua-Lung Am., Inc. v. Am. Underwater Prods., 709 F. Supp. 2d 773, 788 (N.D. Cal. 2010)* (explaining that "a plaintiff has a viable trade secret claim that would protect his proprietary unpatented technology[] only if he reveals implementation details and techniques *beyond* what was disclosed in his patent.") (emphasis in original) (citation omitted).

2. Standing under DTSA

Defendants separately argue that AlterG's DTSA claim must be dismissed because AlterG only alleges acts of misappropriation that took place prior to May 11, 2016, the effective date of the DTSA. Mot. at 15. The DTSA applies to "any misappropriation of a trade secret . . . for which any act occurs on or after the date of the enactment of [the] Act." *Defend Trade Secrets Act of 2016*, *Pub. L. No. 114-153, § 2(e), 130 Stat. 376, 381 (2016)*. The complaint alleges that "Defendants conspired almost immediately [after resigning from AlterG] to create a competing machine incorporating AlterG intellectual property." Compl. ¶ 39. Defendants seize upon the "almost immediately" language to suggest that the alleged acts of misappropriation must have started as early as April 2015, when Whalen and Allen resigned from AlterG, and before the DTSA was enacted. Mot. at 15.

AlterG counters that, although Defendants may have initially **[**21]** *disclosed* its trade secrets in 2015, they *used* the secret information in 2017, when they were developing the Boost One. Opp. at 9-10; *see* Compl. ¶ 38. This allegation is sufficient to support liability under the DTSA because "misappropriation" is defined as the "disclosure *or use* of a trade secret." *18 U.S.C. § 1839(5)* (emphasis added). Relying on *§ 1839(5)*, courts have generally held that the continued use of a trade secret after the effective date of the DTSA is actionable, even if the secret was initially disclosed prior to May 11, 2016. *See, e.g., Cave Consulting Grp., Inc. v. Truven Health Analytics Inc., No. 15-CV-02177-SI, 2017 U.S. Dist. LEXIS 62109, 2017 WL 1436044, at *4 (N.D. Cal. Apr. 24, 2017)*; *AllCells, LLC v. Zhai, No. 16-CV-07323-EMC, 2017 U.S. Dist. LEXIS 44808, 2017 WL 2929380, at *1 (N.D. Cal. Mar. 27, 2017)*.[2]

[*1147] The Court therefore finds that AlterG has standing to bring its trade secret claim.

C. Breach of Contract

AlterG's second cause of action alleges that each Individual Defendant entered into confidentiality agreements with AlterG and breached those agreements "by integrating and using AlterG's proprietary and confidential information into the Boost treadmill products." Compl. ¶ 91. The elements of a breach of contract claim are: (1) the existence of a contract, (2) performance or excuse for **[**22]** nonperformance, (3) defendant's breach, and (4) damages. *Oasis West Realty, LLC v. Goldman, 51 Cal. 4th 811, 821, 124 Cal. Rptr. 3d 256, 250 P.3d 1115 (2011)*. Defendants argue that AlterG fails to adequately plead three of these four elements.

1. Existence of a Contract

First, Defendants argue that the complaint does not describe with specificity the terms of the contracts that were allegedly breached. Mot. at 16. A plaintiff can state a claim for breach of contract by quoting verbatim the terms of the contract or attaching the contract to the complaint, but he is not required to do so. "[A] complaint for breach of contract must include the contract itself or plead its essential terms." *Gross v. Symantec Corp., No. C 12-00154 CRB, 2012 U.S. Dist. LEXIS 107356, 2012 WL 3116158, at *11 (N.D. Cal. July 31, 2012)*.

[2] It is true, as Defendants note, that the court in *Avago Techs. U.S. Inc. v. Nanoprecision Prod., Inc., No. 16-CV-03737-JCS, 2017 U.S. Dist. LEXIS 13484, 2017 WL 412524 (N.D. Cal. Jan. 31, 2017)* ruled the other way. However, *Avago Techs* pre-dates cases like *AllCells* and *Cave Consulting*, and its holding was informed in part by the plaintiff's inability to "cite[] any authority suggesting that the DTSA allows a misappropriation claim to be asserted based on the continued use of information that was disclosed prior to the effective date of the statute." *2017 U.S. Dist. LEXIS 13484, [WL] at *9*. Since then, cases have consistently endorsed just that view.

Here, AlterG has not pleaded all of the essential terms of the relevant contracts. While the complaint states clearly that the contracts at issue require Individual Defendants to "keep confidential and not use or disclose AlterG's proprietary and confidential information in any way contrary to the benefit of AlterG," Compl. ¶¶ 20, 25-26, 34, it does not allege with sufficient particularity what the "proprietary and confidential information" is. The complaint merely lists broad categories of information covered by the agreements. *See id.* ¶ 34; *id.* at 5 n.2. As explained above, these broad categories are insufficient **[**23]** to put Defendants on notice of the scope of the trade secrets that are the subject of AlterG's DTSA claim. AlterG's breach of contract claim is also predicated on Defendants' alleged disclosure of trade secrets, and AlterG must allege with more specificity the types of information protected by its confidentiality agreements.

Two other arguments Defendants make are easily disposed of. The first is that AlterG references multiple confidentiality agreements but does not specify which particular ones were breached. Mot. at 16. But the complaint indicates that Defendants breached all of the agreements. *See* Compl. ¶ 91; Opp. at 11. The second argument is that the complaint does not explicitly state whether the confidentiality agreements continued to have effect after Defendants' employment with AlterG terminated. Mot. at 17. The complaint alleges, however, that an agreement signed by Whalen provided that he would not disclose AlterG's confidential information during his work with AlterG "or at any time thereafter." Compl. ¶ 21. The allegations with respect to Allen's and Bean's agreements are not so explicit, but the complaint states that the agreements required Allen and Bean to "not disclose any **[**24]** of AlterG's confidential and proprietary information without AlterG's permission" without mentioning any time limitation. *Id.* ¶ 88. It is therefore reasonable to infer that the duty of confidentiality imposed by Defendants' agreements extended beyond their periods of employment.

[*1148] 2. Defendants' Breach

Next, Defendants argue that AlterG "failed to plead specifically how each individual has breached his respective contract(s)" because AlterG nowhere mentions "what specific confidential information or trade secrets were in fact integrated into the Boost One." Mot. at 17-18. The complaint currently alleges that the Boost One utilized "an anti-gravity unit that derived directly from the technology Whalen and other AlterG engineers developed for AlterG in the Low Cost Platform Project"; that Bean, while still employed at AlterG, "disclosed confidential and proprietary information about AlterG technology, marketing strategy, and prospective and actual customers and test sites to his friends at Boost"; and that "Defendants have taken technology and negative information and learnings from the [Low Cost Platform] Project . . . and applied them to the Boost One product." *Id.* ¶¶ 33, 36, 95. Once **[**25]** AlterG amends the complaint to describe the terms of its confidentiality agreements and the substance of its trade secrets with more particularity, it will be able to allege the specific trade secrets incorporated into the Boost One in violation of the confidentiality agreements.

3. Damages

Finally, Defendants claim that AlterG has failed to explain how the alleged breaches caused it to suffer damages, given that AlterG admits the LCPP was "not commercialized." Compl. ¶ 43. Defendants misapprehend AlterG's damages theory. The complaint states that Defendants used AlterG's confidential information to "unfairly compete with AlterG and sell over 20 units to date to customers considering an AlterG unit," causing "monetary damages" to AlterG. Compl. ¶ 46. It is well-established that non-speculative lost sales or profits can constitute contractual damages. *See* *Illumina, Inc. v. Ariosa Diagnostics, Inc., No. C 14-01921 SI, 2014 U.S. Dist. LEXIS 109531, 2014 WL 3897076, at *4 (N.D. Cal. Aug. 7, 2014)*; *Grupe v. Glick, 26 Cal. 2d 680, 692, 160 P.2d 832 (1945)*. AlterG may not have brought LCPP-derived products to market, but it has nevertheless alleged that it has lost potential sales of its treadmills as a result of Defendants' exploitation of its confidential information from the LCPP. Allegations of "lost sales or profits" caused by **[**26]** a competitor's contractual breach are sufficient to establish damages at the pleadings stage. *Openwave Messaging, Inc. v. Open-Xchange, Inc., No. 16-CV-00253-WHO, 2016 U.S. Dist. LEXIS 150713, 2016 WL 6393503, at *9 (N.D. Cal. Oct. 28, 2016)*.

Defendants' motion to dismiss AlterG's breach of contract claim is **GRANTED**. AlterG is granted leave to amend its complaint to either attach the relevant confidentiality agreements or to allege their essential terms.

D. Breach of Fiduciary Duty

AlterG's fourth cause of action alleges that Whalen breached the fiduciary duty he owed to AlterG by using AlterG's proprietary and confidential information to benefit Boost. Compl. ¶¶ 115-19. To state a claim for breach of fiduciary duty, a plaintiff must allege: (1) the existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach. *Pierce v. Lyman, 1 Cal. App. 4th 1093, 1101, 3 Cal. Rptr. 2d 236 (1991)*. Here, Defendants do not dispute that Whalen owed a fiduciary duty to AlterG while he was serving as its director, but contends that the duty ended when he joined Boost, because by that point he was no longer a director of AlterG. Mot. at 18-19.

Defendants are correct that, as a general matter, an officer's fiduciary duty to their employer ends upon their **[*1149]** resignation. *See GAB Bus. Servs., Inc. v. Lindsey & Newsom Claim Servs., Inc., 83 Cal. App. 4th 409, 421, 99 Cal. Rptr. 2d 665 (2000)*, *disapproved of on other grounds by* ***[**27]*** *Reeves v. Hanlon, 33 Cal. 4th 1140, 17 Cal. Rptr. 3d 289, 95 P.3d 513 (2004)*. However, "[c]ourts addressing the issue have rejected an expansive reading of the decision in *GAB Bus. Servs.* and appropriately recognized that officers are also charged with a continuing duty to protect privileged and confidential information, which continues even after they leave the company." *Sonoma Pharm., Inc. v. Collidion Inc., No. 17-CV-01459-EDL, 2018 U.S. Dist. LEXIS 199088, 2018 WL 3398940, at *7 (N.D. Cal. June 1, 2018)* (citation and internal quotation marks omitted). Indeed, the Restatement of Agency makes clear that, post termination, an agent continues to have "a duty to the principal not to use or to disclose to third persons . . . trade secrets, written lists of names, or other similar confidential matters given to him only for the principal's use." *Restatement (Second) of Agency § 396(b)*. This means that Whalen owed a continuing fiduciary duty to AlterG not to use its confidential information to its detriment, even after he joined Boost. *See Language Line Servs., Inc. v. Language Servs. Assocs., LLC, No. C 10-02605 JW, 2011 U.S. Dist. LEXIS 28170, 2011 WL 13153247, at *8 (N.D. Cal. Mar. 15, 2011)* (finding breach of fiduciary claim adequately pled where plaintiff alleged that defendant "used his access to Plaintiff's proprietary customer information to further his own anti-competitive agenda during his subsequent employment with [a competitor]").

However, the breach of **[**28]** fiduciary duty claim arises from the same confidentiality agreements underlying AlterG's breach of contract claim. As explained above, AlterG needs to describe the terms of the confidentiality agreements and the trade secrets they protect with more particularity so that it can be ascertained whether Whalen's disclosures constituted a breach of his fiduciary duty. Accordingly, Defendants' motion to dismiss AlterG's breach of fiduciary duty claim is **GRANTED**, and AlterG may amend its complaint to either attach the relevant confidentiality agreements or to allege their essential terms.

E. Interference with Contract

AlterG's fifth cause of action is interference with contract. Compl. ¶¶ 121-27. "The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *Pac. Gas & Elec. Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 1126, 270 Cal. Rptr. 1, 791 P.2d 587 (1990)*. Here, the complaint alleges that Defendants interfered with three sets **[**29]** of contracts: the confidentiality agreements between AlterG and Woodway; contracts between AlterG and its vendors, suppliers, and customers; and the confidentiality agreements between each Individual Defendant and AlterG. Compl. ¶¶ 121-124. Defendants argue that AlterG's allegations are deficient as to all three.

1. Confidentiality Agreements between AlterG and Woodway

Defendants claim that the complaint fails to specify what agreements between AlterG and Woodway were interfered with. Mot. at 20. Defendants also argue that the complaint "presents no facts that support a possible breach of such agreements." *Id.*

[*1150] The first argument in unpersuasive. The complaint specifies that the contracts at issue are two confidentiality agreements between AlterG and Woodway: "a Master Agreement signed May 30, 2007, and a subsequent agreement signed in 2012." Compl. ¶ 32. The essential terms of the agreements are also specified:

"AlterG would provide to Woodway proprietary and confidential information to assist Woodway to build and supply AlterG with anti-gravity units," including "all specifications, drawings, files, instructions, and other documents," and this information was "not to be shared or used **[**30]** with or on behalf of any other person or entity." *Id.* ¶¶ 30-31.

However, Defendants' second argument has merit. The complaint states that "Whalen and Allen started secretly working with Woodway on developing a low-cost anti-gravity unit," and "utilized confidential, proprietary, and trade secret information from the [LCPP], and other AlterG intellectual property, to shortcut the research and development time to come to market with a lower cost unweighting treadmill utilizing a Woodway treadmill." Compl. ¶ 33. This does not mean, however, that Whalen and Allen induced or caused Woodway to disclose AlterG's confidential information to them. In fact, the complaint does not even allege that Woodway in fact disclosed any information; it merely states that Whalen and Allen "utilized" information. It is difficult to imagine that Woodway possessed any confidential information from the LCPP that Whalen and Allen did not already have, given that "Whalen was the principal consultant and engineer" on the LCPP and Allen was also heavily involved in the LCPP. *Id.* ¶¶ 22, 27. If anything, as AlterG's "principal liaison" to Woodway, Allen may have been the one who conveyed AlterG's information to Woodway **[**31]** in the first place. *Id.* ¶¶ 25, 28.

Thus, AlterG has failed to adequately allege that Defendants induced Woodway to breach its contracts with AlterG.

2. Contracts with Vendors, Suppliers, and Customers

AlterG's allegations with respect to its vendors, suppliers, and customers are wholly lacking. The complaint states only that "[c]ontracts existed between AlterG . . . and AlterG vendors, suppliers, and customers" and that "Defendants have . . . interfered with contracts between AlterG and its vendors, suppliers, and customers." Compl. ¶¶ 121, 124. AlterG does not identify any of these "vendors, suppliers, and customers," nor provide any details about the contracts and contractual provisions with which Defendants allegedly interfered. AlterG has therefore failed to state a claim with respect to these contracts. *See* *AccuImage Diagnostics Corp v. Terarecon, Inc., 260 F. Supp. 2d 941, 956 (N.D. Cal. 2003)* (dismissing interference with contract claim because plaintiff merely made "conclusory allegations that valid 'contracts' exist between itself and an unspecified third party" and provided no "facts surrounding the type or nature of the 'contracts' [defendants'] conduct allegedly interfered with").

3. Confidentiality Agreements between Individual Defendants and AlterG

AlterG alleges **[**32]** that Defendants interfered with each other's confidentiality agreements with AlterG. Compl. ¶ 124. Defendants counter that "[t]here is not a single statement, allegation, or fact set forth in the complaint regarding Defendant inducing another Defendant to breach" these agreements. Reply at 11. It is true that while the complaint alleges that the Individual Defendants disclosed confidential information to each other, it stops short of explicitly stating that they **[*1151]** intentionally *induced* each other to disclose this information. *See, e.g.*, Compl. ¶ 36 ("Bean . . . disclosed confidential and proprietary information about AlterG technology, marketing strategy, and prospective and actual customers and test sites to his friends at Boost" while he was still working at AlterG.). Nevertheless, a reasonable inference in AlterG's favor can be drawn that Defendants encouraged each other's disclosure. The allegation that they "conspired . . . to create a competing machine incorporating AlterG's intellectual property" undercuts the possibility that Whalen, Allen, and Bean each made the independent decision to disclose AlterG's information to each other without any prompting. Compl. ¶ 39.

However, because **[**33]** AlterG needs to allege with more specificity the essential terms of the confidentiality agreements underlying this contractual interference claim, the Court will dismiss this claim pending AlterG's amendment.

Accordingly, Defendants' motion to dismiss the interference with contract claim is **GRANTED with leave to amend**.

F. Interference with Prospective Economic Advantage

AlterG's sixth cause of action alleges that Defendants interfered with its prospective economic advantage with Woodway and with AlterG's vendors, suppliers, and prospective and current customers. Compl. ¶¶ 129-33. The elements of a claim for intentional interference with prospective economic advantage are: "(1) an economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff; (2) knowledge by the defendant of the existence of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) damages to the plaintiff proximately caused by the acts of the defendant." *Blank v. Kirwan, 39 Cal. 3d 311, 330, 216 Cal. Rptr. 718, 703 P.2d 58 (1985)*. "The chief practical distinction between interference with contract and interference with prospective **[**34]** economic advantage is that a broader range of privilege to interfere is recognized when the relationship or economic advantage interfered with is only prospective." *Pac. Gas, 50 Cal. 3d at 1126*. Nevertheless, courts have made clear that "[t]he law precludes recovery for overly speculative expectancies by initially requiring proof" that it is "reasonably probable that the prospective economic advantage would have been realized but for defendant's interference." *Westside Ctr. Assocs. v. Safeway Stores 23, Inc., 42 Cal. App. 4th 507, 522, 49 Cal. Rptr. 2d 793 (1996)* (emphasis in original) (citation and internal quotation marks omitted).

AlterG's vague allegations are insufficient to state a claim for interference of prospective economic advantage. With respect to Woodway, the complaint explains that Woodway supplies treadmills to AlterG and has long worked with AlterG to build treadmills "using AlterG's proprietary designs." Compl. ¶ 30. Thus, it can be reasonably inferred that this established commercial relationship contains the probability of future economic benefit to AlterG as Woodway continues to supply AlterG with treadmills. However, AlterG wholly fails to explain how Defendants' actions have jeopardized the ongoing supplier relationship between Woodway and AlterG.[3] **[*1152]** The complaint does not allege that Defendants **[**35]** intentionally acted to disrupt Woodway's supply of treadmills to AlterG, or that the supply was actually disrupted. Indeed, "[t]o this day, Woodway continues to supply treadmills to AlterG." Compl. ¶ 30.

The allegations are even more lacking when it comes to AlterG's relationship with its "vendors, suppliers, and prospective and current customers." Compl. ¶¶ 131. Nowhere does the complaint identify these entities or allege any facts to explain their economic relationship with AlterG, much less suggest that such relationships contain[s] the probability of future economic benefit to [AlterG]." *Blank, 39 Cal. 3d at 330*. Without any facts, it is impossible for the Court to determine whether it is reasonably probable that the prospective economic advantage would have been realized but for Defendants' interference. *See* *Buxton v. Eagle Test Sys., Inc., No. C-08-04404 RMW, 2010 U.S. Dist. LEXIS 29190, 2010 WL 1240749, at *2 (N.D. Cal. Mar. 26, 2010)* (dismissing interference claim because the complaint did "not contain factual allegations about the existence of any specific economic relationships with identifiable third parties").

Accordingly, Defendants' motion to dismiss Plaintiff's interference with prospective economic advantage claim is **GRANTED** with leave for AlterG to amend.

G. False Advertisement **[**36]**

AlterG's seventh cause of action alleges that Defendants engaged in false advertising in violation of *§ 43(a)* of the *Lanham Act*, *15 U.S.C. § 1125(a)*. A false advertising claim under *§ 43(a)* has five elements: "(1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused the false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products." *Skydive Arizona, Inc. v. Quattrocchi, 673 F.3d 1105, 1110 (9th Cir. 2012)* (citing *15 U.S.C. § 1125(a)(1)(B)*).

Because AlterG alleges that "Defendants' false and misleading statements were made in bad faith, willfully, knowingly, and intentionally," Compl. ¶ 136, its false advertising claim sounds in fraud and is subject to the heightened pleading requirements of *Federal Rule of Civil Procedure 9(b)*. *See* *TransFresh Corp. v. Ganzerla &*

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[3] AlterG alleges Defendants induced Woodway to breach its confidentiality agreements with AlterG, but the complaint does not indicate that any such breach in confidentiality disrupted Woodway's supply of treadmills to AlterG.

Assoc., Inc., 862 F. Supp. 2d 1009, 1017-18 (N.D. Cal. 2012). Accordingly, the complaint must allege "'the who, what, when, where, and how' of the fraud." Id. at 1017 (quoting Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)).

AlterG's false advertising claim does not **[**37]** meet the Rule 9(b) pleading standard. The complaint adequately alleges "what" the content of the alleged false statements were and "how" they were false:

> (1) [T]he Boost One claims to adjust air pressure to allow specific body weight calibration at any body weight, between full weight and 20% of body weight, and can be adjusted in 1% increments of body weight. In fact, the Boost One, as tested, does not calibrate to a specific user, does not unweight in precise **[*1153]** 1% of body weight increments, and cannot even distinguish an over 50 lb. weight difference between three different users that happen to use the same shorts and same rack height adjustment;
> (2) Boost claims the Boost One is safe and precise. But, not only does the Boost One not calibrate to specific user's actual weight and volume dimensions like the AlterG DAP systems, but the Boost One, as tested, did not record an error or stop when the air pressure dropped during a session when the shorts were unzipped. The Boost One air pressure also oscillates up and down during a session and does not remain stable — though no difference in calibration or pressure was noted on the machine;
>
> (3) Booast also implies that the Boost One is suitable for **[**38]** use in medical markets or is approved for hospital and clinic use so that it may be "prescribe[d]" for "patients" under the heading "Therapy & Rehabilitation" under product features at woodway.com. On information and belief, the Boost One has not been FDA approved like the AlterG DAP system, and Boost is actively deceiving consumers in their Boost One specification sheet; [and]
> (4) Boost also falsely implies that the Boost One has enjoyed wide market adoption by imputing the Woodway 4Front market to Defendants' Boost One. While the Woodway 4Front is a popular and widely distributed treadmill, on information and belief, the Boost One that incorporates a Woodway 4Front has not enjoyed such widespread acceptance or use by "top athletes" and "Hollywood stars."

Compl. ¶ 44 (line breaks added).

But the complaint does not specify "when" and "where" these statements were made. It merely asserts that "Defendants have disseminated" these statements. *Id.* This is not enough. *See* TransFresh Corp. v. Ganzerla & Assoc., Inc., 862 F. Supp. 2d 1009, 1020 (N.D. Cal. 2012) (dismissing false advertising claim where plaintiff did not "allege specific facts as to when or where these statements were made").[4] Without information about where and when Defendants made the alleged false statements, **[**39]** the Court cannot determine whether the statements were "disseminated sufficiently to the relevant purchasing public to constitute 'advertising' or 'promotion'" within the meaning of the Lanham Act. Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 734-35 (9th Cir. 1999) (quoting 15 U.S.C. § 1125(a)(1)(B)); *see, e.g.,* Prager Univ. v. Google LLC, No. 17-CV-06064-LHK, 2018 U.S. Dist. LEXIS 51000, 2018 WL 1471939, at *10 (N.D. Cal. Mar. 26, 2018) (dismissing false advertising claim because the complaint lacked enough detail from which the court could determine whether the challenged representations were sufficiently disseminated).

The complaint similarly fails to identify the "who." "[W]ithin the realm of Rule 9(b), 'everyone did everything' allegations are not countenanced. Prime Media Grp. LLC v. Acer Am. Corp., No. 5:12-CV-05020 EJD, 2013 U.S. Dist. LEXIS 22437, 2013 WL 621529, at *3 (N.D. Cal. Feb. 19, 2013) (citing Destfino v. Reiswig, **[*1154]** 630 F.3d 952, 958 (9th Cir. 2011)). But that is exactly what AlterG has alleged here. The complaint's allegations regarding false advertising are completely undifferentiated, merely asserting that "Defendants" are responsible for the statements. *See* Compl. ¶ 44. Although "there is no absolute requirement that where several defendants are sued in connection with an alleged fraudulent scheme, the complaint must identify *false statements* made by each and

[4] The only specific fact AlterG alleges in this regard is that Defendants' misrepresentation that the "Boost One is suitable for use in medical markets or is approved for hospital and clinic use" is displayed at "woodway.com." Compl. ¶ 44. However, as Defendants point out, AlterG has alleged no facts to suggest that this statement made on *Woodway*'s website is attributable to *Defendants*.

every defendant," and, "at a minimum, identif[y] the role of [each] defendant[] in the alleged fraudulent scheme." **[**40]** *Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007)* (emphasis removed). AlterG has failed to do so.

Accordingly, Defendants' motion to dismiss AlterG's false advertisement claim is **GRANTED** with leave for AlterG to amend.

H. Trade Libel

AlterG's eighth cause of action is trade libel, based on Defendants' "false, disparaging, and defamatory statements regarding AlterG's business and products to several AlterG customers and potential AlterG customers." Compl. ¶¶ 142-45. "Trade libel is defined as 'an intentional disparagement of the quality of property, which results in pecuniary damage.'" *Aetna Cas. & Sur. Co. v. Centennial Ins. Co., 838 F.2d 346, 351 (9th Cir. 1988)* (quoting *Erlich v. Etner, 224 Cal. App. 2d 69, 73, 36 Cal. Rptr. 256 (1964))*. A trade libel claim requires: (1) a publication, (2) which induces others not to deal with plaintiff, and (3) special damages." *Id.* (citing *Polygram Records, Inc. v. Superior Court, 170 Cal. App. 3d 543, 548-49, 216 Cal. Rptr. 252 (1985))*. Moreover, "a plaintiff must allege: (1) who made the statements, (2) to whom the statements were made, (3) the time and place of publication, and (4) the substance of the statements." *NPK Indus. v. Hunter, No. 15-CV-00811-SI, 2015 U.S. Dist. LEXIS 123824, 2015 WL 5461667, at *4 (N.D. Cal. Sept. 16, 2015)* (citations omitted).

Here, AlterG has adequately alleged who made the statements and the substance of the statements. The complaint specifies that "each of" the Individual Defendants told AlterG customers that "AlterG was going out of business, is in poor financial health and will not **[**41]** be able to get Woodway treadmills anymore," and that "AlterG DAP technology is inferior to that of Boost and that Boost is an equal or better system than AlterG DAP technology, but at a lower cost." Compl. ¶¶ 45, 142.

In contrast, AlterG has not adequately alleged when, where, and to whom the statements were made. It only asserts vaguely that the false statements were made to "several AlterG customers and potential AlterG customers," without identifying any of the customers. *Id.* ¶ 142. The trade libel claim is thus insufficiently pled. *Compare* *NPK Indus., 2015 U.S. Dist. LEXIS 123824, 2015 WL 5461667, at *5* (finding a trade libel claim adequately pled where the complaint specified "that defendants . . ., through phone calls, visits and emails, made disparaging statements about [plaintiff] to [plaintiff]'s customers and business partners, several of whom [plaintiff] identifies by name," and that "these activities took place beginning in July 2013 and November 2013").

AlterG has also failed to plead the "special damages" element of its trade libel claim. To establish this element, a plaintiff "may not rely on a general decline in business arising from the [alleged] falsehood, and must instead identify particular customers and transactions of which **[**42]** it was deprived as a result of the libel." *Mann v. Quality Old Time Serv., Inc., 120 Cal. App. 4th 90, 109, 15 Cal. Rptr. 3d 215 (2004)*, *disapproved of on other grounds by* *Baral v. Schnitt, 1 Cal. 5th 376, 385, 205 Cal. Rptr. 3d 475, 376 P.3d 604 (2016)*. Here, **[*1155]** AlterG asserts that Defendants have "s[old] over 20 units to date to customers considering an AlterG unit," causing "monetary damages" to AlterG. Compl. ¶ 46. However, AlterG has not identified any particular customers associated with these sales, nor explained whether these customers' decision to purchase Boost products in lieu of AlterG products was attributable to Defendants' trade libel. *See* *Heartland Payment Sys., Inc. v. Mercury Payment Sys., LLC, No. C 14-0437 CW, 2016 U.S. Dist. LEXIS 9078, 2016 WL 304764, at *11 (N.D. Cal. Jan. 26, 2016)* (dismissing trade libel claims because "[plaintiff] does not identify any customer who refused to do business with it as a result of [defendant]'s allegedly libelous statements"); *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc., 946 F. Supp. 2d 957, 981 (N.D. Cal. 2013)* (dismissing trade libel claim where "it is not even clear if this allegation [of lost sales] is connected to counterdefendants' [libel]").

Accordingly, Defendants' motion to dismiss AlterG's trade libel claim is **GRANTED** with leave for AlterG to amend.

I. UCL Claim

AlterG's ninth cause of action is unfair competition, brought under California's Unfair Competition Law ("UCL"). Compl. ¶¶ 147-53. The UCL prohibits **[**43]** "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Cal. Bus. & Prof. Code § 17200*.

1. "Unlawful" Prong

Under the "unlawful" prong, "[t]he UCL 'borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable.'" *Wilson v. Hewlett—Packard Co., 668 F.3d 1136, 1140 (9th Cir. 2012)* (quoting *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999))*. Although AlterG's claims are not properly pled at this juncture, it may be able to cure its pleading deficiencies through amendment and establish violations of other laws that serve as a predicate for its "unlawful" claim. Accordingly, AlterG's claim under the "unlawful" prong of the UCL is **DISMISSED without prejudice**.

2. "Unfair" Prong

The "unfair" prong of the UCL prohibits a business practice that "violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits." *McKell v. Wash. Mut., Inc., 142 Cal. App. 4th 1457, 1473, 49 Cal. Rptr. 3d 227 (2006)*. The California Supreme Court has held that "[w]hen a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes *section 17200*, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or **[**44]** spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 186-87, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*.

Here, AlterG describes Boost as "a direct competitor to AlterG." Compl. ¶ 117. However, nowhere in its complaint or briefing does AlterG allege or attempt to argue that the misconduct it describes with respect to Defendants threatens an incipient violation of an ***antitrust law*** or has effects comparable to a violation of an ***antitrust law***. Indeed, case law suggests that the misconduct of a direct competitor must rise to significantly more serious levels than what has been alleged here to **[*1156]** sustain a finding of unfairness under the UCL. *See, e.g., In re Acacia Media Techs. Corp., No. C 05-01114 JW, 2005 U.S. Dist. LEXIS 37009, 2005 WL 1683660, at *5 (N.D. Cal. July 19, 2005)* (repeated filings of "objectively baseless patent infringement lawsuits" in "bad faith" are covered by ***antitrust law***).

In response, AlterG argues that the false claims made by Defendants have also harmed consumers, Opp. at 18-19, and such harm supports its claim under the unfair prong. For this proposition, Defendants rely on *Luxul Technology Inc. v. Nectarlux, LLC, 78 F. Supp. 3d 1156 (N.D. Cal. 2015)*, in which the court determined that the plaintiff had stated a claim under the unfair prong by alleging that the defendant "wrongfully **[**45]** and unfairly represented to third parties that [plaintiff]'s business and/or products are affected by legal issues that do not exist." *Id. at 1174*. But the parties in *Luxul Technology* were not direct competitors. Rather, the defendant was a sales representative for the plaintiff. *Id. at 1165*. That case is therefore inapposite.

3. "Fraudulent" Prong

To state a claim under the fraudulent prong of the UCL, "it is necessary only to show that members of the public are likely to be deceived" by the business practice or advertising at issue. *In re Tobacco II Cases, 46 Cal. 4th 298, 312, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009)* (citation and internal quotation marks omitted). Before evaluating the substance of AlterG's claim under this prong, however, the Court must ensure that AlterG has standing to bring the claim. The UCL limits standing to those individuals who had "suffered injury in fact and has lost money or property as a result of the unfair competition." *Cal. Bus. & Prof. Code § 17204*. The California Supreme Court has interpreted this standing provision as "impos[ing] an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL's fraud prong." *In re Tobacco II Cases, 46 Cal. 4th at 326*. Thus, "courts have recognized that UCL fraud plaintiffs must allege their *own* reliance—not the reliance of third parties—to have standing **[**46]** under the UCL." *O'Connor v. Uber Techs., Inc., 58 F. Supp. 3d 989, 1002 (N.D. Cal. 2014)* (emphasis in original); *see Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 327, 120 Cal. Rptr. 3d 741, 246 P.3d*

877 (2011) (holding that the "plaintiff must allege he or she was motivated to act or refrain from action based on the truth or falsity of a defendant's statement").

AlterG's fraud claims here are predicated on the allegedly false statements Defendants made "to customers and prospects" about AlterG's financial situation and product quality. Compl. ¶¶ 45-46. While the complaint explains that AlterG was harmed by Defendants' fraud because *customers* relied on the misrepresentations and avoided AlterG's products, there is no allegation that AlterG itself relied on Defendants' statements. AlterG's opposition brief does not dispute this. Accordingly, AlterG does not have standing under the UCL to pursue a claim under the fraudulent prong. *See* 23andMe, Inc. v. Ancestry.com DNA, LLC, 356 F. Supp. 3d 889, 911 (N.D. Cal. 2018) (dismissing claim under the fraudulent prong of the UCL where plaintiff alleged a competitor's misrepresentations deceived consumers).

4. Restitution

Damages cannot be recovered through a UCL claim. *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1144, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*. A plaintiff who prevails on such a claim is limited to injunctive relief and **[*1157]** restitution. *Id.* Defendants insist that AlterG is not entitled to UCL relief because "restitution under the UCL . . . is limited to money **[**47]** or property that defendants took directly from a plaintiff or in which a plaintiff has a vested interest.'" *L.A. Taxi Coop., Inc. v. Uber Techs., Inc., 114 F. Supp. 3d 852, 867 (N.D. Cal. 2015)* (citation and alterations omitted). Defendants' argument would carry the day if AlterG were seeking to recover money that Defendants made from sales to customers who would otherwise have purchased treadmills from AlterG. In that case, AlterG would not be asking for money that Defendants took directly from AlterG or in which AlterG has a vested interest. *L.A. Taxi Coop., 114 F. Supp. 3d at 867*. But that is not AlterG's theory of relief. Rather, AlterG clarifies in its opposition brief that it is seeking to recover the value of the proprietary and confidential information Defendants misappropriated from AlterG. *See* Opp. at 19. That information is property in which AlterG "had an ownership interest." *Korea Supply, 29 Cal. 4th at 1144-45*. AlterG is thus entitled to restitution.

Accordingly, Defendants' motion to dismiss AlterG's UCL claim is **GRANTED** as to the unfair and fraudulent prongs. Dismissal of the unfair and fraudulent prong claims is **with prejudice** because AlterG has not demonstrated that Defendants' alleged conduct threatens an incipient violation of an ***antitrust law*** or that AlterG relied on Defendants' false statements.

J. Conspiracy

AlterG's tenth cause **[**48]** of action alleges that Defendants entered into a conspiracy "to interfere with and damage AlterG's business and misappropriate AlterG's intellectual property and confidential information." Compl. ¶¶ 155-62. Defendants argues this claim must be dismissed because conspiracy cannot be pled as a standalone cause of action.

Defendants are correct that "[c]onspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." *Applied Equipment Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 510-11, 28 Cal. Rptr. 2d 475, 869 P.2d 454 (1994)*. A conspiracy allegation must be "activated by the commission of an actual tort." *Swipe & Bite, Inc. v. Chow, 147 F. Supp. 3d 924, 936 (N.D. Cal. 2015)* (citing *Applied Equipment, 7 Cal. 4th at 511*). Here, AlterG may be able to state viable tort claims, such as for breach of fiduciary duty and interference with contract, via amendment. Accordingly, Defendants' motion to dismiss the conspiracy claim as an independent cause of action is **GRANTED**, but AlterG can amend its complaint to state the viable tort claim and to make clear that it is alleging that the Individual Defendants conspired to commit tortious acts and are therefore each liable for those acts under a theory of conspiracy liability.

IV. CONCLUSION

For the **[**49]** foregoing reasons, the Court **GRANTS** Defendants' motion to dismiss. The following causes of action are dismissed with prejudice:

- Ninth (UCL claim under the unfair and fraudulent prongs);
- Tenth (conspiracy as an independent cause of action).

The following causes of action are dismissed without prejudice, with leave to amend within 30 days of the date of this Order:

- First (patent infringement);

[*1158] • Second (breach of contract);

- Third (trade secret misappropriation);
- Fourth (breach of fiduciary duty);
- Fifth (interference with contract);
- Sixth (interference with prospective economic advantage);
- Seventh (false advertisement);
- Eighth (trade libel);
- Ninth (UCL claim under the unlawful prong).

This order disposes of Docket No. 15.

IT IS SO ORDERED.

Dated: May 20, 2019

/s/ Edward M. Chen

EDWARD M. CHEN

United States District Judge

LexisNexis

Monsanto Co. v. Hensel Seed Sols. LLC

United States District Court for the Eastern District of Missouri, Southeastern Division

May 20, 2019, Decided; May 20, 2019, Filed

Case No. 4:18-CV-1812-SNLJ

Reporter

2019 U.S. Dist. LEXIS 84330 *; 2019-1 Trade Cas. (CCH) P80,779; 2019 WL 2173444

MONSANTO COMPANY, Plaintiff, v. HENSEL SEED SOLUTIONS LLC, Defendant.

Prior History: Monsanto Co. v. Hensel Seed Sols. LLC, 2018 U.S. Dist. LEXIS 183808 (E.D. Mo., Oct. 26, 2018)

Core Terms

Seed, counterclaim, pricing, affirmative defense, motion to strike, Dealer, argues, fair dealing, allegations, covenant of good faith, motion to dismiss, particularity, Retailers

Counsel: **[*1]** For Monsanto Company, Plaintiff: Matthew R. Grant, LEAD ATTORNEY, HUSCH BLACKWELL, LLP, St. Louis, MO.

Judges: STEPHEN N. LIMBAUGH, JR., UNITED STATES DISTRICT JUDGE.

Opinion by: STEPHEN N. LIMBAUGH, JR.

Opinion

MEMORANDUM AND ORDER

This matter is before the Court on plaintiff Monsanto Company's motion to partially dismiss defendant Hensel Seed Solution LLC's First Amended Counterclaims and to strike from Hensel's First Amended Answer its Second, Third, Fifth, and Sixth Affirmative Defenses.

I. Factual Background

Plaintiff manufactures crop seeds which it sells to farmers through dealers. Defendant is or was a seed dealer for plaintiff. Plaintiff and defendant entered into Monsanto Brand Seed Dealer Agreement ("MBSD") that sets forth the terms of the parties' relationship. Plaintiff filed this lawsuit seeking damages for defendant's alleged breach of the MBSD and of the parties' credit agreement and for unjust enrichment.

Defendant filed an answer with affirmative defenses and counterclaims. The first counterclaim is for price discrimination under Section 2(a) the Robinson Patman Act, and the second count is for breach of contract, including the implied covenant of good faith and fair dealing. Plaintiff seeks dismissal of the second **[*2]** count. Plaintiff also seeks an order striking the defendant's affirmative defenses of set-off and recoupment, illegality, impossibility, and frustration of purpose.

II. Motion to Dismiss Counterclaim

The purpose of a *Rule 12(b)(6)* motion to dismiss is to test the legal sufficiency of a complaint so as to eliminate those actions "which are fatally flawed in their legal premises and designed to fail, thereby sparing litigants the burden of unnecessary pretrial and trial activity." *Young v. City of St. Charles, 244 F.3d 623, 627 (8th Cir. 2001)* (quoting *Neitzke v. Williams, 490 U.S. 319, 326-27, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989))*. A complaint must be dismissed for failure to state a claim upon which relief can be granted if it does not plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (abrogating the prior "no set of facts" standard set forth in *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*. Courts "do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id. at 555*. A complaint must set forth factual allegations which are enough to "raise a right to relief above the speculative level." *Id. at 555*. However, where a court can infer from those factual allegations no more than a "mere possibility of misconduct," the complaint must be dismissed. *Cole v. Homier Distributing Co., Inc., 599 F.3d 856, 861 (8th Cir. 2010)* (citing *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009))*.

To state a claim for breach of contract in **[*3]** Missouri, counterclaim-plaintiff Hensel Seed must allege

> 1) the existence and terms of a valid and enforceable contract between the [counterclaim-]plaintiff and [counterclaim-]defendant; 2) the rights of the [counterclaim-]plaintiff and the obligations of the [counterclaim-]defendant under the contract; 3) breach of the contract by the [counterclaim-]defendant; and 4) damages suffered by the [counterclaim-]plaintiff due to the breach.

Reitz v. Nationstar Mortg., LLC, 954 F. Supp. 2d 870, 884 (E.D. Mo. 2013). Here, Monsanto argues that Hensel has failed to allege a breach. Hensel alleges that

> Monsanto breached the Monsanto Brand Seed Dealer Agreement...by providing excessive and discriminatory discounts to the Large Chain Retailers on [Dekalb Corn Seed] while lying to Hensel Seed about and concealing the reasons why the Large Chain Retailers were able to sell Dekalb Corn Seed at retail to farms and farmers at prices lower than Hensel Seed's wholesale price from Monsanto.

(#25 at 22.) Further, Hensel claims that the price discrimination made it impossible for Hensel to perform profitably under and realize the benefits of the MBSD Agreement.

Monsanto points out that no term in the MBSD precludes differential pricing among dealers or require disclosure of other **[*4]** dealers' pricing. Hensel counters that, because the Agreement is a contract for the sale of goods, the Uniform Commercial Code imposes a covenant of good faith and fair dealing, *§ 400.1-304 RSMo*, and that sellers who have the ability to set open prices must do so in good faith, *§ 400.2-305(2) RSMo.*

Monsanto argues, however, that the Agreement is a dealership or distributorship agreement, is not a contract for the sale of goods, and is thus not subject to the UCC's covenant of good faith and fair dealing. The parties cite conflicting law. Each of Monsanto's authorities can be traced back to *Tile-Craft Products Co. v. Exxon Corporation, 581 S.W.2d 886, 889 (Mo. App. E.D. 1979)*, which merely observed that a distributorship entity was not itself a good under *Article 2 of the Uniform Commercial Code*. *See* *Vigano v. Wylain, Inc., 633 F.2d 522, 525 (8th Cir. 1980)* and *Kansas City Trailer Sales v. Holiday Rambler Corp., 92-0377-CV-W-6, 1994 U.S. Dist. LEXIS 1698, 1994 WL 49932, at *5 (W.D. Mo. Feb. 16, 1994)* (both citing *id.*).

More recent law supports plaintiff's position that "that section of the Uniform Commercial Code provides that 'every contract or duty within this chapter imposes an obligation of good faith in its performance or enforcement.'" *Conoco Inc. v. Inman Oil Co., Inc., 774 F.2d 895, 908 (8th Cir. 1985)* (quoting *ABA Distributors, Inc. v. Adolph Coors Co., 542 F. Supp. 1272, 1285 (W.D. Mo. 1982))*. *Conoco*, which addressed a breach of contract claim on a distributorship agreement, observed that "this implied covenant imposes upon each party the duty to do nothing destructive of the other party's right to enjoy the fruits **[*5]** of the contract and to do everything that the contract presupposes they will do to accomplish its purpose." *Id.* The Eighth Circuit noted, in a footnote, that "there is no dispute that the [distributorship agreements] were contracts for the sale of goods and thus governed by the Uniform

Commercial Code." *Id. at 908 n.10*. Monsanto thus insists that *Conoco* is inapplicable because the parties there did not dispute that the contracts were for the sale of goods. Tellingly, however, Monsanto's own pleading states that it sold seeds to Hensel pursuant to the terms of the MBSD. (#6 at ¶ 13.) Accordingly, this Court holds that Hensel has sufficiently pleaded that its contract falls within the Missouri UCC.

Monsanto next argues that even if the UCC applies, the good faith requirement does not add a term to the agreement that the parties did not include. *See Centerre Bank of Kansas City, N.A. v. Distribs., Inc., 705 S.W.2d 42, 48-49 (Mo. Ct. App. 1985)*. Where a contract expressly provides a pricing formula, Missouri courts will not "implicitly inject additional terms governing this issue." *Massey v. Tandy Corp., 987 F.2d 1307, 1309 (8th Cir. 1993)*. The MBSD's pricing formula sets forth dealer-specific and grower-specific differential pricing. Thus, Monsanto argues, *§ 400.2-305(2) RSMo*'s good-faith requirement does not apply because the price was settled. Hensel's claim, however, **[*6]** is based on Monsanto's extra-contractual actions involving the pricing it set for other parties. This case is unlike the *Massey* case, upon which Monsanto relies, in which the Eighth Circuit explicitly noted that the plaintiffs' claim for breach of the covenant of good faith and fair dealing did not include that the defendant "charged them more than it charged other franchises; rather, they contend the formula used by [defendant] was irrational...". *Id. at 1309*. Regardless of which section of the UCC applies, for purposes of Monsanto's motion to dismiss, Hensel has adequately alleged that Monsanto breached the implied covenant of good faith and fair dealing.

Next, Monsanto argues that Hensel has not pleaded fraud with particularity as required by *Federal Rule of Civil Procedure 9(b)*. *Rule 9(b)* states that "in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." But, as this Court understands Hensel's pleading, Hensel does not bring a standalone counterclaim for fraud. Rather, as Hensel explains in its response memorandum, his breach of contract count is based on Monsanto's breach of the covenant of good faith and fair dealing when it "fraudulently induce[d] Hensel Seed to buy corn **[*7]** seed at grossly inflated and excessive prices." (#31 at 5.) Hensel adds simply that Monsanto "lied about and concealed" the price discrimination.

"Asserting claims premised on fraudulent conduct can trigger the obligation to plead with particularity." 5A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Fed. Prac. & Proc*. Civ. § 1297 (4th ed.) (collecting cases). For example, "[f]raudulent inducement claims will often arise in contract disputes under state law and are thus similarly subject to *Rule 9(b)* when brought in federal court." *Id.* "[C]onclusory allegations that a defendant's conduct was fraudulent and deceptive are not sufficient to satisfy the rule." *Drobnak v. Andersen Corp., 561 F.3d 778, 783 (8th Cir. 2009)* (internal quotations omitted). Such claims must allege the "who, what, where, when, and how" of the alleged fraud. *Id.* Here, Hensel alleged nothing more than Monsanto "lied about" and "concealed" critical facts and provided no "who, what, where, when, and how" details required by *Rule 9(b)*. Although the allegations are insufficient at this point, Hensel will be permitted to replead this claim with particularity.

Finally, with respect to the breach of contract claim, Monsanto argues that Hensel has not sufficiently alleged its own performance of **[*8]** contractual obligations. Hensel alleges that it purchased, marketed, and sold seed from Monsanto as an exclusive dealer from 2013 through 2017. For purposes of Monsanto's motion to dismiss, Hensel has sufficiently pleaded its own performance of the contract.

III. Motion to Strike

As for the plaintiff's motion to strike, *Federal Rule of Civil Procedure 12(f)* states that the Court "may strike from a pleading ... any ... immaterial ... matter ... on motion made by a party." Because they propose a drastic remedy, motions to strike are not favored and are infrequently granted. *Stanbury Law Firm, P.A. v. Internal Revenue Service, 221 F.3d 1059, 1063 (8th Cir. 2000)*.

> As courts have observed, motions to strike can be nothing other than distractions. If a defense is clearly irrelevant, then it will likely never be raised again by the defendant and can be safely ignored. If a defense may be relevant, then there are other contexts in which the sufficiency of the defense can be more thoroughly tested with the benefit of a fuller record-such as on a motion for summary judgment.

*Shirrell v. St. Francis Med. Ctr., 1:13-CV-42 SNLJ, 2013 U.S. Dist. LEXIS 95237, 2013 WL 3457010, at *1 (E.D. Mo. July 9, 2013)* (internal quotations omitted).

Resolution of a motion to strike lies within the broad discretion of the Court. *Stanbury Law Firm, 221 F.3d at 1063*. "In ruling on a motion to strike, the **[*9]** Court views the pleadings in the light most favorable to the pleader." *Speraneo v. Zeus Tech. Inc., No. 4:12cv578-JAR, 2012 U.S. Dist. LEXIS 80263, 2012 WL 2117872, at *1 (E.D.Mo. June 11, 2012)* (citing *Cynergy Ergonomics, Inc. v. Ergonomic Partners, Inc., 2008 U.S. Dist. LEXIS 70995, 2008 WL 2817106, at *2 (E.D.Mo. July 21, 2008))*. "A motion to strike an affirmative defense should not be granted 'unless, as a matter of law, the defense cannot succeed under any circumstances or is immaterial in that it has no essential or important relationship to the claim for relief.'" *Id.* (quoting *Cynergy Ergonomics, 2008 U.S. Dist. LEXIS 70995, 2008 WL 2817106, at *2*, and citing *FDIC v. Coble, 720 F. Supp. 748, 750 (E.D.Mo. 1989))*. A motion to strike should not succeed unless the party shows that it is prejudiced by the inclusion of a defense or that a defense's inclusion confuses the issues. *Cynergy Ergonomics, 2008 U.S. Dist. LEXIS 70995, 2008 WL 2817106, at *2*. "The prejudice requirement is satisfied if striking the defense would, for example, prevent a party from engaging in burdensome discovery, or otherwise expending time and resources litigating irrelevant issues that will not affect the case's outcome." *Id.*

Monsanto contends that Hensel's affirmative defenses purporting to employ the *Robinson-Patman Price Discrimination Act, 15 U.S.C. §§ 13-13a*, as a shield against Monsanto's debt collection efforts are foreclosed as a matter of law. The Robinson-Patman Act prohibits "any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different **[*10]** purchasers of commodities of like grade and quality." *15 U.S.C. § 13(a)*. Here, Hensel claims Monsanto sold seed to large chain retailers at prices far below the prices for which it sold seed to small retailers like Hensel. Although Monsanto's complaint seeks to recover money allegedly owed by Hensel for seed purchased on credit, Hensel's affirmative defenses include set-off and recoupment, illegality, impossibility, and frustration of purpose—all based on Hensel's price discrimination claim. Monsanto argues that these defenses must be stricken because, "even if the sale prescribed in the contract did give rise to a Robinson-Patman violation, ... the contract is nevertheless enforceable." *Delta Marina, Inc. v. Plaquemine Oil Sales, Inc., 644 F.2d 455, 458 (5th Cir. 1981)*. "The general rule is that an antitrust violation is a defense to enforcement of a contract only if the judgment of the Court (enforcing the contract) would itself be enforcing the precise conduct made unlawful by the Act." *Id.* (quoting *Kelly v. Kosuga, 358 U.S. 516, 520, 79 S. Ct. 429, 3 L. Ed. 2d 475 (1959))*. Although a contract can be intrinsically illegal under other antitrust statutes, "no single sale can violate the Robinson-Patman Act. At least two transactions must take place in order to constitute a discrimination." *Bruce's Juices v. Am. Can Co., 330 U.S. 743, 755, 67 S. Ct. 1015, 91 L. Ed. 1219 (1947)*. A "violation, if there was one, is not inherent in the contract **[*11]** sued upon." *Id.* Moreover, "courts should be reluctant to allow litigation over speculative, complex antitrust issues to infiltrate simple breach-of-contract claims when the contract on its face does not violate ***antitrust law***." *Hemlock Semiconductor Operations, LLC v. SolarWorld Indus. Sachsen GmbH, 867 F.3d 692, 701-02 (6th Cir. 2017)*, *reh'g denied* (Sept. 19, 2017) (citing *Nat'l Souvenir Ctr., Inc. v. Historic Figures, Inc., 728 F.2d 503, 516, 234 U.S. App. D.C. 222 (D.C. Cir. 1984))*.

As a result, violation of the Robinson-Patman Act is not a defense to Monsanto's breach of contract claim. *See* *Capital City Distribution v. Classics Int'l Entertainment, 95 C 5018, 1996 U.S. Dist. LEXIS 13707, 1996 WL 535314, at *3 (N.D. Ill. Sept. 18, 1996)* ("violation of the Robinson-Patman Act is not an affirmative defense to a claim for breach of contract"). In any event, Hensel brought a separate counterclaim for violation of the Robinson-Patman Act. Thus, the affirmative defenses based on the Act complicate matters unnecessarily and will be stricken.

Accordingly,

IT IS HEREBY ORDERED that plaintiff Monsanto's motion to dismiss counterclaims and strike affirmative defenses (#27) is GRANTED.

IT IS FURTHER ORDERED that Hensel's breach of contract counterclaim is DISMISSED without prejudice for failure to plead fraud with particularity.

IT IS FURTHER ORDERED that Hensel is granted leave to file any amended counterclaim by June 10, 2019.

IT IS FURTHER ORDERED that Hensel's affirmative defenses of set-off and recoupment, illegality, impossibility, and frustration of purpose **[*12]** are STRICKEN.

IT IS FURTHER ORDERED that Monsanto's motion to stay discovery (#18) is DENIED as moot.

IT IS FINALLY ORDERED that Monsanto's first motion to dismiss (#16) is DENIED as moot.

Dated this 20th day of May, 2019.

/s/ Stephen N. Limbaugh, Jr.

STEPHEN N. LIMBAUGH, JR.

UNITED STATES DISTRICT JUDGE

FTC v. Qualcomm Inc.

United States District Court for the Northern District of California, San Jose Division

May 21, 2019, Decided; May 21, 2019, Filed

Case No. 17-CV-00220-LHK

Reporter

411 F. Supp. 3d 658 *; 2019 U.S. Dist. LEXIS 86219 **; 2019-1 Trade Cas. (CCH) P80,776; 2019 WL 2206013

FEDERAL TRADE COMMISSION, Plaintiff, v. QUALCOMM INCORPORATED, Defendant.

Subsequent History: Motion granted by *FTC v. Qualcomm Inc., 2019 U.S. App. LEXIS 21992 (9th Cir. Cal., July 23, 2019)*

Motion granted by *FTC v. Qualcomm Inc., 2019 U.S. App. LEXIS 27876 (9th Cir. Cal., Sept. 16, 2019)*

Reversed by, Vacated by *FTC v. Qualcomm Inc., 969 F.3d 974, 2020 U.S. App. LEXIS 25347, 2020 WL 4591476 (9th Cir. Cal., Aug. 11, 2020)*

Prior History: *FTC v. Qualcomm Inc., 2017 U.S. Dist. LEXIS 98632, 2017 WL 2774406 (N.D. Cal., June 26, 2017)*

Core Terms

modem, license, chips, rivals, royalty rate, patents, handset, suppliers, royalty, email, practices, patent license, negotiations, premium, customers, sales, technology, cellular, chipset, terms, unreasonably high, anticompetitive, slide, license agreement, documents, funds, products, intellectual property, selling, cutoff

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Judges: LUCY H. KOH, United States District Judge.

Opinion by: LUCY H. KOH

Opinion

[*668] FINDINGS OF FACT AND CONCLUSIONS OF LAW

[*669] Plaintiff Federal Trade Commission ("FTC") brings suit against Defendant Qualcomm Incorporated ("Qualcomm") for allegedly violating *Section 5(a) of the FTC Act*, *15 U.S.C. § 45(a)*, and seeks permanent injunctive relief. Specifically, the FTC claims that Qualcomm has harmed competition in two markets for baseband processors, also called modem chips, through a set of interrelated Qualcomm practices. The FTC Act prohibits "[u]nfair methods of competition," which include violations of the *Sherman Act*. The FTC asserts that Qualcomm's conduct violates (1) *Section 1 of the Sherman Act, 15 U.S.C. § 1*; (2) *Section 2* of the Sherman Act, *15 U.S.C. § 2*; and (3) *Section 5 of the FTC Act*, *15 U.S.C. § 45(a)*. ECF No. 966.

On April 3, 2017, Qualcomm moved to dismiss the FTC's Complaint. ECF No. 69. On June 26, 2017, the Court denied Qualcomm's motion to dismiss. ECF No. 134.

On August 30, 2018, the FTC moved for partial summary judgment on the question of whether Qualcomm's commitments to two standard setting organizations ("SSOs"), the Alliance for Telecommunications Industry Solutions ("ATIS") and the Telecommunications Industry Association ("TIA"), **[**10]** require Qualcomm to license to other modem chip suppliers on fair, reasonable, and nondiscriminatory terms Qualcomm's patents that are essential to practicing the ATIS and TIA standards. ECF No. 792. On November 6, 2018, the Court granted the FTC's motion for partial summary judgment. ECF No. 931.

The Court held a 10-day bench trial in this matter beginning on January 4, 2019. The parties gave closing arguments on January 29, 2019. Having considered the evidence and arguments of counsel, the relevant law, and the record in this case, the Court hereby enters the following findings of fact and conclusions of law.

I. STIPULATED FACTS

The parties stipulated to the following facts:

1. Qualcomm is headquartered in San Diego, California. ECF No. 1326 at 1.

2. Since at least 1989, Qualcomm has been, and is now, a corporation. *Id.*

3. Since at least 1989, Qualcomm has been, and is now, engaged in interstate and international commerce. *Id.*

4. Qualcomm's operating segment relating to its chip and software business is called Qualcomm CDMA Technologies **[*670]** ("QCT"). Qualcomm's operating segment relating to the licensing of its patents is called Qualcomm Technology Licensing ("QTL"). *Id.*

5. In 2012, Qualcomm **[**11]** created Qualcomm Technologies, Inc. ("QTI"), a wholly owned subsidiary of Qualcomm. QTI operates substantially all of Qualcomm's products and services business, including QCT, as well as substantially all of Qualcomm's engineering, research, and development functions. Qualcomm continues to operate QTL. *Id.*

6. Qualcomm CDMA Technologies Asia-Pacific Pte. Ltd. ("QCTAP"), a Singapore company, is a wholly owned indirect subsidiary of Qualcomm. *Id.*

7. Cellular communications depend on widely distributed networks that implement cellular communications standards. *Id.*

8. Some original equipment manufacturers ("OEMs") have purchased multimode modem chips for use in Cellular Handsets intended for operation on the major U.S. wireless networks. *Id.* at 2.

9. Cellular Handsets are designed, marketed, and sold by OEMs such as Samsung, Huawei, Apple, Xiaomi, OPPO, VIVO, Google, Lenovo/Motorola Mobility, and LGE. *Id.*

10. Consumers purchase Cellular Handsets for a variety of reasons, including for (a) their ability to transmit and receive data at high speeds over cellular networks, such as those implementing Long Term Evolution ("LTE"), the highest-speed cellular standard which has widely commercialized to date, **[**12]** and (b) their ability to perform voice calls. *Id.*

11. The Third Generation Partnership Project ("3GPP") and the Third Generation Partnership Project 2 ("3GPP2") are global collaborative partnerships of standards development/standards-setting organizations ("SDOs" or "SSOs")[1] and other industry participants that develop technical specifications for cellular standards. *Id.*

12. The current "organizational partners" of 3GPP are seven regional SSOs, specifically: the European Telecommunications Standards Institute ("ETSI"), the Alliance for Telecommunications Industry Solutions ("ATIS"), the Association of Radio Industries and Businesses, Japan ("ARIB"), the Telecommunication Technology Committee, Japan ("TTC"), the China Communications Standards Association ("CCSA"), the Telecommunications Standards Development Society, India ("TSDSI"), and the Telecommunications Technology Association, Korea ("TTA"). *Id.*

13. The current organizational partners of 3GPP2 are five regional SSOs, specifically: the Telecommunications Industry Association ("TIA"), ARIB, TTC, CCSA, and TTA. *Id.*

14. Cellular communications standards have evolved over "generations," including second-generation ("2G"), third-generation **[**13]** ("3G"), and fourth-generation ("4G") standards. *Id.*

15. 2G cellular standards include the Global System for Mobile ("GSM") and cdmaOne (also sometimes called "TIA/EIA/IS-95" or "IS-95"). *Id.*

16. ETSI adopted GSM as a cellular standard. ETSI also adopted General Packet Radio Service ("GPRS") and Enhanced Data Global Evolution ("EDGE") **[*671]** as improvements to GSM. These are considered 2G standards. *Id.* at 2-3.

17. GSM uses time division multiple access ("TDMA") technology. *Id.* at 3.

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[1] Consistent with the Court's prior orders, *see* ECF No. 931 at 3 n.2, the Court refers to these standards organizations as SSOs.

18. TIA adopted cdmaOne as a cellular standard. TIA also adopted IS-95A and IS-95B as improvements to cdmaOne. These are considered 2G standards. *Id.*

19. cdmaOne uses code division multiple access ("CDMA") technology. *Id.*

20. 3G cellular standards include the Universal Mobile Telecommunications System ("UMTS") and CDMA2000. *Id.*

21. UMTS is an umbrella term for three 3G cellular air interfaces standardized within 3GPP: UTRA-FDD, commonly called Wideband CDMA ("WCDMA"), used worldwide; UTRA-TDD High Chip Rate, having little deployment; and UTRA-TDD Low Chip Rate, commonly called Time Division-Synchronous CDMA ("TD-SCDMA"), used primarily in China. *Id.*

22. Included within the CDMA2000 family of standards are CDMA2000 1x, often called 1xRTT, **[**14]** and High Rate Packet Data, often called 1xEV-DO or EV-DO. *Id.*

23. CDMA2000 was standardized by 3GPP2. *Id.*

24. In the United States, AT&T and T-Mobile have operated WCDMA networks. Verizon and Sprint have operated CDMA2000 networks. *Id.*

25. All four major U.S. carriers (Verizon, AT&T, T-Mobile, and Sprint) have deployed LTE, which also encompasses the LTE Advanced, or "LTE-A" standard, as their 4G standard. *Id.*

26. LTE uses orthogonal frequency division multiple access ("OFDMA") technology for downlink transmissions and single-carrier frequency division multiple access ("SC-FDMA") technology for uplink transmissions. *Id.*

27. LTE was standardized by 3GPP. *Id.* at 4.

BACKGROUND II.

The Court discusses cellular standard setting organizations ("SSOs"), Qualcomm's license agreements, Qualcomm's modem chip business, antitrust investigations into Qualcomm's licensing practices, and the credibility of many Qualcomm witnesses.

A. SSOs and FRAND

Standing setting organizations ("SSOs") are global collaborations of industry participants that develop technical specifications for cellular standards. ECF No. 1326 at 2. These specifications ensure that cellular industry participants—including modem chip suppliers, handset **[**15]** original equipment manufacturers ("OEMs"), infrastructure companies, and carriers—develop standard-compatible devices that can communicate with each other. CX6786-R at 19:6-22. Cellular standards evolve over time. Therefore, although the first generation of LTE was standardized in 2008, there have been several new LTE releases as standards contributors develop new features. Tr. at 1320:19-1321:2.

Cellular standards may incorporate patented technology. Patents that are essential to a standard are called standard essential patents ("SEPs"). Tr. at 1396:3-7. Because a SEP holder could prevent other industry participants from implementing a cellular standard, SSOs require patent holders to commit to license their SEPs on fair, reasonable, and nondiscriminatory ("FRAND") terms before SSOs will incorporate the patent into the cellular standard. QX2776-001. For example, under the intellectual property policy of the Telecommunications Industry Association ("TIA"), a SSO, a SEP holder must commit to TIA that: "A license under any Essential Patent(s), **[*672]** the license rights which are held by the undersigned Patent Holder, will be made available to all applicants under terms and conditions that are reasonable **[**16]** and nondiscriminatory." *Fed. Trade Comm'n v. Qualcomm, 2018 U.S. Dist. LEXIS 190051, 2018 WL 5848999, at *3*.

This promise to license SEPs on FRAND terms is generally referred to as a SEP holder's FRAND commitment. Tr. at 1423:23-25. At summary judgment, the Court held that Qualcomm's FRAND commitments to SSOs, TIA and ATIS, require Qualcomm to license its modem chip SEPs to rival modem chip suppliers. *Fed. Trade Comm'n v. Qualcomm Inc., 2018 U.S. Dist. LEXIS 190051, 2018 WL 5848999, at *1*.

B. Qualcomm License Agreements

Qualcomm Technology Licensing ("QTL") is the division of Qualcomm that grants licenses to Qualcomm's patent portfolio. CX7257-007. QTL holds and licenses three broad categories of patents: (1) cellular standard essential patents ("SEPs"); (2) non-cellular SEPs; and (3) non-SEPs, which also are known as implementation patents. Tr. at 1537:20-1538:4; CX7257-007. Cellular SEPs are patents necessary to practice a particular cellular standard. QX2776-042 to -043.[2] By contrast, non-cellular SEPs are necessary to the practice of a non-cellular standard. Tr. at 1537:24-1538:1. Non-SEPs are patents not necessary to the practice of any standard. *Id.* at 1538:2-4. Liren Chen (QTL Senior Vice President of Engineering and Legal Counsel) estimated at trial that Qualcomm held approximately 140,000 granted patents and pending patent applications as of March **[**17]** 2018. Tr. at 1540:14-17.

Qualcomm primarily licenses its patents on a "portfolio basis," which means that a licensee pays for and receives rights to all three categories of Qualcomm patents—cellular SEPs, non-cellular SEPs, and non-SEPs. Tr. at 1972:19-24. Qualcomm occasionally offers separate licenses to its SEPs. Tr. at 1991:13-18; CX7257-014. Qualcomm stated in its 2017 10-K filed with the Securities and Exchange Commission ("SEC") that SEP-only licenses "negatively impact" Qualcomm's licensing revenues because Qualcomm receives higher royalty rates for portfolio licenses than for SEP-only licenses. CX7257-027.

In 1990, Qualcomm began licensing its CDMA patents. According to Dr. Irwin Jacobs (Qualcomm Co-Founder and former CEO)[3], Qualcomm first licensed its patents to generate funds for continued research and development. Tr. at 1265:24-1266:22. On July 24, 1990, Qualcomm entered a patent license agreement with AT&T, in which Qualcomm charged a 4% running royalty rate on handset sales and no royalties on chipset sales. JX0002-006; ECF No. 1326 at 4. Qualcomm entered a similar patent license agreement with Motorola **[*673]** in July 1990, in which Qualcomm charged a 4% running royalty rate on **[**18]** handset sales and no royalties on chipset sales. Tr. at 216:20-217:3; JX0003-005.

In a 1999 email, Steve Altman (later Qualcomm President) told Marv Blecker (QTL Senior Vice President) that Qualcomm licensed rival modem chip suppliers in exchange for a 3% running royalty rate on chipset sales. CX8177-001. Specifically, Altman's email stated: "Other ASIC licensees pay royalties to Qualcomm at 3% with no minimum dollar amount." *Id.*

At some point, Qualcomm stopped licensing rival modem chip suppliers and instead started licensing only OEMs at a 5% running royalty on the price of each handset sold. These licenses are called Subscriber Unit License Agreements ("SULA"). *See* JX0030 (SULA between Qualcomm and BenQ). With a SULA, an OEM may sell handsets that practice Qualcomm's patents without fear of an infringement suit from Qualcomm. Tr. at 1426:2-10. The parties stipulated that in a typical SULA, Qualcomm receives consideration in the form of a running royalty rate calculated as a percentage of the licensee's wholesale net selling price of the end-user device (minus applicable

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[2] Exhibits beginning with the letters "CX" are exhibits that the FTC introduced at trial. Exhibits beginning with the letters "QX" are exhibits that Qualcomm introduced at trial. Exhibits beginning with the letters "JX" are exhibits that the parties jointly introduced at trial. The first four numbers after those letters are the exhibit number. The numbers following the dash are the page number. Where the Court cites a page range in an exhibit, the Court uses the word "to" to denote that the Court is citing a range (e.g., QX2776-042 to -043). Where the Court cites multiple pages in an exhibit that are not within a page range, the Court uses a comma to indicate that the Court is citing multiple pages (e.g., QX2776-042, -044).

[3] All the Qualcomm witnesses have or had multiple titles and roles during their time at Qualcomm. Where the Court knows a witness's title at the time of a document or event, the witness is so identified. Where the Court does not know a witness's contemporaneous title, the Court identifies the witness by their current or last title at Qualcomm.

deductions), subject to royalty caps. ECF No. 1326 at 10. An end-user device is a cellular handset, which the parties have stipulated **[**19]** is defined as a mobile phone. ECF No. 1326 at 2.

Specifically, Qualcomm charges a 5% running royalty on handset sales for a license to Qualcomm's CDMA patent portfolio, which includes CDMA SEPs and non-SEPs. Tr. at 1399:21-24. For Qualcomm's LTE portfolio, Qualcomm has historically charged a 4% running royalty rate. *Id.* at 1400:11-16. Qualcomm SULAs grant rights both to the relevant Qualcomm patents existing at the time of the SULA and additional relevant Qualcomm patents issued during the license term. Tr. at 1397:5-8.

Qualcomm has capped the maximum royalty base or net selling price of the handset at $400. Tr. at 1979:19-23; *see also* JX0122-010 (royalty base cap in SULA between Samsung and Qualcomm). In some SULAs, Qualcomm charges an upfront fee in addition to the running royalty rate on handset sales. *See* JX0042-011 (upfront license fee in SULA between Wistron and Qualcomm). SULAs also require OEMs to grant cross licenses to their patents to Qualcomm, sometimes on a royalty-free basis. Tr. at 1398:11-13; CX7257-015.

Qualcomm has been forced to alter certain royalty rates and licensing practices after a 2014 investigation of Qualcomm's business practices by China's National Development **[**20]** and Reform Commission ("NDRC"), the government entity responsible for antitrust. Tr. at 1981:9-16. The NDRC issued a "rectification plan," which requires Qualcomm to offer SEP-only licenses to Qualcomm's China patents at specified rates. *Id.* at 1400:17-25; CX7257-014. The resulting agreements are Chinese Patent License Agreements ("CPLA"). Tr. at 1457:14-1458:3.

In a CPLA, which is a SEP-only license, Qualcomm charges a 5% running royalty rate on sales of handsets that support multiple cellular standards and a 3.5% running royalty rate on sales of LTE-only handsets, although the CPLA charges those rates against 65% of the handset price and the rates apply only to handsets made and sold for use in China. *Id.* at 1400:17-25; *see* QX9266-365 (CPLA between Lenovo and Qualcomm). As will be discussed further below, a presentation to a committee of the Qualcomm Board of Directors in 2015 explained that Qualcomm was able to avoid more aggressive rate cuts by making a $150 million contribution to the Chinese government. CX3755-004.

[*674] Qualcomm now charges the same royalty rates in other SEP-only licenses regardless of whether the handsets are made and sold only for use in China. Tr. at 1401:1-4.

Licensing **[**21]** is very profitable for Qualcomm. In 2015, David Wise (Qualcomm Senior Vice President and Treasurer) stated in a presentation shared with Alex Rogers (QTL President) that "QTL represents the vast majority of our value at $50-$70B" and that "1 point of royalty is $16-$20B." CX5953-004. At trial, Wise agreed that QTL has historically "represented at least two thirds of the value of Qualcomm." Tr. at 91:14-17. Qualcomm's 2017 strategic plan indicates that QTL earned $7.7 billion in 2016. CX7122-026. That figure exceeded the combined 2016 licensing revenue of twelve other patent licensors, including Ericsson, Nokia, and Interdigital. *Id.* A 2012 Bain Consulting presentation that Qualcomm introduced into evidence concluded that in 2011, "Qualcomm has 25% of global patent licensing revenue" in the cellular handset space and that Qualcomm earned more than 50% of all modem chip patent licensing revenue. QX0121A-009.

C. Qualcomm Sales of Modem Chips

Next, the Court provides a general overview of Qualcomm CDMA Technologies ("QCT"), Qualcomm's modem chip supply division. Qualcomm is a "fabless" modem chip supplier, which means that QCT outsources the actual fabrication of QCT modem chips to third **[**22]** parties. CX7257-013. Modem chips[4] enable handsets to communicate with each other across cellular networks. Tr. at 553:25-554:2. Any OEM manufacturing a cellular handset must purchase and install a modem chip. CX0507-001. Because the OEM must integrate the modem chip

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[4] Other terms for modem chips are baseband processors, application specific integrated circuits ("ASICs"), and chipsets. *See, e.g.*, JX0051-004. For ease of reference, and in accordance with the parties' usage, the Court uses the term "modem chip."

into the OEM's handset design process, OEMs may engage with potential modem chip suppliers as many as two years before the OEM plans to commercialize the handset. Tr. at 674:16-21; CX0507-001.

Modem chips are either "single-mode" or "multimode." Whereas a single-mode modem chip supports only one cellular standard (like CDMA), a multimode modem chip supports multiple standards in one chip. Tr. at 1352:21-25. For example, Qualcomm's MSM 7600 modem chip supports six different cellular standards. *Id.* at 1372:8-25. A multimode modem enables global roaming, as carriers in different parts of the world may support different cellular standards. *Id.* at 1352:24-1353:2.

Modem chips also contain varying features. "Thin modems" are standalone modem chips that provide only the core cellular functionality. Tr. at 1378:7-14. Apple, a major OEM, buys thin modems from external modem chip suppliers and internally develops application **[**23]** processors, which include the multimedia capability necessary for smartphones. *Id.* Other OEMs have also purchased thin modems and paired them with application processors. Tr. at 457:5-9. By contrast, a "system on a chip" ("SoC") is an integrated chip that includes both a modem's cellular functionality and the application processor. *Id.* at 1361:6-17; QX9204-015. Qualcomm produces SoCs (its MSM line of chips) and thin modems (its MDM line). CX5551-024; Tr. at 1375:5-21.

Qualcomm first sold commercial quantities of modem chips in 1996. CX1771-022. From fiscal years 2015 to 2017, Qualcomm shipped between 804 million and 932 million modem chips each year. CX7257-012. Although such sales are not relevant to this case, Qualcomm also sells modem **[*675]** chips to OEMs that manufacture items like smart cars. CX7257-012.

As of March 2018, several other companies were selling modem chips. These companies include MediaTek; HiSilicon, a division of the OEM Huawei; Samsung LSI (also referred to as Exynos), a division of the OEM Samsung; Intel; and Unisoc (formerly known as Spreadtrum). Tr. at 323:25-324:4; CX7257-014. Other modem chip suppliers exited the market between 2006 and 2016, including Freescale, **[**24]** Marvell, Texas Instruments, ST-Ericsson, Broadcom, and Nvidia. CX8292-006, -024; Tr. at 324:5-12. The Court will discuss these rivals and how Qualcomm's practices affected them in more detail below.

D. Government Investigations, Findings, and Fines

The following descriptions of various government investigations and findings are from Qualcomm's 2017 10-K filed with the SEC on November 1, 2017:

The FTC first notified Qualcomm of its investigation related to the instant case in September 2014 and filed its complaint in the instant case in January 2017. CX7257-099.

In September 2009, the Japan Fair Trade Commission ("JFTC") issued a cease and desist order regarding certain of Qualcomm's licenses with Japanese licensees. CX7257-097. The JFTC order concluded that the Japanese licensees "were forced to cross-license patents to [Qualcomm] on a royalty-free basis and were forced to accept a provision under which they agreed not to assert their essential patents against [Qualcomm's] other licensees who made a similar commitment." *Id.* Qualcomm invoked its right to administrative hearings before the JFTC and the Tokyo High Court stayed the cease and desist order while the JFTC held administrative **[**25]** hearings. *Id.* As of 2017, the JFTC had held hearings on 37 different dates. *Id.*

In January 2010, the Korea Fair Trade Commission ("KFTC") found that Qualcomm had violated Korean law "by offering certain discounts and rebates for purchases of its CDMA chipsets and for including in certain agreements language requiring the continued payment of royalties after all licensed patents have expired." CX7257-097. The KFTC imposed a fine, which Qualcomm paid, although Qualcomm has appealed the KFTC's order to the Korea Supreme Court. CX7257-097 to -098.

In March 2015, the KFTC notified Qualcomm that the KFTC was investigating whether Qualcomm's licensing practices violate the Korean monopoly laws. CX7257-098. In January 2017, the KFTC issued a written order that the following practices violate Korean law: "(i) refusing to license, or imposing restrictions on licenses for, cellular communications standard-essential patents with competing modem chipset makers; (ii) conditioning the supply of modem chipsets to handset suppliers on their execution and performance of license agreements with the Company; and (iii) coercing agreement terms." *Id.* The KFTC also fined Qualcomm $927 million. *Id.* Qualcomm **[**26]** has appealed the order to the Korea Supreme Court. *Id.*

In 2015, the European Commission began formal proceedings into a 2010 complaint that Qualcomm had engaged in anticompetitive activity. CX7257-098. The Commission issued a decision in 2015 "expressing its preliminary view that between 2009 and 2011, the Company engaged in predatory pricing by selling certain baseband chipsets to two customers at prices below cost, with the intention of hindering competition." *Id.* As of 2017, the matter remained ongoing. *Id.*

[*676] In 2015, the Taiwan Fair Trade Commission ("TFTC") began investigating whether Qualcomm's patent licensing practices violate Taiwan's fair trade laws. CX7257-099. In 2017, the TFTC issued a formal decision that Qualcomm violated Taiwan law by refusing to license modem chip rivals, refusing to supply modem chips to OEMs who are unlicensed, and providing discounts to Apple in exchange for Apple's exclusive purchase of Qualcomm modem chips. *Id.* The TFTC imposed a $778 million fine. *Id.*

In addition, China's National Development and Reform Commission ("NDRC") investigated Qualcomm's licensing practices and in 2015 imposed a rectification plan that altered some of Qualcomm's licensing **[**27]** practices in China, as set forth in the licensing background section above. CX7257-027. Presentation notes from a slide deck that Boston Consulting Group ("BCG") presented to the Qualcomm Board of Directors in 2015 explain that Qualcomm was able to avoid caps on non-SEP royalty rates, more aggressive rate cuts, and forced sales to non-licensees due to a $150 million payment to the Chinese government:

> NDRC settlement-Worst penalties were avoided — e.g. caps on non-SEP royalties, more aggressive rate cuts, forced selling of chips to non-licensees, etc. - primarily because of what CalTech[5] [code name for QCT] offered NDRC (agreement with SMIC (Semiconductor Manufacturing International Corporation) to collaborate on production technology + voluntarily contributing ~$150M to Chinese R&D investment fund.

CX3755-004.

Accordingly, Qualcomm's licensing practices have been the subject of government investigations in the United States since at least 2014 and in Asia and Europe since at least 2009.

E. Credibility Determinations

Before discussing the trial evidence in more detail, the Court observes that Qualcomm's trial presentation relied almost exclusively on trial testimony and ignored Qualcomm's **[**28]** own contemporaneous documents. Qualcomm introduced only 16 of its own documents at trial, as compared to the more than 125 Qualcomm documents that the FTC introduced—not counting license and supply agreements. ECF No. 1458-1. At closing argument Qualcomm relied primarily on expert testimony and demonstratives, and largely ignored Qualcomm's own documents. Most of Qualcomm's experts did not even review Qualcomm's own documents.

The Court finds Qualcomm's internal, contemporaneous documents more persuasive than Qualcomm's trial testimony prepared specifically for this antitrust litigation. *See* *In re High-Tech Employee Antitrust Litig., 289 F.R.D. 555, 576 (N.D. Cal. 2013)* (finding contemporaneous documents more persuasive than the defendants' "litigation driven" declarations).

Specifically, many Qualcomm executives' trial testimony was contradicted by these witnesses' own contemporaneous emails, handwritten notes, and recorded statements to the Internal Revenue Service ("IRS"). For example, at trial and at his deposition, Cristiano Amon (Qualcomm President) testified that he had never been informed of Qualcomm threatening to cut off chip supply:

[5] Project Phoenix was a 2015 Qualcomm analysis of whether to split QTL and QCT, and CalTech was the Project Phoenix code name for QCT. Tr. at 96:20-21.

> **[*677]** **Q**: You were asked, 'You have never been informed that QTL threatened to cease supplying chipsets to a customer because of **[**29]** a licensing dispute; is that right?' You answered 'That is correct.' That was a true statement when you said it?
>
> **A**: That is correct.

Tr. at 548:3-17 (citing Amon Depo. 50:24-51:2). However, Amon's own handwritten notes from 2015 license negotiations with Motorola's President Rick Osterloh, entitled "12-9-15-Rick & Team-Motorola," state: "(1) Licensing > Eric [Reifschneider, QTL Senior Vice President and General Manager] constantly threatening to cut off chip supply." CX7024-001. Thus, despite Amon's own handwriting acknowledging 2015 chip supply threats, Amon testified under oath at his deposition and trial that he was unaware of QTL threats to cutoff chip supply.

Furthermore, Cristiano Amon himself approved joint QTL and QCT plans to cut off chip supply during patent licensing disputes. For example, in November 2012, Eric Reifschneider (QTL Senior Vice President and General Manager) wrote to Amon (then QCT Co-President), Steve Mollenkopf (Qualcomm President), Derek Aberle (QTL President), and Marv Blecker (QTL Senior Vice President) regarding Chinese OEMs: "Cristiano, This summarizes the conclusions we reached regarding sales of TD-SCDMA [TD-SCDMA is a 3G standard used primarily in China] **[**30]** chipsets to customers that we anticipate will use them in TD-SCDMA/GSM products... 3. If any of these customers refuses or fails to pay royalties on any other (i.e., C2K [CDMA], UMTS, LTE) devices, we will discontinue supply to such customers as necessary." CX5053-002. Amon replied: "This summarizes well the discussion between QMC [Qualcomm Mobile Computing, a division of QCT]/QTL and the agreed plan forward. We will start communicating the plan to the customer base." CX5053-001. Thus, Amon not only approved the plan for QCT to cut off chip supply to Chinese OEMs who refuse to pay patent royalties to QTL, but Amon agreed to start communicating this plan to customers. Amon's trial testimony was not consistent with his contemporaneous emails and handwritten notes.

Likewise, at trial, Steve Mollenkopf (Qualcomm CEO) testified that he was not aware that Qualcomm had ever cut off an OEM's chip supply:

> **Q**: "[H]as Qualcomm ever exercised the right to cut off chip supply to a customer that was in dispute about licensing with Qualcomm?
>
> **A**: Not that I'm aware of.

Tr. at 809:16-22. Mollenkopf's testimony also was not consistent with his contemporaneous emails.

On February 23, 2012, Sony CEO Bob Ishida **[**31]** (Sony CEO) sent an email with the subject line "urgent" to Steve Mollenkopf (then Qualcomm President). CX7824-002. Ishida wrote that Qualcomm had held all chip shipments to Sony and asked Mollenkopf to intervene:

> QC legal team ordered to your sales to hold any shipment to SOMC due to non existence of QTL license agreement with SOMC after we became 100% subsidiary of Sony. Are you aware of that? We have an individual talking to your legal team diligently to agree on the licensing terms so it was a surprise that your legal team stopped the shipment. Please let me know what you can do on this.

CX7824-002. After the Sony shipment hold, Steve Mollenkopf wrote an email to Derek Aberle (QTL President) and Cristiano Amon (QCT Co-President) stating not that Qualcomm should never cut off chip supply, but only that Mollenkopf wished to **[*678]** have "visibility" on any future shipment holds: "Let's make sure we have a process to make sure Jim L [Jim Lederer, QCT Executive Vice President] or I have visibility before a stop-ship goes out." CX6522-002.

At trial, Steve Mollenkopf (Qualcomm CEO) testified that the Sony chip supply cutoff was a mistake: "[O]ur team had mistakenly put in a stop ship for [Sony]." **[**32]** Tr. at 811:23-24. However, two months after Qualcomm cut off Sony's chip supply, Qualcomm hired Eric Reifschneider, the outside counsel who threatened to cut off Sony's chip supply, as QTL Senior Vice President and General Manager. ECF No. 1326 at 15. Then, in an October 27, 2012 email to Jonathan Pearl (Sony General Counsel), Eric Reifschneider again threatened Sony's chip supply and told

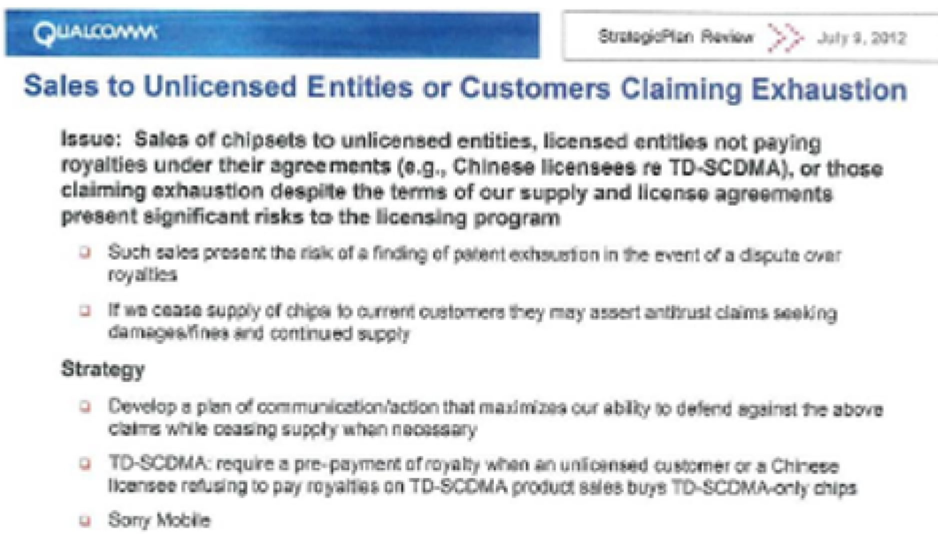
Pearl that QTL would report to QCT that Sony was not licensed: "[A]t this point I must report to QCT that SMC [Sony Mobile Corp.] appears unwilling to enter into a license agreement with Qualcomm." CX5185-005.

Mollenkopf also participated in the November 2012 emails summarizing the QTL and QCT plan for QCT to cut off chip supply to Chinese OEMs who refuse to pay patent royalties to QTL. CX5053-001 to -002. Moreover, on May 20, 2013, Derek Aberle (QTL President) told Steve Mollenkopf (then Qualcomm President) in an email that "I suggest you make the following points to Huawei's CEO." CX5231-001. Among those points was threatening to cut off Huawei's chip supply: "[I]f they don't extend we will have issues re continued chip supply on C2K. Note that Huawei has been claiming patent exhaustion based on **[**33]** their purchase of chips from QC despite the terms of our supply agreement." CX5231-001. Steve Mollenkopf replied, "I got it. Thanks." *Id.*

At both his deposition and at trial, Derek Aberle (QTL President in 2012) was asked about a July 2012 Qualcomm presentation to the Qualcomm Board of Directors that stated "If we cease supply of chips to current customers they may assert antitrust claims seeking damages/fines and continued supply" and listed the following strategy: "Develop a plan of communication/action that maximizes our ability to defend against the above claims while ceasing supply when necessary." CX6974-070.

On July 2, 2012, Derek Aberle (QTL President) sent a slide from the presentation to Dr. Paul Jacobs (Qualcomm CEO), Steve Mollenkopf (Qualcomm President), and Steve Altman (Qualcomm Vice Chairman). CX6998-001, -011. On July 9, 2012, Qualcomm presented the same slide—reproduced below—to the Qualcomm Board of Directors, including Dr. Irwin Jacobs (Qualcomm Co-Founder and former CEO). CX6974-001.

[*679]



At his March 2018 deposition, Derek Aberle (former Qualcomm President), who left Qualcomm in January 2018, could not answer any questions about Qualcomm's July 2012 communication plan **[**34]** to defend against antitrust claims: "Actually, as I read that, I don't recall it. I don't actually know what it means." Aberle Depo. 217:25-218:12.

However, at the January 2019 trial, Derek Aberle testified that the July 2012 slide reflected Qualcomm's intent to "come up with a proactive plan to make sure we could get out ahead of situations where there may be a dispute or a license renewal that needed to happen and somebody was buying chips from us." Tr. at 261:7-19. It is odd that Aberle had better recall during the January 2019 trial than nearly a year earlier at his March 2018 deposition. The Court does not find Aberle's prepared for trial testimony credible.

Similarly, Alex Rogers (QTL President), who has worked at Qualcomm since 2001, testified that Qualcomm has "never threatened to cut off chip supply to get a licensee to accept license terms." Tr. at 1994:1-16. However, Rogers received the October 27, 2012 email that Eric Reifschneider (QTL Senior Vice President and General

Manager) sent to Sony threatening Sony's chip supply because Sony was not licensed. *See* CX5185-002. Rogers' testimony was not consistent with his own emails.

Fabian Gonell (QTL Legal Counsel and Senior Vice **[**35]** President, Licensing Strategy) also testified that Qualcomm does not cut off chip supply during license disputes:

> **Q**: What is Qualcomm's practice with respect to supplying chips to a licensee who is disputing the terms of its license?
>
> **A**: If there's a licensee that is disputing the terms of its license, then we continue to supply chips if they want them.

Tr. at 1428:2-5. However, like Rogers, Gonell received the October 27, 2012 Sony email in which Eric Reifschneider (QTL Senior Vice President and General Manager) threatened Sony's chip supply. *See* CX5185-003. Gonell also received the November 2012 email in which Eric Reifschneider summarized the QTL and QCT plan for QCT to "discontinue supply" to Chinese OEMs who refuse to pay patent royalties to QTL. CX5053-001. Gonell also did not testify credibly when confronted by a recording of a Qualcomm meeting with the IRS, as the Court will discuss later in this order. Gonell's testimony was not consistent **[*680]** with his own emails and his own recorded statements to the IRS.

In addition to giving testimony under oath at trial that contradicted their contemporaneous emails, handwritten notes, and recorded statements to the IRS, some Qualcomm witnesses **[**36]** also lacked credibility in other ways. For example, Dr. Irwin Jacobs (Qualcomm Co-Founder), Steve Mollenkopf (Qualcomm CEO), and Dr. James Thompson (Qualcomm CTO) gave such long, fast, and practiced narratives on direct examination that Qualcomm's counsel had to tell the witnesses to slow down. For example, Qualcomm's counsel told Steve Mollenkopf (Qualcomm CEO): "Slow down just a little bit, Mr. Mollenkopf, if you will, please." Tr. at 803:22-23. Qualcomm's counsel also had to tell Irwin Jacobs to slow down: "I'm going to ask you, Dr. Jacobs, to slow down just a little bit. We're trying to take down every word." Tr. at 1259:25-1260:2. By contrast, when cross-examined by the FTC, each witness was very reluctant and slow to answer, and at times cagey.

Similarly, as CTO, James Thompson oversees engineering at Qualcomm. On direct examination, Thompson readily testified about several of Qualcomm's modem chips, identified them by their marketing codes, and discussed the standards each chip practiced:

> **Q**: Moving over to the next one, the 7600, what was that chip the first of?

A: Okay. So that's — so I mentioned before that we had made a decision to support all modes in the world so our modems **[**37]** could go anywhere in the world, and that was the first chip that supported that.Tr. at 1372:8-13. However, on cross-examination, Dr. Thompson was suddenly unable to answer even basic questions about a modem chip:

> **Q**: Dr. Thompson, Qualcomm's MSM 8655 modem chip is a CDMA capable modem chip?
>
> **A**: That — the MSM 8655, I'm trying to remember. I — you know, off the top of my head, I'm trying to remember which one that is. We use internal code names, and so -
>
> **Q**: Does the second digit being a 6 tell you that this has CDMA?
>
> **A**: Honestly, I don't — I don't know the marketing codes that are used. I have kind of — I think 9 means it has LTE. But — but I'm not sure. I'm not 100 percent sure.

Tr. at 1384:22-1385:6. Similar examples exist for Dr. Irwin Jacobs (Qualcomm Co-Founder) and Steve Mollenkopf (Qualcomm CEO).

Therefore, the Court largely discounts Qualcomm's trial testimony prepared specifically for this litigation and instead relies on these witnesses' own contemporaneous emails, handwritten notes, and recorded statements to the IRS.

III. THE FTC ACT AND THE SHERMAN ACT

The FTC brings its complaint against Qualcomm under *§ 5 of the FTCA*, which prohibits "[u]nfair methods of competition in or affecting commerce." **[**38]** *15 U.S.C. § 45(a)*.

"[U]nfair methods of competition" under the FTCA includes "violations of the Sherman Act." *Fed. Trade Comm'n v. Cement Inst., 333 U.S. 683, 693-94, 68 S. Ct. 793, 92 L. Ed. 1010, 44 F.T.C. 1460 (1948)*. In addition, the FTC under *§ 5* may "bar incipient violations of [the Sherman Act], and conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit." **[*681]** *E.I. du Pont de Nemours & Co. v. Fed. Trade Comm'n, 729 F.2d 128, 136-37 (2d Cir. 1984)* (internal citations omitted); *see also* *Fed. Trade Comm'n v. Brown Shoe Co., 384 U.S. 316, 321, 86 S. Ct. 1501, 16 L. Ed. 2d 587* ("This broad power of the [FTC] is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws."). "The standard of 'unfairness' under the FTCA is, by necessity, an elusive one," and the precise contours of the FTC's authority under *§ 5* are not clearly defined. *Fed. Trade Comm'n v. Indiana Fed. of Dentists, 476 U.S. 447, 454, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*. However, the FTC's authority to proscribe "unfair methods of competition" under *§ 5* is not unbounded. *See* *E.I. du Pont de Nemours & Co., 729 F.2d at 137* ("When a business practice is challenged by the [FTC], even though, as here, it does not violate the antitrust or other laws and is not collusive, coercive, predatory or exclusionary in character, standards for determining whether it is 'unfair' within the meaning of *§ 5* must be formulated to discriminate between normally acceptable business behavior **[**39]** and conduct that is unreasonable or unacceptable.").

Here, FTC alleges that Qualcomm's conduct violates *§ 5 of the FTCA* because Qualcomm's conduct violates both *§ 1* and *§ 2* of the Sherman Act. Compl. ¶ 147; *see also* ECF No. 1083 ("FTC Pretrial Brief"), at 3 (arguing that Qualcomm violated *§ 1* and *§ 2* of the Sherman Act). FTC also alleges that, even if Qualcomm's conduct does not violate either *§ 1* or *§ 2* of the Sherman Act, Qualcomm's conduct nonetheless "constitute[s] unfair methods of competition in violation of *[§ 5*] of the FTCA." Compl. ¶ 147.

A. *Section 1* and *Section 2* of the Sherman Act

"*Section 1* of the Sherman Act, *15 U.S.C. § 1*, prohibits [e]very contract, combination ... or conspiracy, in restraint of trade or commerce among the several States." *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 996 (9th Cir. 2010)*. "Unlike *Section 2* claims, *Section 1* restraint of trade claims need not establish the threshold showing of monopoly control over a relevant market." *Amarel v. Connell, 102 F.3d 1494, 1522 (9th Cir. 1996)*. "To establish liability under *§ 1*, a plaintiff must prove (1) the existence of an agreement, and (2) that the agreement was an unreasonable restraint of trade." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1178 (9th Cir. 2016)*. An agreement is an unreasonable restraint of trade if defendant "plays enough of a role in [the relevant] market to impair competition significantly" and the challenged agreement "is the type that restrains trade." *Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1413 (9th Cir. 1991)*.

"*Section 2* of **[**40]** the Sherman Act makes it unlawful for a firm to 'monopolize.'" *United States v. Microsoft Corp., 253 F.3d 34, 50, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*. "The offense of monopolization has two elements: '(1) the possession of monopoly power in the relevant market"; and (2) "the willful acquisition or maintenance of that power" through exclusionary conduct "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *Id.* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*); *see also* *McWane v. Fed. Trade Comm'n, 783 F.3d 814, 828 (11th Cir. 2015)* (applying these two elements in a case brought under *§ 5 of the FTCA*). As the D.C. Circuit has explained, "to be condemned as exclusionary, a monopolist's act must have an **[*682]** 'anticompetitive effect,'" which means that the conduct "must harm the competitive *process* and thereby harm consumers." *Microsoft, 253 F.3d at 58* (emphasis in original). "The [Sherman Act] directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993).

Thus, the Sherman Act "contains a 'basic distinction between concerted and independent action.'" Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984) (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)). Whereas § 1 prohibits certain concerted activity between separate entities, § 2 is addressed to the anticompetitive conduct of a single firm. Id. at 767-68. In addition, the showing of monopoly power required under § 2 is "more **[**41]** stringent" than the showing of market power required under § 1. Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992).

Nonetheless, once a plaintiff has shown the existence of an agreement under § 1 or shown that a defendant possess monopoly power under § 2, courts apply substantially identical analytical frameworks to determine whether the defendant's conduct actually violated § 1 or § 2. *See* Microsoft, 253 F.3d at 59 (describing the "similar balancing approach" under both § 1 and § 2, and citing cases).

For example, under § 1, unless a restraint is unreasonable *per se*, courts apply the "rule of reason" and its three-step, burden-shifting framework. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284, 201 L. Ed. 2d 678 (2018). The FTC does not argue that Qualcomm entered any agreements that are *per se* unreasonable. FTC Pretrial Brief at 9. Under the § 1 rule of reason, the plaintiff has the initial burden to show that "the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Id.* If the plaintiff makes that showing of anticompetitive effect, "then the burden shifts to the defendant to show a procompetitive rationale for the restraint." *Id.* If the defendant shows a procompetitive rationale, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved **[**42]** through less anticompetitive means." *Id.*

Under § 2, a court asks whether the defendant possessed monopoly power in a relevant antitrust market. Microsoft, 253 F.3d at 51. Monopoly power is "the power to control prices or exclude competition." Grinnell, 384 U.S. at 571. If the court finds that a defendant possessed monopoly power, the court then asks whether the defendant has acquired or maintained its monopoly "by engaging in exclusionary conduct 'as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Microsoft, 253 F.3d at 58 (quoting Grinnell, 384 U.S. at 571). The monopolist's conduct "must have an anticompetitive effect." Eastman v. Quest Diagnostics Inc., 108 F. Supp. 3d 827, 834 (N.D. Cal. 2015) (quoting Microsoft, 253 F.3d at 58).

If the plaintiff makes a prima facie case under § 2 by showing that the monopolist's conduct has anticompetitive effect, the burden shifts to the monopolist to "proffer a 'procompetitive justification' for its conduct." Microsoft, 253 F.3d at 59 (quoting Eastman Kodak, 504 U.S. at 483). If the monopolist shows a procompetitive justification, "the burden **[*683]** shifts back to the plaintiff to rebut that claim." *Id.* If the plaintiff cannot rebut the monopolist's procompetitive justification, the plaintiff "must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit." *Id.*

Therefore, the inquiry as to whether an **[**43]** agreement is an "unreasonable restraint of trade" in violation of § 1 and the inquiry as to whether conduct is exclusionary under § 2 substantially overlap. *See* Williams v. I.B. Fischer Nev., 999 F.2d 445, 448 (9th Cir. 1993) (concluding that because conduct underlying both § 1 and § 2 claims was not anticompetitive under § 1, the court need not separately analyze § 2); *see also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59, 60 S. Ct. 811, 84 L. Ed. 1129 (1940) (holding that "the two sections overlap in the sense that a monopoly under § 2 is a species of restraint of trade under § 1"). The United States Supreme Court has held that under both § 1 and § 2 of the Sherman Act, "the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the rule of reason guided by the established law." Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 61-62, 31 S. Ct. 502, 55 L. Ed. 619 (1911).

As a result, in denying Qualcomm's motion to dismiss the FTC's Complaint, this Court concluded that the analyses of anticompetitive conduct under § 1 and § 2 "are substantially identical." Fed. Trade Comm'n v. Qualcomm, 2017

*U.S. Dist. LEXIS 98632, 2017 WL 2774406, at *9*. Similarly, in *Microsoft*, the D.C. Circuit applied the same three-part burden-shifting analysis to the government's *§ 1* and *§ 2* claims. *See* *253 F.3d at 58, 95-97*. Indeed, the FTC relies on the same theories under both *§ 1* and *§ 2* of the Sherman Act. *See* Compl. ¶ 147; FTC Pretrial Brief at 3 ("The legal analysis of Qualcomm's conduct under *Sections 1* and *2* of the **[**44]** Sherman Act is similar."). Both Qualcomm and the FTC acknowledge that each of the FTC's claims should be judged under this balancing approach. ECF No. 1322 ("QC Pretrial Brief") at 11; ECF No. 1472, FTC Proposed Findings of Fact and Conclusions of Fact ("FTC FOFCOL") at 65.

Accordingly, the Court's analysis proceeds as follows. First, the Court discusses whether the FTC has shown that Qualcomm possessed monopoly power in relevant antitrust markets, and thus satisfied the first element of *§ 2*. Then, the Court discusses whether the FTC has shown that Qualcomm's conduct is an unreasonable restraint of trade under *§ 1* or exclusionary conduct under *§ 2*. Because the Court concludes that Qualcomm's conduct violates the Sherman Act and thereby violates the FTC Act, the Court does not address the separate argument that Qualcomm's conduct is a standalone violation of the FTC Act.

IV. MARKET SHARE AND MARKET POWER

The Court first addresses Qualcomm's market share and market power in the relevant antitrust markets, the market for CDMA modem chips and the market for premium LTE modem chips.

A. Legal Standard

A relevant antitrust market is bounded both by geography and product. *Brown Shoe Co. v. United States, 370 U.S. 294, 324, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. An antitrust market is geographically **[**45]** bounded by "where sellers operate and where purchasers can predictably turn for supplies." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 439 (4th Cir. 2011)* (citing *Tampa Elec Co. v. Nashville Coal Co., 365 U.S. 320, 332-33, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961))*.

[*684] The boundaries of an antitrust product market "are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe, 370 U.S. at 325*. "The test of reasonable interchangeability . . . require[s] the District Court to consider only substitutes that constrain pricing in the reasonably foreseeable future, and only products that can enter the market in a relatively short time can perform this function." *Microsoft, 253 F.3d at 53-54*. "[T]he definition of the relevant market rests on a determination of available substitutes." *Id. at 54* (citation omitted). Other practical indicia of an antitrust product market include "industry or public recognition" of the market and "the product's peculiar characteristics and uses." *Brown Shoe Co., 370 U.S. at 325* (internal citation omitted).

One method that courts have used to apply the above principles and define an antitrust product market is the hypothetical monopolist test. *See Theme Promotions, Inc. v. News Am. Mktg. FSI, 546 F.3d 991, 1002 (9th Cir. 2008)*. Under the hypothetical monopolist test, the court asks "whether a monopolist in the proposed market could profitably impose a small but significant and nontransitory price increase" **[**46]** or "SSNIP." *Id.* If after the monopolist imposed a SSNIP, customers would purchase products outside the proposed market, the proposed antitrust market definition is too narrow. *Saint Alphonsus Med. Center-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 784 (9th Cir. 2015)*. If customers would not change their behavior even if the monopolist imposed a SSNIP, the market definition is proper. *See id.* ("Market definition thus perforce focuses on the anticipated behavior of buyers and sellers."); *see also* *Hynix Semiconductor Inc. v. Rambus Inc., 2008 U.S. Dist. LEXIS 123822, 2008 WL 73689, at *3 (N.D. Cal. Jan. 5, 2008)* (applying the hypothetical monopolist test).

Once the relevant antitrust market is defined, the court must then address whether the defendant held monopoly power during the period alleged. Because there is rarely direct proof of a firm's ability to "profitably raise prices substantially above the competitive level," a court may also rely on circumstantial evidence of monopoly power.

Microsoft, 253 F.3d at 51. "The existence of such power ordinarily may be inferred from the predominant share of the market." *Grinnell, 384 U.S. at 571*. The United States Supreme Court held in *Kodak* that evidence that a defendant holds more than 80% share of the product market "with no readily available substitutes" is sufficient to support a finding of monopoly power. *504 U.S. at 481*. *Kodak* also cited other United States Supreme Court precedent for the proposition **[**47]** that "over two-thirds of the market is a monopoly." *Id.* (citing *Am. Tobacco Co. v. United States, 328 U.S. 781, 797, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946))*. A lesser showing of a "roughly 40% or 50% share" is required to show a *§ 1* violation. *Microsoft, 253 F.3d at 70*.

However, market share alone is not dispositive. *Id. at 54*. Rather, "no single factor has been held determinative as to the existence of [monopoly] power," and courts also consider whether "barriers to entry" protect the dominant firm's ability to control prices. *Oahu Gas Serv., Inc. v. Pac. Res. Inc., 838 F.2d 360, 366 (9th Cir. 1988)*. Entry barriers are market characteristics "that prevent new rivals from timely responding to an increase in price above the competitive level." *Microsoft, 253 F.3d at 51*. An industry that "requires onerous front-end investments that might deter competition from all but **[*685]** the hardiest and most financially secure investors" is one with significant entry barriers. *United States v. Syufy Enters., 903 F.2d 659, 667 (9th Cir. 1990)*. Moreover, a declining market share does not preclude a finding of monopoly power. *Oahu Gas Serv., 838 F.2d at 366*.

Thus, the Ninth Circuit has held that to show monopoly power using circumstantial evidence, a plaintiff must: "(1) define the relevant market; (2) show that the defendant owns a dominant share of that market; and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run." *Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202 (9th Cir. 1997)* (citation **[**48]** omitted).

B. CDMA Modem Chip Market

First, the FTC contends that from 2006 to 2016, Qualcomm possessed monopoly power in the global market for CDMA modem chips. FTC Pretrial Brief at 4. In around 1996, Qualcomm sold its first CDMA modem chip, defined as a modem chip that supports the CDMA standard. Tr. at 327:21-25. A "CDMA multimode" modem chip is a modem chip that supports CDMA and additional standards. CX7606-028. The Court first defines the CDMA modem chip market and then explains how Qualcomm possessed monopoly power in the CDMA modem chip market.

1. CDMA Modem Chip Market Definition

As an initial matter, the geographic boundaries of the CDMA modem chip market are worldwide, a conclusion that Qualcomm does not contest. An antitrust market is geographically bounded by "where sellers operate and where purchasers can predictably turn for supplies." *Kolon Indus., 637 F.3d at 439*. A slide in a 2011 strategic plan for QCT, Qualcomm's modem chip division, shows that Qualcomm sells CDMA modem chips in every region of the globe. CX7606-037. In the same 2011 strategic plan, Qualcomm calculates QCT's CDMA modem chip market share on a global basis. CX7606-029.

Defining the relevant product market "rests on a determination **[**49]** of available substitutes." *Microsoft, 253 F.3d at 54*. Industry practice also informs whether a product market is distinct. *See* *Brown Shoe Co., 370 U.S. at 325* (explaining that practical indicia of an antitrust product market include "industry or public recognition" of the market).

Qualcomm conclusorily disputes that the CDMA modem chip market is a relevant market, but does not cite any evidence. ECF No. 1473, Qualcomm Proposed Findings of Fact and Conclusions of Law ("QC FOFCOL") at 107 (arguing only that the FTC failed to show that Qualcomm held monopoly power in the CDMA modem chip market).

Because non-CDMA modem chips are not "available substitutes" for CDMA modem chips, and because Qualcomm's own documents show that the CDMA modem chip market is a distinct product market, the Court concludes that the FTC has adequately defined the antitrust market.

First, modem chips that do not comply with CDMA standards are not available substitutes for CDMA modem chips. Under the hypothetical monopolist test, the court asks "whether a monopolist in the proposed market could profitably impose a small but significant and nontransitory price increase" or "SSNIP." *Theme Promotions, 546 F.3d at 1002*. If after the monopolist imposed a SSNIP, customers would purchase products outside the proposed **[**50]** market, the proposed antitrust market definition is too narrow. *Saint Alphonsus, 778 F.3d at 784*. If customers would **[*686]** not change their behavior even if the monopolist imposed a SSNIP, the market definition is proper. *See id.*

Application of the hypothetical monopolist test shows that the CDMA modem chip market is properly defined. Due to Qualcomm's large market share, Qualcomm has been able to charge a premium on CDMA modem chips, which is a paradigmatic SSNIP. Per Qualcomm's 2012 QCT strategic plan, Qualcomm planned to charge what the strategic plan called a "CDMA Adder" of $4 on CDMA modem chips relative to comparable modem chips without CDMA capability. CX7607-061. At trial, Cristiano Amon (Qualcomm President) agreed that the slide shows that "Qualcomm associates a $4 CDMA adder" with chips sold for premium handsets. Tr. at 503:25-504:5. Two years later, Qualcomm's 2014 QCT strategic plan shows that Qualcomm anticipated charging a $4 "CDMA Adder" on premium handsets through 2018. CX7644-054.

Qualcomm's CDMA adder has been as high as 30% over comparable UMTS chips, as Qualcomm's expert Tasneem Chipty conceded at trial. Tr. at 1747:4-10. For example, a 2015 modem chip pricing agreement between Qualcomm and Apple indicates **[**51]** that Qualcomm charged Apple $3 more—equivalent to a 30% premium—on "CDMA-enabled" modem chips as compared to "non-CDMA" modem chips. JX0107-013. In 2013, Cristiano Amon stated in an email to Derek Aberle (QTL President), Steve Mollenkopf (Qualcomm President), Paul Jacobs (Qualcomm CEO), and other Qualcomm executives that Qualcomm's CDMA adder had been as high as $7: "[T]here is an overall $4.50-7.00 delta between the chipset price of CDMA and its equivalent UMTS." CX5294-002.

Despite the adder, OEMs cannot substitute a non-CDMA modem chip for a CDMA modem chip. Certain carriers, including Verizon in the United States and China Telecom in China, deploy CDMA networks, which means that an OEM who wishes to sell a handset for use with that carrier needs to purchase a CDMA modem chip. Tr. at 581:9-12. Finbarr Moynihan (MediaTek General Manager of Corporate Sales and Business Development) testified, "[I]f somebody needs to support CDMA for a specific network, like Verizon or Sprint or the Chinese operators, there isn't an alternative to that. It's a standard technology." Tr. at 329:23-25.

John Grubbs (BlackBerry Senior Director of Intellectual Property Transactions) also testified that non-CDMA **[**52]** modem chips are not viable substitutes for CDMA modem chips:

> **Q**: So in order for BlackBerry to sell a phone in to one of these CDMA carriers, the phone had to have a CDMA chipset; is that right?
>
> **A**: That's right.

Grubbs Depo. 208:1-4. As a result, there is no evidence that any OEM substituted a non-CDMA modem chip for a CDMA modem chip, "making the SSNIP unprofitable." *Saint Alphonsus, 778 F.3d at 784*.

Second, Qualcomm documents reflect "industry or public recognition" of the CDMA modem chip market as a distinct product market. *See Brown Shoe Co., 370 U.S. at 325*. For example, a slide in a 2011 QCT strategic plan includes charts identifying "QCT Market Share by Technology," including one that tracks Qualcomm's share in CDMA modem chips. CX7606-029. A July 2016 internal Qualcomm presentation titled Qualcomm Technology Licensing: Market Trends includes updated CDMA market share information, and shows that from 2014 to 2016, Qualcomm held at least a 96% share of the worldwide CDMA modem chip market. CX7618-025. Steve Mollenkopf (Qualcomm CEO), Derek Aberle (Qualcomm President), **[*687]** and Alex Rogers (QTL President) all received the Market Trends presentation. CX7618-001. Those Qualcomm documents confirm that there is a distinct, identified market for CDMA modem **[**53]** chips.

Therefore, the Court concludes that because non-CDMA modem chips are not "available substitutes" for CDMA modem chips, the CDMA modem chip market is a relevant antitrust product market. *Microsoft, 253 F.3d at 54*.

2. Qualcomm CDMA Modem Chip Market Share and Market Power

To show monopoly power, the FTC must demonstrate that Qualcomm owned a dominant share of the market and "show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run." *Image Tech. Servs., 125 F.3d at 1202*. The evidence shows that Qualcomm has maintained a large share of the CDMA modem chip market, that existing competitors have been unable to quickly increase their output to discipline Qualcomm's CDMA adder, and that there are structural barriers to entering the CDMA modem chip market.

Qualcomm's own documents show that Qualcomm has maintained a dominant share of the market. For example, a slide in a 2011 QCT strategic plan includes charts identifying "QCT Market Share by Technology," and indicates that Qualcomm maintained a 95% share of the CDMA modem chip market in 2010. *Id.* A July 2016 internal Qualcomm presentation titled Qualcomm Technology Licensing: Market Trends includes updated CDMA **[**54]** market share information, and shows that from 2014 to 2016, Qualcomm held at least a 96% share of the worldwide CDMA modem chip market. CX7618-025. The July 2017 version of the Market Trends presentation shows that Qualcomm's CDMA market share remained at least 92% through the end of 2016. CX7629-026.

In addition, that Qualcomm could charge its CDMA adder without price discipline is evidence of Qualcomm's market power. *See* *Rebel Oil Co., Inc. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995)* (defining market power as the ability "to increase prices above competitive levels, and sustain them for an extended period").

Qualcomm has directly attributed the CDMA adder to Qualcomm's market power. For example, Cristiano Amon (now Qualcomm President) told Sanjay Mehta (now Qualcomm Senior Vice President for Compute Products) and Jim Lederer (later QCT Executive Vice President and General Manager) in a 2008 email that "UMTS prices are now lower than CDMA not to cost or volume but due to competition." CX8257-001.

In another 2008 email, Cristiano Amon proposed to Steve Mollenkopf (now Qualcomm CEO) that Qualcomm charge a 10% price premium on CDMA modem chips as compared to UMTS modem chips simply because Qualcomm could: "There is no justification for the 10 percent, **[**55]** but we think that it resides within the OEM threshold of tolerances." CX5279-003. In the email, Cristiano Amon was explicit that Qualcomm had the market power to charge an even higher premium, but recommended that "Qualcomm will not exercise its CDMA market share dominance to practice uncompetitive prices." CX5279-003.

In 2013, Cristiano Amon again emphasized that Qualcomm prices its CDMA modem chips based on market power, in an email to Derek Aberle (QTL President), Steve Mollenkopf (Qualcomm President), and other Qualcomm executives: "Our price is not based on cost but on value — in reality, cost will allow modest addition in ASP to cover for CDMA RF. This is not a **[*688]** cost discussion. Present strategy is based on monetizing full value of CDMA." CX5393-001. At trial, Cristiano Amon agreed that Qualcomm has "historically priced CDMA based on value rather than cost." Tr. at 482:21-483:15.

Other evidence at trial also shows that Qualcomm's competitors have lacked the ability "to increase their output in the short run" and discipline Qualcomm's prices. *Image Tech. Servs., 125 F.3d at 1202*. Although a rival modem chip supplier, VIA Telecom ("VIA"), also sold CDMA modem chips, OEMs did not view VIA's chips as competitive. Todd **[**56]** Madderom (Motorola Director of Procurement) testified, "So there was VIA Technologies in the market. They had CDMA IP. We didn't feel it was capable or competitive, and so we were sole sourced to Qualcomm." Madderom Depo. 157:21-23. John Grubbs (BlackBerry Senior Director of Intellectual Property Transactions) testified that there were "[n]ot viable alternatives" to Qualcomm for CDMA modem chips. Grubbs Depo. 214:4-8.

Although VIA lagged in the market, when VIA introduced a CDMA modem chip in a segment where Qualcomm had already introduced a CDMA modem chip, Qualcomm's prices would fall. An April 2009 presentation created by Mark Davis (former VIA Vice President and Chief Technical Officer) stated, "Q and V prices are similar, where comparable products exist," but that "Q's margins are vastly higher in segments where V provides no similar product." CX1770-002. The presentation gave a specific example of how Qualcomm only reduced its prices once

VIA introduced a chip: "When first introduced CBP6 to US market, the price of QSC6055 [a Qualcomm chip] was $18." CX1770-004. Within weeks, "the QSC6055 price was reduced to $10." *Id.*

Qualcomm, too, has viewed itself as the sole viable option **[**57]** for CDMA modem chips. For example, during 2009 internal Qualcomm discussions regarding how to price CDMA modem chips for Apple, Eric Koliander (QCT Vice President, Sales) wrote to Cristiano Amon (now-Qualcomm President): "Truthfully, we should take a harder line with these issues for CDMA since their options are limited." CX6839-002. Cristiano Amon replied: "Can't imagine Via would be an option." CX6839-002. Five years later, James Thompson (Qualcomm CTO) noted to Steve Mollenkopf (Qualcomm President) in a 2014 email that without Qualcomm's CDMA chips, Apple "would lose big parts of North America, Japan and China. That would really hurt them." CX5402-003.

Thus, the evidence shows that Qualcomm's rivals lacked the ability to increase their output in the short term and discipline Qualcomm's CDMA adder. *Rebel Oil Co., 51 F.3d at 1434*.

The CDMA modem chip market is also characterized by significant barriers to entry. In *Syufy Enterprises, 903 F.2d 659*, the Ninth Circuit held that industries that require "onerous front-end investments that might deter competition from all but the hardiest and most financially secure investors" are characterized by structural entry barriers. *Id. at 667*. Modem chips are such a market. Scott McGregor (former Broadcom CEO) testified **[**58]** at trial that "the economics of being in the cellular baseband business are very sensitive to volume of customers" because of the front-end investments necessary to fund research and development. McGregor Depo. 174:19-21.

As a result, rivals have very slowly entered the CDMA modem chip market. In 2013, MediaTek licensed VIA's CDMA patents. Finbarr Moynihan (MediaTek General Manager of Customer Sales and Business **[*689]** Development) testified that MediaTek was not able to launch a CDMA modem chip until 2015 because of the time necessary to "integrate that into a chipset and produce it." Tr. at 327:13-328:6. Finbarr Moynihan testified that MediaTek did not launch a CDMA modem chip in the United States until "late 2016." *Id.* at 327:17-22.

In 2015, Intel purchased VIA for [TEXT REDACTED BY THE COURT] [TEXT REDACTED BY THE COURT][6], according to an Intel presentation. CX1598-004. Aicha Evans (Intel Chief Strategy Officer) testified that because of the significant investment required to develop modem chips, acquiring VIA was the most expedient way to enter the market:

> **Q**: Why did Intel decide to acquire VIA Technologies instead of developing CDMA in-house?
>
> **A**: Because there was — I mean, you need experience, **[**59]** you need talent, expertise, and at this point basically building it from scratch was never — we were not going to make it.

Id. at 585:24-586:1. MediaTek's and Intel's delayed entry into the CDMA modem chip market show that the "onerous front-end investments" required to develop modem chips pose structural entry barriers. *Syufy Enters., 903 F.2d at 667*.

The inquiry into entry barriers focuses on "external factors at work precluding entry into the market," rather than the defendant's conduct. *Oahu Gas., 838 F.2d at 367*. Therefore, although Qualcomm's anticompetitive conduct has imposed additional entry barriers, the Court reserves that discussion for later in this order.

MediaTek's 2015 entry into the CDMA modem chip market exerted downward pressure on Qualcomm's CDMA adder. A 2015 Qualcomm pricing proposal sent to Will Wyatt (QTI [Qualcomm Technologies, Inc., the Qualcomm subsidiary that operates QCT] Vice President, Finance) demonstrates how Qualcomm shifted its prices to respond to MediaTek's entry. Will Wyatt testified that Cristiano Amon (QCT President) also reviewed the pricing proposal. Tr. at 431:10-15. One slide is titled, "Budget Pricing vs Proposed Pricing Moves," and charts Qualcomm's price responses to two MediaTek modem chips. **[**60]** CX7591-011. Will Wyatt agreed at trial that the slide "shows that

[6] To avoid unnecessary redactions, the Court will refer to sealed information once and then not refer to it again unless necessary.

Qualcomm was proposing to reduce the price of its MSM 8939 chip by $2.21 following MediaTek's introduction of the 6752 chip." Tr. at 433:2-5.

Despite MediaTek's entry, Qualcomm still retains a dominant share of the CDMA modem chip market. In a 2018 Qualcomm strategic plan that Steve Mollenkopf (Qualcomm CEO) received, Qualcomm forecast that QCT would maintain a 79% share of CDMA modem chips sold to handset OEMs. CX8190-067.

Against that evidence of market share, barriers to entry, and rivals' inability to increase output, Qualcomm argues that Qualcomm lacked market power because large OEMs "could easily retaliate in the much larger non-CDMA segments against any effort by Qualcomm to exercise monopoly power in the far smaller CDMA segment." QC FOFCOL at 105-06. In *United States v. Archer-Daniels-Midland Co., 781 F. Supp. 1400 (S.D. Iowa 1991)*, the district court made the factual finding that a concentration of powerful buyers of high fructose corn syrup exerted downward pressure on syrup prices. *Id. at 1416-18*. These powerful buyers used various tactics to obtain lower prices from syrup producers, including "[s]winging large volume back and forth among suppliers **[*690]** to show each supplier that it better quote a lower price to obtain and **[**61]** keep large volume sales," and refusing to purchase syrup until producers acceded to the buyers' demands. *Id. at 1418*.

Archer-Daniels-Midland is inapposite. Qualcomm identifies no evidence that OEMs organized to attempt to force down Qualcomm's prices, nor any evidence that any powerful OEMs in fact disciplined Qualcomm's prices. In addition, Qualcomm was able to leverage its CDMA modem chip dominance against the most powerful OEMs. For example, during 2009 internal Qualcomm discussions regarding how to price CDMA modem chips for Apple, Cristiano Amon (now-President of Qualcomm) wrote that Apple had no other CDMA modem chip options: "Can't imagine Via would be an option." CX6839-002.

Even for powerful OEMs, Qualcomm's CDMA modem chip dominance meant that OEMs needed to accede to Qualcomm's royalty demands, or risk the critical harm of being unable to sell handsets. Injung Lee (Licensing Lead at Samsung Intellectual Property Center) testified that Samsung's business could not afford any disruption in CDMA modem chip supply because Samsung purchased 100% of its CDMA modem chips from Qualcomm, and could not sell handsets without those modem chips:

> [G]iven the fact that we were being supplied with 100 **[**62]** percent of our chipsets from Qualcomm, were it such that we were not getting provided with those chipsets as per the normal manner and fashion, then Samsung would not have been able to manufacture mobile phones nor sell the same. And as such, it would have had an untold impact on our business.

Lee Depo. 166:14-20. Todd Madderom (Motorola Director of Procurement) testified, "If we are unable to source the modem, we are unable to ship the handset. It's a direct correlation. No modem supply, no phone supply to our customer." Madderom Depo. 147:25-148:3. Unlike in *Archer-Daniels-Midland*, therefore, an OEM could not refuse to purchase modem chips as leverage against Qualcomm. Nor could an OEM swing large volume back and forth without a viable alternative modem chip supplier.

Qualcomm also argues that the CDMA modem chip market has been characterized by "increasingly competitive conditions." QC FOFCOL at 106. In *Syufy Enterprises*, the Ninth Circuit concluded that because a competitor had "steadily been eating away" at the dominant corporation's market share and because the government *conceded* the lack of entry barriers, a defendant's large market share alone did not prove monopoly power. *903 F.2d at 666-67*. By contrast, modem **[**63]** chip rivals—as will be discussed later—must fund expensive research and development or acquire other companies to gain a foothold in the CDMA modem chip market, and Qualcomm's practices impose further entry barriers. Further, no rival has "steadily been eating away" at Qualcomm's market share, as Qualcomm enjoyed ten years of almost 100% market share before MediaTek finally commercialized a CDMA multimode chip in 2015. As stated above, despite MediaTek's entry, Qualcomm still retains a dominant share of the CDMA modem chip market. In a 2018 Qualcomm strategic plan that Steve Mollenkopf (Qualcomm CEO) received, Qualcomm forecast that QCT would maintain a 79% share of CDMA modem chips sold to handset OEMs. CX8190-067.

Therefore, because Qualcomm has owned a dominant share of the CDMA modem chip market, there are significant barriers to entry, and competitors have lacked the ability to discipline Qualcomm's **[*691]** prices, the Court concludes that Qualcomm has possessed monopoly power in the CDMA modem chip market. *Image Tech. Servs., 125 F.3d at 1202*.

C. Premium LTE Modem Chip Market

The FTC contends that from 2011 to 2016, Qualcomm possessed monopoly power in the global market for premium LTE modem chips, which the FTC defines as **[**64]** "LTE-compliant handsets used in premium handsets." *Id.* at 7. Cristiano Amon (Qualcomm President) testified that LTE modem chips are those modem chips compatible with LTE, a 4G cellular standard. Tr. at 479:3-5. The Court first defines the premium LTE modem chip market and then explains how Qualcomm possessed monopoly power in the premium LTE modem chip market.

1. Premium LTE Modem Chip Market Definition

As an initial matter, the geographic boundaries of the premium LTE modem chip market are worldwide, a conclusion that Qualcomm does not contest. An antitrust market is geographically bounded by "where sellers operate and where purchasers can predictably turn for supplies." *Kolon Indus., 637 F.3d at 439*.

Defining the relevant product market "rests on a determination of available substitutes." *Microsoft, 253 F.3d at 54*. Industry practice also informs whether a product submarket is distinct. *See* *Brown Shoe Co., 370 U.S. at 325* (explaining that practical indicia of an antitrust product market include "industry or public recognition" of the market).

The evidence shows that Qualcomm and other cellular industry participants view the premium LTE modem chip market as a distinct submarket.

Qualcomm categorizes modem chips into different "tiers" of the market. James Thompson (Qualcomm CTO), **[**65]** who leads Qualcomm's modem chip engineering, testified, "So we have a tier of products, so we do what we would call premium tier, and then we do a number of tiers all the way down to what we call the entry level." Tr. at 1363:16-18. Thus, in a 2018 Qualcomm strategic plan slide deck that Steve Mollenkopf (Qualcomm CEO) and Cristiano Amon (Qualcomm President) received, Qualcomm organized modem chips into tiers, including "discrete modem" (a thin modem chip), "premium," "high," and "mid/low." CX8190-261. The same strategic plan identifies Qualcomm strategies and market shares specific to all tiers, including the "mobile premium tier." CX8190-260. Cristiano Amon (Qualcomm President) testified that the Snapdragon 800 is "our premium tier" modem chip series. Tr. at 505:16-18.

OEMs concurred that premium LTE modem chips are a distinct segment. Tony Blevins (Apple Vice President of Procurement) testified that premium modem chips are distinct from lower tier modem chips in terms of features like speed, uplink and downlink performance, quality, miniaturization, and power consumption. Tr. at 673:3-17. Blevins testified that because LTE is the latest cellular standard, any premium modem chip must **[**66]** support LTE. *Id.* at 672:23-24.

Will Wyatt (QTI Vice President, Finance) agreed that "premium tier chipsets typically have a higher product cost and more functionality." Tr. at 434:5-7. QCT's 2016 strategic plan, which Cristiano Amon (QCT President) and Derek Aberle (Qualcomm President) received, shows that Qualcomm proposed to charge, on average, twice as much for a premium LTE modem chip ([TEXT REDACTED BY THE COURT]) as a modem chip released the same quarter in the "low-high" **[*692]** tiers ([TEXT REDACTED BY THE COURT]). CX5551-045. That same strategic plan also shows that Qualcomm earns its highest margins—ranging from 47-49%—on premium LTE modem chips. CX5551-013.

Qualcomm documents also show that OEMs sell cellular handsets in tiers that correspond to the modem chip tier. In a 2016 QCT strategic plan sent to Cristiano Amon (QCT President), Qualcomm defined handsets priced at $400 or more as premium tier, between $250 and $400 as high tier, between $110 and $250 as mid tier, and below $100 as low or entry tier. CX8256-112. Cristiano Amon testified that those handset definitions correspond to the modem chip tier:

> **Q**: It's accurate, sir, that in 2016 Qualcomm continued to view premium tier chips **[**67]** as associated with handset prices of $400 and up; is that right?
>
> **A**: In — that's what this slide is saying, that is correct.

Tr. at 506:20-23. The relevant slide in the 2016 QCT strategic plan that Cristiano Amon received shows that Qualcomm plans specific modem chip features for handsets in the premium tier, as distinct from those features planned for modem chips in lower tiers. CX8256-112.

Product plans in Qualcomm documents also identify specific Qualcomm modem chip models as designed for premium handsets. For example, one slide in the 2016 QCT strategic plan that Cristiano Amon (QCT President) and Derek Aberle (Qualcomm President) received includes a chart with a column for "Handset ASP." CX5551-007. "ASP" means average selling price. That column includes rows for "MDM" (thin modem), and the handset prices $400+, $250-$400, $125-$250, and <$100. *Id.* In the fields to the right of the $400+ row, Qualcomm lists planned modem chip releases for each year. *Id.* Qualcomm released the MSM 8996 modem chip in 2015 and planned to release the MSM 8998 in 2016. *Id.* For 2018, Qualcomm lists no model number, but simply "Premium 18" and planned release dates. *Id.* At trial, Dr. James Thompson (Qualcomm **[**68]** CTO) also referred to a Qualcomm premium modem chip designed for Samsung's line of "premium tier products." Tr. at 1375:15-1376:21. Therefore, Qualcomm's own documents consistently identify a distinct market for LTE-compliant modem chips sold for premium handsets.

Despite Qualcomm's own documents to the contrary, Will Wyatt (QTI Vice President, Finance) testified that some OEMs purchase premium LTE modem chips for use in non-premium handsets: "Xiaomi [an OEM] uses our Snapdragon 800 tier chip in a device that they'll price as low as 2,000 RMB, so that's roughly $300 U.S." Tr. at 451:22-452:2. Will Wyatt also testified that the OEM VIVO "will use our Snapdragon 600 series, and they will sell that in a device that is . . . in the neighborhood of 4- to 500 U.S. dollars." *Id.* at 452:6-12. However, Qualcomm offered no documents to support Will Wyatt's testimony, not even Qualcomm's sales documents to Xiaomi and VIVO. Wyatt's unsupported testimony is contradicted by Qualcomm's own documents, which clearly demonstrate that as a general matter, premium LTE modem chips are those modem chips sold for use in premium tier handsets.

In addition, courts have concluded that "premium" products may constitute **[**69]** distinct antitrust product markets. In *F.T.C. v. Whole Foods Market, Inc., 548 F.3d 1028, 383 U.S. App. D.C. 341 (D.C. Cir. 2008)*, the FTC sought a preliminary injunction and contended that two merging grocery store chains, Whole Foods and Wild Oats, were part of a submarket of "premium, natural, and organic supermarkets." *Id. at 1032*. The FTC proffered undisputed evidence that Whole Foods and Wild Oats "provide higher levels **[*693]** of customer service than conventional supermarkets, a 'unique environment,' and a particular focus on the 'core values'" that certain customers espoused. *Id. at 1039*. Whole Foods and Wild Oats also sold more natural and organic products than conventional supermarkets as a proportion of inventory. *Id.* Finally, when a conventional grocery store opened near a Wild Oats, Wild Oats prices stayed static, but Wild Oats dropped its prices when a Whole Foods opened near a Wild Oats. *Id. at 1040*.

On that evidence, the D.C. Circuit concluded that the FTC could likely show that premium, natural, and organic supermarkets constitute a relevant antitrust submarket. *Id.* The D.C. Circuit concluded that premium, natural, and organic supermarkets "serve a core consumer base." *Id.* Whole Foods' own documents "suggested that if a Wild Oats near a Whole Foods were to close, the majority (in some cases nearly **[**70]** all) of its customers would switch to the Whole Foods rather than to conventional submarkets." *Id.* Therefore, the D.C. Circuit concluded that as a matter of law, "in some situations core consumers, demanding exclusively a particular product or package of products, distinguish a submarket." *Id. at 1041*.

The district court's decision in *United States v. Gillette Co., 828 F. Supp. 78 (D.D.C. 1993)*, is also on point. In *Gillette*, the plaintiff argued that there was a separate antitrust product market for "premium" fountain pens priced from $50 to $400. *Id.* The court concluded that premium fountain pens contained unique features, such that premium fountain pens "afford their users (as well as those who merely put them in their breast pockets) image, prestige, and status." *Id. at 82*. The court also identified industry recognition of a distinct premium fountain pen submarket, as well as evidence that if a retailer increased the price of a premium fountain pen, "consumers will nonetheless purchase the now-costlier pen rather than substitute a less expensive, less prestigious model." *Id.* Above $400, pens "become mere collectors items or 'jewelry' pieces," such that a consumer would not substitute a $400-and-up pen for a premium fountain pen. *Id.* Therefore, the *Gillette* **[**71]** court concluded that premium fountain pens priced between $50 and $400 were not reasonably interchangeable with pens priced below or above that range, and held that premium fountain pens constituted an appropriate antitrust product market. *Id. at 83*.

Here, the premium LTE modem chip market is an appropriate antitrust submarket because OEMs producing premium handsets—the core consumers, as in *Whole Foods*—require premium LTE modem chips. Tony Blevins (Apple Vice President of Procurement) testified that because Apple produces only premium handsets, Apple buys only premium LTE modem chips: "We focus exclusively on premium chips. Our perception is that the iPhone is a premium smartphone, so therefore all of its components need to be the best that we can possibly design or acquire." Tr. at 674:24-675:2.

As in *Gillette*, even if the price of premium LTE modem chips goes up, a non-premium substitute is not a reasonable substitute. Todd Madderom (Motorola Director of Procurement) testified that Motorola requires a premium LTE modem chip for its premium handsets:

> **Q**: And how would it impact Motorola's business if it used a nonpremium-tier cellular modem in a premium-tier handset?
>
> **A**: We've never considered **[**72]** that because I don't think that's a viable approach. I **[*694]** think that equates to not being able to sell in a product.

Madderom Depo. 140:13-18.

Finbarr Moynihan (MediaTek General Manager of Customer Sales and Business Development) made the same points when asked whether an OEM could substitute a non-premium modem chip for a premium modem chip: "So generally those things are not negotiable. They're looking for certain feature sets in those price points at those tiers. So generally not substitutable." Tr. at 325:12-23.

Therefore, because a non-premium LTE modem chip is not an "available substitute" for a premium LTE modem chip, the Court concludes that the premium LTE modem chip market is a relevant antitrust market.

2. Qualcomm Premium LTE Modem Chip Market Share and Market Power

To show monopoly power, the FTC must demonstrate that Qualcomm owned a dominant share of the market and "show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run." *Image Tech. Servs., 125 F.3d at 1202*. The evidence shows that Qualcomm has maintained a large share of the premium LTE modem chip market, that existing competitors have been unable to quickly increase their **[**73]** output, and that there are structural barriers to entering the premium LTE modem chip market.

At trial, Cristiano Amon (Qualcomm President) testified that Qualcomm was the first to supply premium LTE modem chips and that Qualcomm has been "first to market with every transition of LTE." Tr. at 479:3-14. Since then, Qualcomm has maintained a large share of the premium LTE modem chip market. For example, a 2016 QCT strategic plan that Cristiano Amon and Derek Aberle (then Qualcomm President) received states that Qualcomm held an 89% share of the premium LTE modem chip market in 2014 and an 85% share of the market in 2015. CX5551-010. In the same 2016 QCT strategic plan, Qualcomm projected that it would retain a 77% share in 2016 and a 64% share in 2017. CX5551-010.

Qualcomm documents also show that Qualcomm has faced little competition in the premium LTE modem chip market. A presentation for Qualcomm's Board of Directors in July 2017, which Steve Mollenkopf (Qualcomm CEO) received, includes a slide on the "Mobile competitive environment" that compares Qualcomm's position to those of other rival modem chip suppliers. CX8191-089. In the rows that indicate suppliers' offerings in the premium **[**74]** LTE modem chip tier, Qualcomm is the only external supplier of premium LTE SoC modem chips. *Id.* Intel supplies only premium LTE thin modems. *Id.* MediaTek and Spreadtrum have no premium tier offerings, and Spreadtrum has only low tier offerings. *Id.* Although Exynos, Samsung's modem chip division (also known as Samsung LSI), has a premium LTE modem chip, Finbarr Moynihan (MediaTek General Manager of Customer Sales and Business Development) testified that MediaTek does not "tend to see Samsung LSI as a supplier much outside of Samsung's own phones." Tr. at 327:14-15. Similarly, Alex Rogers (QTL President) testified that Exynos primarily supplies modem chips to its parent Samsung. Tr. at 1989:5-6.

OEM testimony confirmed that Qualcomm held market power in LTE. John Grubbs (BlackBerry Senior Director of Intellectual Property Transactions) testified that in 2011, "the other chipset manufacturers were at least two years behind on LTE . . . there would not have been any other viable sources for LTE targeting **[*695]** the early 2013 time frame for release." Grubbs Depo. 215:12-216:1. Similarly, Ira Blumberg (Lenovo Vice President of Intellectual Property) testified that without Qualcomm's premium LTE **[**75]** modem chips, Lenovo's phones would not be viable "at least with respect to the high end of the market." Blumberg Depo. 71:19-72:8.

Qualcomm's ability to charge monopoly prices on premium LTE modem chips over an extended period also shows that competitors were not quickly able to increase output. *See* *Rebel Oil, 51 F.3d at 1434* (defining market power as the ability "to increase prices above competitive levels, and sustain them for an extended period"). For example, in November 2013, Cristiano Amon (QCT Co-President) informed Apple that "LTE was not a commodity and would therefore have to be priced 'upon value — not cost.'" CX0597-001. Amon similarly alluded to value over cost as to CDMA prices, and specifically identified competition rather than cost or volume as the difference in CDMA over UMTS prices: "UMTS prices are now lower than CDMA not to cost or volume but due to competition." CX8257-001. Therefore, the inference is that Qualcomm could also price its LTE modem chips higher due to a lack of competition.

Like the market for CDMA modem chips, the market for premium LTE modem chips is characterized by significant structural barriers to entry. *See* *Syufy Enters., 903 F.2d at 667* (holding that industries that require "onerous front-end investments **[**76]** that might deter competition from all but the hardiest and most financially secure investors" are characterized by structural entry barriers).

Developing premium LTE modem chips requires even more investment in research and development because premium modem chips contain the most advanced features, according to Finbarr Moynihan (MediaTek General Manager of Corporate Sales and Business Development): "You'd certainly like to see that the higher tiers generate higher profit, higher margins, yeah. It takes more R&D to develop those products." Tr. at 378:18-20. Likewise, Aicha Evans (Intel Chief Strategy Officer) testified that when Intel purchased Infineon in 2011 and aimed to develop a premium LTE modem chip from scratch, Intel had to invest heavily: "Lots of money, billions of dollars, and an army of engineers worldwide." Tr. at 565:4-5.

As such, Finbarr Moynihan testified that MediaTek has not been able to develop into a competitor in premium LTE modem chips: "We haven't really penetrated ever what I would call the premium tiers in the market, the high tiers, the highest tiers of the market." Tr. at 324:25-325:2. In fact, Moynihan testified that because research and development for premium **[**77]** LTE modem chips is so expensive, MediaTek has [TEXT REDACTED BY THE COURT] and "decided to focus our limited R&D in other places." *Id.* at 378:2-3.

Therefore, because Qualcomm has owned a dominant share of the premium LTE modem chip market, there are significant barriers to entry, and competitors have lacked the ability to discipline Qualcomm's prices, the Court concludes that Qualcomm has possessed monopoly power in the premium LTE modem chip market. *Image Tech. Servs., 125 F.3d at 1202*. The Court next discusses Qualcomm's anticompetitive conduct and harm.

V. ANTICOMPETITIVE CONDUCT AND HARM

Under the rule of reason, the court "weighs legitimate justifications for a restraint against any anticompetitive effects." *Paladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1156 (9th Cir. 2003)*. In this three-part, burden-shifting analysis, the FTC has the initial burden to **[*696]** show that Qualcomm's conduct "has a substantial anticompetitive effect that harms consumers in the relevant market." *Am. Express, 138 S. Ct. at 2284*. A plaintiff may prove anticompetitive effects either "directly or indirectly." *Am. Express, 138 S. Ct. at 2284*. Direct evidence includes "proof of actual detrimental effects" on competition, including "reduced output, increased prices, or decreased quality in the relevant market." *Id.* (quoting *F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 460, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986))*. By contrast, indirect evidence includes "proof of **[**78]** market power plus some evidence that the challenged restraint harms competition." *Id.* The FTC has satisfied its burden to prove market power, as discussed above, and thus the question is whether Qualcomm's actions harmed competition in the relevant markets.

A. Legal Standard

As the D.C. Circuit observed in *Microsoft*, "[w]hether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad." *253 F.3d at 58*. It is not enough for conduct to harm a competitor. *Id.* Nor is maintenance of monopoly power alone sufficient, if that advantage is "a consequence of a superior product, business acumen, or historic accident." *Grinnell, 384 U.S. at 571*. As the United States Supreme Court has explained, "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*.

Rather, anticompetitive conduct is conduct that "harm[s] the competitive *process* and thereby harm[s] consumers." *Microsoft, 253 F.3d at 58* (emphasis in original). Put another way, "[a]nticompetitive conduct is behavior **[**79]** that tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way." *Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 894 (9th Cir. 2008)*; *see also* *Spectrum Sports, 506 U.S. at 458* (holding that the Sherman Act "directs itself . . . against conduct which unfairly tends to destroy competition itself").

"Although output reductions are one common kind of anticompetitive effect in antitrust cases, a 'reduction in output is not the *only* measure of anticompetitive effect." *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1070 (9th Cir. 2015)* (quoting Areeda & Hovenkamp ¶ 1503b(1) (emphasis in original). "Anticompetitive conduct may take a variety of forms." *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308 (3d Cir. 2007)*. Further, a court should consider the combined anticompetitive effects of a defendant's challenged actions. *City of Anaheim v. S. Cal. Edison Co., 955 F.2d 1373, 1378 (9th Cir. 1992)* (holding that "it would not be proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect"). Finally, "[t]he test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit." *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 191 (3d Cir. 2005)*.

Qualcomm argues that the FTC must also show "a causal link between the challenged conduct and the actual, significant competitive harm." QC Pretrial Brief at 13. However, the D.C. Circuit **[*697]** in *Microsoft* ***[**80]*** rejected a similar contention that "plaintiffs must present direct proof that a defendant's continued monopoly power is precisely attributable to its anticompetitive conduct." *253 F.3d at 79*. A plaintiff need not "reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct." *Id.* Instead, where a government agency seeks injunctive relief—as here—courts should "infer 'causation' from the fact that a defendant has engaged in anticompetitive conduct that 'reasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power." *Id.* (alteration in original) (quoting 3 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 651c, at 78 (1996 ed.)). A court "may infer causation when exclusionary conduct is aimed at producers of nascent competitive [products] as well as when it is aimed at producers of established substitutes." *Id.* Therefore, the Court may infer causation where a defendant has maintained monopoly power and the defendant's anticompetitive conduct "reasonably appears capable" of maintaining monopoly power.

Although the Court's focus is "upon the effect of [the defendant's] conduct, not upon the intent behind it," a monopolist's intent **[**81]** *is* relevant to "the likely effect of the monopolist's conduct." *Id.; see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)* (holding that intent is relevant to the question of anticompetitive effect because "no monopolist monopolizes unconscious of what he is doing"); *Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)* ("[K]nowledge of intent may help the court to interpret facts and to predict consequences.").

If the FTC meets its burden to show that Qualcomm's conduct has anticompetitive effects, the burden then shifts to Qualcomm to show that its conduct has "procompetitive justifications." *Microsoft, 253 F.3d at 58*. Courts have defined a procompetitive justification as "a nonpretextual claim that [the defendant's] conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal." *Id.; see also Kodak, 504 U.S. at 483* (holding that a defendant must show "valid business reasons" for its actions). A defendant does not meet its burden with a purported procompetitive justification that is merely pretextual. *Kodak, 504 U.S. at 484*; *see also Bhan, 929 F.2d at 1413* (holding that the defendant "must offer evidence of pro-competitive *effects*") (emphasis added). Further, "[i]ntellectual property rights do not confer a privilege to violate the antitrust laws." *Microsoft, 253 F.3d at 63* (quoting *In re Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1325 (Fed. Cir. 2000))*.

If Qualcomm meets its burden to show **[**82]** procompetitive justifications for its conduct and the FTC fails to rebut the justification, the burden returns to the FTC to "show that the anticompetitive harm of the conduct outweighs the procompetitive benefit." *Microsoft, 253 F.3d at 59*.

Below, the Court describes in detail Qualcomm's anticompetitive conduct and the resulting harm to competition.

B. Anticompetitive Conduct Against OEMs and Resulting Harm

First, Qualcomm has used its monopoly power in the CDMA and premium LTE modem chip markets to engage in a wide variety of anticompetitive acts against OEMs.

In a practice that Qualcomm concedes is unique within Qualcomm and **[*698]** unique in the industry, Qualcomm refuses to sell modem chips to an OEM until the OEM signs a separate patent license agreement. Thus, Qualcomm refuses to sell an OEM modem chips exhaustively. Under the doctrine of patent exhaustion, "the initial authorized sale of a patented item terminates all patent rights to that item." *Quanta Comp., Inc. v. LG Elecs., Inc., 553 U.S. 617, 625, 128 S. Ct. 2109, 170 L. Ed. 2d 996 (2008)*. Thus, patent exhaustion provides that when a consumer purchases a television, the consumer does not have to separately sign a license and pay royalties for any patents practiced by the television.

To avoid exhaustion and to enforce Qualcomm's practice of requiring a **[**83]** separate patent license before selling modem chips, Qualcomm wields its chip monopoly power to coerce OEMs to sign patent license agreements. Specifically, Qualcomm threatens to withhold OEMs' chip supply until OEMs sign patent license agreements on Qualcomm's preferred terms. In some cases, Qualcomm has even cut off OEMs' chip supply, although the threat of cutting off chip supply has been more than sufficient to coerce OEMs into signing Qualcomm's patent license agreements and avoiding the devastating loss of chip supply. Qualcomm has also used the "carrot" of chip incentive funds, which reduce the price of Qualcomm's chips and induce OEMs to agree to Qualcomm's licensing terms. QTL—Qualcomm's licensing division—funds these agreements even though the incentives accrue on OEMs' purchases of QCT chips. These chip incentive funds often function as de facto exclusive deals that foreclose OEMs from purchasing modem chips from Qualcomm's rivals.

In addition, Qualcomm has refused to even provide samples of Qualcomm modem chips, withheld technical support, and delayed delivery of software or threatened to require the return of software until OEMs sign Qualcomm's patent license agreements. **[**84]** In 2018, Qualcomm paid to extinguish Samsung's antitrust claims and to silence Samsung. Qualcomm patent license agreements also include unusual provisions that require OEMs to cross-license their patents—often royalty-free—to QCT, Qualcomm's modem chip division, in exchange for the rights to QTL's patents. Despite this host of unique arrangements, Qualcomm refuses to provide OEMs lists of Qualcomm's patents or patent claim charts during license negotiations.

Qualcomm's practice of refusing to sell modem chips until an OEM signs a patent license agreement, and Qualcomm's associated threats, generate and sustain Qualcomm's unreasonably high royalty rates. Because Qualcomm receives royalties on any handset sale, even when that handset contains a rival's modem chip, Qualcomm's unreasonably high royalty rates impose an artificial and anticompetitive surcharge on the price of rivals' modem chips. At times, Qualcomm has even charged OEMs higher royalty rates when OEMs purchase rivals' chips than when OEMs purchase Qualcomm's chips, which further harms rivals.

To provide a coherent narrative, the Court organizes its discussion of Qualcomm's anticompetitive practices in patent license negotiations **[**85]** around Qualcomm's conduct toward the following OEMs: (1) LGE, (2) Sony, (3) Samsung, (4) Huawei, (5) Motorola, (6) Lenovo, (7) BlackBerry, (8) Curitel, (9) BenQ, (10) Apple, (11) VIVO, (12) Wistron, (13) Pegatron, (14) ZTE, (15) Nokia, and (16) smaller Chinese OEMs.

1. LG Electronics ("LGE")

Qualcomm engaged in anticompetitive conduct by cutting off LGE's chip supply, threatening to withdraw technical support, threatening to require the return of software, charging higher patent royalty rates when LGE used a rival's instead of Qualcomm's **[*699]** chip, giving LGE chip incentive funds if LGE purchased at least 85% of its chips from Qualcomm, and giving rebates on the price of Qualcomm's chips.

Hwi-Jae Cho (Director of LGE Intellectual Property Center) testified that Qualcomm's requirement that an OEM sign a separate patent license agreement before the OEM can purchase a component is unique in the industry:

> **Q**: Have other suppliers of components to LGE required LGE to execute a separate license agreement in order to obtain access to their components?
>
> **A**: No.

Cho Depo. ¶ 15.

On August 31, 1993, Qualcomm entered an Infrastructure and Subscriber Unit License and Technical Assistance Agreement ("1993 CDMA **[**86]** SULA") with Goldstar Information & Communications Ltd., an LGE corporate predecessor. ECF No. 1326 at 6. According to Hwi-Jae Cho (Director of LGE Intellectual Property Center), LGE paid Qualcomm a 5.75% running royalty on any LGE handsets that LGE sold outside of Korea under the CDMA SULA. Cho Depo ¶ 38h. Qualcomm and LG Information & Communications, Ltd., an LGE corporate predecessor, entered into an Amendment to Subscriber Unit License and Technical Assistance Agreement, with an effective date of March 17, 1998. *Id.* Qualcomm and LGE entered into an Amendment to Infrastructure and Subscriber Unit License and Technical Assistance Agreement, with an effective date of March 15, 2000. *Id.*

On September 1, 2000, QCTAP (QCT's Asia Pacific division) and LGE entered the ASICS Supply Agreement, which governs LGE's purchase of CDMA modem chips. CX6803-001. Hwi-Jae Cho (Director of LGE Intellectual Property Center) agreed that the Supply Agreement "prohibit[s] LGE from using Qualcomm baseband processors in unlicensed handsets." Cho Depo. ¶ 14d. The Supply Agreement also provides that Qualcomm can terminate the Supply Agreement if LGE defaults on its royalty obligations: "QUALCOMM may terminate **[**87]** this Agreement if Buyer is in Default under the License and such default is not cured within the cure period specified therein." CX6803-007.

a. <u>2004 Chip Supply Threats and Cutoff</u>

In December 2003, Qualcomm initiated arbitration against LGE and alleged that LGE had breached LGE's 1993 CDMA SULA by "[f]ailing to report sales of WCDMA products for the purpose of paying royalties to QUALCOMM as required by Section 5." CX8117-007. According to Hwi-Jae Cho (Director of LGE Intellectual Property Center), LGE argued in opposition that "WCDMA arose from a different technology, GSM, which is different technology from CDMA," and that "in contrast to CDMA that was developed mainly by Qualcomm, many companies like Nokia, Ericsson, and NTT Docomo, among others, participated to develop WCDMA." Cho Depo. ¶ 38b-d.

Hwi-Jae Cho testified that LGE also argued in the arbitration that Qualcomm's 5.75% royalty rate for its small share of WCDMA technology would make the aggregate royalty for the entire WCDMA patent portfolio 25% of the phone price, which would make it difficult to make any profit on phones. Companies in the industry thought that approximately 5% of the phone price was the proper cumulative royalty rate **[**88]** for all WCDMA SEPs, not just Qualcomm's share of SEPs. Specifically, Hwi-Jae Cho testified:

> If Qualcomm attempted to assert a 5.75% royalty for its small share of WCDMA technology alone, the aggregate royalty for the entire WCDMA patent portfolio would be more than 25% of **[*700]** handset price, which was far more than what LGE or the industry thought at that time. If the royalty for WCDMA alone was more than 25% of the phone price, it would be impossible to make any profit by selling handsets. Companies in the industry thought that approximately 5% of the phone price was the proper cumulative royalty rate for the entire WCDMA standard essential patents.

Cho Depo. ¶ 38h.

To resolve the patent license dispute, Qualcomm threatened to terminate the Supply Agreement and cut off QCT's supply of modem chips to LGE. On May 6, 2004, Louis Lupin (Qualcomm General Counsel) asserted to Mun-hwa Park (LGE CEO) that "even under LGE's purported interpretation of its license agreements with QUALCOMM, LGE would be in breach of the Supply Agreement" because LGE had not paid any royalties on sales of WCDMA handsets. CX6774-008.

Hwi-Jae Cho (Director of LGE Intellectual Property Center) testified that LGE interpreted **[**89]** Qualcomm's actions as a threat to LGE's modem chip supply: "We thought Qualcomm would use whatever leverage it had because Qualcomm often mentioned termination of the Supply Agreement." Cho Depo. ¶ 61.

On May 26, 2004, Louis Lupin (Qualcomm General Counsel) threatened to cut off chip supply in a letter to Mun-hwa Park (LGE CEO): "[P]lease be advised that QUALCOMM, at this time, has terminated only the MOU but reserves the right to terminate the Supply Agreement as well." CX6774-017. Hwi-Jae Cho testified that any loss of chip supply would be devasting to LGE's handset business: "All of LGE's CDMA products used Qualcomm's baseband chipsets and LGE also started to use Qualcomm's WCDMA baseband chips. Therefore, there would be significant negative impact to LGE's business if Qualcomm had terminated the Supply Agreement." Cho Depo. ¶ 67.

Dr. Irwin Jacobs (Qualcomm Co-Founder and CEO) then became involved in the chip supply threats. On June 16, 2004, Irwin Jacobs wrote a letter to Ssang Su Kim (LGE Vice Chairman) in which he stated that unless LGE withdrew its arbitration claims and paid past WCDMA royalties, Qualcomm would stop accepting LGE purchase orders for chips, cease all shipments **[**90]** of chips, withdraw all technical support, and require LGE to return all chip software. Specifically, Irwin Jacobs stated:

> 1) QUALCOMM will stop accepting LGE purchase orders for WCDMA ASICs;
> 2) QUALCOMM will cease all shipments of WCDMA ASICs to LGE, beginning with the next-scheduled shipment of 500 units of the MSM 6250 for June 30, and 6000 units of the MSM 6200 scheduled to ship during the first week in July;
> 3) QUALCOMM will withdraw all of its substantial WCDMA engineering resources currently providing technical support to LGE and reassign those resources to our strategic ASIC customers, all of whom are honoring their supply contracts and licensing obligation; and
> 4) QUALCOMM will require that LGE return to QUALCOMM all versions and derivations of our WCDMA ASIC software.

CX6814-022. At trial, Irwin Jacobs testified that Qualcomm then cut off LGE's chip supply: "We did not ship to them the chips that were specified here, the 500 and then 6,000 chips as far as I know at this time." Tr. at 1293:25-1294:2.

[*701] In early July, shortly after the CDMA chip supply threats and WCDMA chip supply cutoff, LGE and Qualcomm reached a set of agreements to resolve their dispute. On July 11, 2004, Qualcomm **[**91]** and LGE entered into (1) a Settlement and Release with Qualcomm, JX0025; (2) an Amendment to Infrastructure and Subscriber Unit License and Technical Assistance Agreement, JX0026 ("2004 SULA Amendment); and (3) a Chipset Purchase and Incentive Agreement ("Chipset Agreement"). CX6809. Hwi-Jae Cho (Director of LGE Intellectual Property Center) testified that "[w]hen Qualcomm threatened to terminate the Supply Agreement, LGE had no option but to agree to whatever Qualcomm demanded. LGE's top management did not want to take the risk of endangering LGE's mobile business." Cho Depo. ¶ 91.

Under the 2004 SULA Amendment, LGE paid Qualcomm a 5% running royalty on handsets containing Qualcomm modem chips and a 5.75% running royalty on handsets containing non-Qualcomm modem chips. JX0026-005. Although Hwi-Jae Cho testified that LGE's "assessment of the fairness and reasonability" of Qualcomm's royalty rates had not changed, "LGE accepted such terms because LGE had little chance to evaluate Qualcomm's WCDMA patent portfolio and, most importantly, LGE had to consider the business risks" of a chip supply cutoff. Cho Depo. ¶ 91. Hwi-Jae Cho testified, "During that time period, almost all of the profits of LGE's mobile business were **[**92]** from its CDMA handsets and Qualcomm was the only CDMA chipset supplier. Therefore, if Qualcomm were to suspend the supply of baseband processors, LGE would not have been able to develop or manufacture any CDMA handset products." *Id.* at ¶ 105.

In the July 2004 Chipset Agreement, Qualcomm offered LGE chip incentive funds as another carrot to purchase Qualcomm chips. Qualcomm rebated LGE 3-5% of the purchase price on each Qualcomm modem chip that LGE purchased, provided that LGE purchased at least 85% of its CDMA modem chips from Qualcomm. CX6809-004. This agreement effectively resulted in exclusivity.

LGE has argued that the handset is an unfair royalty base for Qualcomm's royalty rates. Hwi-Jae Cho (Director of LGE Intellectual Property Center) testified that during the 2004 negotiations LGE argued that Qualcomm should deduct the cost of camera modules and mobile television from the royalty base because those features are independent of Qualcomm's SEPs: "LGE argued to deduct the cost of camera modules and DMB (which is the Korean version of mobile TV) modules because, at a minimum, those two features were functionally independent from Qualcomm's standard essential patents at that time." **[**93]** Cho Depo. ¶ 101. Qualcomm rejected LGE's argument. *Id.*

b. <u>2007 Chip Incentive Funds</u>

Qualcomm and LGE entered another set of patent license and chip incentive agreements in 2007. On May 14, 2007, Qualcomm and LGE signed an Amendment to the Infrastructure and Subscriber Unit License and Technical Assistance Agreement ("2007 CDMA SULA"), effective January 1, 2007. ECF No. 1326 at 7. On May 14, 2007, Qualcomm and LGE signed a contract titled "Agreement," effective January 1, 2007. ECF No. 1326 at 7.

The two agreements lowered LGE's royalty rate on non-Qualcomm chips, according to a January 2007 email that Steve Altman (Qualcomm President) sent to Irwin Jacobs (Qualcomm Co-Founder and former CEO): "They currently pay 5% when they use our chip and 5.75% when they don't. We have agreed to take their rate to 5% regardless of whose chip they **[*702]** use." CX6722-001. Thus, from 2004 to 2007, LGE was paying a higher royalty rate on handsets containing rivals' modem chips than on those containing Qualcomm modem chips.

Qualcomm also offered LGE additional chip incentives. According to a May 2007 Qualcomm accounting memo, Qualcomm offered LGE a "Strategic Fund," under which Qualcomm rebated LGE 3-4% of the **[**94]** purchase price on each Qualcomm CDMA or WCDMA modem chip that LGE purchased from 2007 to 2014. CX7556-002.

Importantly, the May 2007 Qualcomm accounting memo concluded that although the chip incentives were calculated on LGE's purchase of QCT modem chips, QTL (Qualcomm's licensing division) received the primary benefit because LGE signed a favorable patent license agreement, and QTL would thus provide the rebate funds: "QTL is deemed to be the primary beneficiary of the elements of these agreements, including the expected royalty streams resulting from QC's first OFDM subscriber device license with a major handset manufacturer. Therefore, the amounts under these agreements will be recorded in the QTL business unit." CX7556-005. OFDMA ("orthogonal frequency division multiple access") is a technology used in the LTE standard. ECF No. 1326 at 3.

c. 2016 Chip Incentive Funds

In 2016, Qualcomm again used chip incentive funds to lower LGE's effective royalty rates on Qualcomm chips only. On or about December 11, 2015, LGE filed a Request for Arbitration with the International Chamber of Commerce in a matter captioned *LG Electronics Inc. v. Qualcomm Inc*. ECF No. 1326 at 8. According to Hwi-Jae **[**95]** Cho (Director of LGE Intellectual Property Center), LGE argued in the arbitration that Qualcomm had not reduced its royalty rate even though Qualcomm's patents had become fully paid up under LGE's existing SULA: "[T]here was no royalty rate adjustment even after the fully paid up rights matured." Cho Depo. ¶ 195. Under a fully paid up agreement, the licensee's royalty obligations may expire after a certain term. On or about February 18, 2016, Qualcomm filed a response to LGE's Request for Arbitration. ECF No. 1326 at 8.

Then, the parties quickly reached three agreements to resolve the royalty dispute before arbitration. On April 16, 2016, Qualcomm and LGE entered (1) a Settlement Agreement and Release, ECF No. 1326 at 8; (2) an Amendment to License Agreements, ECF No. 1326 at 8; and (3) a Strategic Fund and Indemnity Agreement. JX0110-001.

The Strategic Fund and Indemnity Agreement provided that Qualcomm would pay LGE a **7.5**% rebate on the price of any Qualcomm modem chips that LGE purchased. JX0110-009. When asked why LGE entered the 2016 agreements, Hwi-Jae Cho testified that although the Amendment to License Agreements did not alter LGE's contractual royalty rates, the chip rebates **[**96]** reduced LGE's effective royalty rate on Qualcomm modem chips: "Although there were many factors, overall, it would reduce LGE's effective royalty rate through the strategic fund and indemnification." Cho Depo. ¶ 206.

In sum, Qualcomm has engaged in anticompetitive conduct toward LGE by cutting off LGE's chip supply, threatening to withdraw technical support, threatening to require the return of software, charging higher patent royalty rates when LGE used a rival's instead of Qualcomm's chip, giving LGE chip incentive funds if LGE purchased at least 85% of its chips from Qualcomm, and giving rebates on the price of Qualcomm's chips.

[*703] 2. Sony

Qualcomm engaged in anticompetitive conduct toward Sony at least twice in 2012 by threatening and delaying Sony's chip supply.

a. February 2012 Chip Supply Threats and Cutoff

In early 2012, Qualcomm concluded that Sony had become unlicensed after a Sony Ericsson joint venture dissolved. CX6522-004.

On February 20, 2012, Eric Reifschneider (then-outside counsel, later QTL Senior Vice President and General Manager) wrote in an email to Jonathan Pearl (Sony General Counsel) and Derek Aberle (QTL President), "As we discussed in New York, we need to get a new **[**97]** license agreement in place quickly so that we can avoid any disruption in supply. . . . I understand that there are several chipset orders scheduled to ship this week, so we need to move quickly on this." CX7650-002 to -003.

Jonathan Pearl took immediate offense at Qualcomm's threat to Sony's chip supply:

> I am sure that in raising the imminent delivery of Q chipsets that you are not threatening to withdraw or delay chip supplies. Sony Mobile is Qualcomm's 3rd largest customer for chipsets and such action would bring this company to a virtual standstill. In the present circumstances this would seem to be a highly questionable tactic and would unlikely be considered as fair, or reasonable.

CX7650-002.

At trial, Derek Aberle (then QTL President) recalled that Eric Reifschneider had threatened Sony's chip supply:

> **Q**: And at several points through the course of the negotiations, Eric Reifschneider and others reminded Sony that if they did not reach an agreement, that they would be unable to purchase chips; is that correct?
>
> **A**: I remember you showing me passages from emails where that was communicated.
>
> **Q**: Do you call that — those things being communicated at the time?
>
> **A**: Yes.

Tr. at 314:21-315:4.

Internally, **[**98]** Qualcomm continued to view chip supply as leverage against Sony. Derek Aberle (QTL President) wrote in a February 22, 2012 email to Qualcomm executives including Cristiano Amon (QCT Co-President), Steve Mollenkopf (Qualcomm President), and Fabian Gonell (QTL Division Counsel) that Qualcomm needed to maintain its no license, no chips practice: "To my knowledge, we have never shipped commercial quantities of chips to a company without a license. We can't do that here either." CX6522-005. Carol Blubaugh (QCT) stated in an email the same day that QTL had "request[ed] to have us looking at holding chip shipments" to Sony. CX6522-005. On February 23, 2012, Blubaugh stated in another email that "our operations team has been advised to hold all component shipments to SEMC/Sony Mobile." CX6522-003.

At trial, Fabian Gonell testified that QCT only stopped chip shipments because someone at QCT misunderstood a Gonell email: "[I] turns out that they misunderstood my e-mail and did it because of my e-mail and not because somebody else at QTL said that they should do it." The February 16, 2012 Gonell email in question stated only: "SEMC [Sony] is not a licensee w/r/t WCDMA." CX6522-006. Gonell's testimony **[**99]** is contradicted by the record. Carol Blubaugh's (QCT) February 22, 2012 email refers to specific QTL directions regarding the stop shipment: "QTL is working the issue but wanted to bring you up to speed on QTL's request to have us look at **[*704]** holding chip shipments" and "QTL will advise by tomorrow if we need to hold off on pending shipments." CX6522-005. Thus, the Court finds not credible Gonell's testimony.

Sony responded immediately after learning of the shipment hold. On February 23, 2012, Bob Ishida (Sony CEO) sent an email with the subject line "urgent" to Steve Mollenkopf (Qualcomm President). CX7824-002. Ishida wrote that Qualcomm had held all chip shipments to Sony and asked Mollenkopf to intervene:

> QC legal team ordered to your sales to hold any shipment to SOMC due to non existence of QTL license agreement with SOMC after we became 100% subsidiary of Sony. Are you aware of that? We have an individual talking to your legal team diligently to agree on the licensing terms so it was a surprise that your legal team stopped the shipment. Please let me know what you can do on this.

CX7824-002. Steve Mollenkopf replied, "They mistakenly sent the wrong signal and will immediately work to **[**100]** make right today." CX7824-001. However, Ishida replied, "As of now, your legal team does not seems [sic] to be following your instructions. Could you please confirm? Sorry to bother you but this is really urgent and important." *Id.* At trial, Steve Mollenkopf testified that Qualcomm then reinstituted chip supply to Sony. Tr. at 813:13-22. After the reinstitution of chip supply, Steve Mollenkopf (Qualcomm President) wrote a February 23, 2012 email to Derek Aberle (QTL President) and Cristiano Amon (QCT Co-President) stating not that Qualcomm should never cut off chip supply, but only that Mollenkopf wished to have "visibility" on such threats: "Let's make sure we have a process to make sure Jim L [Jim Lederer, QCT Executive Vice President] or I have visibility before a stop-ship goes out." CX6522-002.

A week after the chip supply threats, Sony and Qualcomm reached an interim patent license agreement while negotiations continued. On March 1, 2012, Sony and Qualcomm entered into a Temporary Agreement, effective February 29, 2012. ECF No. 1326 at 8. Two months after Qualcomm cut off Sony's chip supply, Qualcomm hired Eric Reifschneider, the outside counsel who threatened to cut off Sony's **[**101]** chip supply, as QTL Senior Vice President and General Manager. ECF No. 1326 at 15.

Then, on May 3, 2012, Sony and Qualcomm entered into a Subscriber Unit Patent License Agreement, effective February 16, 2012 through September 30, 2012 ("May 2012 Sony Interim License"). ECF No. 1326 at 9. Under the May 2012 Sony Interim License, Sony agreed to provisionally pay Qualcomm a 5% royalty on CDMA handsets. JX0063-015. In contemporaneous notes from the interim negotiations with Sony, Eric Reifschneider (QTL Senior Vice President and General Manager) observed that Sony remained concerned about chip supply: "Sony concerned about QC applying pressure thru chip supply." CX8297-041.

b. <u>October 2012 Chip Supply Threats</u>

Sony and Qualcomm did not reach a long-term agreement before the September 30, 2012 expiration of the May 2012 Sony Mobile Interim License. Thus, on October 1, 2012, Sony Mobile and Qualcomm entered into a brief amendment to the May 2012 Sony Mobile Interim License. ECF No. 1326 at 9.

In late October 2012, after the October amendment to the interim license expired, Qualcomm again threatened Sony's chip supply. In an October 20, 2012, email to Derek Aberle (QTL President), Fabian Gonell **[**102]** (QTL Division Counsel), and Eric Reifschneider (QTL Senior Vice President **[*705]** and General Manager), Marv Blecker (QTL Senior Vice President) recommended that Qualcomm "delay final approval of chip shipment until Tuesday to let them know that we are serious about this." CX5186-001. Reifschneider replied in agreement: "At a minimum, we need to be prepared to stop all chip shipments after Tuesday if [Sony doesn't] sign on Tuesday." CX5186-001. In another email in the same thread, Reifschneider wrote that Qualcomm's primary concern was whether a chip supply threat would get Sony to sign the patent license agreement, and that the most relevant question was "are they more or less likely to sign on Tuesday if we hold the shipment." CX6534-001.

On October 25, 2012, in an email to Derek Aberle (QTL President), Fabian Gonell (QTL Division Counsel), and Marv Blecker (QTL Senior Vice President), Eric Reifschneider (QTL Senior Vice President and General Manager) included a spreadsheet with specific Sony modem chip shipments that Qualcomm could hold: "If I am reading this spreadsheet correctly, it looks like there are shipments scheduled to go out on 10/24 and 10/25, correct? . . . If so, and if they **[**103]** still have not signed the license agreement, I think we need to seriously consider holding those shipments until they do." CX7961-001.

In an October 27, 2012 email, Eric Reifschneider told Jonathan Pearl (Sony General Counsel) that "I must report to QCT that SMC [Sony Mobile Corp.] appears unwilling to enter into a license agreement with Qualcomm," CX5185-005, to which Reifschneider referred at his deposition as "the next step in the escalation process." Reifschneider Depo. 207:6-16. Thus, as in February 2012, QTL again dictated whether QCT would stop Sony's modem chip supply shipments. Fabian Gonell (QTL Division Counsel) and Alex Rogers (current QTL President) each received the email chain including the threats to cut off Sony's chip supply. CX5185-003.

Two weeks after that threat, on November 12, 2012, Sony Mobile and Qualcomm entered into a Subscriber Unit Patent License Agreement, effective beginning October 1, 2012. ECF No. 1326 at 9; JX0072. Under that agreement, Sony paid Qualcomm a 5% royalty on CDMA handsets. JX0072-023.

On September 29, 2015, Qualcomm and Sony Corporation entered into a CDMA Complete Terminal Patent License Agreement, with an effective date of October 1, 2015. **[**104]** ECF No. 1326 at 9; *see* JX0105. Under the 2015 patent license agreement, Sony pays Qualcomm a 3.5% running royalty on handset sales. JX0105-031. At trial, Fabian Gonell (QTL Legal Counsel and Senior Vice President, Licensing Strategy) testified that Qualcomm granted Sony "a discount from our standard royalty terms" because "Sony granted Qualcomm a very robust cross-license to what we considered a commercially valuable portfolio of patents." Tr. at 1407:12-17.

In sum, Qualcomm engaged in anticompetitive conduct toward Sony by repeatedly delaying and threatening Sony's chip supply.

3. Samsung

Qualcomm has engaged in anticompetitive conduct toward Samsung by threatening Samsung's chip supply, reducing the royalty rate if Samsung purchased at least 85% of its chipsets from Qualcomm, delaying the delivery of software, threatening to withhold technical support, offering Samsung chip incentive funds if Samsung purchased 100% of its premium chips from Qualcomm, and paying to extinguish Samsung's antitrust claims and to silence Samsung.

Moreover, when asked whether any other component supplier requires execution **[*706]** of a patent license agreement before selling components, Andrew Hong (Samsung Legal **[**105]** Counsel) also testified that Qualcomm's practice of requiring Samsung to sign a patent license agreement before Samsung can purchase modem chips is unique in the industry:

> **Q**: In any of those negotiations, did Samsung's prospective supplier require that Samsung execute a patent license agreement prior to agreeing to sell their product to Samsung?
>
> **A**: No.

Hong Depo. 197:25-198:4. Injung Lee (Licensing Lead at Samsung Intellectual Property Center) agreed. Lee Depo. 132:23-133:12.

On September 3, 1993, Samsung and Qualcomm entered into an Infrastructure and Subscriber Unit License and Technical Assistance Agreement ("1993 CDMA SULA"). ECF No. 1326 at 8. Under the 1993 CDMA SULA, Samsung paid Qualcomm an $8.5 million upfront fee and a running royalty rate of 5.75% on handsets sold outside of Korea and 5.25% on handsets sold in Korea. JX0006-012. Later, Samsung and Qualcomm entered into an Amendment to Infrastructure and Subscriber Unit License and Technical Assistance Agreement, effective November 17, 1997. ECF No. 1326 at 8.

a. <u>2001 Chip Supply Threats</u>

Qualcomm threatened Samsung's chip supply in 2001. At trial, Steve Altman (former Qualcomm President) agreed that in 2001, Samsung argued "that **[**106]** its existing CDMA license agreement did not apply to its sales of 3G infrastructure and subscriber equipment." Tr. at 186:25-187:3. On August 24, 2001, Irwin Jacobs (Qualcomm Co-Founder and CEO) wrote a letter to Ki Tae Lee (Samsung President) threatening to terminate Qualcomm's chip supply to Samsung:

> [I]f Samsung persists in taking the position that its license agreement does not cover 1X and does not pay QUALCOMM the 1X royalties due under the agreement, we will have no choice but to take all action necessary to enforce the terms of our license agreement, including possible termination. Under our agreements, we do not ship ASICs to non-licensees or to licensees who are not performing their obligations.

CX6729-002. A week later, Samsung caved to Qualcomm's royalty demands, as Ki Tae Lee responded to Irwin Jacobs: "I will remit the 1X royalty payment immediately upon completion of the necessary calculations." JX0014-001.

b. <u>2003 Chip Volume Commitments</u>

In 2003, during patent license renegotiations with Samsung, Irwin Jacobs (Qualcomm Co-Founder and CEO) told Ki Tae Lee (Samsung President) that Qualcomm would only lower Samsung's royalty rate if Samsung committed to purchase 85% of its **[**107]** chips from Qualcomm: "[I]f Samsung maintained our existing partnership agreement and did purchase at least 85% of its ASICs from QUALCOMM (as it is currently doing), then Samsung will receive the benefits of our proposed royalty reduction." CX6719-002. Irwin Jacobs also told Samsung that Qualcomm was offering similar provisions to other OEMs to suppress rivals' market share: "I am compelled to offer this proposal to others as it is important that we maintain good relationships with our other ASIC partners. We are also counting on them to take market share from manufacturers that do not use our ASICs." *Id.*

Shortly thereafter, Samsung and Qualcomm entered into an Amendment to Infrastructure and Subscriber Unit License and Technical Assistance Agreement, with an effective date of March 29, 2004. ECF No. **[*707]** 1326 at 8; *see* JX0024. Under the 2004 SULA amendment, Samsung paid a 5% running royalty rate on CDMA handsets containing Qualcomm chips, subject to a $20 royalty cap. JX0024-002 to -003. Given that Samsung's royalty rate was reduced as Irwin Jacobs had promised if Samsung bought at least 85% of its modem chips from Qualcomm, presumably Samsung agreed to Jacobs' offer.

c. 2008-2009 Chip Sample **[**108]** Software Delay

In 2008, Samsung entered patent license renegotiations with Qualcomm. Injung Lee (Licensing Lead at Samsung Intellectual Property Center), who co-led Samsung's negotiating team, testified that Samsung wanted a lower royalty rate: "[W]e believed that the existing royalty rate was excessively high, which warranted a reduction in it, in our estimation." Lee Depo. 144:6-8. Injung Lee testified that Qualcomm's royalty rates were "rather high in comparison to other patentees," and that Samsung paid Ericsson a lump sum that equated to a [TEXT REDACTED BY THE COURT]% effective royalty rate and paid Nokia a lump sum that equated to a [TEXT REDACTED BY THE COURT]% effective royalty rate. Lee Depo. 145:8-17. According to Injung Lee, Samsung proposed a royalty rate under 1%, but Qualcomm refused. CX2568A-001.

Injung Lee testified that during negotiations, Samsung was concerned about any disruption in chip supply because Samsung depended entirely on Qualcomm CDMA modem chips:

> [G]iven the fact that we were being supplied with 100 percent of our chipsets from Qualcomm, were it such that we were not getting provided with those chipsets as per the normal manner and fashion, then Samsung **[**109]** would not have been able to manufacture mobile phones nor sell the same. And as such, it would have had an untold impact on our business.

Lee Depo. 166:14-20. Although Samsung's March 2008 notes from negotiations with Qualcomm state that "Samsung demanded that Qualcomm's chipset supply and technical support should not be affected by this negotiation, and Qualcomm agreed to this," that only confirms that Samsung was concerned about Qualcomm cutting off chip supply and technical support. QX0551B-161.

Injung Lee (Licensing Lead at Samsung Intellectual Property Center) testified that in 2008, "when the negotiations got prolonged, I was told that at the end of the negotiation process to the effect that there would be some difficulties with the technical support being provided to Samsung." Lee Depo. 72:13-18. Specifically, Injung Lee testified that although Samsung "would receive chip samples and also software to drive the samples of the chipsets . . . I was told that the — receiving the software in that context was getting delayed from Qualcomm." *Id.* at 74:18-25.

Samsung then capitulated to Qualcomm's patent license demands. Injung Lee testified that after those delays, "Vice President Park **[**110]** said that we would expedite thing and to wrap up the negotiations. So that was the course of action we took as a result." *Id.* at 75:5-9. Thus, on November 4, 2009, Samsung and Qualcomm entered into an Amendment to Infrastructure and Subscriber Unit License and Technical Assistance Agreement, with an effective date of January 1, 2009 ("Samsung 2009 SULA Amendment"). ECF No. 1326 at 8; *see* JX0047.

d. 2013 Samsung Views of Qualcomm Royalty Rates

In 2013, Samsung continued to view Qualcomm's royalty rates as unreasonably high. Contemporaneous notes from June 2013 patent license negotiations reflect Samsung's view that "[i]f each holder of **[*708]** communication [SEPs] were to collect royalties on the price of handsets at Qualcomm's rate, this would result in [cumulative] royalty rates of at least 10% being levied on handset manufacturers." CX2642A-002. According to the Samsung notes, Samsung argued that a handset is an outdated royalty base: "The value of smart phones lies in various computer functions, the operating system, software, applications, and design, etc., which have nothing to do with Qualcomm's chipset IP. Therefore it is unfair for Qualcomm to levy royalties on the basis of the entire phone." CX2642A-003. However, **[**111]** Samsung attributed Qualcomm's maintenance of high royalty rates to Qualcomm's chip monopoly: "The structure of high royalties is only possible because Qualcomm has a monopoly position in the chipset market and does not supply chips to manufacturers without licenses to Qualcomm standard essential patents, giving manufacturers no choice but to accept." *Id.*

According to Samsung's notes, Qualcomm was not interested in negotiation: "Qualcomm is confident about defending against Samsung's royalty terms, and there is no additional room for negotiation with regard to royalty reductions." *Id.* Samsung notes from later in the negotiation indicate that Samsung felt unable to challenge

Qualcomm's patent license terms: "Samsung has been practically unable to purchase chips from other chipset suppliers, and had no choice but to enter into a license agreement with Qualcomm despite the unreasonable terms in order to engage in its mobile phone business." CX2643A-002.

Samsung also argued to Qualcomm that because "all Qualcomm [SEPs] are implemented within a chip, royalties should be assessed on a chipset basis." CX2643A-002. However, Injung Lee testified that "Qualcomm does not — has not granted licenses **[**112]** to chipset manufacturers." Lee Depo. 136:3-5. Qualcomm's refusal to license its SEPs to rivals is discussed in more detail later in this order.

e. <u>2018 Qualcomm Monetary Payment to Extinguish Samsung's Antitrust Claims and Silence Samsung, and Chip Incentive Funds</u>

Alex Rogers (QTL President) testified that in 2016, Samsung and Qualcomm entered another patent license renegotiation, which resolved on January 30, 2018 in several agreements. Tr. at 1988:16-18. Among the agreements are: (1) the 2018 Amendment to Infrastructure and Subscriber Unit License and Technical Assistance Agreement, a patent license agreement, JX0122-003; (2) the Amended and Restated Strategic Relationship Agreement, which provides Samsung chip incentives on QCT chips, JX0122-035; (3) the Amendment to Component Supply Agreement, which amends the 2004 CSA, JX0122-043; (4) the 2018 Settlement Agreement, in which both Samsung and Qualcomm release legal claims, JX0122-049; and (5) a foundry agreement, the terms of which are not in evidence. Tr. at 2007:2-2008:6.

The 2018 patent license amendment does not alter Samsung's contractual running royalty rate. JX0122-028 to -029. However, Qualcomm provides Samsung a quarterly **[**113]** credit in exchange for Samsung's cross-license of patents. JX0122-008. Under the Strategic Relationship Agreement, Qualcomm promises to pay Samsung—through December 31, 2023—chip incentive funds that accrue on Samsung's purchases of QCT chips, provided that Samsung purchases specific volumes of Qualcomm chips. JX0122-036 to -037. Specifically, Samsung's receipt of incentive funds is conditioned on Samsung's purchase from Qualcomm of 100% of Samsung's premium modem chips and at least **[*709]** [TEXT REDACTED BY THE COURT] medium and high tier chips. JX0122-036 to - 037. This agreement further ensures that rivals cannot sell modem chips to Samsung.

Under the 2018 Settlement Agreement, Qualcomm paid Samsung $100 million to extinguish all of Samsung's antitrust claims and to silence Samsung. JX0122-054. In the Settlement Agreement, Samsung specifically releases claims based on the following:

> any claim of coercion or other similar claims regarding the negotiation, execution, or terms of this Settlement Agreement, the 2018 Amendment, the CMCPCA, and/or the Collaboration Agreement . . .
> any patent licensing conduct of Qualcomm or any of its Affiliates or (b) any conduct of Qualcomm or any of its Affiliates in the Private and Regulatory Actions . . . [and]
>
> any **[**114]** claim that Qualcomm's Existing Practices violate any antitrust, competition, or similar laws of any state or territory of the United States (including federal law), Korea, or any other country or any jurisdiction, or any principle of common or civil law to similar effect including any claim based on or arising from findings or conclusions articulated in . . . (4) the ultimate decisions, settlement agreements or other dispositions of any of the cases brought against Qualcomm (or that contain counterclaims against Qualcomm) by the U.S. Federal Trade Commission ("U.S. F.T.C.") (*FTC v. Qualcomm Incorporated*, Case No. 5:17-CV-00220-LHK (N.D. Cal.)) . . .

JX0122-050 to -052.

Further, in the Settlement Agreement, Samsung agreed to withdraw from participation in this action and others:

> Samsung will promptly take all actions reasonably required to withdraw all pending or accepted applications for intervention, or any other forms of substantive participation (except for any participation, including discovery or deposition, to the extent required by law), in any of the Private or Regulatory Actions and any other proceedings involving claims that Qualcomm's Existing Practices violate antitrust, competition, **[**115]** or similar laws. . . . [and]

> Samsung will withdraw from all existing Common Interest Agreements and all other similar agreements in which the general purpose is to share information and communications under some form of protection against disclosure (collectively, the "CIAs") between Samsung or any of its Affiliates and any third party that pertains to any of the Private and Regulatory Actions or any other proceedings or collaboration by third parties involving claims or potential claims that Qualcomm's Existing Practices violate antitrust, competition, contract, or similar laws or undertakings.

JX0122-056. Moreover, Samsung promised to make the following statement to the KFTC: "[I]n any statement Samsung provides to the KFTC regarding Qualcomm's compliance with the KFTC 2017 Orders, Samsung agrees that it shall confirm that it has resolved its disputes with Qualcomm and the resolution of such dispute satisfies Samsung's demands made under the KFTC 2017 Orders." JX0122-055.

In sum, Qualcomm has engaged in anticompetitive conduct toward Samsung by threatening Samsung's chip supply, reducing the royalty rate if Samsung purchased at least 85% of its chipsets from Qualcomm, delaying the delivery **[**116]** of software, threatening to withhold technical support, offering Samsung chip incentive funds if Samsung purchased 100% of its premium chips from Qualcomm, and paying to extinguish **[*710]** Samsung's antitrust claims and to silence Samsung.

4. Huawei

Qualcomm engaged in anticompetitive conduct toward Huawei by giving a drastically reduced royalty rate if Huawei purchased 100% of its chips from Qualcomm, requiring Huawei to grant Qualcomm a royalty-free cross-license to Huawei's patents, threatening to cut off Huawei's chip supply on multiple occasions, and demanding unreasonably high royalty rates but refusing to provide patent claim charts.

Moreover, Nanfen Yu (Huawei Senior Legal Counsel) testified that Qualcomm's requirement of a separate patent license when selling chips is unique in the industry:

> **Q**: Are there other suppliers that have that practice [of requiring a separate license when selling modem chips]?
>
> **A**: Not that I'm aware.

Yu Depo. 121:6-22.

a. <u>2001 Component Supply Agreement</u>

Qualcomm and Huawei entered into a Contract for the License of Certain Technology for the Manufacturing and Sale of Certain CDMA Infrastructure Equipment on September 22, 2001. ECF No. 1326 at 5. Qualcomm and Huawei **[**117]** then entered into a component supply agreement effective November 13, 2001. CX1006-002.

The 2001 component supply agreement provides that Qualcomm's sale of modem chips to Huawei does not exhaust Qualcomm's intellectual property rights: "The sale of Products to Manufacturer does not convey to Manufacturer or Trade Corporation title to any embedded software or any intellectual property rights in such Products." CX1006-006. As with other Qualcomm supply agreements, Qualcomm's component supply agreement with Huawei provides that Qualcomm can terminate the supply agreement if Huawei becomes unlicensed: "QCTAP [QCT's Asia Pacific division] may terminate this Contract if Manufacturer is in default under the License Agreement." CX1006-007. Nanfen Yu (Huawei Senior Legal Counsel) testified that although Huawei asked to modify that termination provision, "Qualcomm refused Huawei's request." Yu Depo. 160:24-162:1.

b. <u>2003 and 2004 Chip Supply Leverage</u>

Qualcomm also used its chip supply leverage to obtain substantial modem chip purchase commitments from Huawei. On May 29, 2003, Huawei and Qualcomm entered into a Contract between Qualcomm Incorporated and Huawei Technologies Co. Ltd. for the License **[**118]** of Certain Technology for the Manufacturing and Sale of Certain CDMA Subscriber Units, with an effective date of May 29, 2003 ("2003 CDMA SULA"). ECF No. 1326 at 5; JX0022. In the 2003 CDMA SULA, Huawei agreed to purchase 100% of its CDMA chips for handsets sold in China from Qualcomm in exchange for a reduced royalty rate of 2.65%. JX0022-010, -012. However, if Huawei purchased chips from another supplier, or if Huawei sold handsets outside of China, Huawei owed a 5-7% royalty rate on those handsets. JX0022-010.

Qualcomm also required Huawei to provide Qualcomm royalty-free licenses to Huawei's patents. Nanfen Yu (Huawei Senior Legal Counsel) testified that QTL's patent licenses with Huawei all require Huawei to grant QCT royalty-free cross-licenses to all of Huawei's SEPs, which Yu testified "could be of great value if we license out by ourselves. But through the royalty free grant back license, we're just giving it out to Qualcomm and other handset manufacturers for free." Yu Depo. 195:23-196:13. For example, in the 2003 CDMA SULA, Huawei granted "QUALCOMM a worldwide, nontransferable, non-exclusive, **[*711]** irrevocable and royalty free license . . . to use LICENSEE's Intellectual Property" **[**119]** to make modem chips. JX0022-016.

Qualcomm and Huawei entered into a Memorandum of Understanding ("Huawei MOU"), dated July 21, 2004. ECF No. 1326 at 5. The MOU agreement required Huawei to pay the royalty rates in the 2003 CDMA SULA on Huawei's sales of WCDMA handsets. JX0027-005.

Internally, Qualcomm understood that Qualcomm's chip supply leverage led Huawei to sign the MOU on Qualcomm's standard patent license terms. In a September 2004 email thread forwarded to Steve Altman (later Qualcomm President), Qualcomm employee Jing Wang wrote: "[I]f we could not resolve these issues timely, Huawei could be lured to use EMP's UMTS chip and we could lose a *huge leverage* (ie, MSM 6250 chip supply) in pushing Huawei to sign the definitive agreement with us." CX7886-001 (emphasis added). In a later email in the thread, Jing Wang wrote, "[t]he reason Huawei signed interim agreement on WCDMA IPR with QC two months ago on standard terms was . . . because of their hope to quickly develop UMTS terminals based on our MSM 6250 in order to sell to VF, H3G, Sunday and later China Mobile [all mobile carriers]." CX7886-001. Steve Altman (later Qualcomm President) forwarded the email to another Qualcomm employee **[**120]** and wrote, "Jing is exactly right." *Id.* At trial, Steve Altman conceded that he was the "architect" of Qualcomm's licensing program and practices. Tr. at 177:21-25.

c. <u>2013 Chip Supply Threats</u>

In 2013, Qualcomm and Huawei engaged in negotiations over renewing Huawei's 2003 CDMA SULA, which was slated to expire May 29, 2013. JX0022-007.

Eric Reifschneider (QTL Senior Vice President and General Manager) threatened Huawei's chip supply from the outset of the negotiations. In a May 1, 2013 email, Reifschneider informed Xuxin Cheng (Huawei) that "if the C2K SULA expires and has not been replaced by a new patent license agreement covering C2K products, there will be issues with Huawei's ability to continue to use C2K chipsets or QMCi's software, issues which I am sure both our companies would like to avoid." CX1000-004.

On May 1, 2013, Cheng replied that Huawei wished to reduce the royalty rate it paid Qualcomm "because the current situation is significantly different from ten years ago, such as the fact that many essential patents for C2K [CDMA] have expired or will expire in the coming 3-5 years." CX1000-002.

Eric Reifschneider (QTL Senior Vice President and General Manager) continued to threaten **[**121]** Huawei's chip supply. In a May 8, 2013 email to Cheng and other Huawei negotiators, Reifschneider listed chip supply among the "topics that Qualcomm would like to discuss at our meeting this week." CX1000-001. Reifschneider wrote that if Huawei renewed the patent license, Huawei would not face any chip supply issues: "Ways to avoid any disruption in chipset supply at the end of this month without creating undue risk for either party (the simplest being for Huawei to exercise its right to renew the C2K license agreement under which it has been operating successfully for the last ten years)." *Id.*

Nanfen Yu (Huawei Senior Legal Counsel) testified that at the May 10, 2013 meeting between Huawei and Qualcomm, at which she was present, Reifschneider made oral threats to cut off Huawei's chip supply:

> **Q**: And subsequent to this, did you hear him say it again orally?

[*712] **A**: Yes.

. . .

Q: Did you believe it was just posturing?

A: No.

Yu Depo. 140:23-141:12. Yu testified that specifically, "Eric make it very clear that we have to sign a license agreement in some form. And we didn't see that there's any other possible ways to avoid the disruption of the chipset supply." *Id.* at 69:12-15.

Qualcomm's notes from **[**122]** the May 10, 2013 meeting with Huawei also reflect Reifschneider's threats to Huawei: "Not to mention the chip supply problem. Letting the agreement expire takes flexibility away from both of us. It puts us both in a worse spot. Renewing does not put you in a worse negotiating position; it puts you in a better one." CX6528-002.

In his own notes from the 2013 Huawei negotiations, Eric Reifschneider observed that Qualcomm could not negotiate on the contractual royalty rates, but could negotiate on other points: "We explained why we have little flexibility with the royalty rates given the established value of our patent portfolio and indicated our willingness to consider other ways to have a mutual exchange of value such as a patent transfer" or a chip incentive fund. CX5211-002 to -003.

Other Qualcomm executives discussed using chip supply threats to get Huawei to renew its patent license. These discussions show that QTL, Qualcomm's licensing division, drove the chip supply threats. On May 20, 2013, Derek Aberle (QTL President) told Steve Mollenkopf (Qualcomm President) in an email that "I suggest you make the following points to Huawei's CEO." CX5231-001. Among those points was threatening **[**123]** to cut off chip supply: "[I]f they don't extend we will have issues re continued chip supply on C2K. Note that Huawei has been claiming patent exhaustion based on their purchase of chips from QC despite the terms of our supply agreement." CX5231-001. Steve Mollenkopf replied, "I got it. Thanks." *Id.*

Only a week later, on May 27, 2013, Qualcomm and Huawei entered into an Amendment to Subscriber Unit License Agreement. ECF No. 1326 at 5. Nanfen Yu (Huawei Senior Legal Counsel) testified that although Huawei viewed Qualcomm's royalty rates as high, Huawei signed the license agreement because Huawei had "[n]o choice for the CDMA chipset supply." Yu Depo. 143:9-21. Yu testified that "Qualcomm was essentially the only supplier for CDMA chips in the market," such that "Qualcomm's royalty rate is nonnegotiable." *Id.* at 143:5-6, 149:19-21.

d. <u>2014 Chip Supply Leverage</u>

On December 15, 2014, Huawei and Qualcomm entered an Amendment to Subscriber Unit License Agreement, with an effective date of July 1, 2014, amending the Contract for the License of Certain Technology for the Manufacturing and Sale of Certain CDMA Subscriber Units, dated May 29, 2003. ECF No. 1326 at 5. On December 15, 2014, Huawei **[**124]** and Qualcomm entered a Subscriber Unit License Agreement ("2014 SULA"), with an effective date of July 1, 2014. ECF No. 1326 at 5; JX0098. The 2014 SULA requires Huawei to pay a 5% running royalty rate on devices containing WCDMA technology and a 3.5% running royalty rate on devices containing LTE technology, and includes a royalty cap of [TEXT REDACTED BY THE COURT]. JX0098-011, -016.

Nanfen Yu (Huawei Senior Legal Counsel) testified that the need for chip supply left Huawei with little room to negotiate those royalty rates:

Q: Why do you say 'we had no choice'?

[*713] **A**: Firstly, there were dependency and need from the business unit for us to sign to maintain license agreement for them to be able to obtain chipsets from Qualcomm. . . . Qualcomm wouldn't agree to sign any agreement if we don't include LTE license here.

Yu Depo. 98:4-14.

e. <u>2016 Huawei Royalty Complaints</u>

In June 2016, Huawei sent Qualcomm a proposal to renegotiate the royalty rates due under the Huawei SULA, which Fabian Gonell (QTL Legal Counsel and Senior Vice President, Licensing Strategy) received. CX1101-001. In the proposal, Huawei argued that Qualcomm's royalty rates are unreasonably high because (1) Qualcomm ties its high **[**125]** 3G royalty rates to 4G products in contradiction of industry practice; (2) Qualcomm receives more than 50% of the accumulated royalty rate in the industry even though it contributed only 10% of WCDMA and LTE patents; (3) many of Qualcomm's CDMA patents have expired; and (4) Qualcomm charges its royalty rates on the price of a whole handset when Qualcomm's patents do not contribute to the whole handset's value. Specifically, Huawei stated:

> **Qualcomm unreasonably ties its high 3G rates on 4G multimode products**
> • Despite the fact that 3G is becoming a backup technology with a significant number of 3G patents being expired, Qualcomm is charging 4G multimode products on 3G rates. This is not consistent with industry practice where patent holders charge royalty at the rate of the latest technology and Qualcomm is trying to extend the benefits gained in 3G era based on its dominant position in chipset market and unique business model bundling chipset supply and patent license.
>
> **Qualcomm's royalty rates are not consistent with its contribution to standards**
>
> • Qualcomm's proportion of declared essential patents in both WCDMA and LTE are only around 10%, but its royalty rate is more than 50% of the **[**126]** accumulated royalty rate in the industry
> • Huawei has entered into license agreements with major patent holders in the industry, but the royalty Huawei paid to Qualcomm each year consists of 80-90% of the total royalty we paid for terminal products, which well demonstrates that Qualcomm's royalty rate is excessively higher than other major patent holders in the industry
>
> **The value of Qualcomm's WCDMA SEP portfolio has declined significantly but Qualcomm hasn't adjusted its WCDMA royalty rate accordingly**
> • A significant number of Qualcomm's WCDMA patents are expired or expiring, particularly those early fundamental patents.
>
> **Qualcomm's royalty model does not reflect the real value contributed by patent technology to handset**
> • It is not reasonable to collect royalty on the selling price of the whole handset as Qualcomm's essential patents are mostly implemented by chipset.

CX1101-002 to -003 (emphases in original).

Nanfen Yu (Huawei Senior Legal Counsel) testified that despite Qualcomm's high rates, Qualcomm has never provided patent claim charts to Huawei, but that Nokia, Ericsson, and Siemens all have. Yu **[*714]** Depo. 216:4-217:2. Specifically, as to Qualcomm, Yu testified:

> **Q**: [I]n all of your negotiations **[**127]** with Qualcomm throughout the course of your career, has Qualcomm ever provided claim charts for its patents?
>
> **A**: No.

Id. at 216:4-8. Yu testified that Huawei has not sued Qualcomm to determine a FRAND royalty rate because Qualcomm could cut off Huawei's chip supply: "[O]ne concern would be the chipset supply, and the other is that we have the existing licensing agreements in place." *Id.* at 158:7-9.

Yu testified that although Huawei recently has withheld royalty payments from Qualcomm during license renegotiations, Qualcomm has continued to supply chips to Huawei because, according to Yu, "the NDRC [Chinese antitrust agency] decision and KFTC [Korean Fair Trade Commission] decision requires that Qualcomm does not bundle the chipset into the international [sic] property rights license." Yu Depo. 47:17-21; 70:20-71:8.

In sum, Qualcomm engaged in anticompetitive conduct toward Huawei by giving a drastically reduced royalty rate if Huawei purchased 100% of its chips from Qualcomm, requiring Huawei to grant Qualcomm a royalty-free cross-license to Huawei's patents, threatening to cut off Huawei's chip supply on multiple occasions, and demanding unreasonably high royalty rates but refusing to **[**128]** provide patent claim charts.

5. Motorola

Qualcomm engaged in anticompetitive conduct toward Motorola by offering a significantly reduced effective royalty rate if Motorola purchased 100% of its chips from Qualcomm and threatening to cut off Motorola's chip supply.

Moreover, Todd Madderom (Motorola Director of Procurement) testified that in his 15 years in procurement, no other company has asked him to take a separate patent license to buy components:

> **Q**: And in your experience aside from your experience with Qualcomm, have you ever been required to separately take a license from a component supplier in order to procure commercial quantities from that component supplier?
>
> **A**: No, this is a unique situation. I've never run across this prior.

Madderom Depo. 162:24-163:10. Madderom also testified that Qualcomm's royalty rates are vastly higher than those Motorola pays other patent licensors: "In our experience we've never seen such a significant licensing fee tied to any other IP we license." Madderom Depo. 217:24-218:2.

a. <u>2005 Chip Incentive Funds</u>

On September 26, 1990, Qualcomm entered a license agreement with Motorola, which had an effective date of September 26, 1990. ECF No. 1326 at 6. Under **[**129]** that patent license agreement, Qualcomm charged a 4% running royalty rate on handset sales and no royalties on chipset sales. Tr. at 216:20-217:3; JX0003-005. As relevant here, Qualcomm and Motorola executed a *Second Amendment* to the Agreement to Amend the Patent License Agreement and Technology License Agreement and Software License Agreement, with an effective date of April 11, 2003. ECF No. 1326 at 6.

In May 2005, as Motorola and Qualcomm were negotiating a WCDMA patent license, Paul Jacobs (Qualcomm CEO) wrote to Edward Zander (Motorola CEO) that Qualcomm could not budge on its contractual royalty rates, but could offer other consideration: "[I]t is difficult for us to reduce Motorola's royalties given the impact that it could have on other license **[*715]** agreements. We are prepared, however, to offer Motorola a marketing incentive payment to help defray a portion of Motorola's expenses incurred in selling WCDMA handsets in Europe." CX7041-002. Motorola and Qualcomm then reached a patent license amendment. An October 2006 presentation to the Qualcomm Board of Directors offered an "Executive Summary" of the amendment's benefits, including "Reduced likelihood of litigation with Motorola." CX7042-005.

b. **[**130]** <u>2015 Chip Supply Threats</u>

At trial and at his March 12, 2018 deposition, Cristiano Amon (Qualcomm President) testified that he had never been informed of Qualcomm threatening to cut off chip supply:

> **Q**: You were asked, 'You have never been informed that QTL threatened to cease supplying chipsets to a customer because of a licensing dispute; is that right?' You answered 'That is correct.' That was a true statement when you said it?
>
> **A**: That is correct.

Tr. at 548:3-17 (citing Amon Depo. 50:24-51:2).

However, Amon's own handwritten notes from 2015 license negotiations with Motorola's President Rick Osterloh, entitled " 12-9-15-Rick & Team-Motorola," state: "(1) Licensing > Eric [Reifschneider, QTL Senior Vice President and General Manager] constantly threatening to cut off chip supply." CX7024-001. Thus, despite Amon's own handwriting acknowledging 2015 chip supply threats, Amon testified under oath at his deposition and trial that he was unaware of QTL threats to cut off chip supply.

c. <u>2016 Chip Incentive Fund and Chip Supply Leverage</u>

In 2016, Motorola and Qualcomm again entered patent license negotiations. An October 2016 internal Motorola presentation states that Qualcomm offered Motorola **[**131]** a [TEXT REDACTED BY THE COURT] chip rebate on purchases of Qualcomm modem chips. CX2060-020. Motorola analyzed Qualcomm's proposal on another slide, and concluded that only if Motorola purchased 100% of its modem chips from Qualcomm would Motorola be able to achieve a 3.8% effective royalty rate. CX2060-021.

Todd Madderom (Motorola Director of Procurement) testified that Qualcomm's royalty rates are vastly higher than those Motorola pays other licensors: "In our experience we've never seen such a significant licensing fee tied to any other IP we license." Madderom Depo. 217:24-218:2. A 2015 internal Motorola presentation titled "Motorola Qualcomm Briefing" includes Motorola's talking points for a meeting with Qualcomm, and reflects the same concern. CX2123-003. Under the header "Relationship Struggles," the slide states "Licensing fees are inflated and cost prohibitive to technological advances." *Id.* Todd Madderom testified that the slide reflects that Qualcomm's royalty rates are disproportionate: "I think it's perhaps a relative assessment of the millions of dollars we spend in licensing with Qualcomm is disproportionate to anyone else in the world that we would pay licensing fees **[**132]** to." Madderom Depo. 218:2-5.

Todd Madderom testified that if Motorola did not have to pay Qualcomm's inflated patent license fees, Motorola could invest those funds in better features for consumers: "[W]e believe that the millions of dollars that we pay to royalty could be better — could be invested to perhaps develop our own technological advances." *Id.* at 218:24-219:3.

Madderom testified that Motorola has felt constrained from challenging Qualcomm's royalty rates because Qualcomm has provided the only CDMA and premium **[*716]** LTE modem chip solutions: "For 2013 the only company that offered an LTE solution that was viable was Qualcomm." Madderom Depo. 134:18-19. Madderom also testified that Qualcomm was Motorola's only CDMA modem chip option: "So there was a VIA Technologies in the market. They had CDMA IP. We didn't feel it was capable or competitive, and so we were sole sourced to Qualcomm." *Id.* at 157:21-23.

Any chip supply disruption would be catastrophic for an OEM, Madderom testified: "If we are unable to source the modem, we are unable to ship the handset. It's a direct correlation. No modem supply, no phone supply to our customer." Madderom Depo. 147:25-148:3. Further, "[i]t takes many **[**133]** months of engineering work to design in a replacement solution, if there is even a viable one on the market that supports the need." *Id.* at 147:25-148:11.

Madderom testified that without a chip supply alternative, Motorola is effectively powerless to contest Qualcomm's royalty rates:

> **Q**: How, if at all, would moving away from Qualcomm chipsets better position Motorola to have a fight with Qualcomm about Qualcomm's royalties?
>
> **A**: Qualcomm would not be able to cut off our supply in that fight. It's as simple as that. We could create a fight, and we feel like our supply wouldn't be threatened.

Id. at 223:25-224:7.

In sum, Qualcomm engaged in anticompetitive conduct toward Motorola by offering a significantly reduced effective royalty rate if Motorola purchased 100% of its chips from Qualcomm and threatening to cut off Motorola's chip supply.

6. Lenovo

Qualcomm has engaged in anticompetitive conduct toward Lenovo by threatening to cut off Lenovo's chip supply; threatening that even Qualcomm's rival MediaTek cannot sell chips to Lenovo if Lenovo becomes unlicensed with Qualcomm; demanding unreasonably high royalty rates without providing technical or legal information about Qualcomm's patents; and **[**134]** offering chip incentive funds if Lenovo committed to purchasing 30-50 million Qualcomm chips.

On June 30, 2003, Qualcomm and Legend Mobile Communication Technology Ltd. ("Legend") executed a Contract between Qualcomm Incorporated and Legend Mobile Communication Technology Ltd. for the License of Certain Technology for the Manufacturing and Sale of Certain CDMA Subscriber Units. ECF No. 1326 at 5-6. Lenovo is a successor in interest to Legend. *Id.* at 6. On March 28, 2007, Qualcomm and Lenovo executed an Amendment to Contract between Qualcomm Incorporated and Lenovo Mobile Communication Technology Ltd. for the License of Certain Technology for the Manufacturing and Sale of Certain CDMA Subscriber Units. ECF No. 1326 at 6.

a. 2013 Qualcomm "Carrots and Sticks" Strategy

Ira Blumberg (Lenovo Vice President of Intellectual Property) testified that during 2013 renegotiations of the Lenovo patent license agreement, Eric Reifschneider (QTL Senior Vice President and General Manager) first threatened to cut off Lenovo's chip supply: "At that initial meeting, we explained that we were contemplating terminating the license through whatever mechanism we thought was applicable. And Mr. Reifschneider was very **[**135]** calm about it, and said that we should feel free to do that, but if we did, we would no longer be able to purchase Qualcomm chips." Blumberg Depo. 157:7-14. Blumberg heard from a negotiating colleague that "that same assertion was repeated **[*717]** numerous times during the negotiation of these amendments by the licensing staff at Qualcomm." *Id.* at 158:1-4.

Reifschneider's threats were consistent with tactics articulated in a March 24, 2013 QTL slide deck titled "Lenovo 4G Strategy." CX5210-001. One slide in the presentation was headlined "Carrots and Sticks," with a table below including one column for "Carrots" and one column for "Sticks." CX5210-011. Under "Carrots," Qualcomm listed chip incentives, like "Offer Strategic Fund" and "Offer Chip Rebate." *Id.* Under "Sticks," Qualcomm listed cutting off Lenovo's chip supply: "Product hold on Chip shipments. QMC has 478.5K MSMs on backlog scheduled to ship by 4/9/13." *Id.*

Going into those 2013 patent license negotiations, Lenovo viewed Qualcomm's royalty rates as unreasonably high in comparison to the rates of other SEP licensors. Ira Blumberg testified that Qualcomm's royalty rates "don't take into account changes in the size of their portfolio **[**136]** but fix the royalty rates, and fix those royalty rates at a level higher than most of the other licensors." Blumberg Depo. 30:22-21:2. Blumberg testified that although "I don't know what all other licensors in the field charge, . . . the ones that I do know of are — are lower," including Nokia, Ericsson, and Interdigital. *Id.* at 31:3-12.

Blumberg also testified that he viewed it as a FRAND violation for a modem chip supplier to refuse to license other modem chip suppliers: "My interpretation of FRAND obligations does suggest that the licensor has an obligation to license any company that requests a license, whether it is a chip company, a device company, or anything in between." *Id.* at 132:19-24.

Despite Lenovo's disagreement with Qualcomm's royalty rates, Ira Blumberg (Lenovo Vice President of Intellectual Property) testified that Lenovo was hamstrung by Qualcomm's chip supply leverage:

> My understanding from our business colleagues was that least with respect to high-end phones, at the time that we're talking about, Qualcomm had the best chipset available and that it would be difficult to convince

> consumers and carriers to spend for a high-end phone if it did not have the — the features, **[**137]** functions, and — and performance that the Qualcomm chip provided.

Blumberg Depo. 71:19-72:1. Further, "[i]n the absence of the ability to terminate the license, we don't feel we have much negotiating power to set new terms with Qualcomm." *Id.* at 156:8-11. A contemporaneous internal Lenovo presentation titled "Qualcomm Update" reflects the same concern, with text on one slide stating: "QC says they want to be partners but we see no sign of reducing royalties without a fight due to QC monopoly power." CX2121-005.

Blumberg also testified that litigation to challenge Qualcomm's royalty rate was not an option due to Qualcomm's chip supply leverage: "[T]he quickest legal resolution to that — at least in the US — you're looking at months and months, if not a year or more, without supply, which would be, if not fatal, then nearly fatal to almost any company in this business." Blumberg Depo. 189:13-18. As such, Blumberg testified that Qualcomm did not share any technical information about its patents: "[I]n the absence of the ability to cut off supply, we might have gone through that same kind of arrangement where Qualcomm would have been incented to give us technical and legal presentations **[**138]** to explain why it would be a bad idea to terminate . . . [b]ut we never got to those discussions because Qualcomm didn't feel they needed to." *Id.* at 190:24-191:7.

[*718] Thus, shortly after Eric Reifschneider's (QTL Senior Vice President and General Manager) chip supply threats, Lenovo and Qualcomm agreed to a new patent license agreement. On June 27, 2013, Qualcomm and Lenovo executed an Amendment to Subscriber Unit License Agreement, with an effective date of June 28, 2013. ECF No. 1326 at 6. The 2013 CDMA SULA amendment preserved the royalty rate Lenovo pays to Qualcomm. JX0087-001.

b. <u>2013 Chip Incentive Fund Offer</u>

Later in 2013, during LTE patent license negotiations, Qualcomm offered Lenovo substantial chip incentive funds, although Lenovo remained concerned about Qualcomm's ability to cut off chip supply.

In a November 19, 2013 email, Eric Reifschneider (QTL Senior Vice President and General Manager) proposed that Qualcomm would rebate Lenovo $5 for every Qualcomm modem chip Lenovo purchased, up to a total of $180 million. CX6491-002. The chip incentive fund carried two conditions, according to Reifschneider's email. Lenovo would have to "[e]nter into a 4G SULA . . . with Qualcomm that **[**139]** is generally on Qualcomm's standard terms including royalties of 4% of the net selling price" and "[c]ommit to purchase at least 30M Snapdragon chips from QTI during the first 18 months . . . and at least 50M Snapdragon chips from QTI during the last 12 months." CX6491-003 (emphases removed). QTI ("Qualcomm Technologies, Inc.") is the Qualcomm subsidiary that operates QCT.

Ira Blumberg (Lenovo Vice President of Intellectual Property) testified that the chip incentive fund would lower Lenovo's total cost of doing business with Qualcomm, but not reduce the royalty rate Lenovo paid whenever Lenovo purchased Qualcomm's rivals' chips:

> [I]n general, the way that Christian, who is typically the negotiator on the financial terms, would discuss it with Qualcomm was effectively a total cost of using Qualcomm: Cost of chips, cost of royalties, and so on. And so Qualcomm was basically saying, 'Well, we can address the total cost by doing things that will make it effectively less expensive.'

Blumberg Depo. 218:1-10.

During the negotiations, Lenovo worried about chip supply. On November 22, 2013, Ira Blumberg (Lenovo Vice President of Intellectual Property) wrote to other Lenovo executives that even **[**140]** though Lenovo's strongest leverage in negotiations was to terminate the patent license, doing so could threaten Lenovo's chip supply from both Qualcomm and MediaTek: "Qualcomm has threatened to stop selling its chips to Lenovo if Lenovo terminates its license. Further, Qualcomm has threatened to force its chip licensees (including MediaTek) to stop selling mobile phone chips to Lenovo if Lenovo terminates its license." CX2079-004. As discussed below in the section on Qualcomm's refusal to license rivals, Qualcomm and MediaTek had entered an agreement that restricted MediaTek to selling modem chips only to Qualcomm licensees.

In later emails, Blumberg doubled down on the existential threat posed by a loss of chip supply: "[W]hat would Lenovo do if Qualcomm and/or Mediatek experienced a natural disaster that prevented it from delivering chips for 3† months? The legal situation Lenovo is facing is quite similar as there is risk that Lenovo could lose its supply of chips for a substantial period of time." CX2079-002. However, in December 20, 2013, Yang Chu (Lenovo) confirmed in an email to Blumberg that MediaTek "committed to ensure the supply for Lenovo even if we did not sign off the **[**141]** contract with Qualcomm." CX2079-001. Ultimately, **[*719]** Lenovo did not accept Qualcomm's chip incentive offer. Blumberg Depo. 180:9-14.

c. <u>2015 Chip Supply Threats</u>

China's National Development and Reform Commission ("NDRC"), the government antitrust agency, investigated Qualcomm's patent licensing practices and instituted a rectification plan that altered the terms for Qualcomm's China patent licenses. After the NDRC rectification plan, Qualcomm and Lenovo entered a negotiation regarding Lenovo's China patent license. In a December 16, 2015 email forwarded by Sanjay Vanjani (Lenovo Chief Financial Officer), Scott Offer (Lenovo) reported that Eric Reifschneider (QTL Senior Vice President and General Manager) had again threatened Lenovo's chip supply: "Ira [Blumberg] made a proposal which Eric did not reject out of hand. On that call, Eric once more made another threat about continued chip supply if we do not have a license. Action: David/Heather to research what the NDRC rectification plan says about continued supply." CX2093-002. Two months after Reifschneider's threat, on February 17, 2016, Qualcomm and Lenovo entered a Chinese Patent License Agreement. QX9266-391.

In sum, Qualcomm has engaged **[**142]** in anticompetitive conduct toward Lenovo by threatening to cut off Lenovo's chip supply; threatening that even Qualcomm's rival MediaTek cannot sell chips to Lenovo if Lenovo becomes unlicensed with Qualcomm; demanding unreasonably high royalty rates without providing technical or legal information about Qualcomm's patents; and offering chip incentive funds if Lenovo committed to purchasing 30-50 million Qualcomm chips.

7. BlackBerry

Qualcomm engaged in anticompetitive conduct toward BlackBerry by requiring BlackBerry to sign a patent license agreement before assuring BlackBerry's supply of modem chips and by providing BlackBerry chip incentive funds that effectively required BlackBerry to purchase Qualcomm modem chips exclusively.

John Grubbs (BlackBerry Senior Director of Intellectual Property Transactions) testified that Qualcomm's requirement of a license in order to buy chips is unique in the industry:

> **Q**: Do any other suppliers of BlackBerry require BlackBerry to acquire a patent license in order to purchase components from that supplier?
>
> **A**: No, not to my knowledge.
>
> **Q**: Do any of BlackBerry's suppliers own standard essential patents that breed [sic] on the products that they are selling **[**143]** to BlackBerry?
>
> **A**: Historically when we were producing devices, yes, there were some of our suppliers that owned standard essential patents and — and we did not have a patent license agreement in place with those suppliers.

Grubbs Depo. 268:15-269:5.

On March 22, 2000, Qualcomm entered a patent license agreement with Research In Motion Limited ("RIM"), a corporate predecessor of BlackBerry, effective March 22, 2000. ECF No. 1326 at 4-5. On March 21, 2001, Qualcomm entered a patent license agreement amendment with RIM, effective March 21, 2001 ("2001 SULA"). ECF No. 1326 at 5.

a. <u>2010-2011 Chip Supply Leverage</u>

BlackBerry and Qualcomm further amended the March 22, 2000 SULA in an agreement entered on January 26, 2011, with a retroactive effective date of October 1, 2010 ("2010 SULA"). ECF No. 1326 at 5; JX0094-002.

[*720] John Grubbs (BlackBerry Senior Director of Intellectual Property Transactions), who was involved in negotiations with Qualcomm, testified that Qualcomm required BlackBerry to sign a patent license before Qualcomm would sell BlackBerry premium LTE modem chips: "[A]t that point we had no license for LTE, and from what — from what I recall, we were told that we had to get a license **[**144]** before they would supply us with LTE chipsets." Grubbs Depo. 225:9-13.

Grubbs testified that in 2010, BlackBerry and Qualcomm were engaged in a dispute over the existing 2001 SULA: "[T]here was a dispute between BlackBerry and Qualcomm over . . . the scope of whether the [2001] license agreement covered UMTS-only devices." *Id.* at 231:14-16. UMTS is a 3G standard. ECF No. 1326 at 3. As a result, Grubbs testified that BlackBerry was very concerned that Qualcomm could withhold BlackBerry's chips during the dispute:

> BlackBerry was very concerned that Qualcomm — if BlackBerry pushed that issue too far, that Qualcomm could just shut down supply and walk off, and BlackBerry had no contractual provisions or contractual agreements that would allow them to stop — to not do that or — or to where we could go sue for damages.

Grubbs Depo. 231:17-25. BlackBerry sought a component supply agreement to ensure supply, which Qualcomm conditioned on resolving the SULA, per a June 2010 email Derek Aberle (QTL President) wrote to Larry Conlee (BlackBerry): "As part of this overall deal, we will need to resolve our current disagreement regarding the SULA." CX3264-001.

The supply agreement bolstered Qualcomm's **[**145]** no license, no chips practice, though. Qualcomm could terminate the supply agreement if BlackBerry defaulted on its patent license agreement: "QUALCOMM shall have the right to terminate this Agreement and/or to cancel or hold any and/or all orders placed by Buyer . . . if . . . Buyer is in default under the License Agreement." JX0093-121.

Under the 2010 SULA, BlackBerry paid Qualcomm a [TEXT REDACTED BY THE COURT] advance fee and a [TEXT REDACTED BY THE COURT] per handset royalty payment on each CDMA or WCDMA handset BlackBerry sold. JX0094-019, -027.

John Grubbs (BlackBerry Senior Director of Intellectual Property Transactions) testified that the royalty rates BlackBerry paid Qualcomm were "significantly higher than any other SEP rate [BlackBerry] paid to anybody else in the industry." Grubbs Depo. 236:5-7. However, Grubbs testified that BlackBerry felt unable to challenge Qualcomm's royalty rate without an assurance of chip supply: "I mean, at that point we had no license for LTE, and from what — from what I recall, we were told that we had to get a license before they would supply us with LTE chipsets." Grubbs Depo. 225:9-13.

Grubbs testified that he did not believe Qualcomm's 5% royalty **[**146]** rate was FRAND because many of Qualcomm's CDMA patents had expired: "So at some point you get to the point where an entity is paying 5 percent for the CDMA patents when there may not be but just a handful of CDMA patents left. So that — in that respect, it — it becomes a not — it violates FRAND." Grubbs Depo. 235:10-15.

Grubbs also testified that BlackBerry considers the value of any patent cross-license from the licensee when setting royalty rates: "All I can say is based on what BlackBerry has done, and I know that we would take into account the value of any cross-license coming back — if there was any significant value there — before we **[*721]** would price our license." Grubbs Depo. 94:23-95:2.

However, because BlackBerry needed Qualcomm's CDMA and premium LTE modem chips, BlackBerry was unable to challenge Qualcomm's royalty rates, according to Grubbs: "[I]f BlackBerry tried to assert that the license terms were not FRAND, then that — I mean, that's been our concern, that we can't do that because of the supply issue." *Id.* at 240:25-241:3. When asked if BlackBerry had alternative suppliers for CDMA modem chips, Grubbs testified that there were "[n]ot viable alternatives, no." *Id.* at 213:23-214:8. **[**147]** Thus, if Qualcomm shut off

BlackBerry's CDMA chip supply, Grubbs testified that "30 percent of our device sales would have gone away overnight if we couldn't have supplied CDMA devices." *Id.* at 239:11-14.

BlackBerry was also concerned that Qualcomm could cut off engineering support, which would functionally cut off chip supply: "[I]f we were getting aggressive in terms of the license side, [then] Qualcomm could alter their engineering support services to us, which would have the net effect, or very close to it, of stopping our supply of chipsets." *Id.* at 240:7-20.

b. <u>2010-2011 Chip Incentive Funds</u>

Qualcomm also gave BlackBerry [TEXT REDACTED BY THE COURT] million in chip incentive funds to induce BlackBerry to sign the 2010 SULA. John Grubbs (BlackBerry Senior Director of Intellectual Property Transactions) agreed that the "strategic incentive[s] . . . were contingent on BlackBerry resolving its royalty dispute with Qualcomm." Grubbs Depo. 248:9-15.

The chip incentives effectively required BlackBerry to buy modem chips exclusively from Qualcomm. Derek Aberle's (QTL President) June 2010 proposal stated that BlackBerry could receive the chip incentives only if BlackBerry purchased a majority **[**148]** of its modem chips from Qualcomm: "Savings predicated on achieving 50% of RIM UMTS volume by Q4'11." CX3264-005. BlackBerry received the incentives as rebates on Qualcomm modem chips, according to Grubbs' contemporaneous notes: "Incentive amount is: $1.75 per chip for the 7500A and 7600 chips [and] $2.75 per chip for the 7630 and 8655 chips." CX3255-002.

Thus, John Grubbs testified that because the chip incentives accrued only on purchases of Qualcomm chips and did not reduce BlackBerry's actual royalty burden, the chip incentives reduced the total cost of Qualcomm chips but not of Qualcomm's rivals' chips:

> BlackBerry is going to pay the royalty, regardless of whether it buys the chip from Qualcomm or Marvell. If — if Qualcomm agreed to reduce the royalty, then BlackBerry could buy the chips from Qualcomm or Marvell and still get the benefit of that reduced price. If Qualcomm reduces the chip cost, then we can only go to one person in order to take advantage of that and that's Qualcomm. So we can't go to Marvell and take advantage of a reduction in chip price unless they're going to get this reduction too.

Grubbs Depo. 259:13-25. Grubbs testified that the chip incentives reduced BlackBerry's **[**149]** effective royalty rate on Qualcomm chips to 4.37%. *Id.* at 259:6-11.

Grubbs testified that these chip incentives contributed to BlackBerry shifting its modem chip purchases from Marvell to Qualcomm:

> [Marvell] apparently — or from what I — what I understand were about two years behind on LTE development. And in addition, we — we also switched to Qualcomm because of a — or at least one of them — the factors that didn't — didn't hurt was the fact that we had a large **[*722]** incentive to divert our UMTS business to Qualcomm.

Id. at 111:1-7.

In sum, Qualcomm engaged in anticompetitive conduct toward BlackBerry by conditioning chip supply assurances on BlackBerry signing a Qualcomm patent license agreement and by paying BlackBerry chip incentive funds that functionally required BlackBerry to buy Qualcomm modem chips, to the exclusion of rivals' modem chips.

8. Curitel

Qualcomm engaged in anticompetitive conduct toward the OEM Curitel by cutting off Curitel's chip supply.

In 2001, during patent license negotiations with Curitel, Marv Blecker (QTL Senior Vice President) recommended in an email to Steve Altman (Qualcomm lawyer and later Qualcomm President) and Derek Aberle (Qualcomm lawyer and later Qualcomm **[**150]** President) that Qualcomm threaten Curitel's chip supply to end license negotiations: "I think we need to explicitly threaten to (and actually) cut off ASIC shipments if they do not accept our final proposal (this is our final proposal); after all, they are not licensed and we have moved considerably from our initial position." CX8286-001. Twenty minutes later, Jim Lederer (later QCT Executive Vice President and General Manager) replied that QCT had cut off supply: "We have stopped shipments until resolution of these terms . . . ." CX8286-001.

In January 2002, Marv Blecker told Curitel officials in an email, on which Derek Aberle (Qualcomm lawyer and later Qualcomm President) was copied, that QTL was cutting off Curitel's chip supply:

> I am asking our QCT Division to hold all sales and shipments of CDMA ASICs to Curitel until this agreement is executed because QUALCOMM does not sell CDMA ASICs to non-licensees. We have been working on this agreement for many months and it seems to me that it is well past time to bring this matter to conclusion.

CX6469-001.

9. BenQ

Qualcomm engaged in anticompetitive conduct by threatening to cut off the OEM BenQ's chip supply after BenQ challenged Qualcomm's **[**151]** use of the handset as a royalty base.

In an October 5, 2004 email, Kim Huang (BenQ) stated in an email to Marv Blecker (QTL Senior Vice President) and Derek Aberle (Qualcomm lawyer and later Qualcomm President) that Qualcomm's use of the handset as the royalty base was "an out-of-date concept." CX8281-002. Huang argued that Qualcomm's intellectual property is for communication, and Qualcomm does not own intellectual property on color TFT LCD panel, mega-pixel DSC module, user storage memory, decoration, and mechanical parts. The costs of these non-communication-related components have become more expensive and now contribute 60-70% of the phone value. The phone is not just for communication, but also for computing, movie-playing, video-taking, and data storage. Huang stated specifically:

> Qualcomm owns IPR [intellectual property rights] on 'Communication' related components of a mobile phone; we appreciate and respect that. But you don't own IPR on most of the other key components. For example, color TFT LCD panel, mega-pixel DSC module, user storage memory, decoration mechanical parts and etc. These non-communications-related components have become more and more important and the cost **[**152]** of them became higher and higher-probably contribute more than 60%-70% of a **[*723]** whole phoneset. Please note that, a phone in the future is not for communication only, but may be used for computing, movie playing, video taking, mega-picture taking, data storage and etc. Just like a notebook computer. Do you charge the whole notebook computer when a manufacturer build-in a CDMA modem in their notebooks?

CX8281-002. Huang's email provoked a backlash from Qualcomm.

Jeff Jacobs (Qualcomm)[7] forwarded Huang's email on October 6, 2004 and wrote: "Certainly send waves around the industry if they lose their license as they have made a visible commitment to CDMA and WCDMA." CX8281-001. Tony Thornley (Qualcomm) replied that Qualcomm may need to threaten BenQ's chip supply: "A situation we should work hard to fix rather than terminate. However, the threat may be what is needed." *Id.* The same day, only one day after Huang's email, Steve Altman (Qualcomm lawyer and later Qualcomm President) affirmed in an email sent to Paul Jacobs (later Qualcomm CEO) that Qualcomm had already threatened BenQ's chip supply: "We have made the threat. Hopefully, they will respond positively." *Id.*

Two months later, on January **[**153]** 6, 2005, BenQ and Qualcomm signed a new patent license agreement. JX0030. Under the license agreement, BenQ owed Qualcomm's standard 5% running royalty rate, with the handset as royalty base. *See* JX0030-007 (defining the royalty base as "the Selling Price charged by LICENSEE for Subscriber Units Sold to such Purchaser." JX0030-007 to -008. Thus, BenQ responded "positively" to Qualcomm's chip supply threat. Accordingly, Qualcomm engaged in anticompetitive conduct by threatening to cut off BenQ's chip supply after BenQ challenged Qualcomm's use of the handset as a royalty base.

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[7] Where the Court is not aware of a Qualcomm employee's job title, the Court identifies the individual's role solely as "Qualcomm."

10. Apple

Qualcomm engaged in anticompetitive conduct with respect to Apple by (1) refusing to sell Apple modem chips or even share sample chips until Apple signed a patent license; (2) eliminating a competing cellular standard that Intel was supporting; (3) attempting to require Apple to cross-license its entire patent portfolio to Qualcomm; and (4) using Qualcomm's monopoly power to enter exclusive deals with Apple that foreclosed Qualcomm's rivals from selling modem chips to Apple from 2011 to September 2016.

a. Qualcomm Refused to Sell Apple Modem Chips Until Apple Signed a Patent License

Tony Blevins (Apple Vice **[**154]** President of Procurement) testified that Apple shipped its first handset, the iPhone, in January 2007. Tr. at 669:19-21. Blevins testified that two years before that launch, in 2005, Apple reached out to potential modem chip suppliers, including Qualcomm. *Id.* at 674:16-20. Blevins testified that Qualcomm informed Apple of Qualcomm's practices of not selling modem chips exhaustively and requiring OEMs to sign a license before purchasing modem chips: "[I]nstead of offering us samples and specifications, we got a letter indicating that they had a licensing agreement that had to be completed prior to them shipping us any samples or having any engagement." *Id.* at 675:14-17. That letter, which Jeff Altman (QTL Business Development) sent to Apple's Barry Corlett, stated, "Once this patent license has been completed, licensee would then have the rights to purchase chips, software, reference designs from our ASIC group (called QCT) or one of our **[*724]** other ASIC licensed suppliers." JX0032-001.

Tony Blevins (Apple Vice President of Procurement) testified that Qualcomm's practices were unique in multiple respects. First, that Apple could not even obtain samples without a Qualcomm patent license: "I'd **[**155]** spent 20 years in the industry, I had never seen a letter like this. It was going to take me some time to evaluate, but it looked like there was a requirement for an agreement before we got samples." Tr. at 676:4-7.

Second, that Qualcomm required Apple to cross-license its patents to Qualcomm: "[W]e later learned that license also required Apple to cross-license its IP back to Qualcomm, which we found unsettling. . . . This is the only one that I've ever personally seen." *Id.* at 676:25-677:2, 678:7-10. As a result, Tony Blevins testified, Apple elected not to buy chips from Qualcomm that year: "But we knew that we weren't going to cross-license all of our IP back to Qualcomm. We were simply trying to buy a chip. So at this point we essentially eliminated Qualcomm from further consideration." *Id.* at 677:6-10.

Tony Blevins (Apple Vice President of Procurement) testified that as a procurement executive, he was not usually involved in intellectual property discussions, but that negotiations with Qualcomm always entangled patent licensing and chip supply: "I'm generally not involved in separate and distinct intellectual property licensing discussions. We have a separate team at Apple that **[**156]** does that. However, in this case, these two issues, they were just hopelessly entangled." *Id.* at 704:3-7.

In 2006, Qualcomm reiterated its practice of requiring an OEM to sign a patent license before purchasing modem chips when Qualcomm responded to Apple's request for quotation to supply modem chips for a future Apple handset. In Qualcomm's response, which Tony Blevins (Apple Vice President of Procurement) received, Mark Savoy (QCT Director of Sales) attached a draft patent license agreement: "Attached are documents referenced in the RFQ regarding QUALCOMM's Subscriber User License Agreement (SULA) as well as a letter discussing our position on third party IPR rights." CX0507-001. According to Blevins, Apple viewed the response as a reiteration of Qualcomm's earlier approach: "So once again, they were reiterating that you have to sign this license agreement if you want to buy chips." Tr. at 679:18-20.

b. 2007 Marketing Incentive Agreement

Apple and Qualcomm eventually reached an indirect patent license agreement, which they memorialized in the Marketing Incentive Agreement, effective as of January 8, 2007 ("MIA"). ECF No. 1326 at 4. Of special note, Qualcomm used its monopoly power against **[**157]** Apple to eliminate WiMax, a competing cellular standard supported by Intel.

The MIA lowered Apple's royalty payments to Qualcomm through a rebate structure. Apple does not manufacture handsets itself but instead uses contract manufacturers, including Pegatron and Wistron, to manufacture handsets. ECF No. 1326 at 4. These contract manufacturers pay Qualcomm a 5% running royalty rate on the manufacturers' handset selling price. JX0042-014 to -015 (Wistron SULA). Then, according to Jeff Williams (Apple COO), Apple reimburses the contract manufacturers: "Qualcomm had a standard agreement with contract manufacturers and the contract manufacturers paid Qualcomm, and we reimburse the contract manufacturers." Tr. at 868:5-7. In the MIA, Qualcomm agreed to provide Apple royalty rebates on each handset to reduce Apple's royalty payments: "For each Apple **[*725]** Phone purchased by Apple or an Apple Authorized Purchaser during the Term, Qualcomm agrees to pay a Marketing Incentive (defined below) to Apple." JX0040-002. According to Jeff Williams, the MIA rebated Apple's royalty payments to a total of $7.50 per handset. Tr. at 870:17-18.

Apple had contested Qualcomm's royalty terms during the negotiations **[**158]** leading to the MIA. According to Jeff Williams (Apple COO), Apple did not view a handset as an appropriate royalty base for Qualcomm's cellular patents because Apple added handset value that had little to do with Qualcomm's patents. For example, Apple was the first to embed NAND memory, a type of flash memory. If Apple spent $100 on cost for NAND memory, Apple had to pay $5 to Qualcomm even though Qualcomm's intellectual property had nothing to do with NAND memory:

> We were bringing some innovation. And, for example, we were one of the first and led the charge to embed a lot of NAND memory. We did this on our iPods, and we were going to do it on our iPhones, and if we put another $100 of cost in NAND memory, per the Qualcomm agreement, they would get $5 of that even though their IP had nothing to do with that.

Tr. at 869:18-24. Accordingly, Williams testified that Apple had originally proposed a 5% royalty rate on the modem chip price, which amounted to $1.50 per modem chip: "[W]e originally proposed $1.50. We flew down to San Diego and proposed that. That was rejected." *Id.* at 870:22-24. Although Jeff Williams (Apple COO) testified that Apple viewed the $7.50 per handset royalty payment **[**159]** the companies settled on as excessive, Apple had no alternative: "If we didn't agree, then we would be paying the contract manufacturer rate, which was in the high teens; or if we somehow challenged it, we stood the risk of our brand new iPhone we were working on getting enjoined." *Id.* at 871:8-12.

From Qualcomm's perspective, giving Apple royalty rate rebates was justified because Qualcomm used the MIA to eliminate WiMax, a competing cellular standard supported by Intel. In the MIA, Apple committed to "publicly announce that Apple has chosen GSM technology for its phone and that GSM provides the best global solution for its customers today and into the future with 3G and beyond." JX0040-001. Qualcomm enforced the WiMax provision with a clause that provided the MIA (and thus Apple's rebates) would terminate if (1) Apple sold 1,000 or more WiMax iPhones; or (2) Apple licensed a third party to sell WiMax phones. JX0040-003.

According to Jeff Williams (Apple COO), Apple's MIA with Qualcomm ended Apple's engagement with Intel's WiMax standard:

> **Q**: And following the execution of that agreement, did Apple pursue WiMax further?
>
> **A**: No. In essence, it was killed in the cradle for us. We did not. **[**160]**

Tr. at 873:21-23.

Internally and in discussions with Apple, Qualcomm viewed Apple's commitment to GSM over WiMax as a crucial strategic win. In December 2006, Marv Blecker (QTL President) sent an email regarding the MIA negotiations, and Steve Altman (Qualcomm President) added his notes in a follow-up email. CX8260-001. Paul Jacobs (Qualcomm CEO) and Derek Aberle (Qualcomm General Manager of Licensing) received the email. *Id.* Blecker's email listed "key aspects" of the Apple deal, including "Apple Public commitment to WCDMA vs. WiMax for their next gen products." CX8260-002. Steve Altman responded, "We are most interested in their making it clear **[*726]** that they have no plans for supporting WiMax." *Id.*

Later, in January 2007, prior to the execution of the MIA, Marv Blecker (QTL President) emailed Jeff Williams (Apple COO) and told Williams that Qualcomm's first priority was eliminating WiMax: "However, we believe that the entire basis of this deal is that Apple is going to select either WCDMA [a GSM technology] or WiMax, not both. Motivating Apple to select WCDMA to the exclusion of WiMax is our primary motivation for entering into this agreement." CX0617-001.

Irwin Jacobs (Qualcomm Co-Founder **[**161]** and former Qualcomm CEO) testified that Qualcomm would have been behind in supplying WiMax chips had WiMax become the 3G standard:

> **Q**: It's accurate to state, sir, that if WiMax had ended up as the standard, Qualcomm would have been far behind; is that right?
>
> **A**: That's fine.

Tr. at 1284:10-13.

Thus, via the MIA, Qualcomm used the threat of chip supply and its high royalty rate to eliminate WiMax not because WCDMA was a superior technology, but because Qualcomm's rival was supporting WiMax and Qualcomm was not.

In other contexts, too, Qualcomm has recognized that its chip supply leverage enhances Qualcomm's position in standards bodies. In an April 2015 email, David Wise (now Qualcomm Senior Vice President and Treasurer) told Steve Mollenkopf (Qualcomm CEO) that QCT gives Qualcomm a strong berth in SSOs, but "[i]f separate, QTL may be isolated and ineffective at getting tech into the std. No QCT distribution." CX5913-001. The MIA is one specific example of Qualcomm using chip leverage to have its standard adopted in the first place.

c. <u>2009 Strategic Terms Agreement</u>

Qualcomm later exercised its CDMA monopoly power to charge Apple a CDMA price premium. Tony Blevins (Apple Vice President of Procurement) **[**162]** testified that in 2009, Apple was planning to launch a 2011 CDMA iPhone worldwide. Tr. at 672:9-16. According to Jeff Williams (Apple COO), Qualcomm was Apple's only viable option to supply modem chips for the 2011 CDMA iPhone: "We also looked — there was also a small company in Taiwan, VIA, that we looked at, but concluded they weren't technically ready or capable. So just Qualcomm." Tr. at 874:21-23. On December 18, 2009, QCTAP (QCT's Asia Pacific arm) and Apple entered the Strategic Terms Agreement ("STA"), a CDMA chip supply agreement. JX0052-001.

Tony Blevins testified that the STA terms differed significantly from Apple's other component supply agreements, in that Qualcomm refused to sell modem chips exhaustively and refused to provide indemnification: "They're not what we typically want. Examples I can give you is we want to buy parts exhaustively; the agreement doesn't provide for that. We want indemnification; the agreement doesn't provide for that." Tr. at 686:21-24.

Qualcomm made it clear to Apple that Qualcomm's practice of refusing to sell modem chips exhaustively was unique within Qualcomm, and is limited to the modem chip markets where Qualcomm has monopoly power. A Qualcomm **[**163]** slide deck presented to Tony Blevins (Apple Vice President of Procurement) includes a slide titled "Authorized Purchaser," which sets forth Qualcomm's licensing requirements. CX8261-004. Under "WAN," which means cellular modem chips, the slide states: "Must be a licensee in good standing." *Id.* However, under non WAN, which Blevins testified means all other components, like Wi-Fi, the slide states: "No separate license" **[*727]** and "Sold on an exhaustive basis." *Id.* Thus, Qualcomm does not require OEMs to sign a separate license before purchasing other products and sells products exhaustively in markets where Qualcomm lacks monopoly power, as Tony Blevins testified: "And so they were essentially saying that for these types of products where there was [sic] competitive alternatives, they would match what other competitors would provide." Tr. at 688:2-5.

Similarly, when asked at trial whether "device manufacturers purchasing Wi-Fi components from Qualcomm have to first take a license to Qualcomm's Wi-Fi standard essential patents," Fabian Gonell (QTL Legal Counsel and Senior Vice President, Licensing Strategy) testified "No." Tr. at 1483:18-21. Thus, Qualcomm's practice of only selling modem chips **[**164]** to an OEM after the OEM signs a separate license agreement is unique even within Qualcomm.

During STA negotiations, Qualcomm knew that Qualcomm's monopoly position in CDMA modem chips gave Qualcomm leverage over Apple. For example, during 2009 internal Qualcomm discussions regarding how to price CDMA modem chips for Apple, Eric Koliander (QCT Vice President, Sales) wrote to Cristiano Amon (now Qualcomm President): "Truthfully, we should take a harder line with these issues for CDMA since their options are limited." CX6839-002. Cristiano Amon replied, "Can't imagine Via would be an option." CX6839-002.

Qualcomm proposed to charge Apple a $5 price premium on CDMA modem chips, according to an August 2009 email Koliander sent to Amon and other QCT officials recapping a Qualcomm meeting: "[A]ll are in agreement that we would like to see a CDMA price premium over UMTS quoted price." CX6840-001. Koliander observed later in the email that although Apple may respond negatively to the CDMA adder, Apple did not have other short-term supply options: "May motivate Maverick to light up a CDMA competitor (unlikely given time constraints)." CX6840-002. Maverick is Qualcomm's internal code name for Apple. **[**165]** ECF No. 1326 at 10.

d. 2011 Transition Agreement

Qualcomm entered its first exclusive deal with Apple in 2011. In February 2011, Apple, Qualcomm, and QCTAP entered into a Transition Agreement ("TA"), effective as of February 11, 2011, under which Qualcomm paid Apple funds for Apple to transition its chip business to Qualcomm. ECF No. 1326 at 4.

The TA came about in part because Apple wanted to use Qualcomm modem chips as Apple began developing premium LTE handsets and because Apple wanted additional royalty rate rebates from Qualcomm. Jeff Williams (Apple COO) testified that Qualcomm would not apply the MIA rebate to Apple's CDMA handsets: "[W]e discovered that the $7.50 royalty agreement that we had reached was not going to apply to CDMA phones or iPads, and this really upset us." Tr. at 875:2-4. In addition, Williams testified that Apple needed Qualcomm's CDMA and premium LTE modem chips: "We needed their CDMA and LTE technology. We were interested in working with them. They had good engineering leadership in that space, and we asked for transition funds associated with moving business to them." *Id.* at 875:17-19.

According to an August 2010 email from Paul Jacobs (Qualcomm CEO) to Tim **[**166]** Cook (now Apple CEO), Qualcomm would only provide Apple additional royalty rate rebates if Apple committed to purchasing Qualcomm's chips: "We did discuss potentially providing Apple with a rebate on larger screen devices like the iPad, but as part of a larger business relationship between **[*728]** the companies, including Apple's use of Qualcomm chips in its iPhones and devices like the iPad." CX0599-001.

Later in the TA negotiations, Steve Mollenkopf (QCT President) emphasized to Jeff Williams (Apple COO) that Qualcomm would only provide Apple royalty rate rebates if Apple agreed to use Qualcomm chips exclusively: "[W]e are unwilling to have the marketing agreement apply to CDMA iPhones as part of this deal but we are willing to provide a separate, significant sum of money as part of the chip deal. The structure and $1B (a huge number from our perspective) below is the entirety of our proposal." CX5363-017.

Internal Qualcomm documents from 2010, during the TA negotiations, show that Qualcomm was focused on using Apple's desire for royalty rate rebates to secure exclusivity.

A June 2010 Qualcomm modem strategic plan, which Steve Mollenkopf (QCT President) received, listed "Competition is laser **[**167]** focused on thin modem with significant cost advantage based on scalable architectures" among threats to Qualcomm's modem business. CX6381-008. Mollenkopf agreed at trial that Apple purchases only thin modems. Tr. at 773:13-15.

Thus, in an August 2010 email, Steve Mollenkopf (QCT President) told Paul Jacobs (Qualcomm CEO), Derek Aberle (QTL President), and Steve Altman (Qualcomm President) that if Qualcomm secured Apple exclusivity in the TA, Qualcomm could prevent those thin modem competitors from becoming threats: "[T]here are significant strategic benefits as it is unlikely that there will be enough standalone modem volume to sustain a viable competitor without that slot." CX5348-001. Slot and socket are terms for a modem chip design win for a handset. Tr. at 775:8-10.

Later in the TA negotiations, in November 2010, Steve Mollenkopf (QCT President) received an email from Marc McCloskey (Qualcomm) that highlighted the competitive downside of Apple choosing a different modem chip supplier: "[I]f Maverick went to a competitor and made them more competitive in the market like IFX & Samsung, then what is the impact of losing share going forward?" CX5357-001. Maverick is Qualcomm's code **[**168]** name for Apple, and IFX refers to Infineon. ECF No. 1326 at 9. In December 2010, as TA negotiations neared their end, Steve Mollenkopf (QCT President) again emphasized in an email to Derek Aberle (QTL President) and Steve Altman (Qualcomm President) that Qualcomm was focused on exclusivity: "Need payment and earn-out mechanism that aligns with goal of design-ins and exclusivity." CX5360-003.

Steve Mollenkopf (QCT President) elaborated in another December 2010 email to Cristiano Amon (now Qualcomm President) and other Qualcomm executives that Qualcomm needed to secure exclusivity in future Apple handset models: "The conclusion is that we want this account but the deal needs to tie any incentives to Mav3 and Mav5 as these are the key units with Mav5 being the more important one." JX0055-006.

The TA provided Qualcomm that exclusivity. Qualcomm committed to pay Apple up to $1 billion via a Transition Fund, Marketing and Development Fund ("MDF"), and Variable Incentive Fund ("VIF") from 2011 to 2015. JX0057-001 to -002.

Qualcomm's payments to Apple were subject to some conditions and volume requirements. If Apple did not launch a handset with a Qualcomm UMTS modem chip by March 2012, Apple **[**169]** would forfeit all Transition Fund payments. JX0057-002. UMTS is an umbrella term for the 3G **[*729]** WCDMA standard, which is distinct from CDMA. ECF No. 1326 at 3. If Apple did not launch a UMTS handset by the end of 2012, Apple would have to pay back more than one hundred million in MDF payments. JX0057-002.

Apple's receipt of the hundreds of millions of VIF funds also depended on the volume of chips Apple purchased from Qualcomm. JX0057-002. If Apple purchased more than 115 million Qualcomm modem chips from October 1, 2011 to September 30, 2012, Apple received the full amount of VIF funds for that year. JX0057-002. If Apple purchased fewer than 80 million Qualcomm modem chips in that period, Apple received no money. JX0057-003. In future years, Apple needed to increase purchase volumes to 125 million annual units and then to 150 million units to receive the full amount of VIF funds for that year. JX0057-003.

Further, Tony Blevins (Apple Vice President of Procurement) testified that these payments, which effectively reduced Apple's royalty obligations, were contingent on modem chip exclusivity: "However, and importantly, there would be large rebates associated with the nominal royalty payments **[**170]** if we were to use Qualcomm chips exclusively." Tr. at 689:7-9.

Of particular import in the TA are its termination and clawback provisions, which ensure exclusivity. The TA would automatically terminate if Apple sold any "Apple product commercially that incorporates a non-Qualcomm cellular baseband modem." JX0057-004. Thus, if Apple used any non-Qualcomm modem chip in an Apple handset, Apple would forfeit future TA payments. The clawback provision imposed even greater penalties. Under that provision, "if during calendar year 2013 Apple [sold] an Apple product commercially that incorporates a non-Qualcomm cellular baseband modem," Apple would have to pay back Qualcomm hundreds of millions in funds already received under the TA. JX0057-004.

According to Tony Blevins (Apple Vice President of Procurement), the TA's termination and clawback provisions were effectively exclusivity provisions: "They made it very unattractive for us to choose a different chipset supplier. . . . So when we factor in the rebates that we would forfeit by using a different chip supplier, it served as a very strong disincentive for us to do so." Tr. at 689:18-23.

Qualcomm ensured that those exclusivity provisions remained **[**171]** in the TA. In a January 24, 2011 email attaching a proposed agreement, just weeks before the TA was executed, Steve Mollenkopf (QCT President) informed Jeff Williams (Apple COO) that Qualcomm had reinserted certain provisions: "Lastly, we added back in the language on general design commitments (see our page7) that fell out of this draft. They were in the earlier ones and are important to us." CX0526-002 to -003. Page 7 of the Qualcomm proposal includes the termination and clawback provisions in redline, which shows that Qualcomm reinserted those provisions:

> • If Maverick launches any device, with a non QC modem (regardless of technology), Maverick shall notify QC, and QC will no longer be obligated to make any future payments that otherwise would be required
>
> • Maverick will reimburse Qualcomm all amounts paid, without interest, if before December 31, 2013 Maverick has commercially sold a single or multimode LTE product that incorporates a non QC modem

CX0526-014.

A March 1, 2011 Qualcomm accounting memo discussing the TA shows that Qualcomm viewed the TA as securing exclusivity: **[*730]** "The primary benefits of the Transition Fund to Qualcomm are the volume requirements as well as the exclusivity **[**172]** provision described above." CX5425-004. In sum, the TA ensured that Apple would source its modem chips exclusively from Qualcomm through at least 2013, and prevented rivals from selling any modem chips to Apple during that time period.

e. <u>2013 First Amendment to Transition Agreement</u>

In 2013, Qualcomm again gave Apple royalty rate rebates in exchange for Apple's effective commitment to purchase modem chips exclusively from Qualcomm. Although Apple had planned to purchase modem chips from Qualcomm's rival Intel, Qualcomm's 2013 exclusive deal foreclosed Intel (and Qualcomm's other rivals) from working with Apple until September 2016. The Court discusses below the genesis of the 2013 agreement, its exclusivity provisions, and how Qualcomm used exclusivity to end Apple's engagement with Intel.

According to Jeff Williams (Apple COO), the MIA—which rebated Apple's royalty payments to $7.50 per handset—was set to expire at the end of 2012, and Apple wanted to secure continued royalty rate rebates to avoid hundreds of millions in additional royalty payments:

> [W]hat we were starting at is at the end of 2012, our $7.50 arrangement with Qualcomm was coming to an end and the default was that our royalty rate was **[**173]** going to go up to the high teens because it was just going to flow through this, this crazy contract manufacturing arrangement. And so on top of the chips we're buying, on top of the $7.50 we're already paying, there was going to be another $8 or $10, we were selling a hundred million phones, it would be another billion dollars a year in royalty for, for no extra value from Qualcomm.

Tr. at 885:23-886:7.

Qualcomm documents make clear that with the MIA set to expire, Qualcomm's goal was to secure continued modem chip exclusivity from Apple. Cristiano Amon (QCT Co-President) recommended in a December 2012 email to Steve Mollenkopf (Qualcomm President) that QCT reduce its modem chip prices to secure exclusivity: "The above means that we reduce our ASP [average selling price] premium to buy exclusivity as done in the original deal." CX8276-001.

Specifically, Qualcomm sought continued exclusivity to prevent Apple from working with Intel, a rival modem chip supplier. Apple was in contact with multiple modem chip suppliers in 2011 and 2012, but only Intel proved to be a viable Qualcomm alternative.

At trial, Matthias Sauer (Apple Engineer) said that Apple discontinued working with ST Ericsson **[**174]** in March 2012 because ST Ericsson could not meet Apple's schedules: "As it turned out in the course of the project, it turned out that they were slipping in their execution." Tr. at 1505:9-10. In a March 2012 email to Matthias Sauer, Steve Schell (Apple) offered a more vivid description of ST Ericsson's problems: "They can neither execute nor manage their way out of a paper bag." QX1353-223. Sauer testified that Apple also disengaged with Broadcom in 2012 in part because Broadcom was behind schedule in developing an LTE modem for Apple's 2014 handsets. Tr. at 1510:18-24.

However, Intel proved viable. In October 2012, Apple internally stated its intent to buy modem chips from Intel for a 2014 iPad. An email with the subject line "IMC Status/Next Steps Alignment — Notes" memorializes an Apple modem chip supply meeting. JX0074-001. IMC refers to Intel. **[*731]** Tr. at 691:18-20. The email stated, "Discussed other chipset options including ST Ericsson, Broadcom, Renesas, Mediatek and Marvell, but IMC is the only other Tier 1 option. . . . All agreed in the meeting that IMC for J86 was a good plan." JX0074-002.

At trial, Tony Blevins (Apple Vice President of Procurement), who received the Apple email **[**175]** and attended the meeting, testified that Apple planned to use an Intel modem chip for an iPad as a test run before using Intel in an iPhone:

> At one point in time we had an official plan of record that we would implement Intel on an iPad product launch, and that would give us confidence to extend their presence into an iPhone. We felt that iPad was a simpler transition because it was data only, and then we would add voice as we moved to phone.

Tr. at 690:5-10. J86 was Apple's code name for the iPad Mini 2. *Id.* at 692:9-10.

Aicha Evans (Intel Chief Strategy Officer) testified that Intel's early exposure to Apple provided technical benefits to Intel: "First of all, you just execute, but you start gaining experience and exposure. You also get what I call the halo effect of better presence in the standards." *Tr*. at 569:8-10.

Around that time, Qualcomm knew that Intel was a threat to win Apple's business. Eric Koliander (QCT Vice President, Sales) sent a December 2012 email about Apple's sourcing plans to Steve Mollenkopf (Qualcomm President). CX5378-002. Koliander reported in the email, "Maverick [Qualcomm's code name for Apple] does appear to be working with Intel and we believe, Mav has assigned software **[**176]** and hardware engineering resources to the development of an Intel based platform." *Id.* Koliander continued, "It is unlikely that Mav would launch an Intel based product until late 2013 earliest (believed to be data only for iPad)." *Id.* Mollenkopf testified at trial that Apple told Qualcomm directly that Apple was considering alternative suppliers, like Intel:

> **Q**: And during negotiation of the 2013 agreements, including the First Amendment to the Transition Agreement, Apple told Qualcomm that it was considering using alternative suppliers; correct?
>
> **A**: They did.

Tr. at 787:7-14.

Qualcomm recognizes that Apple is a particularly important OEM for modem chip suppliers in terms of scale, engineering support, and prestige. In a July 2012 slide deck presented to the Qualcomm Board of Directors and sent to Dr. Paul Jacobs (Qualcomm CEO) and Dr. Irwin Jacobs (Qualcomm Co-Founder and former CEO), Qualcomm highlighted Apple's significance to modem chip suppliers. CX6974-001. On a slide titled, "OEM Strategy: Win the Designs that Matter Most," Qualcomm listed as its primary goal "Hold position as Apple's primary modem supplier." CX6974-027. On the following slide, under the subtitle "Apple is Important," Qualcomm **[**177]** highlighted the following benefits of Apple's business:

- The largest consumer of high-tier modems, with binary design awards
- Apple challenges suppliers to provide best-in-class products
- Apple modem supplier is enabled to fund R&D to maintain leadership

CX6974-028. Qualcomm projected that Apple's purchase of Qualcomm modem chips could represent approximately 25% of QCT's total modem chip revenue in 2013. *Id.*

Thus, Qualcomm structured two 2013 agreements to ensure that Apple would continue to purchase modem chips exclusively from Qualcomm, and not from Intel **[*732]** (or any other rival). In January 2013, Steve Mollenkopf (Qualcomm President) explained in an email to Derek Aberle (QTL President) and Paul Jacobs (Qualcomm CEO) that the FATA would sacrifice short-term profits for long-term exclusivity: "Economically, our best outcome is that they second SKU and we maintain the high-end via collection of features. *Strategically*, we are better off keeping them on our stuff." CX5381-001 (emphasis added). "Second SKU" refers to Apple using a second modem chip source.

On February 28, 2013, Apple, Qualcomm, and QCTAP entered into a First Amendment to Transition Agreement, effective as of January 1, 2013 ("FATA"). ECF **[**178]** No. 1326 at 4. On February 28, 2013, Apple and Qualcomm entered into a Business Cooperation and Patent Agreement, effective as of January 1, 2013 ("BCPA"). ECF No.

1326 at 4. According to a 2013 Qualcomm accounting memo, Apple and Qualcomm negotiated the FATA and BCPA in tandem: "[T]he Agreements were negotiated at the same time and there is not sufficient evidence to show that they are separable." CX5391-002.

The BCPA extended and modified the MIA rebate, which lowered Apple's royalty payment per handset. Qualcomm paid Apple rebates to lower Apple's royalty payments to $10 per iPhone and $9 per iPad. JX0078-006. In exchange, Apple promised that "all the Apple Phones it markets, offers to sell and sells will implement one or more CDMA standards." JX0078-001. Apple would forfeit the BCPA rebates if Apple took any of three actions adverse to Qualcomm's licensing business: (1) initiating FRAND litigation against Qualcomm; (2) inducing a third party to initiate FRAND litigation against Qualcomm; or (3) arguing that any Qualcomm modem chip sale exhausted Qualcomm's patents. JX0078-006. Jim Lederer (QCT General Manager) told Steve Mollenkopf (Qualcomm President) in a March 2013 email that **[**179]** the BCPA payments were beneficial to QTL because Qualcomm granted Apple smaller royalty rate rebates than in the MIA: "The large benefit that QTL accrues in the new deal ($10 vs $7.50) is not represented." CX7910-002.

The FATA extended and modified the TA's incentive fund payments. Qualcomm paid Apple a Marketing Fund of $2.50 per iPhone sold with a Qualcomm chip and $1.50 per iPad sold with a Qualcomm chip. JX0057-006 to -007. Qualcomm also paid Apple hundreds of millions in VIF funds conditioned on Apple's purchase of at least 100 million Qualcomm modem chips in both 2015 and 2016. JX0057-008.

Like the TA, the FATA included a clawback provision: "[I]f, during calendar years 2013 or 2014, Apple or any of its Affiliates sells a Non-QC Device commercially (i.e., more than 1000 units), Apple shall (i) promptly notify Qualcomm, and (ii) reimburse QCTAP any Marketing Fund amounts paid by Qualcomm and/or QCTAP in accordance with this Section 1.3A." JX0057-007. If Apple launched a handset with a non-Qualcomm modem chip in 2015, Apple would have to pay back any Marketing Fund amounts earned in the previous 15 months. JX0057-007 to -008. In addition, if Apple launched a handset with a non-Qualcomm modem **[**180]** chip in 2015 or 2016, Apple would have to pay back hundreds of millions in VIF funds. JX0057-009.

As with the TA, the FATA's clawback and termination provisions effectively precluded Apple from working with any of Qualcomm's rivals, as Tony Blevins (Apple Vice President of Procurement) testified: "[I]t was very apparent to us that the very, very large rebates that I mentioned earlier would make it a complete nonstarter to work with someone else." Similarly, **[*733]** Jeff Williams (Apple COO) testified that using a second supplier became financially untenable under the FATA: "In the long term, it made it prohibitively expensive to work with someone else. For example, when we signed — or when we were — we knew we were going to close the 2013 agreement, we cut off the work we were doing with Intel on an iPad." Tr. at 889:9-18.

Contemporaneous Apple documents also reflect that the FATA forced Apple to disengage from Intel. In January 2013, shortly before the FATA was executed, Jeff Williams (Apple Chief Operating Officer) wrote in an email to Tony Blevins (Apple Vice President of Procurement) that Apple, even though it wanted to use a second supplier, would have to stop working with Intel: "Assuming **[**181]** we close QC, we need to communicate to IMC that we will not use their chip in 2014. I think it's also true that given all of our product plan activities, that we don't want to do this." CX0531-001.

Tony Blevins replied that because Blevins made the deal with Intel to use an Intel modem chip, Blevins would tell Intel that the "new QC strategy"—i.e., the FATA—had changed Apple's product plan and prevented Apple from working with Intel:

> Jeff, I feel responsible for communicating this since I made the deal with him. Will do so when I return. We may have accidentally misled him based on the new QC strategy that was not known 6 mos ago. I think we should carefully consider what time window we communicate also ('15 ?).

Id.

The Court finds credible the testimony of Aicha Evans (Intel Chief Strategy Officer), who testified—consistently with the contemporaneous Apple emails—that it was the FATA, not Intel's technical execution, that forced Apple to stop working with Intel: "The reason was that they had, the company, Apple, had some type of business agreement with Qualcomm and that we would get a chance back for the 2016 launch, which means an engagement in 2015." Tr. at 572:1-7.

Evans testified that **[**182]** losing the Apple iPad Mini 2 meant that Intel lost Apple's engineering support, in addition to the iPhone business that could have followed: "We went back to the kid's table in the sense that we didn't have now that deep engagement with their engineers and so on and so forth." *Id.* at 572:21-23. Evans also testified that losing the Apple business harmed Intel's standing in the industry: "It also sort of slowed us down in terms of getting to a more credible position with the operators, as well as with, with standards and TEMS. So, yeah, it set us back two years, and, frankly, it was a near-death experience." *Id.* at 573:19-23. TEMS are network testing companies. *Id.* at 578:19-20. Thus, the FATA had cascading negative effects on Intel.

Other evidence also shows that Apple would have worked with Intel absent the FATA. Although Apple had technical concerns about Intel's execution, Tony Blevins (Apple Vice President of Procurement) testified that Apple *always* has technical concerns about its modem chip suppliers, including Qualcomm:

> I should probably describe to you that Apple's engineering team are some of the most detail obsessed, insanely passionate people on this planet. They hold themselves **[**183]** to high standards. They hold their suppliers to high standards. . . . So in every supplier engagement I've ever been involved in, no one ever meets all of their requirements. I'm not sure it's possible. So I do have some sympathy for our suppliers. But clearly Intel wasn't meeting all of our requirements. **[*734]** I'm not certain they've ever met all of our requirements on any product, and I'm not certain Qualcomm has either or even ever will. That's the nature of the game for us.

Tr. at 696:6-19. Thus, Matthias Sauer (Apple Engineer) testified that in 2016, Apple decided any technical risks were manageable and decided to proceed with purchasing Intel chips: "[T]he general engineering view was that, if we select a second supplier, we have a high chance of success. We had a cross-functional evaluation of different aspects of the engineering work. And we concluded that the identified risks are manageable." Tr. at 1528:2-6.

During the earlier engagement in 2012, the fact that Intel's modem chip did not support carrier aggregation was irrelevant to its suitability for the iPad Mini 2, which Apple launched in 2013. Tony Blevins (Apple Vice President of Procurement) testified: "The iPad Mini 2 architecture **[**184]** itself didn't support carrier aggregation. So whether the chip was capable or not was irrelevant." Tr. at 697:11-13. Moreover, the Qualcomm chip for the next generation of the iPad Mini did not support carrier aggregation. Specifically, Blevins testified as follows:

> **Q**: Were any iPad Mini models released in 2014?

A: Yes, we released a new model in 2014.**Q**: Who was the modem supplier for that device?**A**: That was also Qualcomm.**Q**: Do you if the modem in that device supported carrier aggregation?**A**: I know for a fact the system did not. The system architecture was not designed to enable carrier aggregation.Tr. at 698:10-17.

Although Aicha Evans (Intel Chief Strategy Officer) conceded at trial that other OEMs, including Samsung and Motorola, decided not to purchase Intel's chip in 2013, those decisions post-date the FATA and Apple's disengagement from Intel and do not shed light on whether Apple thought Intel's modem chip was a viable product when Qualcomm entered the FATA with Apple. Tr. at 597:8-18.

Qualcomm's post-deal evaluations of the FATA highlighted its exclusivity provisions. Steve Mollenkopf (Qualcomm President) explained in a March 2013 internal email to Cristiano Amon (QCT Co-President) **[**185]** and other Qualcomm executives that the FATA eliminated the Intel threat: "I understand it but the scenario is really that there would have been a license fight as well and a push for alternative source." CX7910-001. A slide deck on the FATA, sent to both Steve Mollenkopf and Paul Jacobs (Qualcomm Executive Chairman), touted that Qualcomm had won "100% share in wireless phone and tablet markets through 2016" with Apple. CX5389-011.

Another 2013 slide deck with an overview of the FATA, which the Qualcomm Board of Directors received, explained that the Apple exclusivity provisions had strategic benefits for Qualcomm despite a negative near-term financial impact on QCT. CX5527-027. A slide titled "Apple Deal Summary" included the header "QCT well-positioned until 2016," with this bullet underneath: "Strategic importance of Apple modem design-win." *Id.* However, in the next header, Qualcomm recognized that buying longer-term exclusivity through the FATA incentives would negatively impact Qualcomm's margins in the short term: "Near term financial impact QCT margin/growth rate." *Id.*

Specifically, a slide later in the slide deck titled "QCT Apple Financial Summary" compares Qualcomm's direct **[**186]** margins on modem chip sales to Apple under the "Apple Deal" scenario and a "No Deal" **[*735]** scenario. CX5527-029. Qualcomm projected that because of the incentives Qualcomm paid Apple, Qualcomm's direct margins under the "Apple Deal" scenario would be 20% lower in both 2015 and 2016 than under the "No Deal" scenario. *Id.* This too shows that Qualcomm sacrificed profits for exclusivity.

Steve Mollenkopf (Qualcomm President) emphasized in a March 2013 email to Paul Jacobs (Qualcomm CEO) that exclusivity bore longer-term strategic benefits because Qualcomm could avoid both a licensing fight and secure future Apple business:

> The most relevant comparisons however should have been made to the case where they fight on IP and spin up a second source in 2014 and 2015. In this case, we would have lost Mav 10 low, Mav 13 and a bunch of the Mav7/8 volume in 2014 and 2015. You can size the impact on page 6. It is huge and has a large strategic downside.

CX5389-001.

f. <u>FATA Prevents Apple from Purchasing Intel Modem Chips in 2014</u>

In 2014, the FATA again prevented Qualcomm's rival Intel from selling modem chips to Apple, despite Apple's interest in Intel. Ina February 2014 email, Isabel Mahe (Apple Vice President **[**187]** of Software Engineering) told Tony Blevins (Apple Vice President of Procurement) that Intel seemed capable of supplying modem chips for a 2015 iPad and 2016 iPhone: "I have some good news on Intel chipset roadmap. They are open to our proposal of a new chipset that is much lower risk from SW perspective than their current 7460. We may be able to do an iPhone in 2016 once we confirm that they can indeed deliver it." CX0853-001. In a later email, Mahe asked Blevins whether using Intel would lead to FATA penalties: "[C]an we absorb it knowing that this is paving the way so that we can have a phone in 2016?? Assuming iPads are launched in October — not sure how big is this penalty?" *Id.* Blevins replied that Apple could not work with Intel in 2015 given the FATA's clawback provisions: "In net, there is no way that we would forego otherwise earned incentives in favor of launching iPad only in '15." *Id.*

Qualcomm documents show that Qualcomm also knew the FATA precluded Apple from purchasing modem chips from Intel until spring 2016. Will Wyatt (QTI [Qualcomm Technologies, Inc., the Qualcomm subsidiary that operates QCT] Vice President, Finance) wrote in a June 2015 email to Sanjay Mehta (now **[**188]** Qualcomm Senior Vice President for Compute Products) that Apple would have to pay back $645 million in FATA incentives if Apple launched a non-Qualcomm handset before February 2016:

> If Mav were to launch in Sept of 2015 we would get back $200M in VIF and $445M in MDF for a total of $645M in FYQ415. I would also argue that if we knew that Mav would be launching in Oct/Nov/Dec (i.e. they announce it) then we would be able to release the MDF of $445M. Mav also will know how the math will work and likely won't launch until after Feb 15th of 2016 when they have their money for the MDF.

CX5767-001.

Apple felt hamstrung by the inability to buy modem chips from a second supplier. Tony Blevins (Apple Vice President of Procurement) wrote to Isabel Mahe (Apple Vice President of Software Engineering) in a February 2014 email: "In an ideal world, we'd like to have the freedom to either choose QCOM chips or not on the basis of their overall value (specs, sch, terms, price, etc.) and not entangle the licensing issues." CX0578-001. Blevins testified at trial that his email referred to how the FATA prevented Apple from choosing the most competitive **[*736]** modem chip: "[W]e'd entered into agreements that offered **[**189]** Apple very significant sums of money for using their chipsets exclusively. So it wasn't the kind of free market that would give us freedom to choose whomever we might want based on a level playing field." Tr. at 701:21-25.

Both Apple and Qualcomm were also aware that if Apple sourced modem chips from a rival supplier, Apple could have the leverage to challenge Qualcomm's royalty rates. Tony Blevins (Apple Vice President of Procurement) testified that a second supplier could provide competition on Apple's modem chip prices and reduce Apple's royalty burden:

> [O]ur view was that if we could establish a supplemental chip source, we would not only give some leverage on chipset pricing, but we would reduce the stranglehold that Qualcomm has on us relative to royalty leverage, that the point in time they knew we had to buy their chip, we felt it put us in a very unfavorable position on licensing.

Tr. at 711:9-15.

Qualcomm, too, viewed the union of QCT and QTL as important leverage against any Apple attack on Qualcomm's royalty rates. In a June 2014 email to Steve Mollenkopf (Qualcomm CEO), under the header "On QCT/QTL dis-synergy and QTL strategy in general," James Thompson (Qualcomm CTO) wrote **[**190]** that Qualcomm should use its CDMA modem chip market power in response to Apple's desire to develop a second supplier:

> If Apple's ultimate goal is to take down our licensing business or at least chip away at it with a negotiation every few years we should fight back while we are strong. . . . We are the only supplier today that can give them a global launch. In fact, without us they would lose big parts of North America, Japan and China. That would really hurt them. Apple has already said they are going to second us with Intel based on the licensing issue and Intel's willingness to buy the business, so QCT has already lost 40-50% of their business. It can't go down any further. QCT has nothing to lose.

CX5402-003.

g. <u>Apple Launches a Handset with an Intel Modem Chip in 2016</u>

Finally, in late 2016, Apple launched a handset with an Intel modem chip. Qualcomm's rival Intel reaped significant benefits after Apple selected Intel to supply modem chips for a 2016 iPhone. Because an OEM must purchase modem chips well in advance of launching a handset, Apple made the decision to work with Intel in 2014, two years before the 2016 handset's commercial launch, as Matthias Sauer (Apple Engineer) testified **[**191]** at trial:

> **Q**: And in 2014, the Apple engineering team made a unanimous recommendation to select Intel over Broadcom for engagement as a potential second source supplier of baseband modem chips; correct?
>
> **A**: That is correct.

Tr. at 1511:9-13.

Aicha Evans (Intel Chief Strategy Officer) testified that after Intel won Apple's business, other OEMs reached out about Intel's modem chips: "Lenovo is an example, LG is an example, Motorola is an example, Tesla is an example." Tr. at 576:20-577:4. Intel viewed the Apple win as a boon to Intel's business outside of the Apple volumes. Stefan Wolff (Intel Engineer) highlighted many such benefits in an internal Intel email after Intel won the Apple business:

> We will attract operators and network vendors to do early prototyping / field testing with our latest LTE platforms **[*737]** given Apples [sic] huge volumes in the field. This will speed up the development, hardening, and TTM of our modem technology and help us to providing leading [sic] LTE IP for emerging markets like China. The Apple business will boost our modem revenue and will support the funding of our next generation LTE 7460 on IA and 14nm Intel process.

CX1599-001.

As Intel and Apple continued to work **[**192]** together, Apple pushed Intel to accelerate its engineering, Aicha Evans testified: "[O]n the 2017 launch, initially I had to run for a plan of record of 450 megabits per second, and [Apple] gently explained to me that that wasn't going to cut it, it needs to be 600. So eventually I'm sure we would have done it, but not in that timeframe." Tr. at 579:19-24.

Aicha Evans (Intel Chief Strategy Officer) also testified that when working with Apple, a modem chip supplier gains increased standing in SSOs and with operators (also referred to as carriers, like Verizon): "You also get what I call the halo effect of better presence in the standards, not just presence, but better weight in terms of your contributions, in terms of starting to get leadership positions. Same thing with the operators, because these devices eventually end up on their network." Tr. at 569:9-15.

Winning the Apple business for the 2016 launch enabled Intel to acquire VIA Telecom, a CDMA technology company. Intel acquired VIA in 2015, after Intel had won Apple's business but before the Apple handset had launched commercially. CX1598-001. Aicha Evans (Intel Chief Strategy Officer) testified that to win Apple's business worldwide, **[**193]** including with carriers who use CDMA, Intel required CDMA technology: "So it was sort of getting the last piece of the puzzle that would allow us to have the privilege and opportunity to supply worldwide, including on Verizon." Tr. at 584:8-10. Internal Intel projections indicated that acquiring VIA would only be profitable if Intel could supply modem chips to Apple; else Intel would not recoup its investment. CX1598-009. In addition, Aicha Evans (Intel Chief Strategy Officer) testified that Intel's modem chip division was only able to pitch the VIA acquisition after Intel won initial Apple business:

> **Q**: So ultimately did the fact that Intel acquired, or won Apple's business affect its decision to acquire VIA?
>
> **A**: Oh, yeah. There wouldn't have been a — I wouldn't have been — yeah, there wouldn't have been a discussion.

Tr. at 581:17-20.

Thus, Qualcomm's exclusive deals, which delayed Intel's ability to sell modem chips to Apple until September 2016, foreclosed Intel and other rivals from benefits including: (1) a revenue boost critical to funding research and development and acquiring technology (as Intel did with VIA); (2) exposure to Apple's "best-in-class" engineering resources; (3) a **[**194]** foothold at Apple for future handsets; (4) business opportunities with other OEMs; (5) enhanced standing in SSOs; and (6) opportunities to conduct early field testing and prototyping with network vendors and operators.

h. <u>Qualcomm Again Refuses to Sell Modem Chips to Apple</u>

Once Apple started purchasing modem chips from Intel, Apple challenged Qualcomm's royalty rates, as Tony Blevins (Apple Vice President of Procurement) testified at trial: "There are court proceedings where we're trying to establish what is a FRAND rate for royalty." Tr. at 712:2-3. In response, according to Blevins, Qualcomm sought patent injunctions around the world against Apple's handsets: **[*738]** "[T]hey had filed injunctions against Apple and lawsuits on non-SEPs, again, to improve their position . . . on the SEPs." *Id.* at 712:18-20.

Aicha Evans (Intel Chief Strategy Officer) also testified at trial that Qualcomm attempted to ban Apple from importing its handset with Intel chips in proceedings before the International Trade Commission ("ITC"):

> **Q**: [D]o you understand what Qualcomm was seeking in those ITC proceedings?
>
> **A**: Yeah, cut us off at the knees before we're born and ask for a ban of Intel-based iPhones from the United **[**195]** States.

Tr. at 663:14-17.

Later, Qualcomm also cut off Apple's supply of new chips. In spring 2017, Steve Mollenkopf (Qualcomm CEO) testified, Apple's contract manufacturers stopped paying royalties to Qualcomm for Apple handset sales. Tr. at 836:16-25. According to Jeff Williams (Apple COO), Qualcomm then refused to provide Apple with any chips for new devices, although Qualcomm continued to ship Apple modem chips for older iPhones. As a result, Williams testified at trial, none of Apple's 2018 handset models contain Qualcomm modem chips and Apple has purchased modem chips for 2018 handsets solely from Intel:

> Qualcomm has continued to ship us product on the design wins that they have and had at the time. And so they have continued to sell us chips. We have been unable to get them to support us on new design wins past that time, and this has been a challenge. . . . We — I contacted Qualcomm, I contacted Steve, I sent him e-mails, I called. We tried to get them to sell us chips, and they would not.

Tr. at 890:13-24. Tony Blevins (Apple Vice President of Procurement) similarly testified that Apple's lawsuit spurred Qualcomm to use chip leverage: "At the time we made those challenges, Qualcomm **[**196]** was no longer willing to sell us chips. That was very obvious, very apparent to us. And so we went right back to the no license, no chips, that we were facing back in 2005." Tr. at 711:12-16.

In sum, Qualcomm engaged in anticompetitive conduct with respect to Apple by (1) refusing to sell Apple modem chips or even share sample chips until Apple signed a license; (2) eliminating a competing standard supported by Intel; (3) attempting to require Apple to cross-license its entire patent portfolio to Qualcomm; and (4) and using Qualcomm's monopoly power to enter exclusive deals with Apple that foreclosed Qualcomm's rivals from selling modem chips to Apple from 2011 to September 2016.

11. VIVO

Qualcomm engaged in anticompetitive conduct toward VIVO by using the threat of cutting off VIVO's chip supply to enter an exclusive agreement with VIVO that prevented VIVO from using MediaTek modem chips even though the MediaTek chips had competitive advantages and were more compatible with VIVO's handset.

On December 24, 2015, Sanjay Mehta (QCT China Senior Vice President) emailed Derek Aberle (Qualcomm President), Cristiano Amon (QCT President), and Eric Reifschneider (QTL Senior Vice President and **[**197]** General Manager) and stated that QCT could secure modem chip exclusivity with VIVO, if QTL would permit QCT to continue shipping modem chips to VIVO while VIVO negotiated a patent license with QTL. Sanjay Mehta explained that MediaTek, Qualcomm's rival, had a modem chip model that was more compatible with VIVO's handset, and that Qualcomm could eliminate the threat **[*739]** of VIVO using MediaTek with an exclusive agreement:

> The objective of this email is to request confirmation from you such that if VIVO negotiates it's [sic] QTL license in good faith that QCT will continue shipping chipsets. There is a summary deal below which makes sense for QCT to drive for various reasons (essentially we can achieve 100% of VIVO's roadmap in the face of 1) MTK has pin for pin and software compatibility and 2) other OEMs utilizing an inferior chipset with larger memory) and moving the market towards a QCT solution.

CX5321-001.

Under the "summary deal" with VIVO, Qualcomm would secure exclusivity if Qualcomm did not cut off Qualcomm's chip supply. Mehta's email summarizing the deal stated: "What VIVO will commit to (pending QTL confirmation that if VIVO continues to negotiate with QTL in good faith, QCT will **[**198]** continue shipping chipsets) . . . will not launch 6755/6750 based handsets (which means QCT will win significant upside in 2016)." CX5321-002. Cristiano Amon (Qualcomm President) testified that the 6755 and 6750 modem chips were MediaTek modem chips that had "competition advantages . . . and software compatibility with whatever the incumbent chipset in VIVO was." Tr. at 509:13-510:7.

Even without an explicit threat from Qualcomm, the implicit threat that Qualcomm could cut off VIVO's chip supply was significant enough to convince VIVO to permanently stop working with MediaTek as soon as Qualcomm promised to ensure VIVO's chip supply, according to Sanjay Mehta's email: "VIVO CTO Mr. Shi has informed MTK that R&D on 6755/50 will be paused till Feb'16; between now and Feb, if QTL provides confirmation that if VIVO continues to negotiate with QTL in good faith, QCT will continue shipping chipsets, then VIVO will make that official & permanent." CX5321-002.

In sum, Qualcomm engaged in anticompetitive conduct by using the threat of cutting off VIVO's chip supply to enter an exclusive agreement with VIVO that prevented VIVO from using MediaTek modem chips even though the MediaTek chips had **[**199]** competitive advantages and were more compatible with VIVO's handset.

12. Wistron

Qualcomm engaged in anticompetitive conduct toward Wistron by using Qualcomm's royalty rate to impose a surcharge on a MediaTek modem chip that Wistron otherwise thought was the most competitive for Wistron's devices and by refusing to give Wistron a list of Qualcomm's patents during patent license negotiations.

Apple does not manufacture iPhones and iPads itself but instead uses third-party manufacturers ("contract manufacturers") to manufacture those products. ECF No. 1326 at 3. The contract manufacturers that currently manufacture iPhones and/or iPads for Apple include: (i) FIH Mobile Ltd., Hon Hai Precision Industry Co., Ltd., and Foxconn International Holdings Limited (collectively, "Foxconn"); (ii) Pegatron; (iii) Wistron; and (iv) Compal Electronics, Inc. *Id.* at 4. Qualcomm and Wistron entered a CDMA SULA effective May 23, 2007. *Id.*

Under the Wistron SULA, which is perpetual, Wistron paid Qualcomm a [TEXT REDACTED BY THE COURT] upfront fee and pays a 5% running royalty on handsets. JX0042-011, -014 to -015. Brian Chong (Wistron Chief of New Technology Development and Product Planning) testified that Wistron **[**200]** could not afford to use MediaTek's modem chips because Qualcomm imposes onerous royalty payments on MediaTek's chips. This is true even when MediaTek's chips' price and specification are best suitable for Wistron's **[*740]** products. Specifically, Chong testified as follows:

> [T]here was a case that I remember in particular when we were considering introducing lower cost phones. And MTK was the chip supplier that we think best suitable for that product position in terms of price position and the spec corresponding that it offers. However, in the end we decided to stay Qualcomm for the simple reason that because Qualcomm responded that, even if we're using non-Qualcomm chips, we would still have to pay the onerous royalty that Qualcom dictated in the SULA.

Chong Depo. 256:9-20. Chong also testified that the upfront fee Wistron had paid Qualcomm incentivized Wistron to buy Qualcomm chips rather than rivals' chips: "So by staying with Qualcomm we would be able to recoup that investment faster." *Id.* at 256:21-257:1.

Qualcomm also limited Wistron's ability to evaluate Qualcomm's patents, as Brian Chong testified: "I know for a fact that we asked for a list of patents and never got that" and "I'm sure **[**201]** we asked for the possibility of only licensing a portion of Qualcomm patents" *Id.* at 312:6-8, 23-24. When Qualcomm denied Wistron's requests, Chong testified that Wistron felt it had little option but to enter the patent license to obtain business from OEMs: "In a way, we're forced into the situation that we need to sign. Otherwise we will lose the Dell business that opened up as an opportunity for us to get into the smart phone business with a major player." *Id.* at 361:3-7.

13. Pegatron

Qualcomm engaged in anticompetitive conduct toward Pegatron by withholding chip samples until Pegatron would sign Qualcomm's patent license agreement, which requires Pegatron to grant Qualcomm a royalty-free cross-license to Pegatron's patents.

Qualcomm and Pegatron entered into a CDMA SULA effective April 29, 2010. Under the Pegatron SULA, which is perpetual, Pegatron paid Qualcomm a [TEXT REDACTED BY THE COURT] upfront fee and pays a running 5% royalty charged on handsets. JX0053-015, -020. Pegatron also granted QCT a royalty-free cross-license to Pegatron's patents for QCT to produce CDMA modem chips. JX0053-028.

Monica Yang (Pegatron) testified that Qualcomm made clear throughout negotiations that **[**202]** Qualcomm would not sell Pegatron chips until Pegatron signed the patent license: "So even if you sign the CSA [component supply agreement], you cannot get a chip, right. So you have to have the SULA at place. And when I negotiate, I know, okay, you really have to sign the SULA to get the chipset." *Id.* at 184:21-25.

Monica Yang testified that Qualcomm even refused to provide Pegatron any chip samples until Pegatron signed a patent license:

> **Q**: And, in fact, Qualcomm did not even allow Pegatron to obtain any engineering samples or test chips if Pegatron did not first enter into a license with Qualcomm; right?

A: Yes.

Id. at 244:23-245:5.

Monica Yang also knew that Qualcomm's consistent practice was to threaten chip supply: "[I]t's my impression, like, since beginning, you — if you challenge something against Qualcomm, you might lose the chip supply." *Id.* at 184:9-16. Yang testified that chip supply was essential for Pegatron to retain its contract manufacturing opportunities, such that Pegatron did not challenge royalty rate or license terms: "[F]or us the important thing is to get business from customer. So if we don't **[*741]** have chip, we cannot finish any business opportunity then. That's a big **[**203]** damage to us. So we were under pressure at that time, and we don't have the bargaining power to negotiate with Qualcomm." *Id.* at 247:1-7.

In sum, Qualcomm engaged in anticompetitive conduct toward Pegatron by withholding chip samples until Pegatron would sign Qualcomm's patent license agreement, which requires Pegatron to grant Qualcomm a royalty-free cross-license to Pegatron's patents.

14. ZTE

Qualcomm engaged in anticompetitive conduct toward ZTE by threatening ZTE's chip supply. Qualcomm also internally discussed withholding engineering support from ZTE.

Derek Aberle (QTL President) recommended in an April 14, 2011 email to Jing Wang (Qualcomm), Mike Hartogs (QTL Division Counsel), and other Qualcomm employees that Qualcomm threaten litigation and emphasize its practice of not selling chips to unlicensed OEMs in negotiations with ZTE: "They should also consider the impact on their business in the US (e.g., with VZW) if we are forced to sue them for patent infringement. Finally, they should be reminded that we do not supply chips to companies that are not licensed." CX6658-006. Aberle testified that "VZW" is Verizon, a CDMA carrier. Tr. at 275:11-12. On April 16, 2011, after a negotiation **[**204]** with ZTE, Aberle recommended that Qualcomm consider pulling resources from ZTE: "I think we should consider stopping support in several areas until we conclude the agreements, but let me speak to Jing before we make any decisions." CX6658-001.

Qualcomm also used chip incentive funds to convince ZTE to sign a patent license agreement. Derek Aberle (QTL President) stated in the April 14, 2011 email to Jing Wang (Qualcomm), Mike Hartogs (QTL Division Counsel), and other Qualcomm employees that QTL proposed to offer ZTE rebates that accrued on ZTE's purchase of QCT chips: "Starting in the quarter in which we sign we have proposed 1.5% of QCT chipset purchases for 2011, 1.75% for 2012, 2% for 2013, 2.25% for 2014, and 2.5% for 2015 and thereafter. To close the deal, I would be willing to increase the 2011 percentage to 1.75%." CX6658-005. At trial, Aberle testified that by "the deal," he meant ZTE's patent license agreement: "Yeah, the license agreement was part of the overall package we were discussing." Tr. at 275:2-6. A few months later, on July 19, 2011, ZTE and Qualcomm signed CDMA and OFDMA patent licenses. ECF No. 1326 at 9-10.

In sum, Qualcomm engaged in anticompetitive conduct toward **[**205]** ZTE by threatening ZTE's chip supply. Qualcomm also internally discussed withholding engineering support from ZTE.

15. Nokia

Qualcomm planned internally to cut off Nokia's chip supply to ensure that Nokia renewed its patent license agreement with Qualcomm.

Derek Aberle (Qualcomm Legal Counsel in 2004) testified at trial that although Nokia and Qualcomm had a patent license agreement that would expire in 2007, "[Nokia] had an option to keep the agreement going if they wanted to." Tr. at 193:1-6. On December 16, 2004, Derek Aberle (Qualcomm lawyer and later Qualcomm President) wrote to Steve Altman (Qualcomm lawyer and also later Qualcomm President) that Qualcomm should threaten Nokia's chip supply to ensure that Nokia renewed the patent license agreement: "If Nokia refuses to exercise the option in 2007, we would have the right **[*742]** to cut-off their DO chips. This may be enough to keep them from stringing us out until 2008 when the option expires. Just a thought." CX7141-001. Steve Altman (Qualcomm lawyer and later Qualcomm President) concurred: "It is the exact thought that I have had." *Id.*

In March 2005, Matti Kauppi (Nokia) expressed concern in an email to Steve Altman (Qualcomm lawyer and **[**206]** later Qualcomm President) that Qualcomm could cut off Nokia's chip supply: "As you certainly understand, once Nokia proceeds with Qualcomm as its chipset provider, any interruption in supply would bring serious consequences for Nokia. . . . The availability of components is a necessity for doing business." CX6979-001.

However, in May 2005, Steve Altman wrote to Irwin Jacobs (Qualcomm Co-Founder and former CEO) and Paul Jacobs (Qualcomm CEO beginning in June 2005 and son of Irwin Jacobs) that Qualcomm should still plan to threaten Nokia's chip supply: "I would stay firm on a position that we will ship them or an ODM [original device manufacturer] the chips and the latest versions we have only as long as they pay us the current royalties with no recourse, and as soon as they stop paying royalties, we stop shipping." CX6987-001.

Thus, Qualcomm planned internally to cut off Nokia's chip supply to ensure that Nokia renewed its patent license agreement with Qualcomm.

16. Threats and Chip Incentive Funds to Smaller Chinese OEMs

With respect to smaller OEMs in China, QTL has planned to cut off the OEMs' chip supply if the OEMs did not pay royalties and has offered chip incentive funds that induce **[**207]** OEMs to agree to Qualcomm's patent license terms.

In November 2012, Eric Reifschneider (QTL Senior Vice President and General Manager) wrote to Cristiano Amon (QCT Co-President), Steve Mollenkopf (Qualcomm President), Derek Aberle (QTL President), and Marv Blecker (QTL Senior Vice President) regarding Chinese OEMs: "Cristiano, This summarizes the conclusions we reached regarding sales of TD-SCDMA chipsets to customers that we anticipate will use them in TD-SCDMA/GSM products." CX5053-002. TD-SCDMA is a 3G standard used primarily in China. ECF No. 1326 at 3. In the email, Reifschneider stated that Qualcomm would cut off OEMs' chip supply if an OEM stopped paying royalties under any Qualcomm patent license agreement: "3. If any of these customers refuses or fails to pay royalties on any other (i.e., C2L [CDMA], UMTS, LTE) devices, we will discontinue supply to such customers as necessary." CX5053-002.

Cristiano Amon (QCT Co-President) replied-all to Eric Reifschneider's (QTL Senior Vice President and General Manager) email. Amon wrote that QTL and QCT had agreed on that plan of action: "This summarizes well the discussion between QMC [Qualcomm Mobile Computing, a division of QCT]/QTL and **[**208]** the agreed plan forward. We will start communicating the plan to the customer base." CX5053-001.

Three years later, QTL and QCT had a similar plan. In a July 2015, Eric Reifschneider (QTL General Manager and Senior Vice President) recommended to Cristiano Amon (QCT President) and Derek Aberle (Qualcomm President) that Qualcomm threaten the chip supply of a few Chinese OEMs that were not paying royalties: "[W]e discontinue chip supply for the small handful of customers/licensees who have stopped reporting and paying royalties altogether (BBK, Gionee, OPPO, perhaps one or two other small customers) - **[*743]** and make sure they understand why." CX6530-001.

In addition, Qualcomm has paired chip incentive funds with negotiation deadlines to induce OEMs to sign Qualcomm's patent licenses. QTL funds and proposes these chip incentive funds, even though the funds accrue as rebates on QCT modem chips. In 2013, QTL proposed to offer the OEM Yulong $15 million in modem chip rebates. Eric Reifschneider (QTL Senior Vice President and General Manager) wrote that Qualcomm should condition the chip rebates on Yulong signing Qualcomm's patent license agreement: "If we make this offer to Yulong it needs to have **[**209]** a firm deadline on it (e.g., a 4G SULA signed by Sept. 30). CX6500-002. In red text, Jeff Altman (QTL Business Development) wrote: "Agree." *Id.*

Similarly, in 2013, Eric Reifschneider (QTL Senior Vice President and General Manager) wrote to Derek Aberle (QTL President) and Marv Blecker (QTL Senior Vice President) during patent license negotiations with the OEM OPPO that Qualcomm could exchange chip incentive funds for a patent license commitment: "Think we have a good chance of getting them to take a 4G license now, if we are willing to give them (in addition to the $5M strat fund) a capped deduction for marketing expenses." CX6516-001.

At trial, Will Wyatt (QTI Vice President, Finance) testified that QTL created and funded similar Qualcomm chip incentive funds developed in 2016:

Q: And these new incentive deals were funded by QTL even though they were offered by QCT; correct?

A: Yes. These deals were, were created by QTL.
Tr. at 438:9-18.

Thus, according to a Qualcomm accounting memorandum, in April 2016 Qualcomm and Yulong reached two simultaneous agreements: Yulong agreed to a Chinese Patent License Agreement ("CPLA") on Qualcomm's standard 5% royalty terms, and Qualcomm offered Yulong **[**210]** chip incentives through a Strategic Funding Agreement ("SFA"). CX7571-002. Under the SFA, QCTAP (QCT's Asia Pacific division) paid Yulong rebates of $.30 to $.60 per Qualcomm chip Yulong purchased, up to a total of [TEXT REDACTED BY THE COURT]. CX7571-003. The Qualcomm accounting team concluded that QTL obtained the primary benefit from the two agreements: "The SFA was entered into by QCTAP but was negotiated primarily by QTL in connection with the execution of the CPLA and transactions will therefore ultimately be reflected in the QTL segment." CX7571-006.

In sum, with respect to smaller OEMs in China, QTL has planned to cut off the OEMs' chip supply if the OEMs did not pay royalties and has offered chip incentive funds that induce OEMs to agree to Qualcomm's patent license terms.

17. Summary of Anticompetitive Conduct Against OEMs and Resulting Harm

In sum, Qualcomm has engaged in extensive anticompetitive conduct against OEMs. In practices that are unique within Qualcomm and unique in the industry, Qualcomm refuses to sell its modem chips exhaustively and to sell modem chips to an OEM until the OEM signs a separate patent license agreement. To enforce those licensing practices, Qualcomm **[**211]** has cut off OEMs' chip supply, threatened OEMs' chip supply, withheld sample chips, delayed software and threatened to require the return of software, withheld technical support, and refused to share patent claim charts or patent lists. In addition, Qualcomm has required OEMs to grant QCT cross-licenses (often royalty-free) to OEMs' patent portfolios and charged **[*744]** OEMs higher royalty rates on rivals' chips. All of these tactics ensure that OEMs will sign Qualcomm's license agreements and generally result in exclusivity.

In addition to these "sticks," Qualcomm has offered OEMs the carrot of chip incentive funds to induce OEMs to sign patent license agreements. Those chip incentive funds result in exclusivity and near-exclusivity and, by preserving Qualcomm's royalty rates, enable Qualcomm to continue to collect its unreasonably high royalty rates on rivals' chips. Lastly, in 2018, Qualcomm paid to extinguish Samsung's antitrust claims and to silence Samsung.

C. Qualcomm's Refusal to License SEPs to Rivals and Resulting Harm

Next, the Court discusses another element of Qualcomm's anticompetitive conduct, Qualcomm's practice of refusing to license its cellular SEPs to rival modem chip suppliers. **[**212]** This practice has promoted rivals' exit from the market, prevented rivals' entry, and delayed or hampered the entry and success of other rivals. Without a license to Qualcomm's SEPs, a rival cannot sell modem chips with any assurance that Qualcomm will not sue the rival and its customers for patent infringement. Qualcomm's refusal to license its SEPs to rivals also enables

Qualcomm to demand unreasonably high royalty rates. Below, the Court discusses Qualcomm's refusal to license rivals, and how Qualcomm's practice has prevented entry, promoted rivals' entry, and hampered rivals in the market.

1. 2008 Refusal to License MediaTek

Qualcomm refused its rival MediaTek's 2008 request for a patent license, and would only enter an agreement that restricted MediaTek's customer base. Qualcomm's refusal suppressed MediaTek's revenues and prevented MediaTek from being able to fund research and development for future generations of modem chips.

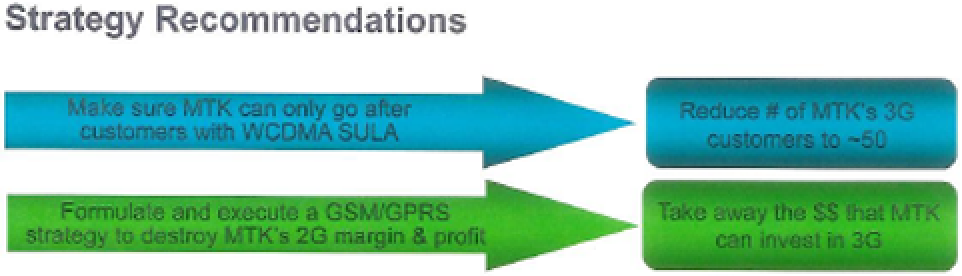
Finbarr Moynihan (MediaTek General Manager of Corporate Sales and Business Development) testified that when MediaTek was soliciting customers for its first 3G modem chip, OEMs uniformly told MediaTek that OEMs would not purchase the modem chips until MediaTek **[**213]** had a license from Qualcomm: "[T]he kind of prevailing message from all of the customers I engaged with was that they expected us to have a license agreement with Qualcomm before they would consider purchasing 3G chipsets from MediaTek." Tr. at 336:13-16. Thus, Moynihan testified that the license requirement "sort of stalled the progress" of MediaTek's modem chip. *Id.* at 336:18-20. Moynihan testified that "somebody in the company reached out at some point to seek a license agreement from Qualcomm." *Id.* at 336:23-25. However, the negotiations went slowly, Moynihan testified: "We would have liked if they had gone faster. We felt like they were sort of maybe being slow." *Id.* at 337:8-10.

Ultimately, Qualcomm refused to enter a license, and would only offer an agreement called the CDMA ASIC Agreement. *Id.* at 337:11-17; *see* JX0050-001 (CDMA ASIC Agreement). The CDMA ASIC Agreement restricted MediaTek to selling modem chips only to "Authorized Purchasers," defined as "only those entities which have been granted a license by Qualcomm under at least Qualcomm's CDMA Technically Necessary Patents . . . but for only so long as such entities remain so licensed by Qualcomm," and included lists of **[**214]** Authorized Purchasers. JX0050-006, -067. Thus, the CDMA ASIC Agreement gave Qualcomm the power to control to whom MediaTek, Qualcomm's rival, sold modem chips.

[*745] In addition, the CDMA ASIC Agreement imposed onerous reporting requirements. The agreement required MediaTek to report to Qualcomm "specific quantities" of modem chips that MediaTek sold to each Authorized Purchaser. JX0050-055 to -056. Thus, MediaTek was forced to give its rival Qualcomm sensitive business information about MediaTek's customers and the quantity of chips MediaTek sold to each customer.

In part due to the delay caused by the need for a license and Qualcomm's refusal, Finbarr Moynihan (MediaTek General Manager of Customers Sales and Business Development) testified that MediaTek's modem chip was outdated by the time it entered the market: "By the time we were really pushing it [in] the market, the requirements had moved on from what features the 6268 could deliver." Tr. at 338:10-12. Moynihan testified that Qualcomm's refusal to license also hampered MediaTek's ability to generate the customer base necessary to invest in future generations: "So not being able to generate profit revenue on 3G I think impacted our **[**215]** ability to invest in 4G." *Id.* at 338:18-339:3.

Qualcomm had articulated such a strategy. A 2009 internal Qualcomm pricing presentation prepared within days of Qualcomm's CDMA ASIC Agreement with MediaTek includes a slide titled "Strategy Recommendations," which is reproduced below. CX5809-041.



The slide includes the strategy "make sure MTK can only go after customers with WCDMA SULA," with an arrow leading to "Reduce # of MTK's 3G customers to ~50." CX5809-041. The next strategy is "Formulate and execute a GSM/GPRS strategy to destroy MTK's 2G margin & profit," with an arrow to "Take away the $$ that MTK can invest in 3G." CX5809-041. Thus, Qualcomm's refusal to license MediaTek was designed to (and in fact did) limit MediaTek's customer pool and reduce MediaTek's revenue base to invest in future cellular generations.

2. 2011 Refusal to License Project Dragonfly

In 2011, Qualcomm refused the Project Dragonfly modem chip venture's request for a SEP license, which prevented Project Dragonfly from ever entering the modem chip market.

In 2011, the carrier NTT DoCoMo, several Japanese OEMs, and Samsung formed a joint venture called Project Dragonfly to design, develop, and sell modem chips. **[**216]** CX2628-001 to -002, -004. Per the Project Dragonfly Joint Venture Agreement, NTT DoCoMo was to "provide the Company with reasonable support in negotiating with Qualcomm Incorporated in the U.S.A. a certain agreement necessary for the Company to implementing the Company's Business (the 'Q License Agreement')." CX2628-004.

Andrew Hong (Samsung Legal Counsel) testified that Project Dragonfly "wanted a license to be able to manufacture our own chips. And so we were trying to have NTT **[*746]** DoCoMo negotiate those rights, as well." Hong Depo. 176:3-11. However, Qualcomm refused a license, and Project Dragonfly failed to become a rival:

> **Q**: And I believe you testified earlier that NTT DoCoMo was unable to obtain such a license; is that correct?
>
> **A**: Yes.
>
> **Q**: And as you mentioned, that that [sic] failure to obtain a license was one of the reasons the joint venture did not proceed; is that correct as well?
>
> **A**: Yes.

Hong Depo. 173:3-10. Thus, Qualcomm's refusal to license Project Dragonfly contributed to Project Dragonfly's inability to enter the market.

3. 2011 Refusal to License Samsung

Around the same time that Qualcomm refused to license Project Dragonfly, Qualcomm also refused to license Samsung—a Project **[**217]** Dragonfly member—out of fear that Samsung could enable Project Dragonfly to become a competitor.

Andrew Hong (Samsung Legal Counsel) testified that in 2011, Samsung requested a patent license, but "Qualcomm refused to provide license to manufacture chips, modem chips." Hong Depo. 81:19-21. Hong testified that Eric Reifschneider (then QTL outside counsel, later QTL Senior Vice President and General Manager) refused to license Samsung because Qualcomm did not want to enable Project Dragonfly to become a rival:

> He was also aware that we were trying to enter into either joint ventures or license — licensing opportunities with third parties, and I believe he also aware of our, our attempts to form the, the Dragonfly JV that was discussed yesterday. So he was very adamant that we — that whatever modem chip of Samsung's was going to be covered under this agreement would not be that Dragonfly product. And he was aware that if we tried to develop our own chip, it would take several years. And Dragonfly was expected to be up and running within a year.
>
> So he was, he was very adamant that any such advantage in bringing in third-party technology to develop our modem chip product would not be permitted. **[**218]** And he was very clear that he was not going to enable that through that — through this agreement and — give me a moment to think back and recall what he was talking about. I do recall he was very, very angry about this, and he said pretty much under no circumstances

was he — was Qualcomm going to permit Samsung to, to have the advantage of, of bringing in third-party technology.

Hong Depo. 215:15-216:14. Hong testified that Reifschneider was aware that Project Dragonfly, given its joint resources, could quickly enter the market with a license: "He said to us pretty much, 'I know if you try to develop this on your own, it will take several years. And I'm not going to let you enter the market in a, in a year." *Id.* at 216:21-24.

Injung Lee (Licensing Lead at Samsung Intellectual Property Center) testified that Qualcomm's 2011 refusal to license Samsung prevented Samsung from selling modem chips to external OEMs: "In the end, Samsung was not able to obtain a license under which it would get to sell modem chipsets externally." Lee Depo. 227:7-9. Thus, in refusing to license Samsung, Qualcomm further ensured that Project Dragonfly could not enter the modem chip market and prevented Samsung **[**219]** from selling modem chips to external OEMs.

4. Refusal to License VIA

As with MediaTek, Qualcomm refused to license VIA Telecom, a CDMA modem chip supplier, and entered an agreement **[*747]** that permitted VIA to sell modem chips only to Qualcomm licensees. VIA never cut into Qualcomm's CDMA market share and was eventually purchased by Intel in 2015, according to an Intel presentation. CX1598-004.

Qualcomm and VIA entered an ASIC Patent License Agreement that permitted VIA to sell ASICs "only to Authorized Purchasers for incorporation by such Authorized Purchasers in Subscriber Units." JX0007-007. The ASIC Patent License Agreement defined "Authorized Purchasers" as "only those companies which have been granted a license by QUALCOMM." JX0007-001. Thus, the CDMA ASIC Agreement gave Qualcomm the power to control to whom VIA sold modem chips.

In addition, the ASIC Patent License Agreement imposed onerous reporting requirements. The agreement required VIA to report to Qualcomm all of its sales of modem chips to each Authorized Purchaser. JX0007-017. Thus, VIA was forced to give its rival Qualcomm sensitive business information about VIA's customers and the quantity of chips VIA sold to each customer. **[**220]**

Qualcomm's Authorized Purchaser requirement—in both the VIA agreement and the MediaTek agreement—came with serious ramifications. In November 2012, John Sun (VIA) sent an email to Luis Guerra (Qualcomm Contracts Specialist) to apologize for mistakenly selling chips to an unlicensed OEM and to state that VIA had immediately stopped shipments to that OEM:

We would like to inform Qualcomm that our team only realized earlier this month

> that Hangzhou Asiafone Technology Co. Ltd. ("Asiafone") is no longer on the list of Sublicensed Affiliates, and that 236,050 units of CDMA ASICs was shipped by VIA Telecom in the months of September and October, with the last shipment taking place on October 29, 2012. We understand that Asiafone was removed from the August list of Sublicensed Affiliate, which was sent to VIA on August 25, 2012, but it appears that our team did not become aware of the fact until recently. As soon as we realized that Asiafone was no longer a Sublicensed Affiliate, we have taken steps to stop all further shipments. We are notifying Qualcomm of this incident at our earliest opportunity.

CX6552-001. Thus, through the Authorized Purchaser agreement, Qualcomm was able to employ VIA **[**221]** to enforce Qualcomm's practices of not selling modem chips to OEMs without a patent license agreement and of cutting off chip supply.

With no license from Qualcomm, VIA was not able to generate a large share of the CDMA modem chip market. Todd Madderom (Motorola Director of Procurement) testified, "In my opinion, Qualcomm has not really had significant competition in CDMA. I think the VIA Technologies alternative IP that was out there in the world really wasn't a competitive threat." Madderom Depo. 206:6-9.

5. 2004 and 2009 Refusals to License Intel

Qualcomm has twice refused to license Intel, a rival modem chip supplier, which delayed Intel's entry into the CDMA and premium LTE modem chip markets.

In 2004, Sean Maloney (Intel) emailed Dr. Irwin Jacobs (Qualcomm CEO and co-founder) to propose that Intel receive a "license to Qualcomm patents in a completed cross-license agreement." CX7580-002. Steve Altman (then a Qualcomm lawyer, later Qualcomm President) responded to Maloney and Irwin Jacobs and rejected Intel's request:

> [A]re you suggesting that we change our existing licensing program such that a **[*748]** third party purchasing a CDMA ASIC from Intel would receive rights under QUALCOMM's patents? **[**222]** If the later, given the negative impact that it could have on QUALCOMM's licensing program (which comprises a very substantial portion of the company's revenue and profit), we cannot agree to this proposal.

CX7580-001. Thus, Altman acknowledged that Qualcomm could not agree to patent exhaustion because doing so would reduce QTL's licensing revenues, which comprised "a very substantial portion of the company's revenue and profit." *Id.*

In 2009, Qualcomm again refused an Intel license request. Mike Hartogs (QTL Senior Vice President and Division Counsel) reported in an email to Steve Altman (Qualcomm President), Derek Aberle (QTL President), Marv Blecker (QTL Senior Vice President), and Fabian Gonell (QTL Division Counsel): "It was quickly made clear that Intel is not interested in a 'simple' mutual non-assert agreement. Just as in every past discussion, they claim their practise [sic] of indemnifying their customers renders meaningless to them receiving a covenant not to assert." CX6663-001. Derek Aberle confirmed at trial that Qualcomm had rejected Intel's request: "[T]here's no agreement in place granting any rights to Intel." Tr. at 311:22-23.

As a result, Intel did not generate a competitive **[**223]** premium LTE modem chip until 2012, after Intel purchased Infineon and, according to Aicha Evans (Intel Chief Strategy Officer) invested "billions of dollars" to develop LTE. Tr. at 565:3-6. Intel did not begin to develop CDMA modem chips until 2015, when Intel was able to purchase VIA. CX1598-004. Aicha Evans testified that Intel did not release its first CDMA and LTE multimode modem chip until 2018. Tr. at 615:18-21. Thus, Qualcomm's refusals to license Intel delayed Intel's entry into the market.

6. 2009 Refusal to License HiSilicon

Qualcomm also refused to license HiSilicon, a modem chip supplier that is a subsidiary of the OEM Huawei. As a result, HiSilicon generally only sells modem chips to Huawei, and not to third-party OEMs.

According to Nanfen Yu (Huawei Senior Legal Counsel), Huawei asked Qualcomm for a license so that HiSilicon could sell modem chips to third parties: "We were seeking exhaustive license from Qualcomm." Yu Depo. 133:14-15. However, Yu testified that Qualcomm refused, and instead sent Huawei a draft ASIC Patent Agreement—similar to the MediaTek and VIA agreements—which was "only a covenant not to — which does not extend to HiSilicon's customer." *Id.* at 133:20-21. **[**224]** Under the draft agreement, Huawei could only sell modem chips to Authorized Purchasers, defined as "only those persons or entities which have been granted a license by QUALCOMM." CX1009-003. Thus, Qualcomm controlled to whom Huawei could sell modem chips.

Nanfen Yu (Huawei Senior Legal Counsel) testified that Huawei refused to enter the draft agreement because of the onerous reporting requirements, and the requirement that Huawei promise not to assert its patents against Qualcomm:

> It requires a very broad nonassertion covenant from HiSilicon to Qualcomm. And it also requires that HiSilicon provide sensitive business information, including the customer and the quantity that we're selling to each customer. So those are the very sensitive business information as we're competitors — HiSilicon is a competitor of Qualcomm.

Yu Depo. 132:13-20.

Today, according to Finbarr Moynihan (MediaTek General Manager of Customer **[*749]** Sales and Business Development), HiSilicon is not a competitor for business from non-Huawei OEMs:

> **Q**: And have you ever changed MediaTek pricing in response to competition from HiSilicon at an OEM other than Huawei?
>
> **A**: No, not that I'm aware of.
>
> **Q**: And why is that?
>
> **A**: Same reason. I think **[**225]** even more so we only see HiSilicon in Huawei phones.

Tr. at 327:16-21. Thus, Qualcomm's refusal to license HiSilicon has prevented HiSilicon from becoming a competitor for business from OEMs other than Huawei.

7. Refusal to License Broadcom

Qualcomm's refusal to license has also promoted rivals' exit from the modem chip business. Scott McGregor (former Broadcom CEO) testified that when Broadcom entered the modem chip business and asked Qualcomm for a license, Paul Jacobs (Qualcomm CEO) refused to license Broadcom:

> And I drove down to visit them in San Diego and I met with Paul and Sanjay[8] was in the office as well. . . . And I was surprised by the tone that Sanjay took and just was very aggressive and said, 'No, we can never work with you.' And, you know, 'We don't want you in the business.' And it was kind of alarming to me, and so I was sort of came to the conclusion that Qualcomm was going to be difficult to work with. And we subsequently tried to work out licensing terms with them and we didn't feel we could get reasonable licensing terms with working on that and we felt that may be blocking us in the space.

McGregor Depo. 151:3-14.

Qualcomm's failure to license Broadcom promoted Broadcom's **[**226]** exit from the market. According to a 2016 internal Qualcomm pricing presentation, Broadcom exited the modem chip market in July 2014. CX8292-006.

8. Refusal to License Texas Instruments

Qualcomm also refused to license its SEPs to rival modem chip supplier Texas Instruments ("TI"), which promoted TI's exit from the market.

According to a June 2012 email from Marv Blecker (QTL Senior Vice President) to Derek Aberle (QTL Group President) and Fabian Gonell (QTL Division Counsel), Qualcomm had previously refused to license TI: "[W]e were also asked for licenses by Intel and TI at a minimum, probably others (e.g., Samsung, Mediatek) as well, and we refused to enter into anything other than a non-exhaustive covenant (or covenant to sue last in the case of SS and MT)." CX8285-001.

According to a 2016 internal Qualcomm pricing presentation, TI exited the modem chip market in November 2012. CX8292-006.

9. 2015 Refusal to License LGE

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[8] There are two current or former Qualcomm executives named Sanjay (Sanjay Jha and Sanjay Mehta), ECF No. 1326, and it is not clear with which McGregor met.

Qualcomm also refused to license LGE, and LGE has not entered the market. According to an October 2015 email regarding LGE negotiations that Eric Reifschneider (QTL Senior Vice President and General Manager) sent to Derek Aberle (Qualcomm President) and Fabian Gonell **[**227]** (QTL Division Counsel), LGE had requested a SEP license from Qualcomm for LGE's potential modem chip, a request Qualcomm planned to refuse:

> Willing to have broad product coverage (as we already do in the existing agreements) but not willing to grant exhaustive **[*750]** license to LGE for chipsets (they don't even have a chipset business — they said they wanted a license just in case, and then they also said they wanted us to license other chip suppliers exhaustively so they could buy chips from them and not pay us royalties on that portion of our patent portfolio).

CX5179-001. Since Qualcomm's refusal to grant LGE a license, LGE has not entered the market as a modem chip supplier.

10. 2009 and 2018 Refusals to License Samsung

Qualcomm has also refused to license Samsung on multiple occasions—in addition to the 2011 refusal discussed above—which has prevented Samsung from selling its modem chips to external OEMs.

According to Andrew Hong (Legal Counsel at Samsung Intellectual Property Center), during license negotiations, Qualcomm made it clear to Samsung that "Qualcomm's standard business practice was not to provide licenses to chip manufacturers." Hong Depo. 161:16-19. Instead, Qualcomm had an **[**228]** "unwritten policy of not going after chip manufacturers." *Id.* at 161:24-25. Samsung's internal notes from another Qualcomm negotiation demonstrate that Qualcomm's refusal to license restricted rivals from selling to third parties: "Qualcomm's business structure does not grant licenses to chipset suppliers, and grants non-assertion covenants to set manufacturers who are not Qualcomm licensees on the ground that they do not sell chipsets, restricting them from selling chipsets." CX2643A-001.

Hong testified that from Samsung's perspective, a promise not to assert patents against Samsung only did not provide sufficient security for Samsung's OEM customers:

> So as part of any chip manufacturing business, a lot of what we do is provide assurances to our customers that we have the rights to manufacture and sell chips. If there's any risk of being sued, meaning that the customer could not use the chip or would have to pay additional amounts, then those become problems for us that we have to address.

Hong Depo. 162:4-11.

In 2017, after the Korea Fair Trade Commission ("KFTC") found that Qualcomm had violated Korean law by "refusing to license, or imposing restrictions on licenses for, cellular communications **[**229]** standard-essential patents with competing modem chipset makers," CX7257-099, Samsung again sought a license from Qualcomm for Samsung to sell modem chips. However, according to Seungho Ahn (Head of Samsung Intellectual Property Center), Qualcomm refused: "They have yet to give us a license." Ahn Depo. 105:9-11.

Qualcomm has also altered the agreements it offers modem chip suppliers in lieu of licenses. Alex Rogers (QTL President) testified at trial that as part of the 2018 Settlement Agreement between Samsung and Qualcomm, Qualcomm did not license Samsung, but instead promised only that Qualcomm would offer Samsung a FRAND license before suing Samsung: "Qualcomm gave Samsung an assurance that should Qualcomm ever seek to assert its cellular SEPs against that component business, against those components, we would first make Samsung an offer on fair, reasonable, and non-discriminatory terms." Tr. at 1989:5-10. Thus, Qualcomm has never licensed Samsung to sell modem chips.

As a result, Samsung is not a competitor to sell modem chips to external OEMs. Alex Rogers (QTL President) testified that Samsung's modem chip division, Exynos (also known as Samsung LSI), is not an external competitor: **[**230]** "Samsung has a cellular **[*751]** baseband business that they make primarily for their own use." Tr. at 1989:5-6. Finbarr Moynihan (MediaTek General Manager of Customer Sales and Business

Development) agreed: "We don't tend to see Samsung LSI as a supplier much outside of Samsung's own phones." Tr. at 327:14-15.

In sum, Qualcomm's refusal to license has prevented rivals' entry, impeded rivals' ability to sell modem chips externally or at all, promoted rivals' exit, and delayed rivals' entry. Qualcomm's refusal to license rivals has further limited OEMs' chip supply options, which has enabled Qualcomm's anticompetitive conduct toward OEMs, sustained Qualcomm's unreasonably high royalty rates, and required OEMs to spend more money on royalty payments to Qualcomm rather than on new technology and product development for consumers.

D. Qualcomm's FRAND Commitments Require Qualcomm to License its Modem Chip SEPs to Rivals

Next, the Court explains how Qualcomm's refusal to license rivals violates Qualcomm's FRAND commitments. The Court held on summary judgment that Qualcomm's FRAND commitments to two SSOs require Qualcomm to license its SEPs to rivals. Outside the context of this litigation, Qualcomm **[**231]** and other SEP holders have advanced the same understanding of FRAND. In addition, Qualcomm's own recorded statements to the Internal Revenue Service ("IRS") show that Qualcomm previously licensed its SEPs to rivals, but stopped doing so because Qualcomm concluded that instead licensing its SEPs to only OEMs is "humongously more lucrative." Therefore, the Court rejects as pretextual Qualcomm's justifications for refusing to license its rivals. The Court discusses these conclusions in more detail below.

1. The Court's Summary Judgment Order

On summary judgment, the Court held that under Qualcomm's FRAND commitments to two cellular SSOs, the Telecommunications Industry Association ("TIA") and Alliance for Telecommunications Industry Solutions ("ATIS"), Qualcomm is required to license its SEPs to rival modem chip suppliers. *Fed. Trade Comm'n v. Qualcomm, 2018 U.S. Dist. LEXIS 190051, 2018 WL 5848999, at *7*.

Although standards promote interoperability, standards also "threaten to endow holders of standard-essential patents with disproportionate market power." *Microsoft Corp. v. Motorola Inc., 696 F.3d 872, 876 (9th Cir. 2012)*. As a result, the Ninth Circuit held in *Microsoft v. Motorola* that "SSOs requir[e] members who hold IP rights in standard-essential patents to agree to license those patents *to all comers* on [FRAND] terms." *Id.* (emphasis **[**232]** added). These SSO intellectual property policies "admit[] of no limitations as to who or how many applicants could receive a license." *Id. at 884*. Three years later, the Ninth Circuit repeated the same principle: a "SEP holder *cannot* refuse a license to a manufacturer who commits to paying the RAND rate." *Microsoft Corp. v. Motorola Inc., 795 F.3d 1024, 1031 (9th Cir. 2015)* (emphasis added).

For example, under the intellectual property policy of TIA, a SEP holder like Qualcomm must commit to TIA that "A license under any Essential Patent(s), the license rights which are held by the undersigned Patent Holder, will be made available to all applicants under terms and conditions that are reasonable and non-discriminatory." *Fed. Trade Comm'n v. Qualcomm, 2018 U.S. Dist. LEXIS 190051, 2018 WL 5848999, at *3*.

[*752] Consistent with the Ninth Circuit's precedents, the Court held at summary judgment that Qualcomm's commitments to ATIS and TIA to license its SEPs on terms "free of any unfair discrimination" prohibit Qualcomm from discriminating against rival modem chip suppliers by refusing to grant them licenses. *2018 U.S. Dist. LEXIS 190051, [WL] at *11*. In addition, consistent with California contract law, the Court examined extrinsic evidence of the meaning of Qualcomm's FRAND commitments. The Court observed that guidelines to TIA's intellectual property policy specifically identify "a willingness **[**233]** to license all applicants except for competitors of the licensor" as discriminatory conduct. *2018 U.S. Dist. LEXIS 190051, [WL] at *12*. The Court further concluded that Qualcomm's contractual commitments to ATIS and TIA to license rivals are consistent with the purposes of SSO intellectual property policies, which require the licensing of SEPs to prevent a SEP holder from securing a monopoly based on the standardization of its technology. *Id.*

2. Qualcomm Had the Same Understanding of FRAND Outside This Litigation

Outside the context of this litigation, Qualcomm expressed the same understanding of FRAND as the Court's summary judgment ruling.

In a 1999 Qualcomm email regarding an Intel request for a license, Steve Altman (then a Qualcomm lawyer, and later Qualcomm President), wrote to Lou Lupin (a Qualcomm lawyer who became Qualcomm General Counsel in 2000) and Marv Blecker (QTL Senior Vice President) that Qualcomm's "commitment to the industry to license on fair and reasonable terms free from unfair discrimination would make it difficult to argue that we have the right to refuse to license [Intel]." CX8177-001 to -002.

Then, in 2000, Steve Altman (then a Qualcomm lawyer, and later Qualcomm President) complained in a letter to **[**234]** Motorola that Motorola was not licensing its modem chip SEPs *to Qualcomm* despite "Motorola's commitment to the industry to license its essential patents." CX7799-001.

More recently, Qualcomm has repeated that understanding of FRAND. During a 2012 meeting with the IRS, Eric Reifschneider (QTL Senior Vice President and General Manager) explained to the IRS that when SEP holders participate in SSOs, "as part of that you often have to make commitments that you will, you know, make that technology available to people who want to make products that practice the standard." CX6786-R at 33:1-7. Eric Reifschneider explained that refusing to license a rival modem chip supplier is "not a great, you know, position to be in in terms of defending yourself against, you know, claims that you've broken those promises to make the technology available." *Id.* at 33:11-17.

Similarly, Ira Blumberg (Lenovo Vice President of Intellectual Property) testified at trial that FRAND requires Qualcomm to license its SEPs to modem chip suppliers: "My interpretation of FRAND obligations does suggest that the licensor has an obligation to license any company that requests a license, whether it is a chip company, a device company, **[**235]** or anything in between." Blumberg Depo. at 132:19-24.

3. Qualcomm Previously Licensed Rivals and Has Received Licenses at the Modem Chip Level

Consistent with its statements about FRAND outside litigation, Qualcomm has previously licensed its modem chip SEPs to rivals and received modem chip-level (as opposed to handset-level) licenses to other patent holders' SEPs.

Qualcomm told the IRS in 2012 that Qualcomm previously licensed its modem **[*753]** chips to rival modem chip suppliers. For example, Fabian Gonell (now QTL Legal Counsel and Senior Vice President, Licensing Strategy) told the IRS that Qualcomm had licensed rival modem chip suppliers: "The standard form for ASICs was a license, and royalties were charged. That was a limited license, but royalties were charged, and that changed some years ago so that it is now no longer a license and there are no royalties charged." CX6786-R at 22:18-22. ASIC is another term for modem chip. Similarly, Eric Reifschneider (QTL Senior Vice President and General Manager) told the IRS that Qualcomm had previously licensed its rivals: "We don't collect license fees or royalties at — for chip sets, and we haven't done so for some time now." *Id.* at 15:9-11.

[236]** Moreover, in a 1999 email, Steve Altman (then a Qualcomm lawyer, later Qualcomm President) stated to Marv Blecker (QTL Senior Vice President) that Qualcomm had licensed modem chip suppliers: "ASIC licensees pay royalties to QUALCOMM at 3% with no minimum dollar amount." CX8177-001. As the Court will explain below, Qualcomm later stopped licensing rivals because Qualcomm decided that it was more lucrative to license only OEMs.

Qualcomm has also received chip-level licenses to others' modem chip SEPs. At trial, Fabian Gonell (QTL Legal Counsel and Senior Vice President, Licensing Strategy) conceded that Qualcomm has received modem chip licenses from other companies:

Q: Qualcomm has had exhaustive chip-level licenses covering cellular standard essential patents from other companies; right?

A: Inbound licenses?

Q: Correct.

A: Yes.

Tr. at 1494:4-9. Specifically, Gonell conceded that Qualcomm has an existing license from Ericsson, *id.* at 1494:10-13, which Christina Petersson (Ericsson Vice President of Intellectual Property) confirmed. Petersson Depo. 26:5-10.

4. Other SEP Holders Have Granted and Received Modem Chip-Level Licenses

Other modem chip suppliers grant chip-level licenses to their modem chip SEPs. **[**237]** Yooseok Kim (Samsung Intellectual Property Center Official) testified that Samsung has granted Google and Intel licenses to Samsung's cellular SEPs. When asked "[A]re you aware of any instances where Samsung gave a license to its cellular patents to a modem chip maker for the manufacture and sale of modem chipsets?", Kim answered "Yes, I am." Kim Depo. 29:24-30:3. Specifically, Kim identified Samsung licenses to Intel and Google. *Id.* at 30:4-12. As noted above, Ericsson also granted Qualcomm a chip-level license.

5. Qualcomm Now Refuses to License Rivals Because it is More Lucrative to License Only OEMs

Qualcomm stopped licensing rival modem chip suppliers not because Qualcomm's view of FRAND changed, but rather because Qualcomm determined that it was far more lucrative to license only OEMs.

For example, at the 2012 IRS meeting, Marv Blecker (QTL Senior Vice President) told the IRS that when Qualcomm licensed rival modem chip suppliers, revenue from those licenses amounted to only a tiny fraction of Qualcomm's handset royalty revenues: "[W]hen ninety-five percent of the royalties come from manufacturers of these things, and I don't know what the percentage was when we were collecting **[**238]** royalties, but it had to be well less than one percent came from component suppliers." CX6786-R at 32:6-10.

[*754] According to a 1999 email Steve Altman (then a Qualcomm lawyer, and later Qualcomm President) sent to Marv Blecker (QTL Senior Vice President), Qualcomm received as little as $.30 in royalty payments per modem chip from modem chip licensees: "Other ASIC licensees pay royalties to QUALCOMM at 3% with no minimum dollar amount. Therefore, on a $10 ASIC, other licensees will pay us 30 cents." CX8177-001.

Qualcomm stopped licensing rivals because doing so could jeopardize Qualcomm's ability to charge unreasonably high royalty rates to OEMs. Eric Reifschneider (QTL Senior Vice President and General Manager) told the IRS that if Qualcomm continued to license rival modem chip suppliers, a rival's modem chip sale to an OEM could prevent Qualcomm from collecting royalties from the OEM: "[W]hen [the rival] sell[s] that chip to somebody who's going to put the chip in a cell phone, okay, the licensee's sale of that chip will exhaust our rights and then we won't be able to collect a royalty on a cell phone that's based on the price of the cellphone." CX6786-R at 26:6-12.

Similarly, in 2004, Steve Altman (Qualcomm President **[**239]** beginning in 2005) told Sean Maloney (Intel) in an email that Qualcomm could not grant Intel a license to sell modem chips to OEMs "given the negative impact that it could have on Qualcomm's licensing program (which comprises a very substantial portion of the company's revenue and profit)." CX7580-001.

Given the choice, collecting handset royalties is far more lucrative than collecting modem chip royalties. Eric Reifschneider (QTL Senior Vice President and General Manager) so told the IRS: "[W]e collect a royalty on a cell phone that's based on the price of the cell phone, and that's a lot higher than the price of the chip. So given a choice, you're always going to want to collect a royalty on the cell phone, not on the chip." CX6786-R at 26:6-18. More simply, Reifschneider told the IRS that Qualcomm decided to "concentrate our licensing program and our licensing negotiations on the guys who make the cell phones and the base stations and the test equipment, *because that's where the real money is*." *Id.* at 27:1-16, 32:14-22 (emphasis added).

Thus, when the IRS asked whether Qualcomm's decision to stop licensing its SEPs to rivals was a "business decision," Marv Blecker (QTL Senior Vice President) **[**240]** agreed: "Oh it's more than that, it's more than that. That's an understatement." *Id.* at 70:22-71:3. Blecker told the IRS that to license rivals would have "the potential of threatening our entire revenue stream at the handset level." *Id.* at 71:5-6.

Fabian Gonell (now QTL Legal Counsel and Senior Vice President, Licensing Strategy) agreed that Qualcomm stopped licensing rival modem chip suppliers because Qualcomm had to choose between licensing rivals and OEMs, and licensing OEMs is far more lucrative: "But having — having to choose between one or the other then you're right, obviously the handset is humongously more . . . lucrative for a bunch of — a bunch of reasons." *Id.* at 71:18-23. At trial, Fabian Gonell again conceded that it is "absolutely correct" that licensing OEMs rather than rivals is more lucrative. Tr. at 1492:7-11. Thus, Qualcomm stopped licensing its SEPs to rivals because licensing rivals could jeopardize Qualcomm's ability to charge unreasonably high royalty rates to OEMs.

6. Other SEP Licensors Have Imitated Qualcomm's Practice Because it is Lucrative

Following Qualcomm's lead, other SEP licensors like Nokia and Ericsson have concluded that licensing only OEMs is **[*755]** more **[**241]** lucrative, and structured their practices accordingly.

At the 2012 IRS meeting, Eric Reifschneider (QTL Senior Vice President and General Manager) told the IRS that Nokia and Ericsson have similar patent portfolios to Qualcomm: "[I]f you have a licensing program like ours — and to some extent Nokia and Ericsson do — they were also companies who participated in the development of wireless technology in the '90s and in the - 2000 decade, and they have large patent portfolios." CX6786-R at 42:11-15.

Eric Reifschneider (QTL Senior Vice President and General Manager) told the IRS that Nokia and Ericsson have imitated Qualcomm's practice and license only OEMs in order to make more money: "[S]o they also — following our lead I might say — you know, decided hey, we can license these patents and make money by doing and we can make more money licensing this than licensing the chip. So like they licensed the cell phone, not the chip." *Id.* at 42:17-21.

A 2014 internal MediaTek memo, another contemporaneous document, confirms that Qualcomm and other SEP holders, like Nokia and Ericsson, refuse to license modem chip suppliers because licensing only OEMs is more lucrative. In the memo, Finbarr Moynihan **[**242]** (MediaTek General Manager of Customer Sales and Business Development) wrote that evolutions in patent exhaustion law "caused many of the IPR holders to rework their licensing agreements and policies and in my experience they now go out of their way to make it absolutely clear that they are NOT licensing to the chipset company." QX0219-002. Previously, most SEP holders—including Qualcomm—would "license *everyone* [in] the supply chain," including modem chip suppliers. QX0219-002 (emphasis added).

Nokia and Ericsson's contemporaneous documents and statements contradict Nokia's and Ericsson's self-serving and made-for-litigation justifications for refusing to license modem chip suppliers. For example, in 2006, Nokia argued before the European Commission that Qualcomm's FRAND commitment to license its SEPs to a modem chip supplier was "unequivocal." *FTC v. Qualcomm, 2018 U.S. Dist. LEXIS 190051, 2018 WL 5848999, at *13*. Specifically, Nokia "alleged that Qualcomm's termination of a modem chip license agreement 'after having induced SSOs to base . . . standards on Qualcomm's technology' breached 'Qualcomm's duty to license on FRAND terms' based on multiple IPR policies." *FTC v. Qualcomm, 2018 U.S. Dist. LEXIS 190051, 2018 WL 5848999, at *13*.

However, to preserve its lucrative OEM licensing business modeled after Qualcomm, Dirk Weiler **[**243]** (Nokia Head of Standards Policy) testified at the instant trial that Nokia follows FRAND "by licensing its patents on the device level." Tr. at 1672:4-6. To license at the "device level" means to license the OEM, not the modem chip supplier. *Id.* at 1674:14-17. This is diametrically opposed to what Nokia represented to the European Commission in 2006.

Despite opining about how the entire industry licenses modem chip SEPs, Weiler conveniently claimed complete ignorance about the specific licenses and licensing discussions of Weiler's employer, Nokia. Thus, Weiler was unable to answer any questions about whether Nokia had licensed its SEPs to modem chip suppliers: "I'm not aware of specific licenses from — inside of Nokia, no." *Id.* at 1688:17-18; *see also id.* at 1688:9-11 (**Q**: And you testified that you've never been involved in any licensing discussions at Nokia; right? **A**: This is correct, yes.). Thus, the FTC could not cross-examine Weiler about Nokia's 2006 statements to the European Commission. **[*756]** The Court finds that Weiler was not credible.

Thus, other SEP holders like Nokia and Ericsson have followed Qualcomm's lead and refuse to license modem chip suppliers because it is more lucrative **[**244]** to license only OEMs.

7. Qualcomm's Justifications for its Refusal to License Rivals Are Pretextual

Qualcomm offers self-serving and pretextual justifications for Qualcomm's refusal to license modem chip suppliers. Qualcomm argues that refusing to license its SEPs to rivals and instead licensing only OEMs is procompetitive because the practice "reduces transaction costs, aligns royalties with the value of the licensed patents, and is much more efficient than the multi-level licensing that would be required if Qualcomm and other innovators licensed other than at the device level." QC FOFCOL at 128.

However, Qualcomm's own recorded statements to the IRS show that Qualcomm used to license rival modem chip suppliers, and that Qualcomm stopped licensing rivals because it is more lucrative to license only OEMs. Nowhere in QTL's long discussion with the IRS did any QTL executive raise concerns about multi-level licensing.

In addition, the unsupported trial testimony that Qualcomm offered to support its justification was not credible. Fabian Gonell (QTL Legal Counsel and Senior Vice President, Licensing Strategy) testified that if Qualcomm had to license modem chip suppliers, Qualcomm would have to engage in **[**245]** multi-level licensing because some of Qualcomm's cellular SEPs read on a handset but not on modem chips. Tr. at 1433:12-14. Thus, Gonell testified, "Once you're in a world where you have to license a device anyway, it's just much more efficient to do one negotiation rather than two." *Id.* at 1434:5-7.

Gonell was not credible in multiple respects. First, Gonell pretended not to recall Qualcomm's 2012 IRS meeting until the FTC played a recording from the meeting with which Gonell disagreed. Second, Gonell's own recorded statements to the IRS, a U.S. government agency, contradict Gonell's prepared for trial testimony.

At trial, Fabian Gonell (QTL Legal Counsel and Senior Vice President, Licensing Strategy) initially claimed to have no memory of the IRS meeting:

> **Q**: In July 2012, you had a conversation with the Internal Revenue Service discussing Qualcomm's licensing practices. Do you recall that?
>
> **A**: No, but I've seen something that purports to be a transcript of that conversation. But I don't have a distinct recollection of that. . . . I really, at this point, don't have a, a memory of the meeting. But I have no reason to doubt that it happened.

Tr. at 1484:17-1485:5. After the FTC played a **[**246]** clip of Marv Blecker (then QTL Senior Vice President) speaking to the IRS, Gonell continued to claim no memory of the meeting:

Q: So do you agree with Mr. Blecker that the ASIC patent agreements that he was describing that you've just testified about were not licenses?

A: . . . That is absolutely 100 percent Marv Blecker's voice. There is no question in my mind. I don't know who the woman on the tape is, but that is absolutely Marv Blecker's voice. So he said those things, absolutely. I just don't know what he means by those things so I can't tell you whether I agree with it or not.

[*757] **Q**: Okay. But you agree that that is something he said?

A: That is absolutely Marv Blecker's voice. I don't know what else is said on the tape. But that is 1,000 percent, to my ears, Marv Blecker's voice.

Q: Okay. And I'd like to play another statement from Mr. Reifschneider. Actually, excuse me. Is it a true statement that Qualcomm told the IRS that its ASIC patent agreements are not license agreements in reality?

A: Well, I don't know. No, I don't know. I mean, Marv Blecker said that. I don't know what the context was, and I don't know what else was said. So I don't know the entirety of what was communicated **[**247]** to the IRS. But those words, whatever those words just, we just heard, Marv Blecker said for sure. But what was communicated and what was intended to be communicated, you know, I'd have to listen to the whole thing or read the transcript to try to understand.

Id. at 1487:23-1489:4. Then, the FTC played a clip of Eric Reifschneider (then QTL Senior Vice President and General Manager) at the meeting, and Gonell continued to profess ignorance:

Q: Okay. And so that was a statement that Mr. Reifschneider made to the Internal Revenue Service on this phone — in this meeting; correct?

A: If this is — if this is a meeting of something with the Internal Revenue Service, I — and he's saying that to — that's who he's talking to, then, yes. It was clearly him talking.

Id. at 1489:17-23.

Finally, the FTC played another clip of Marv Blecker (then QTL Senior Vice President) at the IRS meeting, in which Blecker said that Qualcomm could not charge unreasonably high royalty rates if Qualcomm licensed rival modem chip suppliers. Specifically, Blecker told the IRS:

Yeah, but if I would average royalty on all the handsets that we collect royalties on — I don't remember what it is anymore, I used to know the number **[**248]** — but if — if it were ten dollars, for example, you couldn't charge a ten-dollar royalty on a chipset that cost five dollars, or six dollars, or seven dollars.

CX786R at 73:10-15. Blecker (then QTL Senior Vice President) continued: "Yeah, and it would be hard to convince a court that that was a fair royalty also." *Id.* at 73:20-21.

In court, Fabian Gonell's (QTL Legal Counsel and Senior Vice President, Licensing Strategy) memory of the call suddenly returned:

Q: Are those statements made by Mr. Blecker and yourself on this conversation, in this conversation with the IRS?

A: Yes, although the conversation continued, and I expressed my disagreement with Mr. Blecker's statement.

Q: So you recall this meeting now?

A: No. I remember — I remember reading that.

Id. at 1490:24-1491:6.

Gonell's sudden recall once the FTC played a clip with which Gonell disagreed is not credible given Gonell's prior failure to recall the IRS meeting. Previously, Gonell would only agree that he recognized Reifschneider's or Blecker's voice. Gonell's demeanor in court when feigning ignorance was also not credible.

Most importantly, Fabian Gonell's (QTL Legal Counsel and Senior Vice President, Licensing Strategy) own recorded **[**249]** statements to the IRS, a U.S. government agency, contradict Gonell's trial claim that Qualcomm refuses to license rivals to avoid multi-level licensing. Rather, Gonell told the IRS in 2012 that Qualcomm stopped licensing its rivals because licensing only **[*758]** OEMs is more lucrative: "But having — having to choose between one or the other then you're right, obviously the handset is humongously more . . . lucrative for a bunch of — a bunch of reasons." CX6786R at 71:18-23. Thus, Gonell's trial testimony was not credible, and the Court rejects Qualcomm's self-serving justifications as pretextual.

Accordingly, the Court concludes that Qualcomm's FRAND commitments—consistent with Qualcomm's prior actions and statements—require Qualcomm to license its SEPs to rival modem chip suppliers.

E. Qualcomm Has an Antitrust Duty to License its SEPs to Rivals

The Court now addresses whether Qualcomm has a duty under the Sherman Act to license its SEPs to rival modem chip suppliers. The United States Supreme Court has explained that, in general, "there is no duty to aid competitors." *Trinko, 540 U.S. at 411*. Nonetheless, "[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and **[**250]** violate *§ 2*." *Id.* For the reasons explained below, the Court concludes that Qualcomm has an antitrust duty to license its SEPs to rival modem chip suppliers.

One circumstance where a monopolist has a duty to deal with rivals is explained in *Aspen Skiing, 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467*. In *Aspen Skiing*, the defendant owned three of the four ski resorts in Aspen, Colorado, and the plaintiff owned the fourth resort. *Id. at 585*. The defendant and the plaintiff had, for many years, offered skiers a joint "all-Aspen ticket" that gave skiers admission to all four resorts. *Id. at 589-90*. Revenues from the joint ticket were divided according to the relative percentage of skiers that visited each mountain with the joint ticket. *Id. at 589*.

Believing that it could get greater revenues without the joint ski pass, the defendant offered the plaintiff "an offer that [the plaintiff] could not accept." *Id. at 592*. Essentially, the defendant would only agree to continue the joint ticket if the plaintiff agreed to a fixed percentage of revenue that was below the revenue that the plaintiff had historically received under the joint ticket. *Id.* Significantly, after the plaintiff refused the defendant's offer and the joint ticket was discontinued, the defendant also refused to sell the plaintiff **[**251]** any lift tickets to the defendant's ski resorts, even though the plaintiff offered to pay the defendant retail price for the tickets. *Id. at 593*.

The United States Supreme Court found that the defendant in *Aspen Skiing* violated an antitrust duty to deal with its competitor. The United States Supreme Court explained the general rule that, "[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman] [A]ct does not restrict the long recognized right of a" business to "exercise [its] own independent discretion as to the parties with whom [it] will deal." *Id. at 602*. However, in *Aspen Skiing*, there was sufficient evidence to show that the defendant had refused to deal with the plaintiff only because of the defendant's anticompetitive intent to maintain its monopoly. Specifically, as the United States Supreme Court later explained in *Trinko*, the *Aspen Skiing* Court "found significance in the defendant's decision to cease participation in a cooperative venture." *Trinko, 540 U.S. at 409*. The *Aspen Skiing* defendant's "unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an **[*759]** anticompetitive end." *Id.* Moreover, "the defendant's **[**252]** unwillingness to renew the [joint] ticket even if compensated at retail price revealed a distinctly anticompetitive bent." *Id.* In those circumstances, the defendant's refusal to deal with the plaintiff violated the Sherman Act.

By contrast, the United States Supreme Court in *Trinko* held that Verizon did not have an antitrust duty to deal with its competitors. There, the Telecommunications Act of 1996 for the first time imposed on Verizon an obligation to share its telephone network with its rivals. *Id. at 402*. However, Verizon did not process its rivals' requests "in a timely manner, or not at all." *Id. at 404-05*. Among other provisions, the Telecommunications Act required Verizon to allow rivals to actually enter Verizon's property and "locate and install [the rival's] equipment on the incumbent's [Verizon's] premises." *Id. at 406*.

Verizon's rivals sued Verizon and alleged that Verizon's refusal to deal was part of an anticompetitive scheme to harm its rivals and maintain Verizon's monopoly. *Id.* However, the United States Supreme Court in *Trinko* held that the plaintiffs had failed to show that Verizon's conduct fell within *Aspen Skiing*'s exception to the general no-duty-to-deal rule. *Id. at 408-09*. Specifically, the *Trinko* Court **[**253]** stated that the plaintiff's complaint "d[id] not allege that Verizon voluntarily engaged in a course of dealing with its rivals," or that Verizon would have ever have dealt with its rivals absent the Telecommunications Act's requirements. *Id. at 409*.

Moreover, the *Trinko* Court found further significance in the fact that, unlike the lift tickets at issue in *Aspen Skiing*, the sharing of Verizon's telephone network was "not otherwise marketed or available to the public." *Id. at 410*. Furthermore, elements of Verizon's telephone network "exist[ed] only deep within the bowels of Verizon" on Verizon's property and could only be shared "at considerable expense and effort" from Verizon. *Id.* Thus, the *Trinko* Court "conclude[d] that Verizon's alleged insufficient assistance to the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents." *Id.*

In *MetroNet Services Corp. v. Qwest Corp., 383 F.3d 1124, 1131 (9th Cir. 2004)*, the Ninth Circuit discussed *Trinko* and *Aspen Skiing* and determined that the United States Supreme Court considered three factors "significant for creating antitrust liability" in *Aspen Skiing* that were not present in *Trinko*. First, the *Aspen Skiing* defendant's "unilateral termination of a voluntary and profitable **[**254]** course of dealing." *Id. at 1132*. Second, the *Aspen Skiing* defendant's refusal to deal even if compensated at retail price, which suggested that the defendant's conduct was anticompetitive. *Id. at 1132*. Third, the fact that the *Aspen Skiing* defendant refused to provide its competitor a product that was "already sold in a retail market to other customers." *Id. at 1133*.

Therefore, *MetroNet*'s three factors "significant for creating antitrust liability" guide the Court's analysis. *See also* *SmithKlineBeecham Corp. v. Abbott Labs., 2014 U.S. Dist. LEXIS 164367, 2014 WL 6664226, at *4 (N.D. Cal. Nov. 24, 2014)* (holding that an antitrust duty to deal exists where a defendant decided "to alter a voluntary course of dealing together with evidence of anticompetitive malice"). The Court discusses below how Qualcomm's refusal to license rivals satisfies all three factors relevant to the antitrust duty to deal.

1. Qualcomm Terminated a Voluntary and Profitable Course of Dealing

The first factor relevant to the antitrust duty to deal is **[*760]** whether Qualcomm terminated a "voluntary and profitable course of dealing." *MetroNet, 383 F.3d at 1131*. For example, in *Aspen Skiing*, the defendant discontinued offering a joint lift ticket after many years of doing so. *472 U.S. at 604*. Here, because Qualcomm previously licensed its rivals, but voluntarily stopped licensing rivals even though doing **[**255]** so was profitable, Qualcomm terminated a voluntary and profitable course of dealing.

As the Court explained at length in Section V.D., Qualcomm previously licensed its rivals, as its FRAND commitments require. For example, Fabian Gonell (now QTL Legal Counsel and Senior Vice President, Licensing Strategy) told the IRS that Qualcomm had licensed rival modem chip suppliers: "The standard form for ASICs was a license, and royalties were charged." CX6786R at 22:18-22. ASIC is another term for modem chip.

Licensing rivals was also profitable for Qualcomm, as Qualcomm received royalties on patent licenses to modem chip suppliers. In a 1999 email, Steve Altman (then a Qualcomm lawyer, later Qualcomm President) stated to Marv Blecker (QTL Senior Vice President) that Qualcomm had licensed modem chip suppliers: "ASIC licensees pay royalties to QUALCOMM at 3% with no minimum dollar amount." CX8177-001.

However, Qualcomm voluntarily stopped licensing its rivals. Eric Reifschneider (QTL Senior Vice President and General Manager) told the IRS that Qualcomm no longer licensed its rivals: "We don't collect license fees or royalties at — for chip sets, and we haven't done so for some time now." CX6786R at 15:9-11. **[**256]** Later in the

IRS meeting, Reifschneider again emphasized that Qualcomm voluntarily stopped licensing its rivals: "So we'd gotten to the point where we decided you know what? We're not even going to try to collect license fees and royalties from guys who make chips." *Id.* at 32:14-16.

Thus, because Qualcomm previously licensed its rivals but voluntarily terminated that practice even though it was profitable, the Court concludes that Qualcomm voluntarily terminated a profitable course of dealing, and that the first factor relevant to the antitrust duty to deal is present in this case.

2. Qualcomm's Refusal to License Rivals is Motivated by Anticompetitive Malice

The second factor relevant to the antitrust duty to deal is whether Qualcomm's refusal to deal with its rivals is motivated by "anticompetitive malice." *SmithKline Beecham Corp., 2014 U.S. Dist. LEXIS 164367, 2014 WL 6664226, at *4*. In *Trinko*, the United States Supreme Court observed that the defendant's refusal to deal in *Aspen Skiing* "revealed a distinctly anticompetitive bent" because the defendant would not renew the joint lift ticket even if compensated at retail price. *540 U.S. at 409* (citing *Aspen Skiing, 472 U.S. at 608*). Here, Qualcomm's refusal to deal with its rivals reveals similar anticompetitive malice.

Qualcomm's own statements indicate **[**257]** that Qualcomm refuses to license rivals out of anticompetitive malice. For example, in 2012, Eric Reifschneider (QTL Senior Vice President and General Manager) told the IRS that QTL refuses to license rivals explicitly to avoid enabling competition to QCT, Qualcomm's chip business: "You know, we also have a big chipset business, you know, of our own, and we're also interested in protecting that, right?" CX6786R at 33:15-20.

In addition, refusing to license rivals preserves Qualcomm's unreasonably high royalty rates because if Qualcomm licensed its rivals, a rival's sale to an OEM could **[*761]** prevent Qualcomm from collecting royalties from the OEM, as Eric Reifschneider (QTL Senior Vice President and General Manager) told the IRS: "[T]he licensee's sale of that chip will exhaust our rights and then we won't be able to collect a royalty on a cell phone that's based on the price of the cellphone." CX6786-R at 26:6-12.

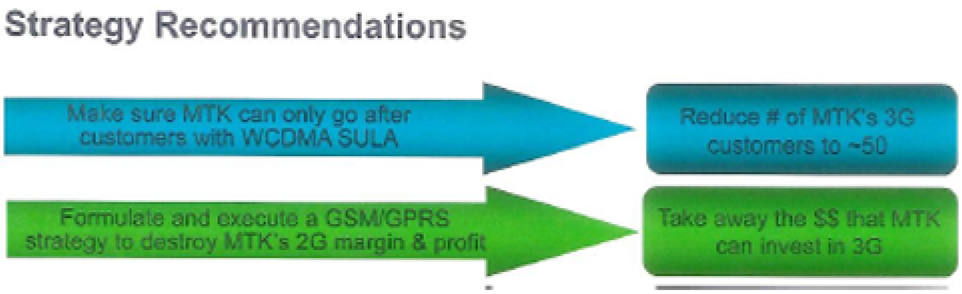
Marv Blecker (QTL Senior Vice President) also told the IRS that Qualcomm refuses to license rivals to preserve its unreasonably high royalty rates, and that to license rivals has "the potential of threatening our entire revenue stream at the handset level." CX6786R at 71:5-6.

Similarly, **[**258]** when Qualcomm refused Intel's 2004 request for a license, Steve Altman (Qualcomm lawyer, and later Qualcomm President) told Sean Maloney (Intel) in an email that Qualcomm could not license Intel because doing so would exhaust Qualcomm's patents and destroy Qualcomm's licensing program:

> [A]re you suggesting that we change our existing licensing program such that a third party purchasing a CDMA ASIC from Intel would receive rights under QUALCOMM's patents? If the later, given the negative impact that it could have on QUALCOMM's licensing program (which comprises a very substantial portion of the company's revenue and profit), we cannot agree to this proposal.

CX7580-001. Thus, Qualcomm's refusal to license rivals bolsters Qualcomm's unique practice of only selling modem chips to an OEM after the OEM signs a separate license agreement and helps Qualcomm avoid patent exhaustion.

In addition, Qualcomm admits that refusing to license rivals harms its rivals in the marketplace and that Qualcomm does so intentionally. In 2009, Qualcomm refused to license MediaTek and instead entered a CDMA ASIC Agreement that permitted MediaTek to sell modem chips only to Qualcomm licensees. JX0050-006. A Qualcomm **[**259]** presentation shared with Will Wyatt (QTI [Qualcomm Technologies, Inc., the Qualcomm subsidiary that operates QCT] Vice President, Finance) within days of the CDMA ASIC Agreement reveals Qualcomm's intent to reduce MediaTek's customer base and ability to invest in future products. Specifically, the presentation includes the strategy "make sure MTK can only go after customers with WCDMA SULA," with the goals to "Reduce # of MTK's 3G customers to ~50" and "Take away the $$that



MTK can invest in 3G." CX5809-041.

Thus, Qualcomm's contemporaneous documents and recorded statements to the IRS indicate that Qualcomm's refusal to license rivals is characterized by a "willingness to sacrifice short-term benefits"—like profitable licenses from modem chip rivals—"in order to obtain higher profits in the long run from the exclusion of competition" to QCT, Qualcomm's modem chip **[*762]** business. *See* MetroNet, 383 F.3d at 1132. Accordingly, with Qualcomm's anticompetitive malice evident, the Court concludes that the second antitrust duty to deal factor is present in this case.

3. There is an Existing Retail Market for Licensing Modem Chip SEPs

The third factor relevant to the antitrust duty to deal is whether Qualcomm refuses to sell **[**260]** products "already sold at retail," such that the Court will not need to set the terms of dealing in a new market. Trinko, 540 U.S. at 410. For example, in *Trinko*, the "services allegedly withheld [were] not otherwise marketed or available to the public." 540 U.S. at 410. Here, by contrast, because Qualcomm and other SEP holders have licensed modem chip SEPs at the chip level—as the Court explained in detail in Section V.E.—there is an existing market for modem chip SEP licenses.

For example, in the 2012 IRS meeting, Qualcomm admitted that Qualcomm has licensed its SEPs to modem chip suppliers for royalties. Fabian Gonell (now QTL Legal Counsel and Senior Vice President, Licensing Strategy) told the IRS that Qualcomm had licensed modem chip rivals and "royalties were charged." CX6786R at 22:18-22. Similarly, in a 1999 email, Steve Altman (then a Qualcomm lawyer, later Qualcomm President) told Marv Blecker (QTL Senior Vice President) that Qualcomm licensed its SEPs to modem chip suppliers "at 3% with no minimum dollar amount." CX8177-001.

Furthermore, Qualcomm has received chip-level licenses to modem chip SEPs, as Fabian Gonell (QTL Legal Counsel and Senior Vice President, Licensing Strategy) conceded at trial. Tr. at 1494:4-9. **[**261]** For example, Qualcomm has an existing license from Ericsson, according to both Gonell and Christina Petersson (Ericsson Vice President of Intellectual Property). *Id.* at 1494:10-13; Petersson Depo. 26:5-10. Yooseok Kim (Samsung Intellectual Property Center Official) testified that Samsung has entered chip-level cross-license agreements with both Intel and Google. Kim Depo. 30:5-12.

Thus, with an existing market for modem chip SEPs, this case is in stark contrast to *Trinko*, in which the "services allegedly withheld [were] not otherwise marketed or available to the public." 540 U.S. at 410. Therefore, the Court concludes that the third factor relevant to the antitrust duty to deal is present in this case. Accordingly, with all three factors from Aspen Skiing met, the Court concludes that Qualcomm has an antitrust duty to license its SEPs to rival modem chip suppliers.

Next, the Court discusses Qualcomm's exclusive dealing agreements with Apple.

F. Qualcomm's Exclusive Deals with Apple and Resulting Harm

The Court now explains how Qualcomm's exclusive deals with Apple, the 2011 Transition Agreement ("TA") and the 2013 First Amendment to Transition Agreement ("FATA"), violate the Sherman Act. Through the TA and FATA, Qualcomm **[**262]** shrunk rivals' sales and foreclosed its rivals from the positive network effects of working with Apple, which the Court discusses below. In so doing, Qualcomm maintained the monopoly power in the CDMA and premium LTE modem chip markets that Qualcomm has used to sustain QTL's unreasonably high royalty rates.

The United States Supreme Court has held that agreements that condition benefits to the buyer on exclusivity may be *de facto* exclusive dealing contracts if the "practical effect" is "to prevent . . . a buyer from using the products of the competitor **[*763]** of the . . . seller." *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 326, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*. The Ninth Circuit has held that an unlawful exclusive dealing arrangement "is an 'agreement between a vendor and a buyer that prevents the buyer from purchasing a given good from any other vendor,' and forecloses competition." *Aerotec Int'l, 836 F.3d at 1180* (quoting *Allied Ortho., 592 F.3d at 996 & n.1*). "This inquiry requires that we look at the actual terms of the agreements; indeed, 'a prerequisite to any exclusive dealing claim is an agreement to deal exclusively.'" *Id. at 1181* (quoting *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 270 (3d Cir. 2012))*.

1. De Facto Exclusive Dealing

The Court first addresses whether the TA and FATA were de facto exclusive deals. "In certain limited situations, discounts and rebates conditioned on a promise of **[**263]** exclusivity or on purchase of a specified quantity or market share of the seller's goods or services may be understood as 'de facto' exclusive dealing contracts because they coerce buyers into purchasing a substantial amount of their needs from the seller." *Aerotec Int'l, 836 F.3d at 1182*; *see also* *Pro Search Plus, LLC v. VFM Leonardo, Inc., 2013 U.S. Dist. LEXIS 169856, 2013 WL 6229141, at *5 (C.D. Cal. Dec. 2, 2013)* ("[D]e facto exclusive dealing claims are cognizable under the antitrust laws." (quoting *ZF Meritor, 696 F.3d at 270*)).

Here, the Court easily concludes that both the TA and FATA were de facto exclusive deals because both coerced "[Apple] into purchasing a substantial amount of their needs from [Qualcomm]." *Aerotec Int'l, 836 F.3d at 1182*. Under both the TA and FATA, Apple received hundreds of millions in incentives from Qualcomm only if Apple purchased substantial volumes of Qualcomm modem chips. For example, under the TA, Apple would only receive transition funds if Apple purchased at least 80 million Qualcomm modem chips each year. JX0057-003.

Even more so, the TA and FATA functioned as exclusive deals by imposing substantial penalties if Apple purchased *any* modem chips from a Qualcomm rival. The TA would automatically terminate if Apple sold any "Apple product commercially that incorporates a non-Qualcomm cellular baseband modem," and Apple would forfeit all future TA payments. **[**264]** JX0057-004. Under the clawback provision of the TA, Apple would have to pay back hundreds of millions in earned incentives if Apple sold a handset containing a Qualcomm rival's modem chip. *Id.* Thus, Tony Blevins (Apple Vice President of Procurement) testified that the TA's termination and clawback provisions effectively prevented Apple from buying modem chips from any supplier other than Qualcomm: "They made it very unattractive for us to choose a different chipset supplier. . . . So when we factor in the rebates that we would forfeit by using a different chip supplier, it served as a very strong disincentive for us to do so." Tr. at 689:18-23.

The FATA also included similar de facto exclusivity provisions. According to a June 2015 email from Will Wyatt (QTI Vice President, Finance) to Sanjay Mehta (QCT), Apple (whom Qualcomm code named "Maverick" or "Mav") would have to return $645 million in FATA incentives if Apple launched a handset containing a Qualcomm rival's chip before February 2016: "If Mav were to launch in Sept of 2015 we would get back $200M in VIF and $445M in MDF for a total of $645M in FYQ415." CX5767-001. The FATA would also terminate and Apple would forfeit future **[**265]** FATA payments if during the term of the agreement Apple sold "a Non-QC Device commercially (i.e., more than 1000 units)." JX0057-010. Accordingly, Tony **[*764]** Blevins (Apple Vice President of Procurement) testified that the FATA, like the TA, effectively precluded Apple from buying modem chips from any of Qualcomm's rivals: "[I]t was very apparent to us that the very, very large rebates that that I mentioned earlier would make it a complete nonstarter to work with someone else." Tr. at 698:21-24.

Therefore, the Court concludes that the TA and FATA were exclusive deals that both coerced "[Apple] into purchasing a substantial amount of [its] needs from [Qualcomm]." *Aerotec Int'l, 836 F.3d at 1182*.

2. Anticompetitive Exclusive Dealing

Although exclusive dealing is a theory under both sections of the Sherman Act, exclusive dealing is not always anticompetitive. *Feitelson v. Google Inc., 80 F. Supp. 3d 1019, 1029-30 (N.D. Cal. 2015)*. The Ninth Circuit has explained that there are "well-recognized economic benefits to exclusive dealing arrangements, including the enhancement of interbrand competition." *Omega, 127 F.3d at 1162*. For a buyer, an exclusive dealing agreement "may assure supply, afford protection against rises in price, enable long-term planning on the basis of known costs, and obviate the expense and risk of **[**266]** storage in the quantity necessary for a commodity having a fluctuating demand." *Std. Oil Co. v. United States, 337 U.S. 293, 306, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949)*.

The exclusive dealing arena is one where *§ 1* and *§ 2* of the Sherman Act diverge to some degree, at least in terms of the showing required to demonstrate anticompetitive effect. The Ninth Circuit has held that "an exclusive dealing arrangement violates *Section 1* only if its effect is to 'foreclose competition in a substantial share of the line of commerce affected." *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 996 (9th Cir. 2010)* (quoting *Omega, 127 F.3d at 1162*). The "substantial share" standard has typically "been quantified as foreclosure of 40% to 50% of the relevant market." *Feitelson, 80 F. Supp. 3d at 1030*.

By contrast, "a monopolist's use of exclusive contracts, in certain circumstances, may give rise to a *§ 2* violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a *§ 1* violation." *Microsoft, 253 F.3d at 70*. Courts have also held that exclusion from market share is not the sole means to show substantial foreclosure. An exclusive agreement may substantially lessen competition if the agreement "severely limit[s] . . . competition for the most important customers." *Kolon Indus., 637 F.3d at 452*. For example, in *Microsoft*, the D.C. Circuit concluded that Microsoft's exclusive dealing harmed competition by keeping "usage of **[**267]** [the rival's product] below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft's monopoly." *253 F.3d at 71*. Beyond market share, other indicia of anticompetitive exclusive dealing contracts include "requirements terms, steep market-share requirements, [and] contract duration." *Aerotec Int'l, 836 F. 3d at 1182*.

The Third Circuit in *ZF Meritor, 696 F.3d 254*, addressed the anticompetitive effects of de facto exclusive dealing agreements between a monopolist transmission supplier and truck manufacturers (referred to as OEMs). In *ZF Meritor*, Eaton, the transmission supplier, conditioned rebates to OEMs on the OEMs agreeing to purchase high percentages of transmissions from Eaton. *Id. at 265*. OEMs maintained "data books," which listed the product specifications (including transmission options) that end consumers could request **[*765]** when purchasing an OEM's truck. *Id. at 264*.

Although the specific arrangements varied, the OEMs all received rebates only if they purchased between 70% to 97.5% of their transmissions from Eaton. *Id. at 265*. As in Qualcomm's exclusive deals with Apple, Eaton retained the option to "require repayment of all contractual savings" or to terminate agreements if an OEM did not meet the required purchase threshold. *Id.* Eaton also **[**268]** required the OEMs "to publish Eaton as the standard offering" in their data books, and in two cases the agreements required OEMs to remove competing products from the data books altogether. *Id. at 265-66*. Eaton required the OEMs to price Eaton products preferentially as compared to those of its rival, ZF Meritor. *Id. at 266*.

The Third Circuit explained that "[e]xclusive dealing arrangements are of special concern when imposed by a monopolist," *id. at 271*, and gave the following example:

> [S]uppose an established manufacturer has long held a dominant position but is starting to lose market share to an aggressive young rival. A set of strategically planned exclusive-dealing contracts may slow the rival's expansion by requiring it to develop alternative outlets for its product, or rely at least temporarily on inferior or more expensive outlets. Consumer injury results from the delay that the dominant firm imposes on the smaller rival's growth.

Id. (quoting Phillip Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 1802c, at 64 (2d ed. 2002)).

In evaluating whether Eaton's exclusive dealing agreements were anticompetitive, the Third Circuit looked at three principal factors. First, the Third Circuit concluded that Eaton's exclusive **[**269]** deals with OEMs reduced the share of the market available to Eaton's competitors to approximately 15%. *Id. at 286*. Second, the exclusive deals were all at least five years in duration, and although the OEMs could technically terminate the agreements, the evidence showed that the termination clause was "essentially meaningless" in light of commercial realities. *Id. at 287*. Third, the Third Circuit observed that the exclusive deals included additional anticompetitive provisions, including the requirements to remove competitors from OEMs' data books and to offer preferential pricing on Eaton's transmissions. *Id. at 287-88*. Those provisions increased transaction costs on any sales of competitors' transmissions and "limited the ability of truck buyers to choose from a full menu of available transmissions." *Id.* Therefore, the Third Circuit held that Eaton's exclusive dealing agreements violated the Sherman Act.

As a point of contrast, the Ninth Circuit's decision in *Allied Orthopedic* provides an example of lawful exclusive dealing agreements. *592 F.3d 991*. The defendant, Tyco, sold sensors to health care providers. *Id. at 993*. When Tyco launched a new product in 2003, Tyco offered health care providers discounts if the providers committed to **[**270]** purchase a minimum percentage of sensors from Tyco. *Id. at 995*. Tyco also entered sole-source agreements with purchasing groups of health care providers, which gave the purchasing groups deeper discounts if the purchasing groups agreed to buy exclusively Tyco sensors. *Id.* The health care providers sued Tyco and argued that Tyco's agreements unlawfully restrained sellers of generic sensors. *Id.*

The Ninth Circuit found it significant that the Tyco agreements "did not contractually obligate Tyco's customers to purchase anything from Tyco," and instead provided discounts only if customers in fact purchased high volumes of sensors **[*766]** from Tyco or did so exclusively. *Id. at 996*. Therefore, health care providers were free to forgo the discounts and purchase lower-cost generic sensors at any time, such that a "competing manufacturer need only offer a better product or a better deal to acquire their [business]." *Id. at 997* (quoting *Omega, 127 F.3d at 1164*) (alterations in original). The Ninth Circuit thus held that Tyco's agreements did not foreclose a substantial share of the market and did not unlawfully restrain trade. *Id. at 998*.

3. Qualcomm's Exclusive Deals with Apple Foreclosed a Substantial Share of the Market

As set forth above, an exclusive deal is **[**271]** unlawful under the Sherman Act if the agreement "substantially foreclosed competition" in the market. *Tampa Elec., 365 U.S. at 334*. Here, Qualcomm's own documents recognize that exclusivity with Apple could in fact eliminate competition in modem chip markets because the remaining sales to other OEMs could not sustain a rival. Qualcomm's exclusive deals with Apple foreclosed rivals not only from Apple's market share, but also from the other benefits of selling modem chips to Apple that increase a modem chip supplier's standing in the industry. Qualcomm's exclusive deals with Apple also contain other anticompetitive indicia, including Qualcomm's intent to prevent Intel from selling modem chips to Apple. Lastly, Qualcomm's exclusive deals with Apple cannot be viewed in isolation, as Qualcomm has given several other OEMs chip incentive funds that further foreclose the market available to Qualcomm's rivals. The Court addresses each point in turn.

a. Qualcomm Recognizes That Without Sales to Apple, Competitors Could Not Survive

Exclusive dealing agreements are particularly fraught in markets, like the modem chip market, that are "highly concentrated" with few market participants. *ZF Meritor, 696 F.3d at 284*. Here, Qualcomm recognized that given **[**272]** that concentration in the market, exclusive deals with Apple could eliminate competition.

For example, in an August 2010 email, Steve Mollenkopf (QCT President) told Paul Jacobs (Qualcomm CEO), Derek Aberle (QTL President), and Steve Altman (Qualcomm President) that if Qualcomm secured Apple exclusivity in the TA, Qualcomm could eliminate any competition from modem chip markets: "[T]here are significant strategic benefits as it is unlikely that there will be enough standalone modem volume to sustain a viable competitor without that slot." CX5348-001. Slot and socket are terms for a modem chip design win for a handset. Tr. at 775:8-10. Thus, by Qualcomm's own accounting, the TA could foreclose Qualcomm's rivals not only from a substantial share of the market, but from remaining in the market altogether.

b. Qualcomm's Exclusive Deals with Apple Foreclosed Rivals from Gaining a Foothold in the Market

In addition, Qualcomm's exclusive deals with Apple deprived rivals of all benefits of selling modem chips to Apple and thus from gaining a foothold in the market. Specifically, Qualcomm's exclusive deals with Apple foreclosed Qualcomm's rivals from: (1) a revenue boost critical to funding research **[**273]** and development and acquisitions; (2) exposure to Apple's "best-in-class" engineering resources; (3) a foothold at Apple for future handsets; (4) opportunities to field test new products with Apple; (5) business opportunities from other OEMs; (6) enhanced standing in SSOs; and (7) opportunities to conduct early field testing and prototyping with network vendors and operators. Even though Qualcomm's own documents recognize that Apple's **[*767]** business generates such benefits for modem chip suppliers, Qualcomm attempts to define the foreclosed market by reference only to the five iPads that Intel lost in 2013 after Qualcomm entered the FATA. QC FOFCOL at 128. Alternatively, Qualcomm claims that Apple's own share of LTE handsets was never more than 41% in any single year. *Id.*

However, the Fourth Circuit and D.C. Circuit have both recognized that pure market share can be an inadequate measure of market foreclosure. In *Kolon Industries*, the Fourth Circuit held that it was sufficient at the pleading stage for the plaintiff to allege that the exclusive dealing agreements "severely limited [the plaintiff] from competition for the most important customers in categories needed to gain a foothold for effective competition." **[**274]** *637 F.3d at 452*. Similarly, in *Microsoft*, the D.C. Circuit found it dispositive that the monopolist's exclusive deals kept the rival's share "below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft's monopoly." *253 F.3d at 59*.

Qualcomm recognizes that winning business from an OEM in one year can lead to repeat business with that OEM. Will Wyatt (QTI Vice President, Finance) testified that winning an OEM's business strengthens a modem chip supplier's ability to supply modem chips to that OEM in future years:

> **Q**: In general, winning one design with an OEM can improve that chip supplier's chances of winning business with the OEM in the future; correct?
>
> **A**: It depends if they do a good job.
>
> **Q**: But in general, that's a true statement; correct?
>
> **A**: If they perform, yes.

Tr. at 443:11-16.

Moreover, Qualcomm's own documents recognize that selling modem chips to Apple helps modem chip suppliers become more competitive. A 2012 Qualcomm presentation shared with the Qualcomm Board of Directors identifies Apple as the OEM that "matters most." CX6974-027. In that presentation, Qualcomm stated that Apple's business is strategically beneficial for a modem chip supplier because Apple is the **[**275]** largest consumer of premium modems; Apple "challenges suppliers to provide best-in-class products" and thereby improves suppliers' products in the broader marketplace; and Apple's supplier receives the sales volumes necessary to fund research and development and produce continually advanced products. CX6974-028.

However, by striving to eliminate competition, Qualcomm's exclusive deals with Apple deprived rival modem chip suppliers of these benefits. As the 2012 Qualcomm presentation recognizes, sales are critical to investment in research and development. Similarly, Scott McGregor (former Broadcom CEO) testified that "the economics of being in the cellular baseband business are very sensitive to volume of customers" because of the investments necessary to fund research and development. McGregor Depo. 174:19-21.

In addition, sales help fund acquisitions to develop new technology. Intel acquired VIA in 2015, after Intel had won Apple's business but before the Apple handset had launched commercially. CX1598-001. Internal Intel projections indicated that acquiring VIA would only be profitable if Intel could supply modem chips to Apple; else Intel would not recoup its investment. CX1598-009. **[**276]** Aicha Evans (Intel Chief Strategy Officer) testified that Intel's modem chip division was only able to pitch the VIA acquisition to Intel management after Intel won initial Apple business:

> **Q**: So ultimately did the fact that Intel acquired, or won Apple's business affect its decision to acquire VIA?
>
> **[*768]** **A**: Oh, yeah. There wouldn't have been a — I wouldn't have been — yeah, there wouldn't have been a discussion.

Tr. at 581:17-20.

Apple's engineering expertise also benefited Intel. As Intel and Apple continued to work together, Apple pushed Intel to accelerate its engineering, Aicha Evans (Intel Chief Strategy Officer) testified: "[O]n the 2017 launch, initially I had to run for a plan of record of 450 megabits per second, and [Apple] gently explained to me that that wasn't going to cut it, it needs to be 600. So eventually I'm sure we would have done it, but not in that timeframe." Tr. at 579:19-24. Similarly, Christopher Johnson (Bain & Co. Partner), who consulted for Intel, testified that engineering engagement with an OEM like Apple sharpens a modem chip supplier's products and leads to opportunities to customize products for that OEM: "[B]y working with a customer and having access to their **[**277]** products and their engineering teams, you can customize your products and basically improve your pace of innovation in the features you're bringing out." Tr. at 1854:16-23.

Working with Apple may also generate business opportunities with other OEMs. Aicha Evans (Intel Chief Strategy Officer) testified that after Intel won Apple's business, other OEMs reached out about Intel's modem chips: "Lenovo is an example, LG is an example, Motorola is an example, Tesla is an example." Tr. at 576:20-577:4.

In addition, sales to OEMs also provide modem chip suppliers with opportunities to field test modem chips in real-world conditions. Finbarr Moynihan (MediaTek General Manager of Customer Sales and Business Development) testified that field testing sharpens a supplier's product and helps a supplier spot technical issues: "[I]f you're launching a new modem generation into the market, it takes certainly some time to get it into production, launch it with multiple OEMs into multiple operator networks and operators, network operators, and iron out any of the issues, the bugs that it might find in the field." Tr. at 365:20-25. During generational transitions especially, Moynihan testified, OEMs can **[**278]** "help us as a supplier and navigate some of those transitions without falling down." *Id.* at 339:19-340:4.

Furthermore, Aicha Evans (Intel Chief Strategy Officer) testified that when working with Apple, a modem chip supplier gains increased standing in SSOs and with operators (also referred to as carriers, like Verizon): "You also get what I call the halo effect of better presence in the standards, not just presence, but better weight in terms of your contributions, in terms of starting to get leadership positions. Same thing with the operators, because these devices eventually end up on their network." Tr. at 569:9-15.

Sales to OEMs like Apple also attract interest from operators and network vendors, who engage successful modem chip suppliers for field testing and early prototyping. For example, Stefan Wolff (Intel Engineer) explained in an internal Intel email that winning Apple's business improved Intel's standing with operators and network vendors, and gave Intel opportunities to conduct early field-testing of its newest products. Those early testing opportunities and the revenue from the Apple business would accelerate Intel's development of new products:

> We will attract operators **[**279]** and network vendors to do early prototyping / field testing with our latest LTE platforms given Apples [sic] huge volumes in the field. This will speed up the development, hardening, and TTM of our modem technology and help us to providing leading [sic] LTE IP for emerging markets like China. The Apple business will boost our modem revenue and will support the **[*769]** funding of our next generation LTE 7460 on IA and 14nm Intel process.

CX1599-001.

Here, however, Qualcomm's exclusive deals with Apple deprived rival modem chip suppliers of the foregoing benefits of selling modem chips to Apple. *See* *Kolon Indus., 637 F.3d at 452* (holding that exclusive dealing agreements are unlawful where they "severely limit[] . . . competition for the most important customers in categories needed to gain a foothold for effective competition"). Specifically, Qualcomm's exclusive deals foreclosed rivals from: (1) a revenue boost critical to funding research and development and acquisitions; (2) exposure to Apple's "best-in-class" engineering resources; (3) a foothold at Apple for future handsets; (4) opportunities to field test new products with Apple; (5) business opportunities from other OEMs; (6) enhanced standing in SSOs; and (7) opportunities **[**280]** to conduct early field testing and prototyping with network vendors and operators.

c. Anticompetitive Indicia

Moreover, Qualcomm's exclusive deals with Apple contain other indicia that Qualcomm's exclusive deals with Apple were anticompetitive. *See* *ZF Meritor, 696 F.3d at 289* (noting, in addition to exclusivity requirements, that the exclusive deals "included numerous provisions raising anticompetitive concerns"). Specifically, Qualcomm intended to foreclose rivals from selling modem chips to Apple and prevented Apple from initiating patent litigation against Qualcomm, which could jeopardize Qualcomm's licensing business.

Qualcomm sought exclusivity in the FATA *after* learning that Apple planned to buy modem chips from Qualcomm's rival Intel. At trial, Tony Blevins (Apple Vice President of Procurement) testified that in 2012, prior to the execution of the FATA, Apple planned to use an Intel modem chip for a 2013 iPad as a test run before using Intel in an iPhone:

> At one point in time we had an official plan of record that we would implement Intel on an iPad product launch, and that would give us confidence to extend their presence into an iPhone. We felt that iPad was a simpler transition because it was data only, **[**281]** and then we would add voice as we moved to phone.

Tr. at 690:5-10. J86 was Apple's code name for the iPad Mini 2. *Id.* at 692:9-10.

Qualcomm knew that Apple wanted to source from Intel. Eric Koliander (QCT Vice President, Sales) sent a December 2012 email about Apple's sourcing plans, which Steve Mollenkopf (Qualcomm President) received. CX5378-002. Koliander reported in the email, "Maverick [Qualcomm's code name for Apple] does appear to be working with Intel and we believe, Mav has assigned software and hardware engineering resources to the development of an Intel based platform." *Id.*

Qualcomm's post-deal evaluations of the FATA highlighted that the FATA prevented Apple from working with a second source. Steve Mollenkopf (Qualcomm President) explained in a March 2013 internal email to Cristiano Amon (QCT Co-President) and other Qualcomm executives that the FATA eliminated the Intel threat: "I understand it but the scenario is really that there would have been a license fight as well and a push for alternative source." CX7910-001.

The TA and FATA also included other anticompetitive provisions, as each would automatically terminate "[i]f Apple or any of its Affiliates initiates any action **[**282]** or litigation against Qualcomm, its Affiliates, or the foundries which includes any claim for intellectual property infringement." JX0057-004. By preventing Apple—a particularly **[*770]** important OEM—from engaging in litigation over Qualcomm's patents, these provisions further impaired "the health of the competitive process." *Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 394 (7th Cir. 1984)*.

d. The Duration of Qualcomm's Exclusive Agreements with Apple Compounds their Anticompetitive Effect

The five-year duration of Qualcomm's exclusive deals with Apple also makes them unlawful. The Ninth Circuit has upheld exclusive dealing agreements of "short duration." *Christofferson Dairy, Inc. v. MMM Sales, Inc., 849 F.2d 1168, 1173 (9th Cir. 1988)*; *see also* *Omega Envtl., 127 F.3d at 1163* (noting that the "easy terminability" of an exclusive deal renders it less likely to foreclose competition).

Although there is no set duration past which an exclusive dealing agreement is no longer "short," the United States Supreme Court upheld the FTC's determination that in an industry characterized by significant entry barriers, exclusive dealing agreements stretching beyond one year were unlawful. *Fed. Trade Comm'n v. Mot. Picture Adv. Serv. Co., 344 U.S. 392, 396, 73 S. Ct. 361, 97 L. Ed. 426, 49 F.T.C. 1730 (1953)*. Similarly, the Third Circuit in *ZF Meritor* found unlawful exclusive dealing agreements that stretched "for at least five years." *696 F.3d at 287*. Such long-term agreements were "unprecedented" in the transmissions **[**283]** industry. *Id.*

Here, the TA and the FATA together secured Qualcomm exclusivity with Apple for over five years, and Qualcomm identifies no other exclusive deals in the industry of comparable duration. The clawback provisions, which imperiled $645 million in earned incentives if Apple purchased modem chips from a Qualcomm rival, meant that neither agreement was at all "easily terminable." Thus, the five-year duration of Qualcomm's exclusive deals with Apple further renders the agreements anticompetitive.

e. Qualcomm's Other Exclusive Deals Compounded the Effect of Qualcomm's Exclusive Deals with Apple

Qualcomm's exclusive deals with Apple cannot be viewed in isolation. Qualcomm has a pattern of seeking this type of exclusivity with other OEMs, which further restricts the market available to rivals.

For example, in 2010, Qualcomm gave BlackBerry [TEXT REDACTED BY THE COURT] million in chip incentives, which BlackBerry received as rebates on QCT modem chips, according to the contemporaneous notes of John Grubbs (BlackBerry Senior Director of Intellectual Property Transactions). CX3255-002. Grubbs testified that because Qualcomm did not reduce BlackBerry's overall royalty burden, the chip incentive **[**284]** fund reduced the effective price of only Qualcomm modem chips, and resulted in exclusivity:

> BlackBerry is going to pay the royalty, regardless of whether it buys the chip from Qualcomm or Marvell. If — if Qualcomm agreed to reduce the royalty, then BlackBerry could buy the chips from Qualcomm or Marvell and still get the benefit of that reduced price. If Qualcomm reduces the chip cost, then we can only go to one person in order to take advantage of that and that's Qualcomm. So we can't go to Marvell and take advantage of a reduction in chip price unless they're going to get this reduction too.

Grubbs Depo. 259:13-25.

Similarly, a 2004 QTL chip incentive fund required LGE to purchase at least 85% of its modem chips from QCT to be eligible for the chip incentives. CX6809-004.

[*771] In 2003, Qualcomm's chip incentive fund required Samsung to purchase at least 85% of its modem chips from QCT in 2003 to "take market share from manufacturers that do not use our ASICs," according to Irwin Jacobs (Qualcomm Co-Founder). CX6719-002. As recently as 2018, Qualcomm's chip incentive fund required Samsung to purchase from Qualcomm 100% of Samsung's premium modem chips and at least a certain number of medium **[**285]** and high tier modem chips. JX0122-036.

In 2013, QTL offered Lenovo $180 million in chip incentives that were contingent on Lenovo purchasing at least 80 million modem chips from QCT over two years. CX6491-003.

In 2016, QTL offered Motorola a chip incentive fund that Motorola concluded would reduce Motorola's effective royalty rate to 3.8% only if Motorola purchased 100% of its modem chips from Qualcomm. CX2060-021.

In addition, Qualcomm used the threat of chip supply to preclude MediaTek from selling modem chips to VIVO, even though MediaTek's modem chips were more compatible with VIVO's handset. In a December 24, 2015 email, Sanjay Mehta told Derek Aberle (Qualcomm President), Cristiano Amon (QCT President), and Eric Reifschneider (QTL Senior Vice President and General Manager) that if Qualcomm committed to ensuring VIVO's chip supply, VIVO would stop working with MediaTek: "What VIVO will commit to (pending QTL confirmation that if VIVO continues to negotiate with QTL in good faith, QCT will continue shipping chipsets) . . . will not launch 6755/6750 based handsets (which means QCT will win significant upside in 2016)." CX5321-002. Cristiano Amon (Qualcomm President) testified that **[**286]** the 6755 and 6750 modem chips were MediaTek modem chips that had "competition advantages . . . and software compatibility with whatever the incumbent chipset in VIVO was." Tr. at 509:13-510:7.

Similarly, Brian Chong (Wistron Chief of New Technology Development and Product Planning) testified that Wistron could not afford to use MediaTek's modem chips because Qualcomm imposes onerous royalty payments on MediaTek's chips. This is true even when MediaTek's chips' price and specification are best suitable for Wistron's products. Specifically, Chong testified as follows:

> [T]here was a case that I remember in particular when we were considering introducing lower cost phones. And MTK was the chip supplier that we think best suitable for that product position in terms of price position and the spec corresponding that it offers. However, in the end we decided to stay Qualcomm for the simple reason that because Qualcomm responded that, even if we're using non-Qualcomm chips, we would still have to pay the onerous royalty that Qualcom dictated in the SULA.

Chong Depo. 256:9-20. Chong also testified that the upfront fee Wistron had paid Qualcomm incentivized Wistron to buy Qualcomm chips rather than **[**287]** rivals' chips: "So by staying with Qualcomm we would be able to recoup that investment faster." *Id.* at 256:21-257:1.

All of these agreements either resulted in or would have resulted in exclusivity, and further restricted the market available to rival modem chip suppliers. The cumulative impact of Qualcomm's pattern of exclusive deals is to suppress the OEM sales available to rival modem chip suppliers and to substantially foreclose the market available to rivals.

Accordingly, the Court concludes that because Qualcomm's exclusive deals with Apple foreclosed a "substantial share" of the modem chip market, Qualcomm's exclusive **[*772]** deals violate the Sherman Act. *Tampa Elec., 365 U.S. at 327*.

4. Qualcomm's Sales of Modem Chips to Apple Were Profitable Without Exclusivity

Qualcomm's own documents and testimony show that selling modem chips to Apple was profitable for Qualcomm *without* exclusivity. A 2011 Qualcomm slide deck, which James Thompson (Qualcomm CTO) and Steve Mollenkopf (Qualcomm President) received, represents final approval of the "Elan" chipset. CX6334-001. One slide shows that although Qualcomm anticipated primarily selling Elan chips to Apple in 2013, Qualcomm anticipated selling much higher volumes of Elan **[**288]** chips to *other* OEMs in future years. CX6334-024. Similarly, Aicha Evans (Intel Chief Strategy Officer) testified that Intel's investments in products for Apple benefit Intel's other products: "Even if we do something that's custom for them, it usually finds itself in the broader, in the broader market. So I would say the majority of the development, the R&D, it eventually will apply to scale." Tr. at 586:17-19.

In addition, Qualcomm's own expert, Dr. Tasneem Chipty, conceded that Qualcomm's exclusive deals with Apple were not necessary for Qualcomm to realize its target profits on thin modems. Dr. Chipty testified that when deciding whether to make a research and development investment for a product, Qualcomm compares the product's anticipated gross margin to the upfront research and development investment necessary to develop the product. Tr. at 1752:5-8. Dr. Chipty testified that Qualcomm calls this a "payback ratio" and that Qualcomm generally targets a payback ratio of three, such that a product's gross margin should triple the upfront research and development investment. *Id.* at 1752:10-13.

Dr. Chipty conceded that to realize that target payback ratio for certain thin modems, Qualcomm **[**289]** did not need to sell any thin modems to Apple. On the MDM 9X15, future sales to other OEMs would enable Qualcomm to realize a payback ratio of 8.2 without counting *a single sale* to Apple. *Id.* at 1753:2-5. In addition, for the Elan thin modem, Dr. Chipty conceded that exclusivity was not necessary to reach Qualcomm's profit goal: "Qualcomm needed to sell some 9X25 chipsets to Apple to meet its target payback ratio of 3, but Qualcomm didn't need to sell all of the chips it actually sold to Apple in order to recognize that payback ratio." *Id.* at 1753:13-16.

Thus, these Qualcomm documents contradict Qualcomm's claim that its exclusive deals with Apple were necessary to defray "relationship-specific" costs of working with Apple. QC FOFCOL at 130. Like Qualcomm's other supposed justifications for its unlawful conduct, this alleged justification is pretextual and contradicted by Qualcomm's own documents.

Rather, the evidence above shows that Qualcomm's sales to Apple already exceeded Qualcomm's target profit ratios. In fact, because of Qualcomm's billion dollar incentive payments to Apple, Qualcomm *sacrificed* short-term profit margins—by 20% in both 2015 and 2016—for the "[s]trategic importance of Apple modem design-win," **[**290]** according to a Qualcomm slide deck presented to the Qualcomm Board of Directors in 2013. CX5527-029. Steve Mollenkopf (Qualcomm CEO) acknowledged those financial implications in a March 2013 email, but said they were worth it for exclusivity: "I understand it but the scenario is really that there would have been a license fight as well and a push for alternative source." CX7910-001. Thus, Qualcomm's litigation justification is pretextual and contradicted by Qualcomm's own documents.

[*773] G. Qualcomm's Royalty Rates Are Unreasonably High

Next, the Court explains how Qualcomm's royalty rates are unreasonably high. Qualcomm's own documents repeatedly recognize that Qualcomm's unreasonably high royalty rates are set by its monopoly chip market share rather than the value of its patents. In fact, Qualcomm refuses to provide patent lists and patent claim charts during license negotiations, unlike other patent holders, and Qualcomm's own documents state that Qualcomm is not the top standards contributor. Moreover, like OEMs, Qualcomm admits that the modem chip no longer drives the value of cellular handsets. Yet Qualcomm continues to charge unreasonably high royalty rates on the sale of the whole **[**291]** handset.

Further, Qualcomm's royalty rate stays constant even though Qualcomm's share of SEPs is declining, Qualcomm's patents expire with successive standards, and Qualcomm receives cross-licenses to OEMs' patent portfolios. OEMs uniformly testified that Qualcomm's royalty rates are higher than any other cellular patent holder. Because of Qualcomm's chip monopoly power, Qualcomm's royalty rates are untested by litigation. For these reasons, and as explained in more detail below, Qualcomm's royalty rates are unreasonably high.

1. Qualcomm Has Admitted That its Chip Market Share Rather Than the Value of its Patents Sustains Qualcomm's Unreasonably High Royalty Rates

In Qualcomm's own documents, Qualcomm has repeatedly admitted that Qualcomm's monopoly chip market share—not the value of Qualcomm's patents—sustains Qualcomm's royalty rates. Qualcomm explicitly considered how QCT chip market share sustains QTL's royalty rates during two internal analyses of whether to split QCT and QTL, as discussed below.

Qualcomm first analyzed whether to split QCT and QTL beginning in 2007, in an analysis called Project Berlin. David Wise (Qualcomm Senior Vice President and Treasurer) led Project Berlin. **[**292]** Tr. at 103:16-18. Qualcomm's Project Berlin documents show that Qualcomm consistently recognized that QCT's modem share sustains QTL's royalty rates.

For example, in May 2007, Marv Blecker (QTL President) emailed Paul Jacobs (Qualcomm CEO) with a list of pros and cons for separation, in which Blecker observed that QCT protects QTL's royalty rates: "Without chip business, more licensees/potential licensees might fight QTL license demands." CX6605-001.

Specifically, OEMs cannot fight QTL's license demands because OEMs need QCT's modem chips. For example, in a February 2008 email, Steve Altman (Qualcomm President) told Paul Jacobs (Qualcomm CEO and son of Qualcomm Co-Founder Irwin Jacobs) that the only companies that had attacked Qualcomm bought little or no chips from Qualcomm, so the combination of QCT and QTL greatly enhances QTL's success. Steve Altman wrote in that email that it was essential for QCT to maintain market share and keep OEMs "reliant on us for continued supply" to protect QTL from royalty attacks:

> If you consider the fact that the only companies that have attacked us today are companies that essentially purchase little or no ASICs from us, you can understand how the combination **[**293]** of QCT with QTL greatly enhances QTL's success. As CDMA2000 grows and OEMs desire to participate in it to grow their market share, OEMs will remain reliant on us for continued supply and will need to maintain positive relationships with us . . . [if split] they would rely entirely on **[*774]** QCT, but would have no incentive NOT to attack QTL.

CX7035-001. At trial, Steve Altman (Qualcomm President during Project Berlin) claimed that he had "always been an advocate" of splitting QCT and QTL. Tr. at 238:21-25. However, the contemporaneous document Altman prepared eleven years earlier when he was Qualcomm President and Qualcomm was considering whether to split QCT and QTL is more persuasive than Altman's trial testimony given to avoid antitrust liability.

In other Project Berlin documents, Qualcomm admitted that without QCT's chip share, QTL might lack "leverage" to negotiate patent license agreements, and thus to continue to receive its unreasonably high royalty rates. A July 2007 Project Berlin presentation that Paul Jacobs (Qualcomm CEO) sent to Sanjay Jha (Qualcomm CEO and QCT President) discussed arguments for and against separation. CX7279-003. The presentation identified the following risk **[**294]** of separation: "Can hurt QTL's leverage to negotiate 3G renewals and 4G (OFDMA) licensing deals (ie. LG)." CX72979-008.

In 2015, Qualcomm again recognized in contemporaneous documents that QCT's monopoly chip power sustains QTL's unreasonably high royalty rates.

In 2015, Qualcomm initiated Project Phoenix, a second analysis of whether to split QCT and QTL, due to "concerns over [the] long-term sustainability of QTL royalty stream," according to a Qualcomm Project Phoenix presentation. CX6837-004. By 2015, several government antitrust investigations into Qualcomm's licensing practices were underway, including this action. According to Qualcomm's 2017 10-K filing with the SEC, the FTC first notified Qualcomm of its investigation related to the instant case in September 2014. CX7257-099. According to the 10-K, the Japan Fair Trade Commission ("JFTC"), Korea Fair Trade Commission ("KFTC"), and China's National Development and Reform Commission ("NDRC") had all investigated Qualcomm's licensing practices by the time Qualcomm initiated Project Phoenix, and the KFTC and JFTC had each concluded that certain Qualcomm practices violated those countries' laws. CX7257-097 to -098.

David Wise (Qualcomm **[**295]** Senior Vice President and Treasurer), who led Project Berlin in 2007-2008, also helped lead Project Phoenix and acknowledged that a special committee of Qualcomm's Board of Directors was responsible for Project Phoenix. Tr. at 88:2-4; 88:24-89:1.

Throughout Project Phoenix, Qualcomm executives explained in contemporaneous documents that QCT's monopoly power sustains QTL's unreasonably high royalty rates. David Wise (Qualcomm Senior Vice President and Treasurer) wrote in an October 2015 email to himself and Neil Martin (Qualcomm) that separating QCT and QTL could jeopardize QTL's licensing revenue, which would harm Qualcomm's overall valuation:

> I believe the QTL business model risk is our BIGGEST issue . . . because QTL represents the vast majority of our value at $50-$70B. Note that 1 point of royalty is $16-$20B in value. Also, a slow erosion of the model vs. sustaining the business would reduce valuation by $30B+. QCT risks are important, but less binary and less impactful to overall QC valuation.

CX8299-001.

Then, David Wise (Qualcomm Senior Vice President and Treasurer) explained that because there is a high correlation between Qualcomm's chip market share and the sustainability of **[**296]** Qualcomm's royalty rate, it is critical for Qualcomm to maintain **[*775]** a high modem chip share to sustain its licensing revenues:

> Notably, we are seeing in the market today that there is a high correlation between our modem (chip) share and licensing compliance and royalty rate sustainability. Where we have low chip share we are seeing challenges with compliance and maintaining the royalty rate. So in a sense, QCT has provided the 'give/get' relationship highlighted in the last point. If it's [sic] share falls, however, we lose that important element to

> sustaining our royalties. SO IT'S CRITICAL THAT WE MAINTAIN HIGH MODEM SHARE TO SUSTAIN LICENSING.

Id. (emphasis in original). In short, Wise admitted that without QCT's chip market share, QTL was "seeing challenges with compliance and maintaining the royalty rate."

David Wise (Qualcomm Senior Vice President and Treasurer) included the same points in a November 2015 Project Phoenix slide deck, which Alex Rogers (now QTL President) and other Qualcomm executives received. CX5953-001. On one slide, under the header "High modem share drives compliance and royalty rate," Wise again explained that there is a high correlation between QCT's modem chip **[**297]** market share and sustaining QTL's unreasonably high royalty rates:

> - Addresses QTL compliance challenges and sustainability of long term royalty rate; without risky litigation
> - High correlation between modem share and QTL compliance and royalty rate sustainability
> - Adds value to our licensees beyond our patent licenses; improving the 'give/get' equation where QTL can't
> - Reduces dependence on legal and regulatory structures to sustain royalty rates

CX5953-011.

Like the Qualcomm executives, consultants for Qualcomm during Project Phoenix also concluded that QCT's market power sustains QTL's unreasonably high royalty rates. In slides prepared for the Project Phoenix committee of the Qualcomm Board of Directors, BCG concluded that separating QCT and QTL could reduce QTL's royalty leverage: "Separation could weaken Tulane [the Project Phoenix code name for QTL] in rate negotiations with major customers — similar to other commercial precedents." CX3755-001. Thus, the Qualcomm Board's Project Phoenix committee knew that without QCT's monopoly chip power, QTL would lose leverage in license negotiations.

David Wise (Qualcomm Senior Vice President and Treasurer) again emphasized in an October 2015 **[**298]** Project Phoenix email to Derek Aberle (Qualcomm President) that maintaining high modem chip market shares was critical to QTL's licensing revenue, and admitted that without "broad modem scale," QTL could not sustain its royalty rates:

> I agree with the viewpoint that as long as QCT has a very high share, they are beneficial to QTL. But if their share drops meaningfully (ie, in China at 30%'ish) then they are less beneficial. That's the logic behind the whole modem licensing concept. We need broad modem scale to support the licensing business.

CX5417-001. Thus, Qualcomm has consistently admitted that without QCT's monopoly chip power, QTL cannot sustain its royalty rates.

As set forth extensively in Section V.B., Qualcomm wields that monopoly chip power against OEMs by cutting off chip supply, **[*776]** threatening to cut off chip supply, refusing to provide chip samples, withholding technical support, and delaying delivery of software or threatening to require the return of software—all to coerce OEMs to sign patent license agreements that sustain Qualcomm's unreasonably high royalty rates.

2. Unlike Other SEP Holders, Qualcomm Refuses to Give Patent Lists or Patent Claim Charts During Patent License Negotiations [**299]

Consistent with Qualcomm's admissions that its royalty rates are sustained by QCT's chip monopoly power rather than by Qualcomm's patent portfolio, Qualcomm also refuses to provide patent lists and patent claim charts to OEMs during patent license negotiations, unlike other patent holders.

For example, Ira Blumberg (Lenovo Vice President of Intellectual Property) testified that patent license negotiations typically include technical discussions of the licensor's patents:

> Typically, you'll see technical engagement in a licensing scenario before there is a license, as part of the licensor's practice to convince the licensee why they need a license. So in circumstances like that, you typically have lots of claim charts outlining the licensor's best patents, how they cover the licensee's products, arguments, or at least presentations about how there's no alternative, and so on.

Blumberg Depo. 190:10-19. However, Blumberg testified, Qualcomm never engaged in such a technical discussion with Lenovo during patent license negotiations "because Qualcomm didn't feel they needed to" with its ability to threaten chip supply. Blumberg Depo. 191:6-12.

Similarly, Nanfen Yu (Huawei Senior Legal Counsel) **[**300]** testified that despite Qualcomm's high rates, Qualcomm has never provided patent claim charts to Huawei, but that Nokia, Ericsson, and Siemens all have. Yu Depo. 216:4-217:2. Specifically, as to Qualcomm, Yu testified:

> **Q**: [I]n all of your negotiations with Qualcomm throughout the course of your career, has Qualcomm ever provided claim charts for its patents?
>
> **A**: No.

Id. at 216:4-8.

Brian Chong (Wistron Chief of New Technology Development and Product Planning) testified that Qualcomm would not even provide Wistron a list of any Qualcomm patents: "I know for a fact that we asked for a list of patents and never got that." Chong Depo. 312:6-8, 23-24.

3. Qualcomm's Anticompetitive Licensing Practices are Unique to Modem Chip Markets Where Qualcomm Has Monopoly Power

Furthermore, even within Qualcomm, Qualcomm's anticompetitive practices are unique to the modem chip market where Qualcomm has monopoly power, which further indicates that QCT's monopoly power sustains Qualcomm's unreasonably high royalty rates.

When asked at trial whether "device manufacturers purchasing Wi-Fi components from Qualcomm have to first take a license to Qualcomm's Wi-Fi standard essential patents," Fabian Gonell (QTL Legal **[**301]** Counsel and Senior Vice President, Licensing Strategy) testified "No." Tr. at 1483:18-21.

Qualcomm made the distinction explicit in a Qualcomm slide deck presented to Tony Blevins (Apple Vice President of Procurement). CX8261-004. To purchase modem chips, an OEM "[m]ust be a licensee in good standing." *Id.* For *all other* components, however, an OEM needs "[n]o separate license," and Qualcomm will sell **[*777]** the component on an exhaustive basis. *Id.* Thus, Qualcomm only refuses to sell modem chips exhaustively and requires OEMs to sign patent license agreements before purchasing modem chips where Qualcomm has monopoly power.

Qualcomm's practice is also unique in the industry. Cellular company after cellular company testified that no other modem chip supplier or component supplier refuses to sell components until the OEM signs a license agreement.

Tony Blevins (Apple Vice President of Procurement) testified: "I'd spent 20 years in the industry, I had never seen a letter like this [requiring Apple to sign a license agreement before purchasing chips]." Tr. at 676:4-7.

Similarly, Todd Madderom (Motorola Director of Procurement) testified of Qualcomm's practice: "[T]his is a unique situation. I've never **[**302]** run across this prior." Madderom Depo. 162:24-163:10.

John Grubbs (BlackBerry Senior Director of Intellectual Property Transactions) testified that no other component supplier required BlackBerry to sign a separate patent license agreement: "[T]here were some of our suppliers that owned standard essential patents and — and we did not have a patent license agreement in place with those suppliers." Grubbs Depo. 268:15-269:25.

Hwi-Jae Cho (Director of LGE Intellectual Property Center), when asked whether "other suppliers of components to LGE required LGE to execute a separate license agreement in order to obtain access to their components," testified "No." Cho Depo. ¶ 15.

Likewise, when asked whether "Samsung's prospective supplier require[d] that Samsung execute a patent license agreement prior to agreeing to sell their product to Samsung," Andrew Hong (Samsung Legal Counsel) testified "No."

When asked whether other component suppliers require Huawei "to obtain a separate license and enter into a separate license agreement," Nanfen Yu (Huawei Senior Legal Counsel) testified that she was not aware of any suppliers. Yu Depo. 121:6-22.

Aicha Evans (Intel Chief Strategy Officer) testified that **[**303]** no component supplier—"except for one, Qualcomm"—requires OEMs to sign a license before purchasing components. Tr. at 555:2-4.

Even though Qualcomm sells other components exhaustively and does not require OEMs to sign a separate license before purchasing other components, and even though no other component supplier with patents follows Qualcomm's practices, Qualcomm contends that its practices are procompetitive "because Qualcomm has never priced its intellectual property into its chip prices; [thus] OEMs that bought Qualcomm chips without a license would be using Qualcomm's intellectual property for free." ECF No. 1322 at 6. If Qualcomm's practices were truly procompetitive and "involve[], for example, greater efficiency or enhanced consumer appeal," Qualcomm would not implement the practice only where Qualcomm has monopoly power, and not on sales of any other Qualcomm chips. *See* *Microsoft, 253 F.3d at 59*.

Qualcomm offers no documents to explain its inconsistent licensing practices. In fact, Qualcomm's own documents discussed above reveal that Qualcomm's practices are designed to leverage Qualcomm's "high modem share to sustain licensing." CX8299-001. Specifically, as Eric Reifschneider (QTL Senior Vice President **[**304]** and General Manager) admitted at his deposition, Qualcomm can only sustain that licensing business aimed at OEMs by refusing to sell modem chips to unlicensed **[*778]** OEMs and avoiding exhaustion of its patents: "[T]he concern for the risk to the licensing business of selling — selling chips to unlicensed customers, the — the risk of a customer making an argument of patent exhaustion and sort of undercutting the ability to license the patent portfolio." Reifschneider Depo. 30:15-20.

Thus, Qualcomm leverages its monopoly chip supply and engages in a host of anticompetitive practices to avoid exhaustion and ensure that OEMs acquiesce to Qualcomm's license demands. For example, Qualcomm cuts off chip supply, threatens to cut off chip supply, threatens to withhold engineering support, and delays and threatens to take back software, among other tactics—all to coerce an OEM into signing a Qualcomm license agreement before purchasing modem chips, unlike any other component supplier in the industry. Thus, the Court rejects Qualcomm's justification as pretextual.

4. Qualcomm's Contributions to Standards Do Not Justify its Unreasonably High Royalty Rates

Moreover, Qualcomm's own documents also show that **[**305]** Qualcomm is not the top standards contributor, which confirms Qualcomm's own statements that QCT's monopoly chip market share rather than the value of QTL's patents sustain QTL's unreasonably high royalty rates. According to internal Qualcomm documents not created for antitrust investigations, other patent holders like Nokia and Ericsson have made comparable or even greater contributions to cellular standards than Qualcomm.

Lorenzo Casaccia (Qualcomm Vice President of Technical Standards) leads Qualcomm's participation in 3GPP, the SSO that standardized LTE. ECF No. 1326 at 11. In 2009, Casaccia sent a slide deck to Edward Tiedemann (Qualcomm Senior Vice President, Engineering) that discussed Qualcomm's 3GPP contributions relative to other licensors. CX6336-001. On one slide, Casaccia posed the question: "To which level is Qualcomm a player in 3GPP?" CX6336-009. Casaccia gave the answer: "Another metric is the number of rapporteurships," defined "rapporteur of a work area" as "has opened/created the work area." *Id.* On the following slide, Casaccia displayed a pie chart and table listing Qualcomm's relative rapporteurships in 3GPP. CX6336-010. According to Casaccia, Qualcomm was responsible **[**306]** for 7% of all rapporteurships, whereas Ericsson was responsible for 17%, more than twice Qualcomm's contribution. *Id.* Casaccia stated that Qualcomm's 7% share of rapporteurships rendered it a "major player" in 3GPP. *Id.*

Similarly, in 2015, Lorenzo Casaccia (Qualcomm Vice President of Technical Standards) prepared and sent a slide deck to Fabian Gonell (QTL Division Counsel) and David Wise (now Qualcomm Senior Vice President and Treasurer). CX6138-001. On one slide, Casaccia referred to the top five "technical contributors" to 3GPP as Ericsson, Huawei, Qualcomm, Samsung, and Nokia, in that order, and referred to those five companies as the "big boys" in 3GPP. CX6138-032. Thus, even if approved contributions are an imperfect means of measuring a company's contributions to cellular standards, as the Court notes below, Qualcomm *itself* internally charts the major players in standards by reference to technical contributions.

Moreover, Eric Reifschneider (QTL Senior Vice President and General Manager) conceded to the IRS in 2012 that Nokia and Ericsson contributed to the development of cellular standards, have large patent portfolios, and claim to have many SEPs: "[I]f you have a licensing **[**307]** program like ours — and to some extent Nokia and Ericsson do — they were also companies **[*779]** who participated in the development of wireless technology in the '90s and in the - 2000 decade, and they have large patent portfolios, and they also claim to have many patents that are — that are essential to those technical standards." CX6786-R at 42:11-15.

Even in documents Qualcomm created expressly for antitrust investigations into Qualcomm's licensing practices, Qualcomm has represented that Ericsson and Nokia possess significant SEP portfolios. In a September 2016 Qualcomm SEPs and standards presentation to the European Commission during the Commission's investigation into Qualcomm's licensing practices, Qualcomm included a slide titled "The Handful of Active Contributors are the Major SEP Owners." CX8262-035. In a table of the "Top 10 Patent Holders," Qualcomm listed itself as the top patent holder, with Nokia second, InterDigital third, and Ericsson fourth. *Id.* Thus, only in a document created to avoid antitrust liability has Qualcomm identified itself as the top SEP holder, and even in that presentation Qualcomm acknowledged that other patent holders have comparable SEP portfolios and made **[**308]** comparable contributions to standards. The Court finds most persuasive Qualcomm's internal documents not prepared to avoid antitrust liability, which acknowledge that by multiple metrics Qualcomm is not the leading contributor to standards.

Despite Qualcomm's representations about Nokia and Ericsson's comparable contributions, Nokia and Ericsson's royalty rates and licensing revenues are a fraction of Qualcomm's, as the Court discusses in more detail below.

Qualcomm tried to refute its own documents and statements with trial testimony and expert opinion prepared for litigation, but none of Qualcomm's witnesses assessed the relative value of Qualcomm's patent portfolio or testified about Qualcomm's royalty rates. Liren Chen (QTL Senior Vice President of Engineering and Legal Counsel) testified about the aggregate number of Qualcomm's patents and patent applications, Tr. at 1540:14-17, and Dr. Irwin Jacobs (Qualcomm Co-Founder and former Qualcomm CEO) testified that Qualcomm was instrumental in developing CDMA technology in the early 1990s, Tr. at 1264:7-1265:16. Neither witness's testimony is probative of the relative value of Qualcomm's patents from 2006 to 2016—particularly when many **[**309]** of Qualcomm's early CDMA patents have expired.

Similarly, Durga Malladi (Qualcomm Senior Vice President of Engineering and General Manager of 4G/5G) testified that Qualcomm played a "pioneering role" in unlicensed spectrum technology, which "unleashed gigabit LTE data rates in North America." Tr. at 1326:3-1329:6. However, Malladi conceded that he has no perspective on the relative value of Qualcomm's contributions: "I don't actually look at what others are doing. I only look at what we are doing." *Id.* at 1336:25-1337:9. Moreover, Malladi conceded that he could not offer insight into the value of 5G technology "from a royalty rate standpoint." *Id.* at 1335:16-19.

Qualcomm's expert testimony on this point was equally inapposite. Dr. Jeffrey Andrews opined that 34 of Qualcomm's cellular SEPs "made very fundamental contributions to cellular standards." Tr. 1592:22-23. However, Dr. Andrews analyzed only 34 cellular SEPs, and Dr. Andrews offered no opinion on whether other patent holders have developed *more* or *equally* fundamental contributions to cellular communications. In addition, Dr. Andrews admitted at trial that he offered no opinion on:

(1) the royalty value of those 34 Qualcomm patents, **[**310]** *id.* at 1615:2-24;

[*780] (2) the value of any of Qualcomm's non-essential patents, which Qualcomm also licenses, *id.* at 1616:23-1617:1;

(3) the value of any Qualcomm patents outside cellular standards, *id.* at 1617:2-8;

(4) whether any other company owns any valuable patents related to the technologies Dr. Andrews discussed, *id.* at 1617:9-12; or

(5) the relative strength of Qualcomm's patent portfolio or of Qualcomm's patents essential to any standard, *id.* at 1617:16-1618:3.

Neither Dr. Andrews's qualitative opinions on 34 Qualcomm cellular patents nor any of Qualcomm's witnesses rebut or even respond to the evidence in Qualcomm's own documents that Qualcomm's royalty rates are unreasonably high and are sustained by Qualcomm's chip market share.

Furthermore, Qualcomm helped design the patent portfolio scoring system of the patent pool Avanci, which scores Qualcomm's portfolio comparably to Ericsson's even though Ericsson's licensing revenue is a small fraction of Qualcomm's.

Fabian Gonell (QTL Legal Counsel and Senior Vice President, Licensing Strategy) testified at trial that Qualcomm, Ericsson, Nokia, and InterDigital are participants in Avanci, "an effort at joint licensing of cellular essential **[**311]** patents for certain products," including vehicles and smart meters. Tr. at 1467:6-10. A smart meter is a utility meter with cellular connectivity. *Id.* at 1467:12-15. As a participant in Avanci, Qualcomm has agreed to grant licenses to its 3G and 4G SEPs to any vehicle or smart meter OEM that wishes to license Avanci's patents. *Id.* at 1467:18-21. Avanci then distributes those royalty revenues to the individual SEP licensors according to Avanci's distribution method. *Id.* at 1467:23-24.

Avanci's royalty distribution method apportions royalty revenues to Qualcomm and other SEP licensors based on a point-scoring system, according to the Avanci Master License Management Agreement. JX0116-133. Fabian Gonell (QTL Legal Counsel and Senior Vice President, Licensing Strategy) testified that Qualcomm negotiated the point-scoring system with Ericsson, another founding Avanci participant: "[S]o it was basically a three-way negotiation between Qualcomm and Ericsson and the founders of Avanci." Tr. at 1474:14-15.

Michael Lasinski, an FTC patent expert, testified that Avanci awards SEP licensors a maximum of [TEXT REDACTED BY THE COURT] points for deemed SEPs, a maximum of [TEXT REDACTED BY THE COURT] **[**312]** points for approved contributions, and a maximum of [TEXT REDACTED BY THE COURT] points for historical licensing revenue. Tr. at 1025:21-1026:1. According to Lasinski, "deemed SEPs" are SEPs that studies have concluded are in fact essential to a standard. *Id.* at 1016:23-1017:2. According to Lasinski, Qualcomm and Ericsson have comparable SEP portfolios under Avanci's point-scoring system. *Id.* at 1027:2-13. That is so even though one of the Avanci methods—historical licensing revenue—clearly favors Qualcomm because Qualcomm charges vastly higher royalty rates to OEMs than Ericsson does, as the Court will explain in more detail below. Despite having comparable SEP portfolios, Ericsson's royalty rate is a fraction of Qualcomm's, according to Injung Lee (Samsung Intellectual Property Center). Lee Depo. 145:8-17. Accordingly, Qualcomm's contributions to standards do not justify Qualcomm's unreasonably high royalty rate.

5. Qualcomm's Documents Recognize That Modem Chips Do Not Drive Handset Value

In addition, it is unreasonable for Qualcomm to charge its unreasonably high royalty **[*781]** rates on the sale price of an entire handset, as even Qualcomm's own document recognizes that a modem chip does **[**313]** not drive a cellular handset's value.

In a 2008 QCT strategic plan shared with Steve Mollenkopf (now Qualcomm CEO) and Cristiano Amon (now Qualcomm President), Qualcomm stated that the user experience rather than the modem chip drive a handset's value:

> Past: Modem Leadership Drove Value
>
> **Now: Best User Experience Drives Value**

CX7559-018 (emphasis in original).

OEMs also recognize that the modem chip does not drive handset value. For example, in 2004, Kim Huang (BenQ) emailed Marv Blecker (QTL Senior Vice President) and Derek Aberle (Qualcomm lawyer, and later Qualcomm President). Huang argued that Qualcomm's intellectual property is for communication, and Qualcomm does not own intellectual property on color TFT LCD panel, mega-pixel DSC module, user storage memory, decoration, and mechanical parts. The costs of these non-communication-related components have become more expensive and now contribute 60-70% of the phone value. The phone is not just for communication, but also for computing, movie-playing, video-taking, and data storage. Huang stated in full:

> Qualcomm owns IPR [intellectual property rights] on 'Communication' related components of a mobile phone; we appreciate and respect that. **[**314]** But you don't own IPR on most of the other key components. For example, color TFT LCD panel, mega-pixel DSC module, user storage memory, decoration mechanical parts and etc. These non-communications-related components have become more and more important the cost them became higher and higher-probably contribute more than 60%-70% of a whole phoneset. Please note that, a phone in the future not for communication only, but may be used for computing, movie playing, video taking, mega-picture taking, data storage and etc.

CX8281-002.

Similarly, Jeff Williams (Apple COO) testified that because Apple invests heavily in the handset's physical design and enclosures to add value, and those physical handset features clearly have nothing to do with Qualcomm's cellular patents, it is unfair for Qualcomm to receive royalty revenue on that added value:

> Apple spends a lot of time making its products really beautiful, so we'll spend an extra $60 on the stainless steel and aluminum enclosures and things like that. And per the agreement, if we spent cost on that, say that extra $60, it has nothing to do with their IP, the Qualcomm arrangement would have them collect $3. So that, that didn't make sense to **[**315]** us, and still doesn't today.

Tr. at 869:25-870:5.

Samsung's contemporaneous notes from June 2013 license negotiations reflect Samsung's concurring view that Qualcomm's royalty rates have nothing to do with Qualcomm's patents: "The value of smart phones lies in various computer functions, the operating system, software, applications, and design, etc., which have nothing to do with Qualcomm's chipset IP. Therefore it is unfair for Qualcomm to levy royalties on the basis of the entire phone." CX2642A-003.

Qualcomm's own document recognizes that decorative parts, design, user interface, and mechanical features—the "user experience"—now drive the handset's value rather than the modem chip. *See* CX7559-018. Thus, it makes little sense for Qualcomm to receive royalty revenue on **[*782]** the added value to which Qualcomm did not contribute.

OEMs add other value to handsets unrelated to modem chips. For example, Hwi-Jae Cho (Director of LGE Intellectual Property Center) testified that during 2004 license negotiations LGE argued that Qualcomm should deduct the cost of camera modules and mobile television from the royalty base because those features are independent of Qualcomm's modem chip SEPs: "LGE argued **[**316]** to deduct the cost of camera modules and DMB (which is the Korean version of mobile TV) modules because, at a minimum, those two features were functionally independent from Qualcomm's standard essential patents at that time." Cho Depo. ¶ 101.

Jeff Williams (Apple COO) also testified that Apple invests in other innovations beyond its handset enclosures that add value to a handset. For example, Apple was the first to embed NAND memory, a type of flash memory. If Apple spent $100 on cost for NAND memory, Apple had to then pay Qualcomm $5 even though Qualcomm's intellectual property had nothing to do with NAND memory:

> We were bringing some innovation. And, for example, we were one of the first and led the charge to embed a lot of NAND memory. We did this on our iPods, and we were going to do it on our iPhones, and if we put another $100 of cost in NAND memory, per the Qualcomm agreement, they would get $5 of that even though their IP had nothing to do with that.

Tr. at 869:18-24.

Thus, in 2016, Huawei argued in a letter to Fabian Gonell (QTL Division Counsel) that Qualcomm's royalty rates do not reflect the proportional contribution of Qualcomm's patents to handset value: "It is not reasonable **[**317]** to collect royalty on the selling price of the whole handset as Qualcomm's essential patents are mostly implemented by chipset." CX1101-003.

Expert testimony was consistent with the documentary evidence and OEM testimony. Richard Donaldson, the FTC's licensing expert, explained that Qualcomm's royalty rates should decline over time because handsets are now essentially computers:

> [I]n the case of Qualcomm when rates were first established back when CDMA was used in telephones were our cell phones were — it was just a cell phone. No other capabilities. And those products have changed dramatically over the life since then and we now have smartphones with many, many features that do not infringe the cellular patents, the SEPs. So I would expect that to drive a lower royalty rate.

Tr. at 971:7-14. Likewise, Qualcomm expert Dr. Aviv Nevo testified that handsets have changed dramatically since Qualcomm entered its first license agreements:

> **Q**: The product in which the IP was going to be used changed dramatically over that time; correct?
>
> **A**: Cell phones did, yeah, they clearly changed.

Tr. at 1944:14-16.

The modem chip also does not drive handset value because handset users can now more easily use **[**318]** Wi-Fi to transmit data. Michael Lasinski, an FTC expert, testified that the use of Wi-Fi to transmit data has increased: "[I]t turns out that significantly more data is being offloaded to WiFi networks." Tr. at 1016:2-3. Qualcomm expert Dr. Jeffrey Andrews agreed that handset users can use Wi-Fi rather than a modem chip to access data "[a]ssuming they're connected to a Wi-Fi access point that works." Tr. at 1615:7-8.

[*783] Qualcomm's constant royalty rate does not reflect the decline in the importance of modem chips in handsets.

6. Qualcomm's Use of the Handset as the Royalty Base is Inconsistent with Federal Circuit Law

Further, Qualcomm's use of the handset device as the royalty base is inconsistent with Federal Circuit law on the patent rule of apportionment. Under the rule of apportionment, "[a] patentee is only entitled to a reasonable royalty attributable to the infringing features." *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc., 904 F.3d 965, 977 (Fed. Cir. 2018)*. In line with that principle, the Federal Circuit held in *LaserDynamics, Inc. v. Quanta Computer, Inc.* that "it is generally required that royalties be based not on the entire product, but instead on the smallest salable patent-practicing unit." *694 F.3d 51, 67 (Fed. Cir. 2012)*. Thus, Qualcomm is not entitled to a royalty on the entire **[**319]** handset.

Subsequent to *Quanta*, the Federal Circuit has clarified that "[w]here the smallest salable unit is, in fact, a multi-component product containing several non-infringing features with no relation to the patented features . . . , the patentee must do more to estimate what portion of the value of that product is attributable to the patented technology." *Virnetx, Inc. v. Cisco Sys., Inc., 767 F.3d 1308, 1327 (Fed. Cir. 2014)*. This Court has held, in a different case, that "the baseband processor"—the modem chip—"is the proper smallest salable patent-practicing unit" in a cellular handset. *GPNE v. Apple, Inc., 2014 U.S. Dist. LEXIS 53234, 2014 WL 1494247, at *10 (N.D. Cal.*

Apr. 16, 2014), *aff'd*, 830 F.3d 1365 (Fed. Cir. 2016). Because Qualcomm's own document states that a handset's value is now attributable primarily to the "user experience" and not "modem leadership," Qualcomm's collection of a royalty on the entire handset is inconsistent with *VirnetX* and Federal Circuit law on the smallest salable patent practicing unit.

7. Qualcomm Acknowledges That its SEP Share Has Declined with Successive Standards Yet its Royalty Rate Has Remained Constant for 30 Years

Moreover, even though Qualcomm's share of SEPs is declining and Qualcomm's SEPs expire with successive standards, Qualcomm still maintains a constant royalty rate. A summary exhibit collecting Qualcomm's patent license agreements **[**320]** over the past 30 years shows that Qualcomm has consistently charged OEMs a 5% running royalty for licenses to Qualcomm's patent portfolio. QX9148. Qualcomm charged Siemens a 5% running royalty in 1996 and charged VIVO a 5% running royalty in 2015. QX9148-003, -004.

At trial, Alex Rogers (QTL President) testified that as of 2018, Qualcomm's royalty rate for a portfolio license remains 5%. Tr. at 1972:23-24. Yet according to a March 2016 Qualcomm slide deck that Alex Rogers (QTL President) himself received, Qualcomm's "SEP share has declined with successive standards." CX6594-067.

Consistent with that Qualcomm document, Huawei argued in a 2016 letter to Qualcomm that it is unreasonable for Qualcomm to charge 4G royalty rates predicated on the value of Qualcomm's 3G patent portfolio when Qualcomm's 4G patent portfolio is lower in value:

> Despite the fact that 3G is becoming a backup technology with a significant number of 3G patents being expired, Qualcomm is charging 4G multimode products on 3G rates. This is not consistent with industry practice where patent holders charge royalty at the rate of the **[*784]** latest technology and Qualcomm is trying to extend the benefits gained in 3G era based on **[**321]** its dominant position in chipset market and unique business model bundling chipset supply and patent license.

CX1101-002. Qualcomm's royalty rate should not stay constant across standards when its patent portfolio has declined with successive standards.

As Qualcomm's March 2016 slide deck and Huawei's 2016 letter pointed out, Qualcomm's patent contributions are declining with successive standards. Under the Patent Act, a patent expires twenty years from the date of patent application. 35 U.S.C. § 154(a)(2). Thus, many of Qualcomm's patents—especially those patents covered in early CDMA license agreements—have doubtless expired, as OEMs have asserted.

For example, John Grubbs (BlackBerry Senior Director of Intellectual Property Transactions) testified that Qualcomm's 5% running royalty violates FRAND because many of Qualcomm's CDMA patents have expired: "So at some point you get to the point where an entity is paying 5 percent for the CDMA patents when there may not be but just a handful of CDMA patents left. So that — in that respect, it . . . it violates FRAND." Grubbs Depo. 235:10-15.

Similarly, according to Eric Reifschneider's (QTL Senior Vice President and General Manager) contemporaneous notes, Huawei **[**322]** asserted in 2013 license negotiations that Qualcomm's royalty rate should decline with the expiration of Qualcomm's patents: "As to term, it makes sense to keep it short for c2k [CDMA2000] since half of your patents have expired or will expire in 3-5 years." CX6528-009.

Richard Donaldson, the FTC's expert, testified consistently: "Many of Qualcomm's early patents are expiring which, in my experience in license negotiations, when your portfolio is weakened by expiring significant patents, the royalty rate would typically decrease." Tr. at 971:22-25. Yet Qualcomm's rates have not decreased, which further indicates that Qualcomm's royalty rates are unreasonably high.

Qualcomm's royalty rate stays constant even though Qualcomm receives cross-licenses to OEMs' patent portfolios, which differ in value. John Grubbs (BlackBerry Senior Director of Intellectual Property Transactions) testified that BlackBerry considers the value of cross-licenses when setting a royalty rate: "All I can say is based on what

BlackBerry has done, and I know that we would take into account the value of any cross-license coming back — if there was any significant value there — before we would price our license." Grubbs **[**323]** Depo. 94:23-95:2.

In addition, OEMs uniformly testified that Qualcomm's royalty rates are disproportionately higher than the royalty rates OEMs owe other licensors. Jeff Williams (Apple Chief Operating Officer) testified that "Qualcomm charges us more than everybody else put together." Tr. at 871:2-6.

Similarly, Todd Madderom (Motorola Director of Procurement) testified that Qualcomm's royalty rates are the highest Motorola has ever had to pay: "In our experience we've never seen such a significant licensing fee tied to any other IP we license." Madderom Depo. 217:24-218:2.

Ira Blumberg (Lenovo Vice President of Intellectual Property) concurred: "Based on the negotiations I've had with companies like Nokia, Ericsson, InterDigital, and other significant patent holders, Qualcomm's rates are substantially higher." Blumberg Depo. 149:9-13.

Likewise, John Grubbs (BlackBerry Senior Director of Intellectual Property Transactions) testified that Qualcomm's **[*785]** royalty rate was the highest in the industry: "[T]he 5 percent royalty rate was significantly higher than any other SEP rate we paid to anybody else in the industry." Grubbs Depo. 236:5-7.

Hwi-Jae Cho (Director of LGE Intellectual Property Center) **[**324]** testified that Qualcomm's royalty rate was so high that it could lead to an aggregate royalty that would make it impossible to generate profit on handsets:

> If Qualcomm attempted to assert a 5.75% royalty for its small share of WCDMA technology alone, the aggregate royalty for the entire WCDMA patent portfolio would be more than 25% of handset price, which was far more than what LGE or the industry thought at that time. If the royalty for WCDMA alone was more than 25% of the phone price, it would be impossible to make any profit by selling handsets.

Cho Depo. ¶ 38h.

Similarly, in a June 2016 proposal to Fabian Gonell (QTL Division Counsel) to renegotiate the royalty rate Huawei paid to Qualcomm, Huawei stated that Huawei's royalty payments to Qualcomm comprised 80-90% of the total royalty payments Huawei paid for terminal products:

> Huawei has entered into license agreements with major patent holders in the industry, but the royalty Huawei paid to Qualcomm each year consists of 80-90% of the total royalty we paid for terminal products, which well demonstrates that Qualcomm's royalty rate is excessively higher than other major patent holders in the industry.

CX1101-001.

Qualcomm has sustained **[**325]** by far the highest royalty rates of any cellular patent holder despite its declining SEP share with successive standards and the expiration of its patents. The degree to which Qualcomm's royalty rates and revenues outstrip the rates and revenues of SEP holders that Qualcomm's own documents state are the top contributors to standards is staggering. For example, QTL's 2017 strategic plan, which Derek Aberle (Qualcomm President) and Alex Rogers (QTL President) reviewed, states that QTL earned $7.7 billion in licensing revenue for Qualcomm in 2016, which exceeded the combined licensing revenue of twelve other licensors, including Ericsson, Nokia, and Interdigital. CX7122-026.

Similarly, a slide deck that Bain prepared for Intel, and which Qualcomm introduced into evidence, shows that in 2011, Qualcomm earned over 25% of global cellular patent licensing revenue and over 50% of global patent licensing revenue related to modem chips. QX0121A-009.

Qualcomm generates that revenue with unreasonably high royalty rates, even though Qualcomm's own documents recognize that Qualcomm is not the top contributor to standards. Injung Lee (Licensing Lead at Samsung Intellectual Property Center) testified **[**326]** that in comparison to Qualcomm's 5% running royalty rate, Samsung paid Ericsson a lump sum royalty payment that worked out to a [TEXT REDACTED BY THE COURT] % effective royalty rate and Nokia a lump sum royalty payment that worked out to a [TEXT REDACTED BY THE COURT] %

effective royalty rate. Lee Depo. 145:8-17. According to Nokia's discovery responses to the FTC, Nokia[9] licenses its SEPs at rates between [TEXT REDACTED BY THE COURT] per handset. QX2778-008. %, but caps its royalty charges at [[TEXT REDACTED BY THE COURT] Euros]

[*786] Other patent licensors like Nokia and Ericsson have announced publicly that the aggregate royalty an OEM pays to *all* SEP licensors should not exceed 5%. In 2002 (at the launch of WCDMA), Ericsson, Siemens, Nokia, and other SEP licensors stated in a press release their mutual understanding to "enable the cumulative royalty rate for W-CDMA to be a modest single digit level"—specifically under a 5% cumulative royalty rate paid to all SEP licensors. CX4103-001. In 2008 (at the launch of LTE), those same SEP holders similarly stated in a press release that an OEM's aggregate LTE royalty rate paid to all SEP licensors should be a single digit rate: "[T]he companies **[**327]** support that a reasonable maximum aggregate royalty level for LTE essential IPR in handsets is a single-digit percentage of the sales price." CX4104-001.

Against this wave of evidence that Qualcomm's unreasonably high royalty rate should not stay constant and Qualcomm's admissions that only its monopoly modem chip share sustains Qualcomm's royalty rate, Qualcomm economic expert Dr. Aviv Nevo opined that Qualcomm's royalty rates are reasonable *because* the rates are constant. However, Dr. Nevo was contradicted by Qualcomm's own documents, and the Court does not find his testimony reliable.

Dr. Nevo explained that economists generally believe that to determine a FRAND rate, one should look at rates negotiated before the standard was adopted: "[O]ne thing that's in pretty consensus agreement is the fact that we should be looking at, at negotiations that happened ex ante. Ex ante means before the standard was adopted." Tr. at 1872:13-16. Dr. Nevo observed that Qualcomm entered five CDMA license agreements before 1993, when the CDMA standard was adopted, and that Qualcomm's royalty rates varied from 4% to 6.5%. *Id.* at 1873:1-2.

However, Dr. Nevo made the faulty assumption that Qualcomm's royalty **[**328]** rates in later patent licenses are only unreasonably high if Qualcomm's royalty rates *increased* over time. Tr. at 1865:12-15. Dr. Nevo's assumption ignores the foregoing evidence that Qualcomm's royalty rate should instead decline over time. Dr. Nevo himself admitted that handsets have changed since Qualcomm first licensed its patents: "Cell phones did, yeah, they clearly changed." *Id.* at 1944:16

Most important, Qualcomm's own admissions contradict Dr. Nevo's claim. For example, in a 2015 Project Phoenix email, David Wise (Qualcomm Senior Vice President and Treasurer) explained that "there is a high correlation between our modem (chip) share and licensing compliance and royalty rate sustainability." CX8299-001. Where QCT had low chip share, Wise stated, "we are seeing challenges with compliance and maintaining the royalty rate." *Id.* Thus, Qualcomm has recognized that QCT's monopoly power helps Qualcomm *sustain* its unreasonably high royalty rates, and that QTL's unreasonably high royalty rates are not attributable to the value of QTL's patents.

8. Qualcomm's Unreasonably High Royalty Rates Have Not Been Tested by Litigation

Moreover, Qualcomm's unreasonably high royalty rates have not **[**329]** been tested by litigation because Qualcomm's chip supply leverage insulates Qualcomm from legal challenges. Qualcomm's own documents recognize how Qualcomm's monopoly modem chip share prevents litigation, which sustains Qualcomm's unreasonably high royalty rates.

For example, Steve Altman (Qualcomm President) prepared portions of a January 2008 Project Berlin presentation shared **[*787]** with Steve Mollenkopf (QCT President). CX6992-001. On one slide, Altman wrote that if Qualcomm separated, Qualcomm's licensing business may be in jeopardy: "Post spin, many current QCT customers may more aggressively seek to challenge certain aspects of our licensing business and/or their agreements with Qualcomm."

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[9] As the Court explained in Section V.E., Nokia followed Qualcomm's lead in licensing at the handset instead of the chipset level and thus to protect its licensing revenue supported Qualcomm at summary judgment and testified for Qualcomm at trial.

CX6992-035. Altman testified that "spin" refers to separating QTL and QCT. Tr. at 201:15-18. Among those challenges might be FRAND litigation to challenge Qualcomm's royalty rates, Altman testified:

> **Q**: One argument that's available to companies trying not to pay royalties that they agreed to pay would be to bring a claim that Qualcomm's royalties did not comport with Qualcomm's FRAND commitments; isn't that right?
>
> **A**: They would try that.

Tr. at 202:11-15.

Seven years later, during Project Phoenix, David **[**330]** Wise (Qualcomm Senior Vice President and Treasurer) included the same points in a slide deck sent to Alex Rogers (now QTL President) and other Qualcomm executives. CX5953-001. On one slide, under the header "High modem share drives compliance and royalty rate," Wise wrote that QTL could avoid "risky litigation" thanks to QCT's modem share: "Addresses QTL compliance challenges and sustainability of long term royalty rate; without risky litigation." CX5953-011. At trial, David Wise (Qualcomm Senior Vice President and Treasurer) conceded that avoiding risky litigation helps avoid any reduction in QTL's royalty rates:

> **Q**: But one component of risky litigation is the risk that Qualcomm doesn't get the royalty rate it seeks? Isn't that fair?
>
> **A**: You could end up with not getting the royalty rate you think you deserve, sure.

Tr. at 109:25-110:4.

Consistent with Qualcomm's contemporaneous documents, OEMs testified at trial that QCT's monopoly power and QTL's use of chip supply threats precluded litigation over Qualcomm's royalty rates, or over whether Qualcomm's patents are valid or infringed. For example, Ira Blumberg (Lenovo Vice President of Intellectual Property) testified that ordinarily, litigation **[**331]** provides a tool for both parties to a license negotiation if one thinks the other is being unreasonable:

> [T]hat's the number one thing I use to assess whether I want to sign a license, is a careful analysis of whether litigation and the likely outcome of litigation, plus the expense, taking into account the time value of money and so on, is ultimately greater than or less than the negotiated alternative. And I'm very pragmatic; when the negotiated alternative is clearly less expensive, I'm happy to take a license. When the negotiated alternative is equal to or greater than the likely litigation outcome, I'm not ready to sign, and I'm ready to keep negotiating and/or litigating as necessary.

Blumberg Depo. 188:2-15. However, Blumberg testified that Qualcomm's chip supply leverage took litigation off the table: "But [w]hen you're facing, as we've discussed, a dispute resolution that says either you agree or can't get any more key supplies, it certainly changes the balance of negotiating capabilities." *Id.* at 189:6-9.

Similarly, John Grubbs (BlackBerry Senior Director of Intellectual Property Transactions) testified that Qualcomm rejected BlackBerry's request to arbitrate Qualcomm's royalty **[**332]** rate:

> **Q**: And is this email requesting an arbitration on the royalty cap and on a FRAND determination for Qualcomm's royalty rate?
>
> **A**: Yes.
>
> **[*788]** **Q**: Was Qualcomm willing to arbitrate the claim . . . that royalties were not FRAND?
>
> **A**: No, it was not.

Grubbs Depo. 295:6-14.

Nanfen Yu (Huawei Senior Legal Counsel) also testified that Huawei could not litigate Qualcomm's royalty rates because Huawei was concerned about chip supply:

> **Q**: Would there be practical problems with suing Qualcomm for determination of the FRAND royalty rate while you are obtaining product from Qualcomm?
>
> **A**: So one concern would be the chipset supply, and the other is that we have the existing license agreements in place. And we have contractual obligations under the agreement, too.

Yu Depo. 158:3-10.

Specifically, Todd Madderom (Motorola Director of Procurement) testified that if an OEM challenged Qualcomm's royalty rate and lost chip supply, an OEM would lose all of its related handset business: "If we are unable to source the modem, we are unable to ship the handset. It's a direct correlation. No modem supply, no phone supply to our customer." Madderom Depo. 147:25-148:3.

Richard Donaldson, the FTC's licensing expert, offered expert **[**333]** testimony consistent with Qualcomm's documents and OEM testimony. Donaldson testified that in a typical negotiation, a licensee always has FRAND litigation as a recourse: "[I]f he is of the opinion that what is being proposed, the rates being proposed are unreasonably high, he would have an expectation that a reasonable court would lower what a reasonable — his determination of a reasonable royalty." Tr. at 966:2-5. However, Qualcomm's licensing practices removed that option: "[I]t would put the licensee at a severe disadvantage. He's basically — and as the testimony reflects — he's basically in the position, I agree to the license or basically go out of business." *Id.* at 967:-18-21. Consistent with the trial evidence, Donaldson opined that this dynamic "results in a disproportionately high royalty rate." *Id.* at 967:24-25.

In addition, Donaldson testified that from 2006 to 2016, Qualcomm was involved in only two patent litigation lawsuits "unrelated to enforcing the SEP patents." Tr. at 973:23-24. By contrast, other SEP holders like Ericsson, Nokia, and InterDigital each were involved in more than twice as many patent litigations over the same period. *Id.* at 973:19-22; *see* CX0101-001 (chart comparing **[**334]** litigation by company). According to Donaldson, those figures undersell the effect of Qualcomm's licensing practices:

> Ericsson, Nokia, and InterDigital did not have a no license, no chip policy, so their negotiations would have always included, or been negotiated in the shadow of what possible legal remedies might exist, which would have — which would suggest that they would have been more reasonable in setting what their royalty demands were and avoiding litigation in a number of cases that aren't reflected here.

Tr. at 973:25-974:7. Because Donaldson's testimony was consistent with Qualcomm's documents and the trial evidence, the Court finds reliable his opinion that Qualcomm's monopoly chip power both sustains Qualcomm's unreasonably high royalty rates and prevents litigation to challenge those royalty rates.

Although Qualcomm's license agreements offer OEMs binding arbitration, Qualcomm has threatened to cut off chip supply and technical support, and to require the return of software when OEMs attempt to arbitrate royalty rates. This renders arbitration a functional nonstarter. For example, after LGE and Qualcomm **[*789]** exchanged arbitration demands in 2004 relating to LGE's WCDMA royalty **[**335]** obligations, Dr. Irwin Jacobs (Qualcomm Co-Founder and former CEO) stated that unless LGE withdrew its arbitration claims and paid past WCDMA royalties, Qualcomm would stop accepting LGE purchase orders for chips, cease all shipments of chips, withdraw all technical support, and require LGE to return all chip software. Specifically, Irwin Jacobs stated:

> I therefore request that LGE promptly (i) retract and waive Mr. Ham's claim that QUALCOMM has waived its rights under our existing Supply Agreement or that LGE has received or somehow receives any implied royalty free license to use our WCDMA ASICs and (ii) without prejudice to either party's position in the present arbitration, agree to report and pay royalties on all of its sales of past and future WCDMA subscriber units and infrastructure equipment in accordance with the terms of the license agreement. Otherwise, QUALCOMM is left with no choice but to take the following steps:
>
> 1) QUALCOMM will stop accepting LGE purchase orders for WCDMA ASICs;
>
> 2) QUALCOMM will cease all shipments of WCDMA ASICs to LG, beginning with the next-scheduled shipments of 500 units of the MSM 6250 for June 30, and 6000 units of the MSM 6200 scheduled to ship **[**336]** during the first week in July;

> 3)QUALCOMM will withdraw all of its substantial WCDMA engineering resources currently providing technical support to LGE and reassign those resources to our strategic ASIC customers, all of whom are honoring their supply contracts and licensing obligation; and
> 4) QUALCOMM will require that LGE return to QUALCOMM all versions and derivations of our WCDMA ASIC software.

CX6814-022. At trial, Irwin Jacobs testified that Qualcomm then cut off LGE's chip supply: "We did not ship to them the chips that were specified here, the 500 and then 6,000 chips as far as I know at this time." Tr. at 1293:25-1294:2.

Hwi-Jae Cho (Director of LGE Intellectual Property Center) testified that "[w]hen Qualcomm threatened to terminate the Supply Agreement, LGE had no option but to agree to whatever Qualcomm demanded. LGE's top management did not want to take the risk of endangering LGE's mobile business." Cho Depo. ¶ 91.

Thus, because Qualcomm threatened to cut off and actually did cut off OEMs' chip supply and threatened to revoke technical support and software from OEMs, arbitration—even if technically available—was not a realistic path for an OEM. Accordingly, Qualcomm's monopoly **[**337]** chip power leads to unreasonably high royalty rates by eliminating the prospect of FRAND litigation or arbitration.

Lastly, Michael Lasinski, the FTC's patent valuation expert, also concluded that Qualcomm's royalty rates are unreasonably high. Lasinski's methodologies are not reliable, as he evaluated SEP holders' relative portfolio strength in part by counting SEP holders' approved contributions to standards. At trial, Lasinski admitted that a company can receive credit for an approved contribution based on a mere cosmetic change to an existing standards document. *Id.* at 1067:17-1068:9. For example, one approved contribution to 3GPP states that the contribution provides "editorial corrections" to a standards document and "has no impact on the implementations" of the standard. QX6457-001. Accordingly, the district court in **[*790]** *TCL Communication Technology Holdings, Ltd. v. Telefonaktiebolaget LM Ericsson, 2017 U.S. Dist. LEXIS 214003, 2018 WL 4488286 (C.D. Cal. Nov. 8, 2017)*, concluded that using contribution counting to value a patent portfolio suffers from two flaws: "the absence of any evidence that it corresponds to actual intellectual property rights, and its inability to account for transferred or expired patents." *2017 U.S. Dist. LEXIS 214003, [WL] at *41*. Thus, the Court does not rely on Lasinski's testimony.

However, Lasinski's ultimate conclusions are in line with **[**338]** the documentary evidence that Qualcomm's royalty rates are unreasonably high. Specifically, Lasinski determined that for any OEM, Qualcomm's FRAND royalty rate should be below 1%: "So my highest indicator here is 0.58%, which is significantly below what Qualcomm has actually charged historically to these licensees." Tr. at 1034:25-1035:2. The Court notes that Lasinski's calculations are consistent with [TEXT REDACTED BY THE COURT]'s and [TEXT REDACTED BY THE COURT]'s rates.

Thus, based on all the foregoing evidence—primarily Qualcomm's own documents—the Court concludes that Qualcomm's royalty rates are unreasonably high. These unreasonably high royalty rates raise costs to OEMs, and harm consumers because OEMs pass those costs along to consumers. Qualcomm's unreasonably high royalty rates also prevent OEMs from investing in new handset features, which further harms consumers. Todd Madderom (Motorola Director of Procurement) testified that if Motorola did not have to pay Qualcomm's inflated license fees, Motorola could invest those funds in better features for consumers: "[W]e believe that the millions of dollars that we pay to royalty could be better — could be invested to perhaps develop **[**339]** our own technological advances." Madderom Depo. 218:24-219:3.

Moreover, Qualcomm's unreasonably high royalty rates may dissuade OEMs from investing in new features that would benefit consumers because an OEM will have to pay Qualcomm additional royalties if the new features add to the handset's price. For example, Jeff Williams (Apple COO) testified that if Apple added $60 of value to its handset enclosure, Qualcomm would receive $3 in royalty payments on each Apple handset even though Qualcomm's cellular patents had nothing to do with Apple's addition. Tr. at 869:21-24.

H. Qualcomm's Surcharge on Rivals Bolsters Qualcomm's Monopoly Chip Market Share, Unreasonably High Royalty Rates, and Exclusivity with OEMs

Next, the Court discusses how Qualcomm's unreasonably high royalty rates impose a surcharge on rivals' modem chips. Under Qualcomm's patent license agreements with OEMs, Qualcomm charges its unreasonably high royalty rates anytime an OEM sells a handset, even when that handset contains a rival's modem chip. Thus, Qualcomm imposes an artificial surcharge on all sales of its rivals' modem chips. The surcharge increases the effective price of rivals' modem chips, reduces rivals' margins, **[**340]** and results in exclusivity.

For example, Brian Chong (Wistron Chief of New Technology Development and Product Planning) testified that Qualcomm's patent license restricts Wistron's ability to use rivals' modem chips because the royalty rate imposes a surcharge on rivals' chips:

> [T]here was a case that I remember in particular when we were considering introducing lower cost phones. And MTK was the chip supplier that we think best suitable for that product position in terms of price position and the spec **[*791]** corresponding that it offers. However, in the end we decided to stay Qualcomm for the simple reason that because Qualcomm responded that, even if we're using non-Qualcomm chips, we would still have to pay the onerous royalty that Qualcom dictated in the SULA.

Chong Depo. 256:9-20. Chong also testified that the upfront fee Wistron had paid Qualcomm incentivized Wistron to buy Qualcomm chips rather than rivals' chips: "So by staying with Qualcomm we would be able to recoup that investment faster." *Id.* at 256:21-257:1.

Practices that unfairly suppress sales of competing products "below the critical level necessary for any rival to pose a real threat" cause anticompetitive harm because they **[**341]** exclude competitors from the marketplace and thereby harm competition in general. *Dentsply, 399 F.3d at 191*; *see also* *Spectrum Sports, 506 U.S. at 458* (holding that the Sherman Act "directs itself . . . against conduct which unfairly tends to destroy competition itself").

The Seventh Circuit's decision in *Premier Electrical Construction Company v. National Electrical Contractors Association, 814 F.2d 358 (7th Cir. 1987)*, demonstrates how a monopolist can use an across-the-board price increase to impose artificial constraints that disproportionately harm the monopolist's competitors, as Qualcomm has done.

In *Premier*, an association of electrical employers known as the National Electrical Contractors Association ("the Association") established a fund with an electrical workers' union ("the Union"). *Id. at 359*. Association members contributed 1% of their gross payroll into the fund to offset the cost of collective bargaining and administrative services. *Id. at 359-60*. However, because electrical employers who were not Association members were "free of the 1% contribution," these electrical employers "had lower costs of doing business" and could charge lower prices. *Id. at 368*. Electrical employers who were not Association members thus began to underbid the Association's members for electrical contracting work. *Id.*

To prevent being underbid, the Association enlisted the Union to collect the **[**342]** 1% fee from non-Association electrical employers as well. *Id. at 368*. In this way, the Association "leveled" the playing field because all employers had to pay into the fund, but in so doing the Association gave itself an advantage. "The result was higher prices to purchasers of electrical work and higher profits for members of the Association—both because there is more in the fund, for the Association's use, and because the reduction in competition enabled the members to capture more of the market." *Id.* Although the Association in *Premier* charged the 1% fee directly to its rivals—whereas Qualcomm's surcharge raises the price an OEM must pay for rivals' modem chips—the result is substantially the same. Like the Association, Qualcomm has "raised its rivals' costs, and thereby raised the market price to its own advantage." *Id.*

Qualcomm's unreasonably high royalty rates enable Qualcomm to control rivals' prices because Qualcomm receives the royalty even when an OEM uses one of Qualcomm's rival's chips. Thus, the "all-in" price of any modem chip sold by one of Qualcomm's rivals effectively includes two components: (1) the nominal chip price; and (2) Qualcomm's royalty surcharge.

To Qualcomm, the surcharge **[**343]** represents "higher profits," both because the surcharge brings additional revenue to Qualcomm, and "because the reduction in competition enable[s]" Qualcomm "to capture more of the [modem chip] market." **[*792]** *Premier, 814 F.2d at 368*; *see* *United Shoe Mach. Corp. v. United States, 258 U.S. 451, 457, 42 S. Ct. 363, 66 L. Ed. 708 (1922)* (holding that agreements with "the practical effect" to exclude purchases of a competitor's products are anticompetitive).

Because the surcharge also raises the market price of rivals' chips, Qualcomm prevents rivals from underbidding Qualcomm, so that Qualcomm can maintain its modem chip market power. The surcharge affects demand for rivals' chips because as a matter of basic economics, regardless of whether a surcharge is imposed on OEMs or directly on Qualcomm's rivals, "the price paid by buyers rises, and the price received by sellers falls." N. Gregory Mankiw, Principles of Microeconomics, Vol. 1 156 (7th ed. 2014). Thus, the surcharge "places a wedge between the price that buyers pay and the price that sellers receive," and demand for such transactions decreases. *Id.* Rivals see lower sales volumes and lower margins, and consumers see less advanced features as competition decreases.

The district court in *Caldera, Inc. v. Microsoft Corp., 87 F. Supp. 2d 1244 (D. Utah 1999)*, addressed how a similar royalty surcharge increased rivals' prices **[**344]** and promoted exclusivity. Caldera alleged that Microsoft had unlawfully maintained its monopoly in operating systems used for personal computers through several practices. *Id. at 1246*. In one practice, Microsoft entered multiyear licenses with OEMs that required OEMs to pay Microsoft "a royalty on every machine the OEM shipped regardless of whether the machine contained [Microsoft's operating system] or another operating system." *Id. at 1249-50*. This raised the all-in price of Caldera's operating system. *Id. at 1250*.

Further, Microsoft offered discounts on Microsoft's operating system if OEMs entered the license agreements, which induced OEMs to enter agreements that raised the effective price of Caldera's operating system. *Id.* At summary judgment, the district court concluded that a reasonable jury could conclude that Microsoft's license agreements and discounts "resulted in an agreement with the practical effect of exclusivity" because Microsoft's surcharge increased the effective price of Caldera's operating systems. *Id.* Here, too, Qualcomm's surcharge increased the effective price of rivals' modem chips and Qualcomm's agreements with OEMs result in exclusivity.

I. Qualcomm's Chip Incentive Funds Bolster Qualcomm's [**345] Monopoly Chip Market Share, Unreasonably High Royalty Rates, and Exclusivity with OEMs

QTL's chip incentive funds lower the effective price of Qualcomm's modem chips, which exacerbates the effect of Qualcomm's surcharge on rivals' chips. Qualcomm's exclusive deals with Apple are the most prominent single example of such funds, but Qualcomm regularly gave OEMs chip incentives that result in exclusivity and in combination "severely restrict the market's ambit." *Dentsply, 399 F.3d at 191*. In turn, QTL's unreasonably high royalty rates generate the revenue that enables QTL to offer OEMs hundreds of millions (or in the case of Qualcomm's exclusive deals with Apple, billions) in chip incentives.

In 2010, Derek Aberle (QTL President) offered BlackBerry [TEXT REDACTED BY THE COURT] million in chip incentives, which BlackBerry received as rebates on QCT modem chips, according to the contemporaneous notes of John Grubbs (BlackBerry Senior Director of Intellectual Property Transactions). CX3255-002. Grubbs testified that because Qualcomm did not reduce BlackBerry's overall royalty burden, the chip incentive fund **[*793]** reduced the effective price of only Qualcomm modem chips, and resulted in exclusivity:

> BlackBerry is going to **[**346]** pay the royalty, regardless of whether it buys the chip from Qualcomm or Marvell. If — if Qualcomm agreed to reduce the royalty, then BlackBerry could buy the chips from Qualcomm or Marvell and still get the benefit of that reduced price. If Qualcomm reduces the chip cost, then we can only go to one person in order to take advantage of that and that's Qualcomm. So we can't go to Marvell and take advantage of a reduction in chip price unless they're going to get this reduction too.

Grubbs Depo. 259:13-25.

Similarly, a 2004 QTL chip incentive fund required LGE to purchase at least 85% of its modem chips from QCT to be eligible for the chip incentives. CX6809-004.

In 2003, Qualcomm's chip incentive fund required Samsung to purchase at least 85% of its modem chips from QCT in 2003 to "take market share from manufacturers that do not use our ASICs," according to Irwin Jacobs (Qualcomm Co-Founder). CX6719-002. As recently as 2018, Qualcomm's chip incentive fund required Samsung to purchase from Qualcomm 100% of Samsung's premium modem chips and at least a certain number of medium and high tier modem chips. JX0122-036.

In 2013, QTL offered Lenovo $180 million in chip incentives that were contingent **[**347]** on Lenovo purchasing at least 80 million modem chips from QCT over two years. CX6491-003.

In 2016, QTL offered Motorola a chip incentive fund that Motorola concluded would reduce Motorola's effective royalty rate to 3.8% only if Motorola purchased 100% of its modem chips from Qualcomm. CX2060-021.

In 2003, Qualcomm charged Huawei a reduced royalty rate of 2.65% if Huawei purchased 100% of its CDMA modem chips for use in China from Qualcomm, but a 5-7% royalty rate if Huawei purchased CDMA modem chips from a Qualcomm rival. JX0022-010.

Similarly, for years Qualcomm charged LGE a 5.75% running royalty rate on handsets containing Qualcomm's rival's chips and a 5% running royalty rate on handsets containing Qualcomm's chips. JX0026-005. Thus, all of these chip incentives and license provisions tend to result in exclusivity.

In internal documents, Qualcomm has recognized that reducing its chip price rather than reducing its royalty rate—as Qualcomm does via chip incentive funds—prevents Qualcomm from having to compete with rival modem chip suppliers on price, and results in exclusivity. Thus, in a 1998 email to Steve Altman (later Qualcomm President), Marv Blecker (QTL Senior Vice President) **[**348]** recommended that Qualcomm reduce prices on modem chips, rather than reducing Qualcomm's royalty rates:

> Basically, by reducing royalties we are doing nothing more than competing on price with our asic competitors; that is if the reduced or zero royalty is the incentive to buy Q ASICs, then the same effect can be achieved by simply reducing price on our ASICs by that same amount. The advantage of doing it the latter way is that we have preserved the integrity of our royalty rate; ie we have not started down the 'slippery slope' of reducing royalty rates.

CX8206-001.

Qualcomm's billion-dollar exclusive deals with Apple are the most prominent single **[*794]** example of Qualcomm eliminating chip price competition for OEM business. As the Court discussed at length in Section V.G., Qualcomm's exclusive deals with Apple foreclosed rivals from the many direct and indirect benefits of selling modem chips to Apple. Per a 2012 presentation to the Qualcomm Board of Directors, Apple is the OEM that "matters most" because Apple is the largest consumer of premium modem chips—thus providing its suppliers with high sales volumes—and Apple "challenges suppliers to provide best-in-class products," which improves **[**349]** suppliers' products in the broader marketplace. CX6974-029.

Qualcomm has recognized that Apple's purchase volumes are significant enough that without selling thin modem chips to Apple, a rival supplier of thin modem chips cannot survive in the market. In August 2010, Steve Mollenkopf (QCT President) told Paul Jacobs (Qualcomm CEO), Derek Aberle (QTL President), and Steve Altman (Qualcomm President) in an email that if Qualcomm secured Apple exclusivity in the TA, Qualcomm could prevent rivals from becoming threats: "[T]here are significant strategic benefits as it is unlikely that there will be enough standalone modem volume to sustain a viable competitor without that slot." CX5348-001.

Furthermore, Aicha Evans (Intel Chief Strategy Officer) testified that after Intel won Apple's business, other OEMs, including Lenovo, LGE, Motorola, and Tesla, reached out about Intel's modem chips. Tr. at 576:20-577:4. Evans testified that Apple enhances a modem chip supplier's presence in SSOs. *Id.* at 569:9-10. Similarly, Stefan Wolff

(Intel Engineer) explained in a contemporaneous email that winning Apple's business would enable Intel to attract operators and network vendors for early prototyping **[**350]** of Intel's newest LTE modem chips. CX1599-001. Thus, Qualcomm's exclusive deals with Apple both restricted rivals' sales and deprived rivals of the positive network effects of supplying modem chips to Apple.

Qualcomm's chip incentive funds also help maintain Qualcomm's unreasonably high royalty rates and surcharge on rivals' chips by inducing OEMs to sign license agreements. In 2013, Eric Reifschneider (QTL Senior Vice President and General Manager) told Derek Aberle (QTL President) and Marv Blecker (QTL Senior Vice President) that Qualcomm could convince OPPO to sign a QTL license if QTL offered chip incentives: "Think we have a good chance of getting them to take a 4G license now, if we are willing to give them (in addition to the $5M strat fund) a capped deduction for marketing expenses." CX6516-001.

Similarly, John Grubbs (BlackBerry Senior Director of Intellectual Property Transactions) testified that BlackBerry's receipt of chip incentive funds was "contingent on BlackBerry resolving its royalty dispute with Qualcomm." Grubbs Depo. 248:9-15. By using chip incentive funds to close the gap on license agreements, Qualcomm ensures that QTL can continue to charge unreasonably high royalty **[**351]** rates on rivals' modem chips.

Finally, QTL's unreasonably high royalty rates continue the cycle of anticompetitive harm because royalty revenues fund QTL's enormous chip incentive funds.

A May 2007 Qualcomm accounting memo concluded that even though a chip incentive fund accrued on LGE's purchase of QCT modem chips, QTL would fund the chip incentive fund because QTL received the primary benefit: "QTL is deemed to be the primary beneficiary of the elements of these agreements, including the expected royalty streams resulting from QC's first OFDM [an LTE technology] subscriber device license with a major handset manufacturer. **[*795]** Therefore, the amounts under these agreements will be recorded in the QTL business unit." CX7556-005. Because Qualcomm's unreasonably high royalty rates are not based on the value of Qualcomm's patents but rather on Qualcomm's chip monopoly power, using those unfairly obtained royalty revenues to impair rivals "does not further competition on the merits." *PeaceHealth, 515 F.3d at 894*.

Thus, QTL's unreasonably high royalty rates enable QTL to offer OEMs enormous chip incentive funds, which lower the relative price of Qualcomm's modem chips, result in exclusivity, and maintain Qualcomm's ability **[**352]** to impose a surcharge on rivals' modem chips.

Qualcomm argues that its chip incentive funds are procompetitive as "legitimate marketing funds rather than exclusionary conduct." ECF No. 1470-2 ¶ 697. However, Qualcomm's own documents discussed at length above show that QTL's chip incentive funds preserve QTL's "royalty stream" and enable Qualcomm to avoid competing on chip price with its rivals. Qualcomm offers no evidence that Qualcomm or OEMs viewed Qualcomm's chip incentive funds as anything other than rebates designed to lower Qualcomm's chip prices relative to Qualcomm's rivals and to preserve Qualcomm's unreasonably high royalty rates. Therefore, the Court rejects Qualcomm's procompetitive justification as pretextual.

J. Qualcomm's Refusal to License Rivals Bolsters Qualcomm's Monopoly Chip Share, Unreasonably High Royalty Rates, and Exclusivity with OEMs

Qualcomm also refuses to license rivals in violation of its FRAND commitments and its antitrust duty to deal with rivals. As the Court explained in Section V.C., Qualcomm's refusal to license its modem chip SEPs to rival modem chip suppliers prevents rivals' entry, promotes rivals' exit, and hampers Qualcomm's rivals in the marketplace. **[**353]** Instead of licensing rivals, Qualcomm will only enter CDMA ASIC Agreements, which enable Qualcomm to control to whom its rivals sell modem chips and to require that rivals report to Qualcomm the identities of specific quantities sold to each customer.

In so doing, Qualcomm reduces its rivals' customer base and sales, which results in exclusivity. By preventing rivals from entering the market and restricting the sales of those rivals that do enter, Qualcomm entrenches its monopoly power, maintains its chip leverage over OEMs, and sustains its unreasonably high royalty rates. *See* Dentsply, 399 F.3d at 191 (holding that anticompetitive harm results when anticompetitive practices "bar a substantial number of rivals" from the market).

Qualcomm's refusal to license rivals boxes out rivals. Scott McGregor (former Broadcom CEO) testified that Qualcomm refused to license Broadcom to prevent Broadcom from becoming a competitor: "[W]e subsequently tried to work out licensing terms with them and we didn't feel we could get reasonable licensing terms with them working on that and we felt they may be blocking us in the space." McGregor Depo. 151:10-14.

Instead of licenses, Qualcomm enters CDMA ASIC Agreements that permit rivals **[**354]** to sell modem chips to only "Authorized Purchasers"—Qualcomm licensees. JX0050-001. Qualcomm's CDMA ASIC Agreements also require rivals to report to Qualcomm "specific quantities" of modem chips sold to each Authorized Purchaser, and thus give Qualcomm sensitive business information about rivals' sales and customers. JX0050-055 to -056. Thus, Qualcomm controls and monitors to whom its rivals sell modem chips.

[*796] Qualcomm has emphasized to OEMs that Qualcomm controls to whom its rivals sell modem chips, which bolsters Qualcomm's chip supply leverage and ability to extract unreasonably high royalty payments from OEMs. In November 2013, Ira Blumberg (Lenovo Vice President of Intellectual Property) wrote to other Lenovo executives that Qualcomm had threatened to withhold Lenovo's chip supply *and* to force MediaTek to withhold Lenovo's chip supply: "Qualcomm has threatened to stop selling its chips to Lenovo if Lenovo terminates its license. Further, Qualcomm has threatened to force its chip licensees (including MediaTek) to stop selling mobile phone chips to Lenovo if Lenovo terminates its license." CX2079-004.

Qualcomm even boxes out its rivals through chip supply threats to OEMs. For example, **[**355]** in 2015, Qualcomm used the threat of chip supply cutoff to prevent VIVO from purchasing a more competitive modem chip from Qualcomm's rival MediaTek. Sanjay Mehta (QCT China Senior Vice President) told Derek Aberle (Qualcomm President) and Cristiano Amon (QCT President) in an email that QCT could secure exclusivity with VIVO if QTL permitted QCT to continue supplying chips: "What VIVO will commit to (pending QTL confirmation that if VIVO continues to negotiate with QTL in good faith, QCT will continue shipping chipsets) . . . will not launch 6755/6750 [MediaTek modem chips] based handsets (which means QCT will win significant upside in 2016)." CX5321-002. When asked about the email, Cristiano Amon (now Qualcomm President) testified that the 6755 and 6750 modem chips were MediaTek modem chips that had "competition advantages . . . and software compatibility with whatever the incumbent chipset in VIVO was." Tr. at 509:13-510:7. Thus, Qualcomm used VIVO's fear of losing chip supply to secure exclusivity with VIVO and eliminate a competitive threat from MediaTek.

Similarly, Brian Chong (Wistron Chief of New Technology Development and Product Planning) testified that Qualcomm's refusal to **[**356]** license rivals, and the resulting surcharge on rivals' chips, limited Wistron's ability to use a MediaTek modem chip that Wistron preferred:

> [T]here was a case that I remember in particular when we were considering introducing lower cost phones. And MTK was the chip supplier that we think best suitable for that product position in terms of price position and the spec corresponding that it offers. However, in the end we decided to stay Qualcomm for the simple reason that because Qualcomm responded that, even if we're using non-Qualcomm chips, we would still have to pay the onerous royalty that Qualcom dictated in the SULA.

Chong Depo. 256:9-20.

Refusing to license rivals not only blocks rivals, but also preserves Qualcomm's ability to demand unreasonably high royalty rates from OEMs. Eric Reifschneider (QTL Senior Vice President and General Manager) told the IRS in 2012 that if Qualcomm licensed a rival, and that rival sold a modem chip to an OEM, Qualcomm could not then collect additional royalty revenues from that OEM: "[W]hen [the rival] sell[s] that chip to somebody who's going to put the chip in a cell phone, okay, the licensee's sale of that chip will exhaust our rights and then **[**357]** we won't be able to collect a royalty on a cell phone that's based on the price of the cellphone." CX6786-R at 26:6-12. Instead, Qualcomm would only charge its royalty rate against the price of a modem chip. According to an email Steve Altman (former Qualcomm President) sent in 1999, the total royalty payment per chip has been as low as

$.30. CX8177-001. That revenue pales in comparison **[*797]** to the $20 royalty payment per chip Qualcomm can receive when demanding a 5% royalty rate on a $400 handset.

Accordingly, when the IRS asked whether Qualcomm's decision to stop licensing its SEPs to rivals was a "business decision," Marv Blecker (QTL Senior Vice President) agreed: "Oh it's more than that, it's more than that. That's an understatement." CX6786R at 70:22-71:3. Blecker told the IRS that to license rivals would have "the potential of threatening our entire revenue stream at the handset level." *Id.* at 71:5-6.

Fabian Gonell (now QTL Legal Counsel and Senior Vice President, Licensing Strategy) also conceded to the IRS that Qualcomm stopped licensing rivals because Qualcomm had to choose between licensing rivals and OEMs, and licensing OEMs is far more lucrative: "But having — having to choose between **[**358]** one or the other then you're right, obviously the handset is humongously more . . . lucrative for a bunch of — a bunch of reasons." *Id.* at 71:18-23.

Thus, Qualcomm's refusal to license rivals prevents entry, promotes exit, and hampers rivals in the marketplace by reducing rivals' customer base and sales. This results in exclusivity, like Qualcomm's other practices. By reducing the sales available to rivals and avoiding exhaustion claims, Qualcomm's refusal to license rivals also helps Qualcomm maintain the chip supply leverage against OEMs that sustains Qualcomm's unreasonably high royalty rates.

K. Qualcomm's Monopoly Chip Market Share, Unreasonably High Royalty Rates, and Exclusivity with OEMs Create Insurmountable Barriers for Rivals

Collectively, the harms caused by Qualcomm's anticompetitive practices take repeated aim at the elements necessary for a rival modem chip supplier to compete in the market. The Ninth Circuit has held that "[a]nticompetitive conduct is behavior that tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way." *PeaceHealth, 515 F.3d at 894*.

Here, Qualcomm's interrelated practices create insurmountable **[**359]** and artificial barriers for Qualcomm's rivals, and thus do not further competition on the merits. Qualcomm's practices all reduce rivals' sales. Qualcomm's chip incentive funds for OEMs lower the effective price of Qualcomm's modem chips, result in exclusivity, and restrict the OEM customer base available to Qualcomm's rivals. Through CDMA ASIC Agreements, Qualcomm limits its rivals' customers and further reduces sales. The surcharge on rivals' modem chips imposed by Qualcomm's unreasonably high royalty rates increases the cost of rivals' chips, which reduces demand for rivals' chips and reduces rivals' margins. By attacking all facets of rivals' businesses and preventing competition on the merits, these practices "harm the competitive process and thereby harm consumers." *See Microsoft, 253 F.3d at 59*.

Qualcomm's licensing practices have enabled Qualcomm to eliminate a cellular standard supported by a rival. Qualcomm's suppression of rivals' sales also forecloses rivals from the revenue necessary to invest in research and development and acquisitions to develop new technology. Without sales to OEMs, rivals lack opportunities to engage with OEMs' engineering teams, customize products for an OEM, and win year-after-year **[**360]** business from an OEM. Finally, Qualcomm's practices harm rivals' standing with SSOs and network vendors. As a result, rivals lack the resources and industry standing to **[*798]** bring the most advanced modem chips to market, which further reduces rivals' sales, and increases Qualcomm's sales. Then, the cycle begins again. The Court discusses these compounding anticompetitive harms in more detail below.

1. Qualcomm Strives to Eliminate Rivals and Eliminated a Competing Standard

Qualcomm's licensing practices, which result in exclusivity, can make it impossible for rivals to survive—as Qualcomm's own documents recognize. For example, as Qualcomm sought exclusivity from Apple in 2010, Steve Mollenkopf (QCT President) told Paul Jacobs (Qualcomm CEO), Derek Aberle (QTL President), and Steve Altman (Qualcomm President) that exclusivity would so restrict the market that no rival supplier of premium thin modems could survive: "[T]here are significant strategic benefits as it is unlikely that there will be enough standalone modem volume to sustain a viable competitor without that slot." CX5348-001.

Not only did Qualcomm strive to eliminate thin modem competitors, but also Qualcomm attempted to and succeeded **[**361]** at eliminating a competing cellular standard. Qualcomm wielded chip supply leverage and the specter of its unreasonably high royalty rates to eliminate WiMax, a competing cellular standard supported by Intel. In the 2007 Marketing Incentive Agreement ("MIA"), Qualcomm offered Apple royalty rate rebates conditioned on (1) Apple publicly announcing that Apple had "chosen GSM technology for its phone . . . into the future with 3G and beyond"; (2) Apple not selling more than 1,000 WiMax handsets; and (3) Apple not licensing a third party to sell WiMax handsets. JX0040-003. During MIA negotiations, Marv Blecker (QTL President) emailed Jeff Williams (Apple COO) to state that Qualcomm's first priority was eliminating WiMax: "Motivating Apple to select WCDMA to the exclusion of WiMax is our primary motivation for entering into this agreement." CX0617-001.

Irwin Jacobs (Qualcomm Co-Founder and former Qualcomm CEO) testified at trial that Qualcomm would have been behind in supplying WiMax chips had WiMax become the standard:

Q: It's accurate to state, sir, that if WiMax had ended up as the standard, Qualcomm would have been far behind; is that right?

A: That's fine.
Tr. at 1284:10-13.

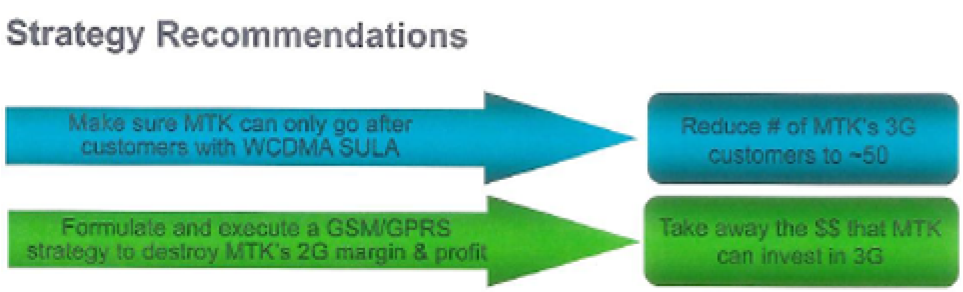
As a result **[**362]** of the MIA, WiMax was eliminated. Jeff Williams (Apple COO) testified that the Qualcomm agreement ended Apple's engagement with Intel's WiMax standard:

Q: And following the execution of that agreement, did Apple pursue WiMax further?

A: No. In essence, it was killed in the cradle for us. We did not.
Tr. at 873:21-23. Thus, Qualcomm eliminated a competing cellular standard supported by Intel not because WiMax was inferior, but to eliminate competition.

2. Qualcomm's Licensing Practices Prevent Rivals from Investing in New Technology Through Research and Development and Acquisitions

Even when Qualcomm's licensing practices do not outright eliminate competition, Qualcomm can suppress rivals' sales such that rivals lack revenue to invest in research and development, as Qualcomm's own documents recognize. For example, in a 2009 presentation that Qualcomm prepared within days of its CDMA ASIC Agreement with MediaTek—which restricted MediaTek's sales to Qualcomm licensees **[*799]** only—Qualcomm stated that by reducing MediaTek's customer base, Qualcomm could "[t]ake away the $$ that MTK can invest in 3G." CX5809-041. The slide is reproduced below. Thus, Qualcomm aimed to reduce MediaTek's customer base **[**363]** to destroy MediaTek's margin, and thereby impede MediaTek's ability to invest in 3G.



Reducing rivals' revenue to invest in research and development gravely harms rivals because producing modem chips requires very high fixed research and development costs. For example, after Intel purchased Infineon, Intel had to spend "billions of dollars" to develop LTE technology from scratch, according to Aicha Evans (Intel Chief Strategy Officer). Tr. at 565:3-6.

Accordingly, to cover the costs of research and development, a modem chip supplier must generate a larger customer base. Will Wyatt (QTI [Qualcomm Technologies, Inc., the Qualcomm subsidiary that operates QCT] Vice President, Finance) testified at trial that a large customer base provides the revenue necessary "to make R&D investments to support customers and develop technology." Tr. at 443:6-10. Thus, after Intel won Apple's high-volume business, Stefan Wolff (Intel Engineer) emphasized in an internal Intel email that revenue from sales to Apple would "support the funding of our next generation LTE 7460" modem chip. CX1599-001.

Similarly, Scott McGregor (former Broadcom CEO) testified that because modem chip research and development is so **[**364]** expensive, the economics of supplying modem chips are very sensitive to customer volume:

> I mean, the cellular baseband business is extremely R&D intensive. More so than probably any other semiconductor business by a lot. And it's a lot of software people, a lot of engineers to do the hardware, a lot of testing, a lot of other things. And the more volume you have, the more you can amortize the fixed costs of doing the development on chips. And so the economics of being in the cellular baseband business are very sensitive to volume of customers.

McGregor Depo. 174:12-21.

Producing premium LTE modem chips is especially sensitive to customer volume because research and development for premium modem chips is more expensive. Finbarr Moynihan (MediaTek General Manager of Corporate Sales and Business Development) testified that premium LTE modem chips require more upfront investment and require higher margin to support that investment: "You'd certainly like to see that the higher tiers generate higher profit, higher margins, yeah. It takes more R&D to develop those products." Tr. at 378:18-20.

Qualcomm's own documents and testimony recognize that research and development is necessary to win the **[**365]** race to market. For example, a 2016 Qualcomm pricing strategy plan received by Will **[*800]** Wyatt (QTI Vice President, Finance) twice makes the point that being first to market has compounding advantages for a modem chip supplier: "Winner Take All in the Mobile Silicon Space" and "It's very simple: If you are first > you win / If you are late > you lose." CX8262-003. At trial, Will Wyatt also testified that it is essential for a modem chip supplier to be first to market:

> **Q**: And you would agree that in the semiconductor space, being early in terms of new technology is very helpful in terms of being successful; correct?
>
> **A**: Yes. You need to win each of the specific modem socket designs, and they turn over very quickly.

Tr. at 445:2-6.

Thus, by suppressing rivals' sales and revenue to invest in research and development for new technology, Qualcomm ensures that its rivals will lose repeatedly. Those losses further suppress rivals' sales, and further suppress rivals' ability to fund research and development.

In contrast, by winning repeatedly, Qualcomm maintains the scale and margin to have "large teams" that "work around the world" on research and development, as James Thompson (Qualcomm CTO) testified **[**366]** at trial. Tr. at 1382:10-18.

Qualcomm also has two monopoly-generated revenue streams to invest in research and development, unlike its rivals. Qualcomm's monopoly chip power sustains Qualcomm's unreasonably high royalty rates and billions in licensing revenue. Qualcomm's monopoly chip power also enables Qualcomm to charge monopoly prices on modem chips. For example, according to an April 2009 VIA presentation, Qualcomm reduced its prices whenever VIA introduced a comparable chip—which shows that Qualcomm was previously receiving monopoly prices on its modem chips: "When [VIA] first introduced CBP6 to US market, the price of QSC6055 [a Qualcomm chip] was $18," but within weeks "the QSC6055 price was reduced to $10." CX1770-004. Similarly, Will Wyatt (QTI Vice President, Finance) conceded at trial that a 2015 Qualcomm pricing proposal, CX7591-011, shows that Qualcomm reduced its modem chip prices by more than $2 following MediaTek's introduction of a competitive modem chip. Tr. at 433:2-5. Thus, Qualcomm's monopoly chip power has enabled Qualcomm to charge monopoly chip prices.

With those two revenue streams, and with rivals' revenues suppressed, Qualcomm can "take risk and invest in **[**367]** new areas before our competition, so we often have a green field to create new intellectual property," as Paul Jacobs (Qualcomm CEO) stated in a July 2012 letter to the Qualcomm Board of Directors. CX6974-017.

Similarly, suppressing rivals' sales also prevents rivals from developing new technology by acquisition, an alternative to research and development. For example, according to Intel's internal projections, spending [TEXT REDACTED BY THE COURT] million to acquire VIA (and its CDMA technology) was only profitable for Intel once Intel secured business from Apple. CX1598-009. Similarly, Aicha Evans (Intel Chief Strategy Officer) testified that without proof of Intel's capability in the market, "there wouldn't have been a discussion" at Intel about acquiring VIA. Tr. at 581:17-20.

Accordingly, Qualcomm's suppression of rivals' sales deprives rivals of revenue to invest in research and development and acquisitions to develop new technology, which prevents the emergence of new rivals, hampers rivals already in the market, and hinders the development of new technologies available to consumers. *See* *Microsoft, 253 F.3d at 79* (holding the court **[*801]** may infer that conduct caused anticompetitive harm "when exclusionary **[**368]** conduct is aimed at producers of nascent competitive [products] as well as when it is aimed at producers of established substitutes").

3. Qualcomm's Licensing Practices Foreclose Rivals from New and Repeat Business, Engineering Engagement, and Field Testing with OEMs

By restricting rivals' sales, Qualcomm's licensing practices also prevent rivals from developing new and maintaining ongoing business relationships with OEMs.

Sales to one OEM can lead to sales to other OEMs, who, impressed that the modem chip supplier can execute, may then reach out to the supplier. For example, Aicha Evans (Intel Chief Strategy Officer) testified that several OEMs reached out to Intel after Intel won Apple's business: "Lenovo is an example, LG is an example, Motorola is an example, Tesla is an example." Tr. at 576:20-577:4.

In addition, winning business from an OEM in one year can lead to repeat business with that OEM. Will Wyatt (QTI Vice President, Finance) testified that winning an OEM's business strengthens a modem chip supplier's ability to supply modem chips to that OEM in future years:

> **Q**: In general, winning one design with an OEM can improve that chip supplier's chances of winning business with the **[**369]** OEM in the future; correct?
>
> **A**: It depends if they do a good job.
>
> **Q**: But in general, that's a true statement; correct?
>
> **A**: If they perform, yes.

Tr. at 443:11-16.

Winning business with an OEM generates deep engagement with that OEM's engineering teams. That engagement both sharpens a modem chip supplier's products and leads to opportunities to customize modem chips for that OEM, as Christopher Johnson (Bain & Co. Partner), who consulted for Intel, testified: "[B]y working with a customer and having access to their products and their engineering teams, you can customize your products and basically improve your pace of innovation in the features you're bringing out." Tr. at 1854:16-23. Specifically, a July 2012 Qualcomm presentation to the Qualcomm Board of Directors states that Apple's engineering team challenges modem chip suppliers to produce "best-in-class" products. CX6974-029.

Sales relationships with OEMs also provide modem chip suppliers with opportunities to field test modem chips in real-world conditions. Finbarr Moynihan (MediaTek General Manager of Customer Sales and Business Development) testified field testing sharpens a supplier's product and helps a supplier spot technical issues: **[**370]** "[I]f you're launching a new modem generation into the market, it takes certainly some time to get it into production, launch it with multiple OEMs into multiple operator networks and operators, network operators, and iron out any of the issues, the bugs that it might find in the field." Tr. at 365:20-25. During generational transitions especially, Moynihan testified, OEMs can "help us as a supplier and navigate some of those transitions without falling down." *Id.* at 339:19-340:4.

Qualcomm's licensing practices suppress rivals' sales and thus foreclose rivals from new or repeat OEM business, engineering engagement with OEMs, and field testing with OEMs. Missing out on those opportunities further weakens rivals, reduces rivals' ability to produce competitive modem chips, and bolsters Qualcomm's monopoly chip power.

4. Qualcomm's Licensing Practices Harm Rivals' Standing with Other Industry Participants Like SSOs, Network Vendors, and Operators

As discussed above, Qualcomm used its monopoly chip power to eliminate a competing **[*802]** standard, WiMax. However, Qualcomm's licensing practices also harm rivals' standing with SSOs, network vendors, and operators (also referred to as carriers, like Verizon), **[**371]** which further suppresses rivals' sales and further entrenches Qualcomm's monopoly power.

Sales to OEMs are correlated with a supplier's standing in SSOs. For example, Qualcomm's own documents recognize that without QCT's monopoly chip power, QTL would be isolated in SSOs. In April 2015, Steve Mollenkopf (Qualcomm CEO) and David Wise (Qualcomm Senior Vice President and Treasurer) exchanged views over email on how the coming 5G transition may affect QTL and QCT. CX5913-001. Steve Mollenkopf wrote to David Wise and the "exc@qualcomm.com" distribution list: "One of the arguments for not splitting is that we need to be positioned for 5G." CX5913-001. David Wise replied that without QCT's monopoly power, QTL may become isolated and ineffective at embedding its technology into standards:

> The main point on 5G is that we are in a stronger position to extend QTL licensing model together than separate. Less about level of spend. Much more about our strength in the standards process and regulatory. If separate, QTL may be isolated and ineffective at getting tech into the std. No QCT distribution.

CX5913-001. With QCT's monopoly power, though, QTL retains a strong presence in the standards.

In turn, **[**372]** QTL's influence in SSOs bolsters QCT's chip monopoly power because QTL can embed Qualcomm's technology into cellular standards and enable QCT to win the race to market. For example, a BCG presentation prepared during Project Phoenix states that QCT's share of modem chip sales is "~30% higher in first years of technology standard." CX3755-014. Speaker's notes for the slide explain that Qualcomm's influence in standards enables QCT to get a head start on product development: "Standards are set in ways favorable to [QCT] due to research capabilities and strong influence on SSOs . . . Influence enables head start in product development even before standard is fully set." *Id.*

Similarly, Aicha Evans (Intel Chief Strategy Officer) testified that working with Apple in particular enhances a modem chip supplier's position in the standards: "You also get what I call the halo effect of better presence in the standards, not just presence, but better weight in terms of your contributions, in terms of starting to get leadership positions." Tr. at 569:9-13. Evans testified that winning Apple's business "really got us to the table in terms of standards . . . meaning 3GPP and IEEE [two SSOs]." *Id.* at **[**373]** 574:20-22.

However, by limiting rivals' sales to OEMs like Apple, Qualcomm prevented its rivals from obtaining more influence in standards, and thus ensured that Qualcomm could maintain a time-to-market advantage.

Sales also attract interest from operators and network vendors, who engage successful modem chip suppliers for field testing and early prototyping. Those opportunities help accelerate a modem chip supplier's development of new products.

For example, after Intel won Apple's business, Stefan Wolff (Intel Engineer) wrote in a contemporaneous email that operators and network vendors reached out to Intel for field testing of Intel's latest LTE modem chips because of Intel's increased sales volumes: "We will attract operators and network vendors to do early prototyping / field testing with our latest LTE platforms given Apples [sic] huge volumes in the field." CX1599-001. As a result, Wolff wrote, Intel could bring its **[*803]** modem chips to market more quickly: "This will speed up the development, hardening, and TTM [time-to-market] of our modem technology." *Id.* Likewise, Aicha Evans (Intel Chief Strategy Officer) testified that operators are not interested in working with a modem chip supplier **[**374]** with low sales: "[F]or the operators, too, to give you that credibility, they're not going to give you that credibility because you have one phone in the corner of the third shelf that nobody buys." Tr. at 576:17-19.

By harming rivals' standing with industry participants, Qualcomm suppresses rivals' ability to generate additional business, develop new products, and win the race to market. Instead, Qualcomm wins these opportunities, which further entrenches Qualcomm's monopoly chip power.

5. Qualcomm's Rivals Have Exited the Market, and Those That Remain are Hobbled

In sum, with practices that result in exclusivity and eliminate opportunities to compete for OEM business, Qualcomm undermines rivals in every facet. Qualcomm attempts to eliminate competition in certain markets; eliminates competing standards; deprives rivals of revenues to invest in research and development and acquisitions; forecloses rivals from establishing technical and business relationships with OEMs; prevents rivals from field testing with OEMs, network vendors, and operators; and ensures that Qualcomm retains influence in SSOs, so that Qualcomm can maintain its time-to-market advantage and its unlawful monopoly. By **[**375]** so hobbling rivals, Qualcomm's practices "unfairly tend[] to destroy competition itself." *Spectrum Sports, 506 U.S. at 458*.

Foreclosed from sales to OEMs and the resulting benefits, rivals are unable to produce competitive modem chips, which further suppresses rivals' sales. Because Qualcomm's practices all reduce rivals' ability to become and remain viable competitors, the Court concludes that the practices "reasonably appear[] capable" of maintaining Qualcomm's monopoly power. *See Microsoft, 253 F.3d at 59*; *see also id. at 79* ("We may infer causation when exclusionary conduct is aimed at producers of nascent competitive technologies as well as when it is aimed at producers of established substitutes.").

The modem chip market reflects the cumulative anticompetitive harm of Qualcomm's practices. Many of Qualcomm's rivals have exited, and those rivals that remain are hobbled by Qualcomm's anticompetitive harms.

On this causation question, Qualcomm overstates the FTC's burden. For example, Qualcomm presents evidence that Apple viewed both Broadcom and ST Ericsson—rivals that have exited the market—as technically not capable to supply modem chips for a 2013 Apple handset. QX1353-223; Tr. at 1510:18-24.

In addition, Qualcomm cites a Bain & Company presentation **[**376]** that concluded that although Intel invested only 32% less than Qualcomm in research and development into SoC modem chips in 2015, Qualcomm was more efficient and produced two or three times the product output as Intel. QX0123A-002. However, Intel had to build its modem chip research and development infrastructure from scratch, whereas Qualcomm had two decades head start on Intel. For example, Aicha Evans (Intel Chief Strategy Officer) testified that Intel had to invest "lots of money, billions of dollars, and an army of engineers" to generate a premium LTE modem chip business from scratch. Tr. at 565:3-6. Moreover, Qualcomm ignores how Qualcomm's set of anticompetitive licensing practices undermine **[*804]** its rivals' ability to execute and compete in the market.

Furthermore, Qualcomm's licensing practices blocked Project Dragonfly, a potentially powerful rival, from ever entering the market. Project Dragonfly was a joint venture to sell modem chips comprised of Samsung, one of the largest global OEMs selling cellular handsets; NTT DoCoMo, the largest carrier in Japan; and several Japanese OEMs. CX2628-001. Qualcomm's own document recognizes that Samsung is one of the top five contributors **[**377]** to SSOs. CX6138-032. Thus, Project Dragonfly had access to engineering expertise, the combined capital to fund research and development and acquisitions, the benefit of Samsung's standing in SSOs, and Samsung's existing relationships with operators and network vendors, all of which would have primed Project Dragonfly for success.

According to Andrew Hong (Samsung Legal Counsel), Qualcomm knew that Project Dragonfly could enter the market in a year because of its joint resources. Hong Depo. 215:15-216:14. However, aware of that threat, Eric Reifschneider (QTL Senior Vice President and General Manager) rejected Project Dragonfly's request for a license and Samsung's request for a license, which would have covered Project Dragonfly and its customers. Andrew Hong (Samsung Legal Counsel) testified that Reifschneider explicitly rejected Samsung's request for a license to avoid enabling Project Dragonfly to come to market: "He said to us pretty much, 'I know if you try to develop this on your own, it will take several years. And I'm not going to let you enter the market in a, in a year." Hong Depo. at 216:21-24. After Qualcomm rejected Project Dragonfly's and Samsung's requests for licenses, **[**378]** Project Dragonfly did not proceed. *Id.* at 173:3-10. Thus, Qualcomm's licensing practices also bar potentially strong rivals from ever entering the market, which stifles competition and harms consumers.

Moreover, even if Qualcomm's rivals have contributed to their own failings, the Court need not conclude that Qualcomm's conduct is the sole reason for its rivals' exits or impaired status to conclude that Qualcomm's practices harmed competition and consumers. Where a government agency seeks injunctive relief, the Court need only conclude that Qualcomm's conduct made a "significant contribution" to Qualcomm's maintenance of monopoly power. *Microsoft, 253 F.3d at 79* (citation omitted). The plaintiff is not required to "present direct proof that a defendant's continued monopoly power is precisely attributable to its anticompetitive conduct." *Id.*

Qualcomm ignores that standard and argues that the FTC must present evidence that "tends to exclude the possibility" that Qualcomm's rivals exited the industry or are hobbled for reasons independent of Qualcomm's conduct. QC FOFCOL at 127. However, in *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*, the United States Supreme Court held in the context of a conspiracy to restrain trade that the evidence must "tend[] to exclude the possibility" **[**379]** that the alleged *conspirators* were acting independently. The instant case does not allege a conspiracy. Qualcomm's authorities say little about the causation standard for the FTC's Sherman Act claims.

Rather, the United States Supreme Court has held that indirect evidence of anticompetitive conduct includes "proof of market power plus some evidence that the challenged restraint harms competition." *Am. Express, 138 S. Ct. at 2284*. Where the government is a plaintiff, the Court may "infer 'causation' from the fact that a defendant has engaged in anticompetitive **[*805]** conduct that 'reasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power." *Microsoft, 253 F.3d at 79* (citation omitted). The FTC is not required "to reconstruct the hypothetical marketplace absent a defendant's conduct." *Id.* Thus, the Court need not conclude that Qualcomm's anticompetitive licensing practices are the sole reason for any particular rival's exit or any particular rival's reduced performance to conclude that Qualcomm's anticompetitive practices harmed competition in the CDMA and premium LTE modem chip markets.

Rather than address that causation question, Qualcomm's experts all simply ignored the effects of Qualcomm's own anticompetitive **[**380]** conduct. It makes little sense to evaluate whether conduct "reasonably appears capable" of causing anticompetitive harm, *see* *Microsoft, 253 F.3d at 79*, by ignoring evidence of that conduct altogether. Without considering Qualcomm's anticompetitive conduct, one cannot answer whether that conduct has sustained Qualcomm's monopoly power. *Grinnell, 384 U.S. at 571*. But that is how Qualcomm's experts proceeded.

For example, Dr. Edward Snyder, a Qualcomm economic expert, never even considered how Qualcomm's anticompetitive practices affect Qualcomm's rivals. Dr. Snyder testified that only had he found evidence to contradict his own theory that "independent" factors harmed Qualcomm's rivals "would [he] have gone to the next step to evaluate . . . the FTC's claims about Qualcomm's conduct." Tr. at 1788:6-8. Dr. Snyder ignored Qualcomm's conduct even though Dr. Snyder conceded that his "independent" factors are not mutually exclusive with Qualcomm's conduct, and that "anticompetitive conduct by a dominant firm can affect its rivals' investment decisions." *Id.* at 1808:24-1809:1. Because Dr. Snyder did not even evaluate Qualcomm's conduct, the Court finds that Dr. Snyder's opinions are not reliable.

Similarly, Dr. Aviv Nevo also ignored Qualcomm's **[**381]** anticompetitive practices. Dr. Nevo opined that the modem chip industry is "thriving," but made no claim about how Qualcomm's practices might have affected the industry:

> **Q**: Well, can you rule out the possibility that things would have been better were it not for conduct that's been alleged?
>
> **A**: No, I can't rule that out, and that's not what I'm claiming here.

Id. at 1905:5-8. Thus, the Court finds that Dr. Nevo's opinions are not reliable.

Finally, Dr. Tasneem Chipty also acknowledged that her analysis ignored Qualcomm's anticompetitive practices. For example, Dr. Chipty conceded that she conducted no analysis of how Qualcomm's refusal to license rivals, refusal to sell modem chips exhaustively, requirement that an OEM sign a license before purchasing modem chips, and threats to cut off chip supply and other support affected modem chip markets. Tr. at 1738:3-1739:3. Therefore, because Dr. Chipty failed to consider whether Qualcomm's actual anticompetitive practices harmed rivals, the Court finds that Dr. Chipty's opinions are not reliable.

Here, the modem chip market reflects the expected outcomes of Qualcomm's anticompetitive practices, which "impair the opportunities of rivals" and "do[] **[**382]** not further competition on the merits." *PeaceHealth, 515 F.3d at 894*.

Many of Qualcomm's rivals have exited the market. Scott McGregor (former Broadcom CEO) testified that remaining in the modem chip market was not "economically viable" for Broadcom because Broadcom did not generate the scale "sufficient to cover the R&D and other costs **[*806]** required to create those chips." McGregor Depo. 12:14-17. According to a 2014 Qualcomm presentation shared with Will Wyatt (QTI Vice President, Finance), the former modem chip supplier Freescale exited the market in 2008 due to "customer concentration and the need for significant investment in scale to supply customers." CX8292-006. According to the same 2014 Qualcomm presentation, ST-Ericsson left the market in 2013 due to reduced purchase volumes from two OEM customers, and Texas Instruments also left the market in 2012 due to a reduced customer base. *Id.*

Qualcomm's rivals that remain in the market are hobbled by Qualcomm's practices. For example, Qualcomm's rival MediaTek had to discontinue its [TEXT REDACTED BY THE COURT]. CX3551-004. Finbarr Moynihan (MediaTek General Manager of Customer Sales and Business Development) testified at trial that MediaTek has not "penetrated ever **[**383]** what I would call the premier tiers in the market." Tr. at 324:25-325:2. According to Moynihan, MediaTek has not "been able to invest enough I think in the modem technology and deploy it fast enough to market." *Id.* at 365:10-13. Although MediaTek licensed VIA's CDMA technology in 2013, MediaTek only sold its first CDMA modem chip in 2015. *Id.* at 328:13-16. According to a 2017 presentation to Qualcomm's Board of Directors, which Steve Mollenkopf (Qualcomm CEO) received, MediaTek has no premium LTE modem chip offering. CX8191-089.

In addition, even though Intel is supplying modem chips to Apple, Aicha Evans (Intel Chief Strategy Officer) testified that Intel has never met its target margins and that Intel's sales of modem chips to Apple have not yet been profitable. Tr. at 587:12-22. When asked about the probable effect of losing Apple's business in any given year, Evans testified that losing Apple's business "would not be near death, that would be death." *Id.* at 589:18-19. Specifically, Evans testified: "Once you're in the cycle and you've shipped millions of units, it's — I call it it's Christmas, there's Christmas every year and you can't miss it essentially." *Id.* at 589:11-14.

Furthermore, **[**384]** Samsung's and Huawei's modem chip supply divisions do not compete with Qualcomm for third-party OEM business. At trial, Alex Rogers (QTL President) testified that Exynos is not an external competitor: "Samsung has a cellular baseband business that they make primarily for their own use." Tr. at 1989:5-6. Finbarr Moynihan (MediaTek General Manager of Corporate Sales and Business Development) agreed: "We don't tend to see Samsung LSI as a supplier much outside of Samsung's own phones." Tr. at 327:10-15. The same is true of HiSilicon, Huawei's modem chip division, according to Finbarr Moynihan (MediaTek General Manager of Corporate Sales and Business Development): "I think even more so we only see HiSilicon in Huawei phones." *Id.* at 327:20-21.

Given the fragile state of Qualcomm's rivals, the exits of several other rivals, and Qualcomm's continued dominance, the Court concludes that there is plentiful "evidence that the challenged restraint harms competition." *See* *Am. Express, 138 S. Ct. at 2284*.

The Court has already rejected all of Qualcomm's litigation justifications for its conduct as pretextual. *See* Section V.C. (refusal to license rivals); Section V.E. (Apple exclusive agreements); Section V.F. (refusal to sell **[**385]** modem chips without a license agreement); Section V.I. (chip incentive funds). Even if Qualcomm had shown non-pretextual procompetitive justifications for its conduct, the foregoing anticompetitive harm is so severe that the "anticompetitive harm outweighs [any] **[*807]** procompetitive benefit" of Qualcomm's conduct. *Microsoft, 253 F.3d at 59*.

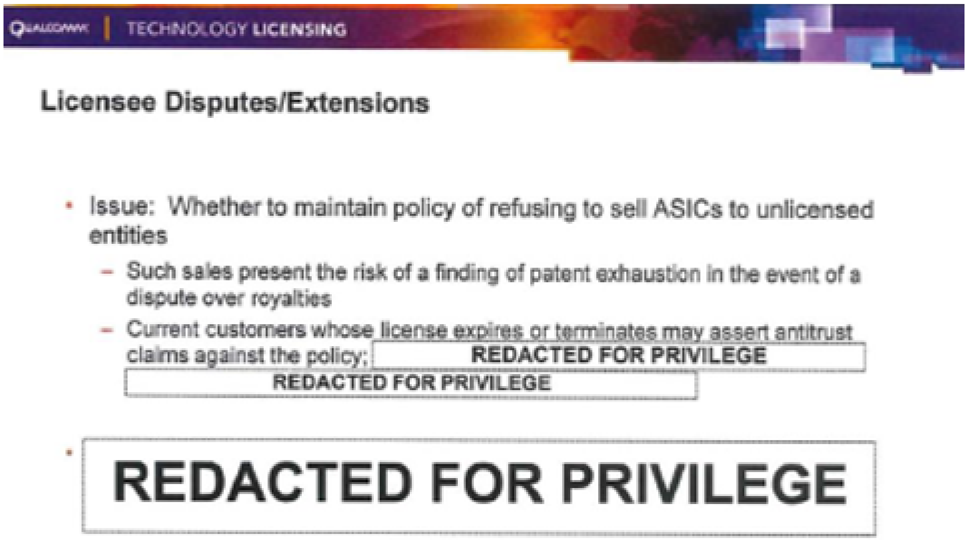
Finally, the Court turns to evidence of Qualcomm's intent to harm competition, as found in Qualcomm's own documents.

L. Qualcomm's Intent to Harm Competition Confirms That Qualcomm's Practices Cause Anticompetitive Harm

Qualcomm's own documents show that Qualcomm knew its licensing practices could lead to antitrust liability, knew its licensing practices violate FRAND, and knew its licensing practices harm competition, yet continued anyway—even in the face of government investigations in Japan, Korea, Taiwan, China, the European Union, and the United States. This evidence of Qualcomm's intent confirms the Court's conclusion that Qualcomm's practices cause anticompetitive harm because "no monopolist monopolizes unconscious of what he is doing." *Aspen Skiing, 472 U.S. at 602*; *see also* *Chicago Bd. of Trade, 246 U.S. at 238* ("[K]knowledge of intent may help the court to interpret facts and to predict consequences.").

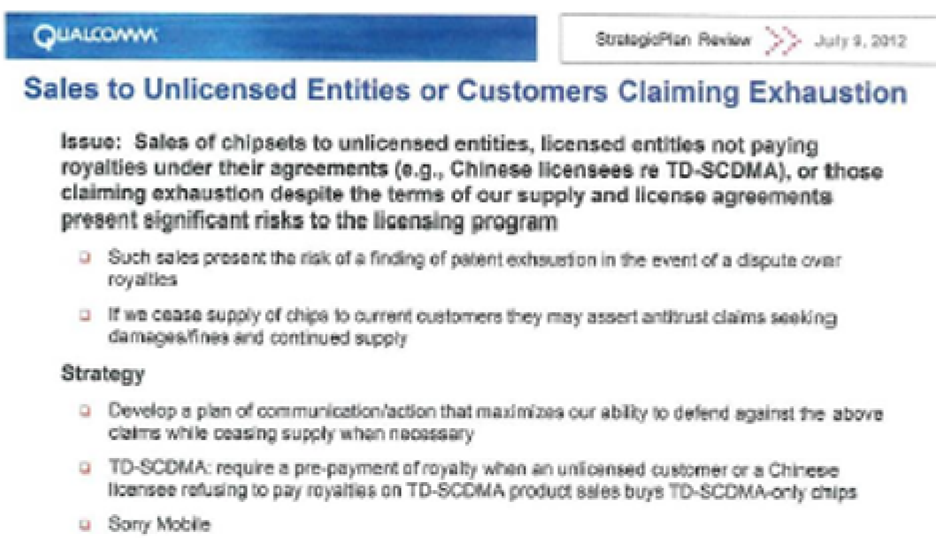
First, Qualcomm admitted in contemporaneous **[**386]** documents that its practices of avoiding patent exhaustion, requiring OEMs to sign a separate license before purchasing modem chips, and threatening to cut off OEMs' chip supply may cause antitrust liability.

For example, in a May 2012 slide deck prepared by Fabian Gonell (now QTL Legal Counsel and Senior Vice President, Licensing Strategy) and reproduced below, Qualcomm admitted that its licensing practices could lead to antitrust claims.



Gonell's slide was shared with Eric Reifschneider (QTL Senior Vice President and General Manager), Derek Aberle (QTL President), Marv Blecker (QTL Senior Vice President), and Lou Lupin (Qualcomm Legal Consultant). Gonell stated that selling modem chips to an unlicensed OEM could "present the risk of a finding of patent exhaustion in the event of a dispute over royalties." CX6548-002. As a result, Qualcomm "refus[es] to sell ASICs to unlicensed entities." *Id.* However, Gonell expressed the concern that "[c]urrent customers whose license expires may assert antitrust claims against the policy." *Id.*

Qualcomm's internal contemporaneous documents repeatedly acknowledge that its licensing practices expose Qualcomm to antitrust claims. The following slide is **[**387]** contained in: (1) a July 2, 2012 QTL strategic **[*808]** plan presentation that Derek Aberle (QTL President) created and sent to Dr. Paul Jacobs (Qualcomm CEO), Steve Mollenkopf (Qualcomm President), and Steve Altman (Qualcomm Vice Chairman), CX6998-001; and (2) a July 9, 2012 presentation to the Qualcomm Board of Directors, which Dr. Irwin Jacobs (Qualcomm Co-Founder) also received. CX6974-001. Yet despite a concern about antitrust claims, Qualcomm planned to continue the anticompetitive practices and to develop a plan of communication against antitrust claims.



The slide states that Qualcomm's licensing practices may expose Qualcomm to antitrust liability: "If we cease supply of chips to current customers they may assert antitrust claims seeking damages/fines and continued supply." CX6974-070. In response, Qualcomm planned to continue its anticompetitive practices: "Develop a plan of communication/action that maximizes our ability to defend against the above claims while ceasing supply when necessary." *Id.* Thus, Qualcomm repeatedly acknowledged that its licensing practices raise antitrust claims, yet continued the licensing practices anyway.

In fact, Qualcomm's threats to OEMs' chip supply are **[**388]** an ongoing company practice that began with Qualcomm's co-founder, Dr. Irwin Jacobs. For example, in June 2004, Irwin Jacobs (then Qualcomm CEO) threatened LGE that unless LGE withdrew arbitration claims and paid past due royalties, Qualcomm would "stop accepting LGE purchase orders for WCDMA ASICs," "cease all shipments of WCDMA ASICs to LGE," "withdraw all of its substantial WCDMA engineering resources currently providing technical support to LGE," and require LGE to return software to Qualcomm. CX6814-022. At trial, Irwin Jacobs testified that Qualcomm in fact did cut off LGE's chip supply: "We did not ship to them the chips that were specified here, the 500 and then 6,000 chips as far as I know at this time." Tr. at 1293:25-1294:2.

Similarly, after Qualcomm presented the above July 2012 slide to the Board of Directors, Qualcomm continued to threaten OEMs' chip supply. For example, only three months after the July 2012 Board of Directors meeting, Eric Reifschneider (QTL Senior Vice President and General Manager) threatened to cut off Sony's chip supply. In an October 27, 2012 email, Eric Reifschneider told Jonathan Pearl (Sony General Counsel) that "I must report to **[*809]** QCT that SMC **[**389]** [Sony Mobile Corp.] appears unwilling to enter into a license agreement with Qualcomm," CX5185-005, to which Reifschneider referred as "the next step in the escalation process." Reifschneider Depo. 207:6-16.

In 2013, Reifschneider threatened Huawei's chip supply. In a May 1, 2013 email, Reifschneider informed Xuxin Cheng (Huawei) that "if the C2K SULA expires and has not been replaced by a new patent license agreement covering C2K products, there will be issues with Huawei's ability to continue to use C2K chipsets or QMCi's software, issues which I am sure both our companies would like to avoid." CX1000-004.

In 2013, according to contemporaneous Lenovo documents, Qualcomm threatened to cut off chip supply to Lenovo and to force MediaTek to cut off chip supply to Lenovo: "Qualcomm has threatened to stop selling its chips to Lenovo if Lenovo terminates its license. Further, Qualcomm has threatened to force its chip licensees (including MediaTek) to stop selling mobile phone chips to Lenovo if Lenovo terminates its license." CX2079-004.

In 2015, Cristiano Amon's (QCT President) own handwritten notes from 2015 license negotiations with Motorola's President Rick Osterloh, entitled "12-9-15-Rick **[**390]** & Team-Motorola," state: "(1) Licensing > Eric [Reifschneider, QTL Senior Vice President and General Manager] constantly threatening to cut off chip supply." CX7024-001.

These chip supply threats are critical for maintaining Qualcomm's unreasonably high royalty rate. If Qualcomm sells a modem chip to an unlicensed OEM, that OEM can claim that Qualcomm's sale of the modem chip exhausted Qualcomm's patent rights, according to a 2012 QTL slide presented to the Qualcomm Board of Dirctors: "Such sales present the risk of a finding of patent exhaustion." CX6974-070. If a modem chip sale exhausts Qualcomm's patent rights, Qualcomm cannot then collect its unreasonably high royalty rate from the OEM, as Eric Reifschneider (former QTL Senior Vice President and General Manager) testified: "[T]he concern for the risk to the licensing business of selling — selling chips to unlicensed customers, the — the risk of a customer making an argument of patent exhaustion and sort of undercutting the ability to license the patent portfolio." Reifschneider Depo. 30:15-20.

Yet Qualcomm has recognized that Qualcomm's licensing practices and its unreasonably high royalty rates—the royalty rates that its practices **[**391]** are designed to sustain—violate FRAND. Marv Blecker (QTL Senior Vice President) told the IRS in 2012 that Qualcomm could not obtain the same royalty revenue through patent licenses to rival modem chip suppliers because doing so would violate FRAND. Specifically, Blecker told the IRS:

> Yeah, but if I would average royalty on all the handsets that we collect royalties on — I don't remember what it is anymore, I used to know the number — but if — if it were ten dollars, for example, you couldn't charge a ten-dollar royalty on a chipset that cost five dollars, or six dollars, or seven dollars.

CX786-R at 73:10-15. Blecker (then QTL Senior Vice President) continued: "Yeah, and it would be hard to convince a court that that was a fair royalty also." *Id.* at 73:20-21.

Similarly, Eric Reifschneider (QTL Senior Vice President and General Manager) told the IRS that Qualcomm's refusal to license rivals violates FRAND. CX6786-R at 33:1-7. Specifically, Reifschneider explained to the IRS that when Qualcomm participates in SSOs, "as part of that you **[*810]** often have to make commitments that you will, you know, make that technology available to people who want to make products that practice the standard." *Id.* Reifschneider **[**392]** explained that refusing to license a rival modem chip supplier is "not a great, you know, position to be in in terms of defending yourself against, you know, claims that you've broken those promises to make the technology available." *Id.* at 33:11-17. Thus, Qualcomm recognizes that its licensing practices and royalty rates violate FRAND.

Moreover, Qualcomm has admitted that its monopoly chip share sustains Qualcomm's ability to receive that unreasonably high royalty rate. During Project Phoenix, David Wise (Qualcomm Senior Vice President and Treasurer) explained in an email that because there is a high correlation between Qualcomm's chip market share and the sustainability of Qualcomm's royalty rate, it is critical for Qualcomm to maintain a high modem chip share to sustain its licensing revenues:

> Notably, we are seeing in the market today that there is a high correlation between our modem (chip) share and licensing compliance and royalty rate sustainability. Where we have low chip share we are seeing challenges with compliance and maintaining the royalty rate. So in a sense, QCT has provided the 'give/get' relationship highlighted in the last point. If it's [sic] share falls, however, **[**393]** we lose that important element to sustaining our royalties. SO IT'S CRITICAL THAT WE MAINTAIN HIGH MODEM SHARE TO SUSTAIN LICENSING.

Id. (emphasis in original). In short, Wise admitted that without QCT's chip market share, QTL was "seeing challenges with compliance and maintaining the royalty rate."

Because Qualcomm acknowledges that chip market share and not the value of its patents determines Qualcomm's royalty rate, Qualcomm refuses to give OEMs information about Qualcomm's patents, including even patent lists, when negotiating patent licenses with OEMs.

Nanfen Yu (Huawei Senior Legal Counsel) testified that Qualcomm has never provided patent claim charts to Huawei, but that Nokia, Ericsson, and Siemens all have. Yu Depo. 216:4-217:2. Specifically, as to Qualcomm, Yu testified:

> **Q**: [I]n all of your negotiations with Qualcomm throughout the course of your career, has Qualcomm ever provided claim charts for its patents?
>
> **A**: No.

Id. at 216:4-8.

Brian Chong (Wistron Chief of New Technology Development and Product Planning) testified that Qualcomm would not even provide Wistron a list of any Qualcomm patents: "I know for a fact that we asked for a list of patents and never got that." Chong Depo. **[**394]** 312:6-8, 23-24.

Qualcomm not only knows that its royalty rates violate FRAND and are sustained by Qualcomm's modem chip share, but Qualcomm has also intended to harm competition via its practices.

For example, Qualcomm wielded chip supply leverage and the specter of its unreasonably high royalty rates to eliminate WiMax, a competing cellular standard supported by Intel. In the 2007 Marketing Incentive Agreement ("MIA"), Qualcomm offered Apple royalty rate rebates conditioned on (1) Apple publicly announcing that Apple had "chosen GSM technology for its phone . . . into the future with 3G and beyond"; (2) Apple not selling more than 1,000 WiMax handsets; and (3) Apple not licensing a third party to sell WiMax handsets. JX0040-003. During MIA negotiations, **[*811]** Marv Blecker (QTL President) emailed Jeff Williams (Apple COO) to state that Qualcomm's first priority was eliminating WiMax: "Motivating Apple to select WCDMA to the exclusion of WiMax is our primary motivation for entering into this agreement." CX0617-001.

Irwin Jacobs (Qualcomm Co-Founder and former Qualcomm CEO) testified at trial that Qualcomm would have been behind in supplying WiMax chips had WiMax become the standard:

> **Q**: It's accurate **[**395]** to state, sir, that if WiMax had ended up as the standard, Qualcomm would have been far behind; is that right?
>
> **A**: That's fine.

Tr. at 1284:10-13.

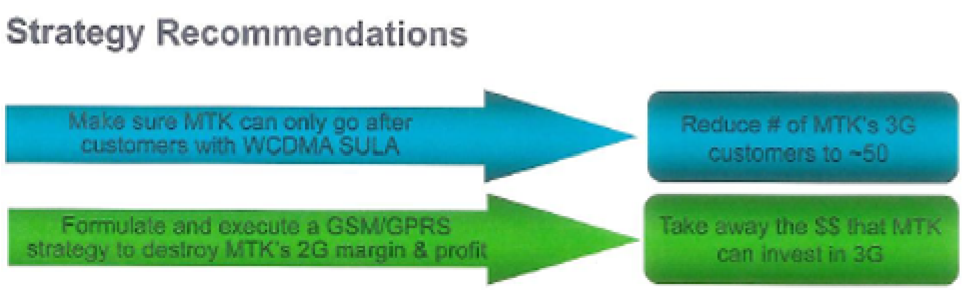
As a result of the MIA, WiMax was eliminated. Jeff Williams (Apple COO) testified that the Qualcomm agreement ended Apple's engagement with Intel's WiMax standard:

> **Q**: And following the execution of that agreement, did Apple pursue WiMax further?
>
> **A**: No. In essence, it was killed in the cradle for us. We did not.

Tr. at 873:21-23.

Similarly, Qualcomm entered an exclusive deal with Apple because doing so would eliminate competition. In an August 2010 email, Steve Mollenkopf (QCT President) told Paul Jacobs (Qualcomm CEO), Derek Aberle (QTL President), and Steve Altman (Qualcomm President) that if Qualcomm secured Apple exclusivity in the TA, Qualcomm would eliminate thin modem competitors: "[T]here are significant strategic benefits as it is unlikely that there will be enough standalone modem volume to sustain a viable competitor without that slot." CX5348-001.

In addition, Qualcomm refused to license its rivals and restricted rivals' customer base with the intent to prevent rivals from investing in research and development, and to weaken them in the **[**396]** market. For example, in a 2009 pricing presentation that Qualcomm prepared within days of its CDMA ASIC Agreement with MediaTek—which limited MediaTek's sales to Qualcomm licensees only—Qualcomm stated that by reducing MediaTek's customer base, Qualcomm could "[t]ake away the $$ that MTK can invest in 3G." CX5809-041. The slide is reproduced below:



Lastly, lawyers—including Derek Aberle, Steve Altman, Eric Reifschneider, Fabian Gonell, and Lou Lupin—were the architect, implementers, and enforcers of Qualcomm's licensing practices. Lawyers explicitly stated that Qualcomm's licensing practices raised concerns about antitrust liability, but chose to continue those practices anyway, with full knowledge that Qualcomm's unreasonably high royalty rates violate FRAND and that Qualcomm's licensing practices harm rivals. That willful, conscious decision to continue **[*812]** Qualcomm's licensing practices is further evidence of intent to harm competition. Although intent is not dispositive, evidence of Qualcomm's intent confirms the Court's conclusion that Qualcomm's licensing practices cause antitrust harm because "no monopolist monopolizes unconscious of what he is doing." *Aspen Skiing, 472 U.S. at 602*.

In combination, Qualcomm's **[**397]** licensing practices have strangled competition in the CDMA and premium LTE modem chip markets for years, and harmed rivals, OEMs, and end consumers in the process. Qualcomm's conduct "unfairly tends to destroy competition itself." *Spectrum Sports, 506 U.S. at 458*. Thus, the Court concludes that Qualcomm's licensing practices are an unreasonable restraint of trade under *§ 1* of the Sherman Act and exclusionary conduct under *§ 2* of the Sherman Act. *Microsoft, 253 F.3d at 58-59* (holding that where conduct causes anticompetitive harm not justified by procompetitive business reasons, the monopolist violates both *§ 1* and

§ 2). Therefore, Qualcomm's practices violate *§ 1* and *§ 2* of the Sherman Act, and that Qualcomm is liable under the *FTC Act*, as "unfair methods of competition" under the FTC Act include "violations of the Sherman Act." *Cement Inst., 333 U.S. at 693-94*.

VI. INJUNCTIVE RELIEF

The FTC Act authorizes the FTC to seek, and the Court to order, a permanent injunction "after proper proof" of an FTC Act violation. *15 U.S.C. § 53(b)*. The FTC has shown that Qualcomm is liable under the FTC Act for violating the Sherman Act. Therefore, the Court must consider whether to permanently enjoin Qualcomm and, if so, in what fashion.

A. Legal Standard

Injunctive relief should be granted if "there exists some cognizable danger **[**398]** of recurrent violation." *United States v. W.T. Grant Co., 345 U.S. 629, 633, 73 S. Ct. 894, 97 L. Ed. 1303 (1953)*. In a case governed by the FTC Act, "an injunction will issue only if the wrongs are ongoing or likely to recur." *Fed. Trade Comm'n v. Evans Prods. Co., 775 F.2d 1084, 1087 (9th Cir. 1985)*. The Court has already rejected Qualcomm's pre-trial argument that a court must consider "post-discovery evidence of current market power" before issuing an injunction. ECF No. 997.

Injunctive relief may be appropriate under this standard even when the unlawful conduct has ceased. *Evans Prods., 775 F.2d at 1088* ("Even though Evans' alleged violations have completely ceased, we must review whether those violations are likely to recur."); *see also* *Fed. Trade Comm'n v. Accusearch Inc., 570 F.3d 1187, 1201-02 (10th Cir. 2009)* (concluding that the district court properly issued an injunction under the FTC Act despite cessation of the unlawful conduct because of the possibility of recurrence); *Fed. Trade Comm'n v. Affordable Media, LLC, 179 F.3d 1228, 1237 (9th Cir. 1999)* (same). Past unlawful conduct is "highly suggestive of the likelihood of future violations." *CFTC v. Yu, 2012 U.S. Dist. LEXIS 113122, 2012 WL 3283430, at *4 (N.D. Cal. Aug. 10, 2012)* (quoting *CFTC v. Hunt, 591 F.2d 1211, 1220 (7th Cir. 1979))*.

In terms of the scope of any injunction, the United States Supreme Court instructs "that a remedies decree in an antitrust case must seek to 'unfetter a market from anticompetitive conduct,' to 'terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization **[**399]** in the future.'" *Microsoft, 253 F.3d at 103* (quoting **[*813]** *Ford Motor Co. v. United States, 405 U.S. 562, 577, 92 S. Ct. 1142, 31 L. Ed. 2d 492 (1972)*, and *United States v. United Shoe Mach. Corp., 391 U.S. 244, 250, 88 S. Ct. 1496, 20 L. Ed. 2d 562 (1968))*. "[A]dequate relief in a monopolization case should put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power found to be in violation of the Act." *Grinnell, 384 U.S. at 577*.

Thus, it is "entirely appropriate" for a court to order an injunction "beyond a simple proscription against the precise conduct previously pursued." *Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 698, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*. The relevant question is "whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct." *Id.*; *accord* *Fed. Trade Comm'n v. Grant Connect, LLC, 763 F.3d 1094, 1105 (9th Cir. 2014)*. Where the government has established a violation of law, "all doubts as to the remedy are to be resolved in [the government's] favor." *United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 334, 81 S. Ct. 1243, 6 L. Ed. 2d 318 (1961)*. Further, a district court in an antitrust case has "'large discretion' to fit the decree to the special needs of the individual case." *Ford Motor Co., 405 U.S. at 573*.

Qualcomm also argues that the Court must consider traditional equitable factors, including whether the public interest would be disserved by a permanent injunction. QC FOFCOL at 141. Although Qualcomm cites the FTC Act for the proposition that the Court may issue an FTC Act injunction only after "weighing the equities," that provision refers only to the issuance **[**400]** of a preliminary injunction: "Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a *preliminary injunction* may be granted without bond." *15 U.S.C. § 53(b)* (emphasis added). Qualcomm cites no FTC Act case in which a court considered those equitable factors at the permanent injunction stage.

Regardless, by its very nature, the determination that a monopolist has violated the Sherman Act and that "the wrongs are ongoing or likely to recur" is a finding that an injunction is in the public interest because it will restrain the defendant from further anticompetitive conduct. *Evans Prods., 775 F.2d at 1087*.

Thus, the Court first considers whether "there exists some cognizable danger of recurrent violation," *W.T. Grant Co., 345 U.S. at 633*, and then whether the FTC's requested relief will "unfetter [the] market from anticompetitive conduct." *Ford Motor Co., 405 U.S. at 577*.

B. Qualcomm's Practices Are Ongoing

The evidence demonstrates that Qualcomm's anticompetitive conduct is ongoing and that an injunction is thus warranted. *See Evans Prods, 775 F.2d at 1087* (holding that an injunction may issue where unlawful conduct is "ongoing").

Qualcomm continues to refuse **[**401]** to provide patent exhaustion, refuse to sell modem chips to an OEM until the OEM signs a license, and engage in chip supply threats and cutoffs. Steve Mollenkopf (Qualcomm CEO) conceded at trial that Qualcomm does not sell chips to unlicensed OEMs:

> **Q**: And you would agree, sir, that it is Qualcomm's policy not to sell chips to companies that are unlicensed or not complying with their licenses; right?
>
> **[*814] A**: We have that policy, yes.

Tr. at 842:25-843:3.

In addition, Qualcomm continues to withhold chip supply as leverage against OEMs. After Apple challenged Qualcomm's royalty rates in 2016, Qualcomm refused to provide Apple with any chips for new devices, and none of Apple's 2018 handset models contain Qualcomm chips, per Jeff Williams (Apple Chief Operating Officer):

> Qualcomm has continued to ship us product on the design wins that they have and had at the time. And so they have continued to sell us chips. We have been unable to get them to support us on new design wins past that time, and this has been a challenge. . . . We — I contacted Qualcomm, I contacted Steve, I sent him e-mails, I called. We tried to get them to sell us chips, and they would not.

Tr. at 890:13-24. Tony Blevins (Apple **[**402]** Vice President of Procurement) similarly testified that Apple's lawsuit spurred Qualcomm to use chip leverage: "At the time we made those challenges, Qualcomm was no longer willing to sell us chips. That was very obvious, very apparent to us. And so we went right back to the no license, no chips, that we were facing back in 2005." Tr. at 711:12-16.

Qualcomm has also continued to use chip incentive funds and other payments to silence OEMs. For example, Qualcomm and Samsung entered a series of agreements in early 2018, including the Amended and Restated Strategic Relationship Agreement and the Settlement Agreement. JX-0122-001. The Amended and Restated Strategic Relationship Agreement continues Qualcomm's practice of incentivizing OEMs to buy Qualcomm modem chips to the exclusion of rivals' chips, as Qualcomm promises to pay Samsung rebates only when Samsung purchases Qualcomm modem chips. JX0122-036 to -037. To receive the rebates, Samsung must purchase from Qualcomm 100% of Samsung's premium modem chips and at least a certain number of mid and higher tier chips. *Id.*

The Settlement Agreement represents a new Qualcomm tactic in license negotiations. Qualcomm paid Samsung $100 million to **[**403]** extinguish Samsung's antitrust claims and to silence Samsung. JX0122-054. Samsung specifically releases claims based on the following:

> any claim of coercion or other similar claims regarding the negotiation, execution, or terms of this Settlement Agreement, the 2018 Amendment, the CMCPCA, and/or the Collaboration Agreement . . .
> any patent licensing conduct of Qualcomm or any of its Affiliates or (b) any conduct of Qualcomm or any of its Affiliates in the Private and Regulatory Actions . . . [and]
>
> any claim that Qualcomm's Existing Practices violate any antitrust, competition, or similar laws of any state or territory of the United States (including federal law), Korea, or any other country or any jurisdiction, or any principle of common or civil law to similar effect including any claim based on or arising from findings or conclusions articulated in . . . (4) the ultimate decisions, settlement agreements or other dispositions of any of the cases brought against Qualcomm (or that contain counterclaims against Qualcomm) by the U.S. Federal Trade Commission ("U.S. F.T.C.") (*FTC v. Qualcomm Incorporated*, Case No. 5:17-CV-00220-LHK (N.D. Cal.)) . . .

JX0122-050 to -052. Samsung also agreed to withdraw from participation in the instant action and **[**404]** others:

> **[*815]** Samsung will promptly take all actions reasonably required to withdraw all pending or accepted applications for intervention, or any other forms of substantive participation (except for any participation, including discovery or deposition, to the extent required by law), in any of the Private or Regulatory Actions and any other proceedings involving claims that Qualcomm's Existing Practices violate antitrust, competition, or similar laws. . . . [and]
> Samsung will withdraw from all existing Common Interest Agreements and all other similar agreements in which the general purpose is to share information and communications under some form of protection against disclosure (collectively, the "CIAs") between Samsung or any of its Affiliates and any third party that pertains to any of the Private and Regulatory Actions or any other proceedings or collaboration by third parties involving claims or potential claims that Qualcomm's Existing Practices violate antitrust, competition, contract, or similar laws or undertakings.

JX0122-056.

Further, in the Settlement Agreement, Samsung agreed to make the following statement to the KFTC: "[I]n any statement Samsung provides to the KFTC regarding **[**405]** Qualcomm's compliance with the KFTC 2017 Orders, Samsung agrees that it shall confirm that it has resolved its disputes with Qualcomm and the resolution of such dispute satisfies Samsung's demands made under the KFTC 2017 Orders." JX0122-055.

Qualcomm also continues to refuse to license rival modem chip suppliers. Alex Rogers (QTL President) testified, "So we don't license at the component level." *Id.* at 1978:7. Licensing at the component level refers to licensing to modem chip suppliers. *Id.* at 1978:5-6.

Therefore, all of Qualcomm's unlawful practices continue unabated. This is so even though government agencies in Japan, Korea, Taiwan, China, the European Union, and the United States began investigating Qualcomm's licensing practices as early as 2009, as Qualcomm reported in its own 2017 10-K filed with the SEC. CX7257-097. Qualcomm has fought against attempts in those investigations to change its licensing practices. For example, presentation notes from slides that BCG presented in 2015 to the Project Phoenix committee of the Qualcomm Board of Directors explained that Qualcomm evaded more serious penalties—including a ban on its refusal to sell modem chips to unlicensed OEMs or more **[**406]** aggressive royalty rate cuts—by making a $150 million contribution to the Chinese government. CX3755-004.

That Qualcomm's unlawful practices continue is consistent with its own longstanding strategy. In a 2012 QTL strategic plan presentation that Derek Aberle (QTL President) created and sent to Dr. Paul Jacobs (Qualcomm CEO), Steve Mollenkopf (Qualcomm President), and Steve Altman (Qualcomm Vice Chairman), Aberle included a slide titled, "Sales to Unlicensed Entities or Customers Claiming Exhaustion." CX6998-011. Aberle wrote, "If we cease supply of chips to current customers they may assert antitrust claims seeking damages/fines and continued supply." *Id.* In a section titled "Strategy," Aberle identified the following strategy: "Develop a plan of communication/action that maximizes our ability to defend against the above claims while ceasing supply when necessary." *Id.* In July 2012, Qualcomm presented to the Qualcomm Board of Directors an identical slide, with the identical strategy: "Develop a plan of communication/action that maximizes our ability to defend **[*816]** against the above claims while ceasing supply when necessary." CX6974-070.

Therefore, the Court concludes that Qualcomm's unlawful **[**407]** practices are "ongoing" or likely to recur.

Qualcomm argues that although Qualcomm's practices are ongoing, an injunction may only issue if Qualcomm continues to maintain monopoly power in the CDMA and premium LTE modem chip markets. QC FOFCOL at 142. However, Qualcomm identifies no legal requirement that a plaintiff show future market power. The Court has already concluded that "evidence of Qualcomm's past conduct is sufficient to show whether any violations are 'likely to recur.'" ECF No. 997 at 7 (quoting *Evans Prods. Co., 775 F.2d at 1087*).

Regardless, Qualcomm's internal documents and public statements show that Qualcomm is likely to replicate its market dominance during the transition to 5G, the next generation of modem chips. Here, in both internal documents and public statements, Qualcomm has consistently stated that it is ahead of rival modem chip suppliers in developing 5G modem chips.

For example, in a January 2018 letter to Qualcomm shareholders, Steve Mollenkopf (Qualcomm CEO), stated, "Qualcomm is 12-24 months ahead of our merchant competitors in the transition to 5G — a result of our innovation and technological advancements." CX8198-004. At trial, Mollenkopf agreed that his January 2018 statement was true when made. Tr. **[**408]** at 765:17-19. Similarly, a Qualcomm script for a January 2018 earnings call includes the following talking point: "Another important area is 5G and we estimate that we have a 12 to 24 month lead ahead of our key competitors in the transition to 5G." CX8195-083. The script further highlights carriers and OEMs with whom Qualcomm has "already partnered . . . across the globe as we work to bring 5G to market." *Id.*

Internally, Qualcomm maintains similar messaging about its leadership position. For example, in a presentation prepared for a December 2017 Qualcomm Board of Directors meeting, Qualcomm included a slide, "Global 5G Momentum," which highlighted Qualcomm's existing 5G design engagements with several OEMs. CX8196-129. In addition, in a QTL slide deck titled "FY17 Strategic Plan Review" and sent to Derek Aberle (Qualcomm President) and Alex Rogers (QTL President), a slide highlights that 12 of Qualcomm's top 20 licensees by revenue have entered license agreements with no fixed expiration date and which may already cover some 5G patents. CX7122-016. In another slide deck shared in December 2017 with the Qualcomm Board of Directors, Qualcomm acknowledged that it may face some competition **[**409]** in 5G, as a "5G Leadership Summary" slide stated that, "Samsung & HiSilicon expected to compete with QCT," but "Intel & MTK lagging on time to market." CX8191-121.

However, since then, Qualcomm has remained optimistic about its 5G positioning because of Qualcomm's previous experience at cellular standards transitions. In January 2018, Qualcomm presented to shareholders a slide deck titled, "A Clear Roadmap for Value Creation." CX8197-001. One slide states that "Technology transitions create significant returns for Qualcomm." CX8197-020. Specifically, "During 3G to 4G transition, Qualcomm revenues more than doubled." *Id.* In addition, Qualcomm "[c]aptured 80% share of units during first 3 years of technology transition from 3G to 4G." *Id.* Thus, with 5G imminent, "Qualcomm stockholders [are] poised to achieve substantial returns on 5G investment." *Id.* At trial, Steve Mollenkopf (Qualcomm CEO) conceded that each of the foregoing statements are true. Tr. at 766:6-18.

[*817] Further, Qualcomm explicitly considered its potential advantages in 5G during its 2015 Project Phoenix analysis of whether to split QTL and QCT. In a series of emails from April 2015 before a Qualcomm executive committee meeting, **[**410]** Steve Mollenkopf (Qualcomm CEO) and David Wise (Qualcomm Senior Vice President and Treasurer) exchanged their views on how the coming 5G transition should play into the decision whether to split QTL and QCT. CX5913-001. Steve Mollenkopf wrote to David Wise and the "exc@qualcomm.com" email distribution list, "One of the arguments for not splitting is that we need to be positioned for 5G." CX5913-001. David Wise, who was then working on the Project Phoenix analysis, replied to all on the email thread and explained a Qualcomm lead in 5G modem chips could continue to prop up Qualcomm's royalty rates:

> The main point on 5G is that we are in a stronger position to extend QTL licensing model together than separate. Less about level of spend. Much more about our strength in the standards process and regulatory. If

> separate, QTL may be isolated and ineffective at getting tech into the std. No QCT distribution. Longer term an independent QTL may not be seen as much as an enabler and more pressure could come on its model risking erosion or worse. Made worse by the fact the dollars are small and could be replicated by an independent QCT who would also probably be in favor of curtailing the QTL model, **[**411]** although you could keep the two contractually connected for a few years.

CX5913-001.

OEMs and rival modem chip suppliers have also recognized that Qualcomm is likely to have a 5G chip lead. In a May 2016 email to a colleague, Todd Madderom (Motorola Director of Procurement) wrote, "Procurement is actively seeking 5G chipset alternatives from MTK and Intel. Neither supplier is responding with the urgency we seek. This is very concerning and suggests a new technology gap is forming which will, once again, put Qualcomm in a position of dominance and monopoly." CX2125-001. Madderom testified consistently at trial, "[W]hat I wrote was that we may be doing a reset in the market where Qualcomm resets and maybe they become several years ahead of the competitor, the competitive alternatives where it took several years for MediaTek or Intel to catch up." Madderom Depo. 234:17-23.

Finbarr Moynihan (MediaTek General Manager of Corporate Sales and Business Development) testified, "I think on the flavor of 5G that will be required for markets like the U.S., I believe there's still a substantial gap," with MediaTek behind Qualcomm. Tr. at 380:1-5. Aicha Evans (Intel Chief Strategy Officer) testified **[**412]** that Intel plans to release a 5G modem chip in late 2019. Tr. at 619:7-16.

Therefore, although rivals anticipate commercializing 5G chips, Qualcomm's own documents and statements show that Qualcomm is already engaged with a significant number of prominent OEMs on 5G designs and that Qualcomm projects the 5G transition may enable Qualcomm to achieve a dominant position in the 5G modem chip market. CX8196-129 (Qualcomm list of its 5G engagements with OEMs); CX8197-020 (Qualcomm projection that 5G transition can provide Qualcomm a dominant share of 5G market). This disposes of Qualcomm's argument that its 5G license agreement with Samsung, for example, is free of anticompetitive conduct because Qualcomm is not yet selling 5G modem chips. QC Pretrial Brief at 17. If Qualcomm has a lead on 5G chips, as Qualcomm states it does, then Samsung had little option but to sign Qualcomm's 5G license agreement to ensure access to Qualcomm's chip supply.

[*818] Moreover, the Ninth Circuit has held that an injunction is appropriate when there is a "possibility of recurrence" of illegal conduct. *Affordable Media, 179 F.3d at 1237* (holding that the district court properly entered an injunction under the FTC Act against future conduct despite **[**413]** the defendant's cessation of illegal conduct due to the "possibility of recurrence"). Furthermore, the United States Supreme Court has held that where the government has established a violation of law, all doubts as to the remedy are to be resolved in the government's favor. *E.I. du Pont de Nemours & Co., 366 U.S. at 334* (holding that where the government has established a violation of law, "all doubts as to the remedy are to be resolved in [the government's] favor").

Therefore, because Qualcomm's unlawful practices continue and there is a significant risk that Qualcomm will be dominant in 5G, the Court concludes that the unlawful conduct is likely to recur and that a permanent injunction is warranted. *See* *W.T. Grant Co., 345 U.S. at 633* (holding that an injunction is warranted under the FTC Act where "there exists some cognizable danger of recurrent violation").

C. The Injunction

The Court now turns to the appropriate remedies. The FTC's Complaint does not specify the relief it seeks, other than to ask "[t]hat Qualcomm is permanently enjoined from engaging in its lawful conduct" and "[t]hat Qualcomm is permanently enjoined from engaging in similar and related conduct in the future." Compl. at 32. In the parties' joint pretrial statement, the FTC specifies the **[**414]** relief it seeks and requests that the Court:

(1) Prohibit Qualcomm from conditioning the supply of modem chips on a customer's patent-license status;

(2) Require Qualcomm to negotiate or renegotiate, as applicable, license terms with customers in good faith under conditions free from the threat of lack of access to or discriminatory provision of modem chip supply or associated technical, software, or other support;
(3) Require Qualcomm to submit, as necessary, to arbitral or judicial dispute resolution to determine reasonable royalties and other license terms should a customer choose to pursue such resolution;
(4) Require Qualcomm to make exhaustive SEP licenses available to modem-chip suppliers on fair, reasonable, and non-discriminatory terms and to submit, as necessary, to arbitral or judicial dispute resolution to determine such terms;
(5) Prohibit Qualcomm from discriminating or retaliating in any way against any modem-chip customer or modem-chip supplier because of a dispute with Qualcomm over license terms or because of a customer's license status;
(6) Prohibit Qualcomm from making payments or providing other value contingent on a customer's agreement to license terms;

(7) Prohibit **[**415]** Qualcomm from entering express or de facto exclusive-dealing agreements for the supply of modem chips;
(8) Prohibit Qualcomm from interfering with the ability of any customer to communicate with a government agency about a potential law enforcement or regulatory matter; (9) Require Qualcomm to adhere to compliance and monitoring procedures and

(9) Require Qualcomm to adhere to compliance and monitoring procedures and appropriate 'fencing in' provisions, including but not limited to a potential **[*819]** firewall between patent licensing and chip personnel; and
(10) Impose any other relief that the Court finds necessary and appropriate to redress and prevent recurrence of Qualcomm's conduct.

ECF No. 1314-3 at 3-4.

Under United States Supreme Court precedent, "a remedies decree in an antitrust case must seek to 'unfetter a market from anticompetitive conduct,' to 'terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.'" *Microsoft, 253 F.3d at 103* (quoting *Ford Motor Co., 405 U.S. at 577*, and *United Shoe Mach. Corp., 391 U.S. at 250*). "[A]dequate relief in a monopolization case should put an end to the combination and deprive the defendants of any of the benefits of **[**416]** the illegal conduct, and break up or render impotent the monopoly power found to be in violation of the Act." *Grinnell, 384 U.S. at 577*. Thus, it is "entirely appropriate" for a court to order an injunction "beyond a simple proscription against the precise conduct previously pursued." *Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 698*.

Qualcomm raises the overarching argument that all of the FTC's proposed relief is overbroad because the FTC seeks to enjoin Qualcomm's conduct in all modem chip markets, not merely those in which the FTC alleged and showed that Qualcomm held monopoly power. QC FOFCOL at 144. Qualcomm contends that such a remedy is not "tailored to remedy the specific harm alleged." *Id.* (citing *Lamb-Weston, Inc. v. McCain Foods, Ltd., 941 F.2d 970, 974 (9th Cir. 1991))*. However, this argument is simplistic and factually faulty.

Although Qualcomm argues that Qualcomm could not have used CDMA market power to obtain unreasonably high royalty rates in WCDMA license agreements, Qualcomm's own expert Dr. Aviv Nevo admitted at trial that Qualcomm's WCDMA license agreements often covered sales of CDMA handsets. Tr. at 1646:9-13. Therefore, Qualcomm's CDMA modem chip leverage could have come to bear on WCDMA license negotiations. Further, Qualcomm primarily sells multimode modem chips that support multiple cellular standards. Tr. at 1355:2-6. **[**417]** Accordingly, Qualcomm's monopolies in premium LTE and CDMA modem chip markets could have come to bear on Qualcomm's other license negotiations, if the OEM needed access to Qualcomm's multimode LTE or CDMA modem chips. *See also* *E.I. du Pont de Nemours & Co., 366 U.S. at 334* (holding that where the government has established a violation of law, "all doubts as to the remedy are to be resolved in its favor").

The Court, however, agrees that certain of the FTC's proposed remedies are either vague or not necessary to "'unfetter a market from anticompetitive conduct,' to 'terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.'" *Microsoft, 253 F.3d at 103* (citations omitted).

Lastly, the Court notes that more than three months after this trial concluded, the United States filed a statement of interest. ECF No. 1487. The United States argues that if the Court finds a violation of the FTC Act, the Court "should permit additional briefing and schedule an evidentiary hearing to resolve any disputes regarding the scope and impact of injunctive relief." **[*820]** *Id. at 3*. However, an evidentiary hearing is not necessary where "the matter of relief was part **[**418]** of the trial on liability." *Microsoft, 253 F.3d at 101*.

Here, for example, the parties presented considerable testimony, evidence, and argument on the feasibility of requiring Qualcomm to license its SEPs to rival modem chip suppliers, and on other issues related to the scope or nature of the remedy. *See, e.g.*, QX2778C-012 (Nokia response to FTC civil investigative demand regarding licensing to modem chip suppliers); Tr. at 1913:3-16 (Qualcomm's expert Dr. Aviv Nevo testifying about the implications of enjoining Qualcomm's practice of requiring OEMs to sign a separate license before buying modem chips); Tr. at 1432:25-1434:21 (Fabian Gonell, QTL Legal Counsel and Senior Vice President, Licensing Strategy, testifying about implications of requiring Qualcomm to license its SEPs to rival modem chip suppliers); Tr. at 2169:12-2173:3 (Qualcomm closing argument on remedies, including on implications of requiring Qualcomm to renegotiate existing patent licenses with OEMs).

In addition, the circumstances in *Microsoft*, on which the United States chiefly relies, are distinguishable. In *Microsoft*, the district court instituted the extraordinary remedy of requiring divestiture, even though "[i]n two separate offers of proof, **[**419]** Microsoft identified 23 witnesses who . . . would have challenged a wide range of plaintiffs' factual representations." *Id. at 101*. The district court acknowledged the "acute factual disagreements," but declined to hold an evidentiary hearing. *Id.* The United States identifies no such disagreements or circumstances in this case. Therefore, the Court declines to hold an evidentiary hearing on the question of remedy.

In accordance with the principles above and consistent with the Court's findings of fact and conclusions of law, the Court orders the following injunctive relief:

(1) Qualcomm must not condition the supply of modem chips on a customer's patent license status and Qualcomm must negotiate or renegotiate license terms with customers in good faith under conditions free from the threat of lack of access to or discriminatory provision of modem chip supply or associated technical support or access to software.

This remedy addresses Qualcomm's practices of not selling modem chips exhaustively, requiring OEMs to sign a separate license before buying modem chips, and Qualcomm's associated threats to cut off OEMs' chip supply and technical support and to delay or revoke access to software, which **[**420]** the Court held constitute anticompetitive conduct under the Sherman Act. Prohibiting Qualcomm from cutting off OEMs' chip supply, technical support, and access to software ensures that Qualcomm and OEMs can negotiate patent license terms that reflect the fair value of Qualcomm's patents, rather than terms that reflect Qualcomm's monopoly power in modem chips. The evidence showed a sufficient risk that Qualcomm will have market power in 5G modem chips and could exercise its dominance to extract unreasonably high royalties. Therefore, prohibiting Qualcomm from cutting off OEMs' chip supply, technical support, and access to software helps "ensure that there are no practices likely to result in monopolization in the future." *Microsoft, 253 F.3d at 103*.

Requiring Qualcomm to renegotiate its existing patent license agreements also addresses the "fruits of [Qualcomm's] statutory **[*821]** violation." *United Shoe Mach. Corp., 391 U.S. at 250*. Many of Qualcomm's existing patent licenses negotiated under the threat of lack of access to chip supply, technical support, or software are long-term or perpetual in duration. For example, a 2017 Qualcomm slide deck states that 12 of Qualcomm's top 20 licensees by licensing revenue have entered patent license agreements that **[**421]** have no fixed expiration date and that may already cover 5G technology. CX7122-016.

It makes little sense for the Court, having found that Qualcomm's patent licenses are the product of anticompetitive conduct, to leave those licenses in place. To permit Qualcomm to continue to charge unreasonably high royalty rates would perpetuate its artificial surcharge on rivals' chips, which harms rivals, OEMs, and consumers, and would enable Qualcomm to continue to reap the fruits of its Sherman Act violation. Thus, the Court finds it necessary to require Qualcomm to renegotiate those license agreements. *See Grinnell, 384 U.S. at 577* (holding "that adequate relief in a monopolization case should put an end to the combination and *deprive the defendants of any of the benefits of the illegal conduct*") (emphasis added).

Requiring negotiations and renegotiations of license agreements to occur without the threat of chip supply, technical support, and software cutoff will enable Qualcomm and OEMs to negotiate license terms that reflect the fair value of Qualcomm's patents. Although this remedy does not merely proscribe future Qualcomm conduct, and will require Qualcomm to renegotiate many licenses, it is "entirely appropriate" **[**422]** for a court to order an injunction "beyond a simple proscription against the precise conduct previously pursued." *Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 698*.

(2) Qualcomm must make exhaustive SEP licenses available to modem-chip suppliers on fair, reasonable, and non-discriminatory ("FRAND") terms and to submit, as necessary, to arbitral or judicial dispute resolution to determine such terms.

This remedy addresses Qualcomm's refusal to license rival modem chip suppliers on FRAND terms, which the Court held is anticompetitive conduct under the Sherman Act. Thus, requiring Qualcomm to license its SEPs to rival modem chip suppliers on FRAND terms "unfetter[s] [the] market from anticompetitive conduct." *Ford Motor Co., 405 U.S. at 577*. Although Qualcomm claims such a remedy is inconsistent with industry practice, Qualcomm conceded to the IRS in 2012 that Qualcomm licensed modem chip suppliers only until Qualcomm decided that licensing OEMs at the handset level instead was "humongously more lucrative." CX6786-R at 71:18-23. Thus, Qualcomm itself has licensed its SEPs to rival modem chip suppliers.

Licensing SEPs to rival modem chip suppliers is also consistent with Qualcomm's existing voluntary FRAND commitments. Requiring Qualcomm to license its SEPs to rival **[**423]** modem chip suppliers will eliminate the anticompetitive conduct in this case because Qualcomm's rivals may enter modem chip markets without fear of an infringement action. Further, requiring Qualcomm to license its SEPs to rival modem chip suppliers on FRAND terms will enable a fair valuation of Qualcomm's modem chip SEPs because modem chip suppliers are unaffected by chip supply leverage. Finally, arbitral and judicial dispute resolution procedures are already in place for FRAND disputes.

[*822] (3) Qualcomm may not enter express or de facto exclusive dealing agreements for the supply of modem chips.

This remedy addresses Qualcomm's exclusive dealing agreements with Apple; de facto exclusive dealing agreements with LGE, BlackBerry, Samsung, and VIVO; and offers of de facto exclusive dealing agreements to Motorola and Lenovo. Qualcomm's exclusive dealing agreements have foreclosed Qualcomm's rivals from a substantial share of the CDMA and premium LTE modem chip markets. Exclusive dealing agreements are particularly fraught in markets, like the modem chip market, that are "highly concentrated" with few market participants and where there are significant barriers to entry. *ZF Meritor, 696 F.3d at 284*. Exclusive dealing **[**424]** by a monopolist in particular "raise[s] legitimate concerns about harm to competition." *Microsoft, 253 F.3d at 70*.

In 2018, Qualcomm agreed to give Samsung chip incentive funds only if Samsung purchases 100% of its premium modem chips from Qualcomm in a given year. JX0122-036 to - 037. The Court notes that Qualcomm entered into this de facto exclusive agreement with Samsung a year after the KFTC made adverse findings against Qualcomm for Qualcomm's licensing practices and a year after the FTC filed the instant action.

Thus, Qualcomm continues to enter exclusive deals that could foreclose rivals from the market. In addition, Qualcomm entered its exclusive dealing agreements with Apple during the transition to LTE, when Qualcomm maintained a 100% share of the premium LTE modem chip market. The cellular industry is preparing to transition to 5G, a new generation, and Qualcomm's own internal and public statements represent that Qualcomm "has a 12 to 24 month lead ahead of [its] key competitors in the transition to 5G." CX8195-083. Thus, there is a sufficient likelihood that Qualcomm will hold monopoly power in the 5G modem chip market such that exclusive dealing agreements for the supply of modem chips could foreclose **[**425]** competition in that emerging market.

Moreover, the Court notes that the Ninth Circuit has held that an injunction is appropriate when there is a "possibility of recurrence" of illegal conduct. *Affordable Media, 179 F.3d at 1237* (holding that the district court properly entered an injunction under the FTC Act against future conduct despite the defendant's cessation of illegal conduct due to the "possibility of recurrence"). Furthermore, the United States Supreme Court has held that where the government has established a violation of law, all doubts as to the remedy are to be resolved in the government's favor. *E.I. du Pont de Nemours & Co., 366 U.S. at 334* (holding that where the government has established a violation of law, "all doubts as to the remedy are to be resolved in [the government's] favor").

(4) Qualcomm may not interfere with the ability of any customer to communicate with a government agency about a potential law enforcement or regulatory matter.

This remedy protects against Qualcomm's continued violation of the Sherman Act. *See* *W.T. Grant Co., 345 U.S. at 633* (holding that an injunction is warranted under the FTC Act where "there exists some cognizable danger of recurrent violation"). Without the aid of market participants, a government agency may be hamstrung in pursuing a potential **[**426]** law enforcement or regulatory matter. Many of Qualcomm's OEM customers testified at trial in both the FTC's and Qualcomm's cases in chief. Thus, this remedy is designed to unfetter the market from anticompetitive conduct. *See* **[*823]** *Microsoft, 253 F.3d at 103*. This remedy also addresses Qualcomm's conduct in this case because Qualcomm has, even with this action in progress, interfered with the ability of its OEM customers to assist government agencies.

In January 2018, a year after the KFTC made a finding against Qualcomm in January 2017 and fined Qualcomm $927 million, and a year after the FTC filed its complaint in this case, Qualcomm entered a Settlement Agreement in which Qualcomm paid Samsung $100 million to extinguish Samsung's antitrust complaints and to silence Samsung as to any anticompetitive conduct by Qualcomm. For example, in the Settlement Agreement, Samsung specifically releases claims based on the following:

> any claim of coercion or other similar claims regarding the negotiation, execution, or terms of this Settlement Agreement, the 2018 Amendment, the CMCPCA, and/or the Collaboration Agreement . . .
>
> any patent licensing conduct of Qualcomm or any of its Affiliates or (b) any conduct of Qualcomm or any of its Affiliates in the Private and Regulatory Actions **[**427]** . . . [and]
>
> any claim that Qualcomm's Existing Practices violate any antitrust, competition, or similar laws of any state or territory of the United States (including federal law), Korea, or any other country or any jurisdiction, or any principle of common or civil law to similar effect including any claim based on or arising from findings or conclusions articulated in . . . (4) the ultimate decisions, settlement agreements or other dispositions of any of the cases brought against Qualcomm (or that contain counterclaims against Qualcomm) by the U.S. Federal Trade Commission ("U.S. F.T.C.") (*FTC v. Qualcomm Incorporated*, Case No. 5:17-CV-00220-LHK (N.D. Cal.)) . . .

JX0122-050 to -052. In addition, in the 2018 Settlement Agreement, Samsung promised to withdraw from participation in the instant action and other antitrust actions, outside of that participation required by law:

> Samsung will promptly take all actions reasonably required to withdraw all pending or accepted applications for intervention, or any other forms of substantive participation (except for any participation, including discovery or deposition, to the extent required by law), in any of the Private or Regulatory Actions **[**428]** and any other proceedings involving claims that Qualcomm's Existing Practices violate antitrust, competition, or similar laws.

JX0122-056.

Moreover, Samsung promised to make the following statement to the KFTC: "[I]n any statement Samsung provides to the KFTC regarding Qualcomm's compliance with the KFTC 2017 Orders, Samsung agrees that it shall confirm that it has resolved its disputes with Qualcomm and the resolution of such dispute satisfies Samsung's demands made under the KFTC 2017 Orders." JX0122-055. Qualcomm's pursuit of this and similar releases to extinguish antitrust claims threatens to impede the government's ability to enforce the antitrust laws, and could enable future unlawful Qualcomm conduct to go unreported.

This remedy is particularly relevant given the Court's order below that Qualcomm submit to compliance and monitoring procedures. In the course of such monitoring, the FTC may seek information from OEM customers and other market participants to confirm Qualcomm's compliance with the Court's order enjoining Qualcomm's **[*824]** license practices. Qualcomm could frustrate such inquiries by interfering with OEM's communications to the FTC.

(5) In order to ensure Qualcomm's compliance [429] with the above remedies, the Court orders Qualcomm to submit to compliance and monitoring procedures for a period of seven (7) years. Specifically, Qualcomm shall report to the FTC on an annual basis Qualcomm's compliance with the above remedies ordered by the Court**.

It is well established that in FTC enforcement actions, a court may require a defendant to submit to compliance reporting or monitoring by the FTC. *See* *United States Dep't of Justice v. Daniel Chapter One, 89 F. Supp. 3d 132, 144 (D.D.C. 2015)* (citing cases and holding that "courts may order record-keeping and monitoring to ensure compliance with a permanent injunction"). For example, in *F.T.C. v. Direct Marketing Concepts, Inc., 648 F. Supp. 2d 202 (D. Mass. 2009)*, the district court concluded that monitoring provisions were appropriate because the defendants had "violated a preliminary injunction" and otherwise "demonstrated a history of poor diligence." *Id. at 216*.

Similarly, Qualcomm's failure to alter its unlawful licensing practices despite years of foreign government investigations, findings, and fines suggests an obstinance that a monitoring provision may address. Other courts in FTC enforcement actions have held that compliance reporting requirements are not "unduly burdensome," even when the provisions require reporting for a period of twenty years. *See* *Fed. Trade Comm'n v. John Beck Amazing Profits LLC, 888 F. Supp. 2d 1006, 1016 (C.D. Cal. 2012)*. Accordingly, the Court finds that **[**430]** requiring Qualcomm to submit annual compliance reports and submit to FTC monitoring is appropriate in this case.

IT IS SO ORDERED.

Dated: May 21, 2019

/s/ Lucy H. Koh

LUCY H. KOH

United States District Judge

JUDGMENT

On May 21, 2019, the Court entered its Findings of Fact and Conclusions of Law, and found that Defendant violated the Federal Trade Commission Act. ECF No. 1490. Accordingly, the Clerk shall enter judgment in favor of Plaintiff. The Clerk shall close the file.

IT IS SO ORDERED.

Dated: May 21, 2019

/s/ Lucy H. Koh

LUCY H. KOH

United States District Judge

Blanton v. Domino's Pizza Franchising LLC

United States District Court for the Eastern District of Michigan, Southern Division

May 24, 2019, Decided; May 24, 2019, Filed

Case No. 18-13207

Reporter
2019 U.S. Dist. LEXIS 87737 *; 2019 WL 2247731

HARLEY BLANTON, on Behalf of Himself and All Others Similarly Situated, Plaintiff, v. DOMINO'S PIZZA FRANCHISING LLC, DOMINO'S PIZZA MASTER ISSUER LLC, DOMINO'S PIZZA LLC, and DOMINO'S PIZZA, INC., Defendants.

Subsequent History: Motion granted by *Blanton v. Domino's Pizza Franchising LLC, 2019 U.S. Dist. LEXIS 184817 (E.D. Mich., Oct. 25, 2019)*

Core Terms

alleges, no-hire, antitrust, franchisees, conspiracy, employees, franchise, franchise agreement, Sherman Act, concealed, horizontal, restraint of trade, Defendants', wages, pleads, motion to dismiss, Fraudulent, compete, Courts, pled, standard of review, rule of reason, anticompetitive, depressed, diligence, entities, mobility, hire

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For Domino's Pizza Franchising LLC, Domino's Pizza Master Issuer LLC, Domino's Pizza LLC, Domino's Pizza, Inc., Defendants: David H Bamberger, DLA Piper LLP (US), Washington, DC; Edward J. Hood, Clark Hill (Detroit), Detroit, MI; John J. Hamill, John R. Robertson, DLA Piper LLP (US), Chicago, IL; Norman M. Leon, DLA Piper LLP, Chicago, IL.

Judges: Victoria A. Roberts, United States District Judge. Magistrate Judge David R. Grand.

Opinion by: Victoria A. Roberts

Opinion

OPINION AND ORDER DENYING DEFENDANTS' MOTION TO DISMISS (Doc. #26)

I. INTRODUCTION

On October 15, 2018, Harley Blanton, individually and as a representative of similarly-situated **[*2]** persons, filed suit against Defendants Domino's Pizza Franchising LLC, Domino's Pizza Master Issuer LLC, Domino's Pizza LLC, and Domino's Pizza, Inc. (collectively, "Defendants").

Blanton says Defendants violated the Sherman Antitrust Act by orchestrating an employee no-hire agreement among their nationwide network of franchisees. Under the no-hire provision at issue—included in every Domino's franchise agreement from at least January 2013 to April 2018—Domino's franchisees agreed not to solicit or hire current employees of other Domino's franchisees and affiliated entities.

Blanton alleges that this is a "horizontal" restraint of trade that is sufficiently pled. Defendants disagree and move to dismiss under *Federal Rules of Civil Procedure 12(b)(1)* and *12(b)(6)*; they say that Blanton failed to sufficiently allege injury and state a claim upon which relief can be granted. Oral argument was heard on April 15, 2019.

The Court finds that Blanton has sufficiently pled a horizontal restraint of trade between franchisees at the same level. The Court also finds that—contrary to what Defendants urge—it need not now decide what standard of review will ultimately govern once all facts become known.

Defendants' motion to dismiss is **DENIED**.

II. BACKGROUND [*3]

Blanton worked for a Domino's franchise in Port Orange, Florida, from January 2017 until April or May of that year; he says he quit because his hours were repeatedly cut back. The Domino's franchise that Blanton worked for is one of many in the nation that signed the Domino's franchise agreement and agreed to the no-hire provision.

Defendant Domino's Pizza Franchising, LLC—the current franchising arm of Defendant Domino's Pizza, Inc.—enters into a standard franchise agreement with each new Domino's franchise owner; Domino's franchises are independently owned and operated as separate entities from Defendants.

Until at least April of 2018, each franchise agreement included the no-hire provision. The no-hire provision required franchisees to agree not to:

> Directly or indirectly, solicit or employ any person who is employed by Domino's, by any entity controlled by or affiliated with Domino's, or by any other of our franchisees, nor will you induce any of these people to leave their employment without the prior written consent of their employers.

[Doc. No. 1, pp. 3].

This provision prohibits a Domino's franchisee from recruiting or hiring a current employee of another Domino's franchisee without **[*4]** prior written consent. Franchisees also agree that a violation of the no-hire provision will cause "irreparable harm" to Defendants; moreover, a violation triggers termination of the violating franchisee's franchise agreement.

Blanton says that Defendants used the franchise agreements to orchestrate a conspiracy among their franchisees to not compete for labor; Blanton says that the no-hire provision is evidence of that conspiracy and violates the Sherman Antitrust Act because it unreasonably restrains competition for Domino's franchise employees and depresses employee wages, lessens employee benefits, and stifles employee mobility.

III. STANDARD OF REVIEW

A motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)* tests a complaint's legal sufficiency. Although the federal rules only require that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief," see *Rule 8(a)(2)*, the statement of the claim must be plausible. Indeed, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. A claim is plausible where the facts allow the Court to infer that the defendant **[*5]** is liable for the misconduct alleged. *Id.* This requires more than "bare assertions of legal conclusions"; a plaintiff must provide the "grounds" of his or her "entitlement to relief." *LULAC v. Bredesen, 500 F.3d 523, 527 (6th Cir. 2007)*. In deciding a motion under *Rule 12(b)(6)*, the Court must construe the complaint in the light most favorable to the plaintiff and accept as true all well-pled factual allegations. *Id.* The Court "may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. Nat'l Collegiate Athletic Ass'n, 528 F.3d 426, 430 (6th Cir. 2008)*.

IV. ANALYSIS

A. Antitrust Overview

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

The *Clayton Act* provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained." *15 U.S.C. § 15*. Claims brought under the Sherman Antitrust Act are subject to a four-year statute of limitations from the **[*6]** date "the cause of action accrued." *Z Techs. Corp. v. Lubrizol Corp., 753 F.3d 594, 598 (6th Cir. 2014)*.

Because Defendants spend considerable time in their papers discussing the standard of review that the Court should apply in deciding whether Blanton plausibly states a Sherman Act violation, the Court will address the standard of review. However, the Court's attention is on whether the allegations are sufficient to demonstrate that Defendants entered into agreements with franchisees that resulted in less mobility and lower wages for employees. The focus is on whether the allegations themselves are sufficiently specific to "raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly, 550 U.S. at 556*.

Under the Sherman Act, restraints of trade are classified as either vertical or horizontal. Courts typically analyze vertical restraints of trade—agreements made between entities at different levels of the distribution chain—under the "rule of reason" standard. *See* *Com-Tel, Inc. v. DuKane, Corp., 669 F.2d 404, 409 (6th Cir. 1982)* (quoting *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131 (2d Cir. 1978))*.

Courts use rule of reason analysis where an agreement's "competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." *Nat'l Soc. Of Prof'l Engineers v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*. "Under this rule, the factfinder weighs all of the **[*7]** circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition . . . Appropriate factors to take into account include . . . 'the restraint's history, nature, and effect.'" *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 885-86, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*.

Horizontal restraints—which Blanton alleges is the restraint Defendants engage in—are agreements made between entities operating at different levels of distribution. By contrast, they are deemed *per se* illegal. Horizontal restraints are typically characterized as "naked restraints of trade with no purpose except stifling competition," and "therefore, [are] *per se* violations of the Sherman Act." *Com-Tel, Inc., 669 F.2d at 409* (quoting *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131 (2d Cir. 1978))*; a naked restraint of trade is one "in which the restriction on competition is unaccompanied by new production or products . . . If two people meet one day and decide not to compete, the restraint is 'naked'; it does nothing but suppress competition." *Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F.2d 185, 188-89 (7th Cir. 1985)*.

Not all horizontal restraints are "naked" restraints of trade. Indeed, horizontal restraints that are ancillary to procompetitive agreements are typically judged under the rule of reason. *See* *Deslandes v. McDonald's USA, LLC, No. 17-C-4857, 2018 U.S. Dist. LEXIS 105260, 2018 WL 3105955, at *7 (N.D. Ill. June 25, 2018)*; *see also* *Polk Bros., 776 F.2d at 188-89* ("If A hires B as a salesman and passes customer lists to B, then B's reciprocal covenant **[*8]** not to compete with A is 'ancillary.' At the time A and B strike their bargain, the enterprise (viewed as a whole) expands output and competition by putting B to work . . . Covenants of this type are evaluated under the Rule of Reason as ancillary restraints, and unless they bring a large market share under a single firm's control they are lawful.").

Finally, there is a third, intermediate mode of analysis—which courts refer to as the "quick-look" approach. Courts take a "quick-look" where the *per se* rule is inapplicable, but the anticompetitive effects of an agreement are so obvious that "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *California Dental Ass'n v. F.T.C., 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*.

Blanton challenges what he says is a horizontal restraint of trade that is so pernicious that it is a *per se* violation of the Sherman Act. Alternatively, Blanton says he has sufficiently pled a claim under the "quick look" approach, but reiterates the precise standard need not be decided by the Court now.

B. Blanton Sufficiently Alleges Article III Standing and Antitrust Injury

Defendants say Blanton's complaint should be dismissed for lack of Article III standing under *Federal Rule of Civil Procedure 12(b)(1)*. They also say Blanton **[*9]** fails to allege antitrust injury. The Court disagrees.

To establish Article III standing, a plaintiff must plead facts showing actual injury, causation, and redressability. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. Moreover, an antitrust plaintiff must establish antitrust injury, "which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *NicSand, Inc. v. 3M Co., 507 F.3d 442, 450 (6th Cir. 2007)*.

Blanton pleads that Defendants' no-hire provision "harmed [Domino's franchise] employees by lowering the salaries and benefits employees otherwise would have commanded in a competitive marketplace." Blanton says that his own wages were depressed.

Economic injuries like this "have long been recognized as sufficient to lay the basis for [Article III] standing." *Sierra Club v. Morton, 405 U.S. 727, 733, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972)*; *see also* *Milwaukee Police Ass'n v. Flynn, 863 F.3d 636, 639 (7th Cir. 2017)* ("concrete financial injuries, namely deprivation of wages . . . are prototypical of injuries for the purposes of Article III standing.").

Blanton also alleges causation and redressability. He asserts that his depressed wages were a direct result of the allegedly unlawful no-hire agreement; further, he seeks treble damages, which would more than make up for lost wages.

The Court finds that Blanton has sufficiently alleged **[*10]** standing.

Blanton also sufficiently alleges antitrust injury. Blanton contends that Defendants' no-hire agreement is "a conspiracy not to compete for labor." As discussed above, Blanton says the conspiracy had the purpose and effect of depressing wages and limiting the employment mobility of Domino's franchise employees, including himself. Blanton also alleges that Domino's franchises compete against one another for labor.

"The relevant cases hold that plaintiffs whose opportunities in the employment market have been impaired by an anticompetitive agreement directed at them as a particular segment of employees have suffered an antitrust injury under the governing standard." *Roman v. Cessna Aircraft Co., 55 F.3d 542, 544 (10th Cir. 1995)* (citing *Radovich v.*

National Football League, 352 U.S. 445, 77 S. Ct. 390, 1 L. Ed. 2d 456 (1957)); *see also Phillip Areeda & Herbert Hovenkamp,* ***Antitrust Law*** ¶ 377c (rev. ed. 1995) ("[a]ntitrust law addresses employer conspiracies controlling employment terms precisely because they tamper with the employment market and thereby impair the opportunities of those who sell their services there . . . An employee overcomes the primary hurdle to standing when he shows that the alleged violation restrains competition in the labor market.").

Blanton alleges facts sufficient to show Article III standing and antitrust **[*11]** injury.

C. Blanton Pleads a Plausible Violation of the Sherman Act

Blanton says that the no-hire provision is a *per se* violation of the Sherman Act; he argues that the no-hire provision is evidence of the type of horizontal agreement that courts always deem *per se* illegal. Courts hold that this type of restraint has such a clear lack of redeeming value that it is conclusively presumed to be unreasonable. *See Expert Masonry, Inc. v. Boone Cty.,* Ky., 440 F.3d 336, 342 (6th Cir. 2006).

In the alternative, Blanton says that the no-hire provision is illegal under the quick-look approach. Defendants disagree and urge the Court to apply the "rule of reason" approach discussed above and dismiss Blanton's complaint. Notably, Defendants rely on a number of summary judgment and trial decisions in their motion papers, both of which are improper at this stage—where the Court is only to evaluate the sufficiency of the pleadings.

The Court declines to announce a rule of analysis at this juncture. More factual development is necessary. The Court does find that Blanton pled a plausible violation of the Sherman Act.

The essential elements of a violation of Section 1 of the Sherman Act are: (1) a contract, combination, or conspiracy; (2) affecting interstate commerce; (3) which imposes **[*12]** an unreasonable restraint on trade. White and White, Inc. v. Am. Hosp. Supply Corp., 723 F.2d 495, 504 (6th Cir. 1983). As discussed, an antitrust plaintiff must also plead antitrust injury, "which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." Valley Products Co., Inc. v. Landmark, a Div. of Hospitality Franchise Systems, Inc., 128 F.3d 398, 402 (6th Cir. 1997) (citing Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)).

Blanton says Defendants orchestrated an agreement not to compete for labor among their franchisees; he says that franchisees, by signing the franchise agreement, tacitly agree not to hire one another's employees—an agreement he says is evidenced by the provision that allows franchisees the power to waive the no-hire restraint. Further, Blanton says this agreement lowered the wages and depressed the mobility of a nationwide class of Domino's employees.

Blanton has plausibly pled a "contract, combination, or conspiracy" affecting interstate commerce, in violation of Section 1 of the Sherman Act. Blanton has also plausibly alleged that the agreement is unreasonable under both the *per se* rule and quick-look analysis. He sufficiently alleges that the agreement "has such a clear lack of redeeming value that it is conclusively presumed to be unreasonable"; he also sufficiently pleads that the anticompetitive effects of the agreement are **[*13]** so obvious that "an observer with even a rudimentary understanding of economics could conclude that [the agreement] in question would have an anticompetitive effect on customers and markets." However, as discussed, more factual development is necessary to determine which standard of review will apply to the no-hire provision.

D. Blanton States a Plausible Claim Against all Defendants

Defendants say that Domino's Pizza Master Issuer LLC, Domino's Pizza LLC, and Domino's Pizza, Inc. should be dismissed because Blanton fails to plead facts sufficient to plausibly allege their involvement in the purported conspiracy. Defendants say that Blanton's only allegations with respect to the non-franchisor defendants pertain to places of incorporation and corporate affiliation; most importantly, Defendants claim that no allegations plausibly connect the non-franchisor defendants to the challenged provision.

Defendants misrepresent Blanton's complaint.

To state a plausible antitrust conspiracy claim, the allegations in the complaint must "be specific enough to establish the relevant 'who, what, where, when, how, or why.'" *Carrier Corp. v. Outokumpu Oyj, 673 F.3d 430, 445 (6th Cir. 2012)*. The complaint must also "specify how [each] defendant [was] involved in the **[*14]** alleged conspiracy." *Id.* "Generic pleading, alleging misconduct against defendants without specifics as to the role each played in the conspiracy" is insufficient. *In re Refrigerant Compressors Antitrust Litig., No. 2:09-MD-02042, 2012 U.S. Dist. LEXIS 80269, 2012 WL 2114997, at *8 (E.D. Mich. June 11, 2012)*.

Contrary to Defendants' assertions, Blanton sufficiently alleges the role each Defendant played in the purported conspiracy. Blanton alleges more than mere corporate affiliation and place of incorporation; he says that each Defendant either acted as franchisor or was otherwise involved in the franchising process with respect to franchise agreements still in effect over the past four years.

Simply put, Blanton's allegations are sufficient to allow this Court to reasonably infer the involvement of all Defendants in the alleged conspiracy. *See* *Bredesen, 500 F.3d at 527* ("[i]n deciding a motion under *Rule 12(b)(6)*, the Court must construe the complaint in the light most favorable to the plaintiff and accept as true all well-pled factual allegations."). *See also* *Catlin Indem. Co. v. Westfield Ins. Co., No. 14-13685, 2015 U.S. Dist. LEXIS 133193, 2015 WL 5728838, at *2 (E.D. Mich. Sept. 30, 2015)* ("[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.") (citing *Twombly, 550 U.S. at 556*).

Blanton plausibly alleges the involvement **[*15]** of all Defendants in the purported conspiracy.

E. Blanton Sufficiently Pleads Fraudulent Concealment

Blanton seeks to represent a class of plaintiffs that goes back more than four years; he argues that the four-year statute of limitations for Sherman Act claims should be tolled because Defendants fraudulently concealed their conspiracy.

Defendants say that Blanton's allegation of fraudulent concealment should be stricken; they say Blanton fails to plead the requisite elements with the particularity required by *Federal Rule of Civil Procedure 9(b)*. Specifically, Defendants assert that they could not have wrongfully concealed the no-hire provision because it was publicly available, and they claim that Blanton impermissibly fails to plead the affirmative steps he took to discover his cause of action within the statute of limitations period. Again, Defendants are wrong.

Federal Rule of Civil Procedure 9(b) mandates that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P. 9(b)*.

To state a claim of fraudulent concealment, a plaintiff must plead "'(1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of **[*16]** action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts.'" *Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975)*. Importantly, "[t]he requirement of diligence is only meaningful, however, when facts exist that would excite the inquiry of a reasonable person." *See* *Conmar Corp. v. Mitsui & Co. (U.S.A.), Inc., 858 F.2d 499, 504 (9th Cir. 1988)*; *see also* *Carrier Corp. v. Outokumpu Oyj., 673 F.3d 430, 448 (6th Cir. 2012)* ("[t]his would appear to be enough to place [Plaintiff] on inquiry notice, which in turn would require [Plaintiff] diligently to investigate its possible claim."). Blanton says that Defendants made "false public representations" which concealed the existence of the no-hire provision. Specifically, Blanton claims that Defendants publicly represented that franchisees make their own employment decisions; Defendants also allegedly stated that employees may advance from an entry level position to store owner. Blanton says that the no-hire provision prohibited franchisees from hiring employees of other franchisees; he also says that it operated to limit employee mobility. Given Blanton's assertions, the above statements—if in fact made by Defendants—plausibly operate to conceal the existence of the no-hire provision.

Finally, Blanton sufficiently pleads due diligence, notwithstanding that he does not plead the affirmative steps **[*17]** taken to discover the cause of action. While Defendants claim that the franchise agreement and no-hire provision were publicly available, they fail to say where or how employees could have found them. Instead, Blanton alleges that employees had no access to franchise agreements. He says the 2013 franchise agreement was the only agreement available online; further, he says that the agreement was only available through a third-party website that franchise employees had no reason to know of. Given Blanton's allegations, it is reasonable to infer that Domino's franchise employees had no reason to suspect that the no-hire provision existed.

Blanton plausibly alleges that Defendants fraudulently concealed the existence of the no-hire provision. His allegations are sufficient to create the reasonable inference that members of the potential class were not aware of facts that would require diligence on their part.

V. CONCLUSION

Blanton's allegations are sufficient to establish both Article III standing and antitrust injury. He also plausibly alleges that all Defendants were involved in the purported conspiracy. Fraudulent concealment is sufficiently pled. Finally—and most importantly—Blanton plausibly **[*18]** alleges that Defendants violated the Sherman Antitrust Act. *See* *In re Text Messaging Antitrust Litig., 630 F.3d 622, 629 (7th Cir. 2010)* ("the case is just at the complaint stage and the test for whether to dismiss a case at that stage turns on the complaint's plausibility.")

Defendants' motion to dismiss is **DENIED** in its entirety.

IT IS ORDERED.

/s/ Victoria A. Roberts

Victoria A. Roberts

United States District Judge

Dated: May 24, 2019

RxStrategies, Inc. v. CVS Pharm., Inc.

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

May 29, 2019, Decided; May 29, 2019, Filed

Case No: 8:18-cv-1087-T-30TGW

Reporter

390 F. Supp. 3d 1341 *; 2019 U.S. Dist. LEXIS 104350 **; 2019-1 Trade Cas. (CCH) P80,784; 2019 WL 2751092

RXSTRATEGIES, INC., Plaintiff, v. CVS PHARMACY, INC. and WELLPARTNER, LLC, Defendants.

Subsequent History: Motion denied by *RxStrategies, Inc. v. CVS Pharm., Inc., 2019 U.S. Dist. LEXIS 224710, 2019 WL 7584729 (M.D. Fla., Dec. 4, 2019)*

Motion denied by *Rxstrategies, Inc. v. Cvs Pharm., 2020 U.S. Dist. LEXIS 258568 (M.D. Fla., Feb. 6, 2020)*

Core Terms

pharmacy, allegations, trade secret, misappropriation, covered entity, market power, geographic, customers, unjust enrichment, patients, program administrator, tortious interference, market share, entity's, motion to dismiss, data processing, inducement, antitrust, markets, retail, business relationship, preempted, antitrust claim, prescriptions, drugs, lists, fraudulent misrepresentation, negligent misrepresentation, proprietary, argues

Counsel: **[**1]** For Rxstrategies, Inc., Plaintiff: Gregory P. Brown, Ryan James Leuthauser, Tori Simmons, LEAD ATTORNEYS, Hill Ward Henderson, PA, Tampa, FL USA.

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For Christopher L. Griffin, Mediator: Christopher Lee Griffin, LEAD ATTORNEY, Griffin Mediation LLC Tampa, FL USA.

Judges: JAMES S. MOODY, JR., UNITED STATES DISTRICT JUDGE.

Opinion by: JAMES S. MOODY, JR.

Opinion

[*1346] **ORDER**

THIS CAUSE comes before the Court upon Defendants' Motion to Dismiss (Dkt. 36), Plaintiff's Response in Opposition (Dkt. 42), Defendants' Memorandum in Support of the Motion (Dkt. 48), and Plaintiff's Response to Defendants' Memorandum (Dkt. 55). The Court, having reviewed the filings and being otherwise advised in the premises, concludes that Defendants' Motion should be granted in part.

BACKGROUND

The 340B Drug Pricing Program **[**2]** ("340B Program" or "340B") is a federal government program that allows qualifying healthcare providers, called "covered entities," to purchase outpatient drugs at a **[*1347]** significant discount. After purchasing the discounted drugs, covered entities can dispense them to patients directly, or through third-party pharmacies called "contract pharmacies." The 340B Program provides covered entities with savings based on the discounted prices of drugs. And participants in the program can choose how to use the savings they realize, including "caring for more patients, providing charitable medical care, and offsetting losses incurred from treating underinsured, uninsured, and indigent patients." Dkt. 30, p. 5.

The 340B Program holds participating covered entities responsible for complex tasks such as managing the contract pharmacies, preventing duplicate discounts for certain drugs, and ensuring compliance with government regulations. Plaintiff RxStrategies, Inc. ("RxStrategies") is a 340B program administrator, hired by covered entities to ensure their compliance with the 340B Program. Defendant CVS Pharmacy, Inc. ("CVS") is a retail pharmacy chain with some (or as RxStrategies argues, many) contract **[**3]** pharmacies that dispense outpatient drugs pursuant to the 340B Program.

According to RxStrategies, in 2016, CVS approached RxStrategies with the idea that RxStrategies could serve as a program administrator for CVS. The two entities entered into a mutual non-disclosure agreement ("NDA"), and RxStrategies began designing, building, and testing software solutions for CVS. RxStrategies alleged it shared proprietary information with CVS during these development phases, including lists of RxStrategies' covered entity customers and data processing solutions.

On December 18, 2017, CVS announced it acquired Defendant Wellpartner, LLC ("Wellpartner") to serve as CVS's exclusive program administrator for the 340B Program. RxStrategies alleged that CVS shared RxStrategies' proprietary information with Wellpartner, and Wellpartner contacted some of RxStrategies' covered entity customers. Wellpartner and RxStrategies are direct competitors.

CVS now requires any covered entity that wants to fill 340B Program prescriptions at a CVS pharmacy to use Wellpartner as its program administrator. If the covered entity does not want to use Wellpartner as its 340B program administrator, it cannot utilize CVS **[**4]** as a contract pharmacy for the 340B Program.

RxStrategies filed suit against CVS and Wellpartner alleging claims for illegal tying in violation of the Sherman Act against both Defendants (Count I); breach of contract against CVS (Count II); tortious interference with a contractual relationship against both Defendants (Count III); tortious interference with a business relationship against both Defendants (Count IV); misappropriation of trade secrets against both Defendants (Counts V and VI); fraud in the inducement against CVS (Count VII); fraudulent misrepresentation against CVS (Count VIII); negligent misrepresentation against CVS (Count IX); and unjust enrichment against CVS (Count X). Defendants move to dismiss RxStrategies' Amended Complaint.

MOTION TO DISMISS STANDARD

Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a complaint when it fails to state a claim upon which relief can be granted. When reviewing a motion to dismiss, a court must accept all factual allegations in the complaint as true. *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (internal citation omitted). It must also construe those factual allegations in the light most favorable to the plaintiff. *Hunt v. Aimco Properties, L.P., 814 F.3d 1213, 1221 (11th Cir. 2016)* (internal citation omitted).

[*1348] To withstand a motion to dismiss, the complaint must include **[**5]** "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678,* *129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Pleadings that offer only "labels and conclusions," or a "formulaic recitation of the elements of a cause of action," will not do. *Twombly, 550 U.S. at 555*.

DISCUSSION

Count I: Tying in Violation of the Sherman Act, 15 U.S.C. §1, against both Defendants

As an initial matter, the Court notes that RxStrategies is required to establish antitrust standing to assert its antitrust claim. *See Palmyra Park Hosp. Inc. v. Phoebe Putney Mem'l Hosp., 604 F.3d 1291, 1298 (11th Cir. 2010)* ("courts require parties to show that they are the proper plaintiffs to vindicate the public's interest in enforcing the antitrust laws.") "Standing in an antitrust case involves more than the 'case or controversy' requirement that drives constitutional standing." *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1448 (11th Cir. 1991)*. The Eleventh Circuit has established a two-prong test for antitrust standing: "(1) the plaintiff must establish that it has suffered an antitrust injury, and (2) the plaintiff must be an 'efficient enforcer' of the antitrust laws." *Sunbeam Television Corp. v. Nielsen Media Research, Inc., 711 F.3d 1264, 1271 (11th Cir. 2013)* (internal citations omitted). Neither party disputes RxStrategies' antitrust standing, **[**6]** and the Court concludes that RxStrategies has established standing to bring its antitrust claim.

With its antitrust claim, RxStrategies takes issue with CVS's mandate: covered entities that want to use CVS for 340B contract pharmacy services must also use Wellpartner for 340B program administrator services. RxStrategies alleges that Defendants violate the Sherman Act by tying these two services.

To bring a claim under *section one of the Sherman Act*, RxStrategies "must define the relevant market and establish that the defendants possessed power in that market." *Duty Free Americas, Inc. v. Estee Lauder Companies, Inc., 797 F.3d 1248, 1263 (11th Cir. 2015)* (citation omitted). *See also Jacobs v. Tempur-Pedic Intern., Inc., 626 F.3d 1327, 1336 (11th Cir. 2010)*. The relevant market includes the geographic market and the product market. *Id.* Defendants argue the Court should dismiss RxStrategies' claim because RxStrategies fails to establish the geographic market and the requisite market power. The Court discusses each element below.

Geographic Market

The relevant geographic market is "the area of effective competition in which a product or its reasonably interchangeable substitutes are traded." *Duty Free Americas, 797 F.3d at 1263* (citing *L.A. Draper & Son v. Wheelabrator-Frye, Inc., 735 F.2d 414, 423 (11th Cir.1984))*. It is "comprised of the area where [ ] customers would look to buy [ ] a product." *Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 726 (3d Cir. 1991)*. When determining a geographic market, a court must consider "economic **[**7]** and physical barriers to expansion [such] as transportation costs, delivery limitations and customer convenience and preference." *Cobb Theatres III, LLC v. AMC Entm't Holdings, **[*1349]** Inc., 101 F. Supp. 3d 1319, 1336 (N.D. Ga. 2015)*. And markets that involve services offered only at a particular location "like those provided by hospitals [and] theaters . . . will often be defined by how far consumers are willing to travel." *Id.* (citing Earl W. Kintner, Federal ***Antitrust Law*** § 10.15 (2013)).

RxStrategies alleges the relevant geographic market in this case "consists of local relevant geographic markets across the country . . . limited to the distance that a covered entity's patients travel to fill their prescriptions." Dkt. 30, p. 35. RxStrategies supports this allegation with facts including a covered entity's strong preference for utilizing contract pharmacies located close to the entity's patients and ways in which covered entities compete with one another. RxStrategies notes the "area of competition is typically small" based on patients' travel preferences. *Id.* at p. 35.

Defendants argue that "local" markets are not proper geographic markets and that RxStrategies does not provide the specific size or boundary of any local market. Defendants cite to *Spanish Broadcast System of Fla., Inc. v. Clear Channel **[**8]** Communications, Inc.*, where the Eleventh Circuit described a relevant geographic market as "a distinct market, with a specific set of geographical boundaries." 376 F.3d 1065, 1074 (11th Cir. 2004). But this description was not made in the context of pleading requirements. *See* Thompson v. Metro. Multi-List, Inc., 934 F.2d 1566, 1573 (11th Cir. 1991) ("The parameters of a given market are questions of fact."). Six years later, the Eleventh Circuit decided *Jacobs v. Tempur-Pedic Intern., Inc.*, and declared that to survive a motion to dismiss, "antitrust plaintiffs . . . must present enough information in their complaint to plausibly suggest the contours of the relevant geographic and product markets." 626 F.3d at 1336. RxStrategies' allegations, taken together, "plausibly suggest the contours" of the relevant geographic market.

Market Power

Market power exists when a "seller has some special ability . . . to force a purchaser to do something that he would not do in a competitive market." *Illinois Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 36, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)* (citing *Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 13, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*, *abrogated by* *Illinois Tool Works, 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26*). In the context of antitrust claims, "sufficient economic power in the tying product market," enables a seller to "coerce buyer acceptance of the tied product." *Tic-X-Press, Inc. v. Omni Promotions Co. of Georgia, 815 F.2d 1407, 1414 (11th Cir. 1987)*, *holding modified by* *Thompson v. Metro. Multi-List, Inc., 934 F.2d 1566 (11th Cir. 1991)*.

"[In] all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying **[**9]** product." *Illinois Tool Works, 547 U.S. at 46*. "[A] showing of market power is necessary, but not sufficient, to establish potential harm to competition." *Jacobs, 626 F.3d at 1340* (internal citation omitted). It is "unmistakably clear" that a seller's "economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market." *Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495, 502-03, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969)*. "Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." *Id.*

[*1350] "Relevant determinants of the market power of a prospective predator . . . include its absolute and relative market shares, and those of competing firms; the strength and capacity of current competitors; the potential for entry; the historic intensity of competition; and the impact of the legal or natural environment." *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 994 (11th Cir. 1993)*, *certified question answered*, *264 Ga. 295, 443 S.E.2d 833 (1994)* (citing *International Tel. & Tel. Corp., 104 F.T.C. 280, 412 (1984))*. Overall, "the principal judicial device for measuring actual or potential market power remains market share, typically measured in terms of a percentage of total market sales." *Id.*

Defendants argue that RxStrategies alleges information about CVS's dominance among retail **[**10]** pharmacies, not 340B contract pharmacies. Therefore, Defendants argue, RxStrategies does not allege market power in the *relevant* market. Defendants also argue that RxStrategies does not allege enough for the Court to infer that CVS's retail pharmacy market power (a market share of 23.6% of retail pharmacies) is sufficient to establish market power for 340B contract pharmacies. The Court addresses each argument.

RxStrategies alleges many facts about CVS. According to RxStrategies, 82% of the population lives within 10 miles of a CVS pharmacy location; CVS is the second-largest contract pharmacy; CVS has grown its number of locations by 281% since 2013, and has 9,800 pharmacy locations ("the most pharmacy locations"); patients fill their prescriptions, including prescriptions pursuant to the 340B Program, close to where they live; covered entities utilize pharmacies that a large percentage of their patients already use to fill prescriptions; and covered entities view CVS as an "essential" contract pharmacy. RxStrategies also urges the Court to accept that available data about CVS's market share in the 340B contract pharmacy market is understated because of CVS's recent changes to its **[**11]** policies for partnering with covered entities.[1]

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[1] According to RxStrategies, before acquiring Wellpartner, CVS had a "one-to-one" policy where one CVS pharmacy location would serve as a contract pharmacy to only one covered entity. RxStrategies alleges this policy protected CVS from potential

In a way, RxStrategies asks the Court to infer that CVS's dominance among retail pharmacies results in dominance in the 340B contract pharmacy market. Though this may be true, RxStrategies' Amended Complaint does not include enough for the Court to infer the level of dominance that equates to market power in the relevant product market. Importantly, as Defendants argue, RxStrategies alleges much about CVS's national market power and market share in certain states. But RxStrategies alleged its geographic markets are local. The allegations are not inconsistent, but they are lacking for the geographic market RxStrategies defined.

The parties argue over the importance of CVS's alleged 23.6% nationwide market share of retail pharmacies. Though the number would likely be insufficient to establish market power, the figure is for a different product market, so it does not have as much relevance here. With 23.6% of the retail pharmacy market share, CVS could have a 10% market share of 340B contract pharmacies or a 90% share. RxStrategies alleges that the five largest pharmacy chains (as alleged, "CVS, Walgreens, Walmart, Rite Aid, and Kroger") represent **[**12]** 60% of 340B contract pharmacies. **[*1351]** Dkt. 30, p. 12. It is unclear what percentage of this share CVS occupies.

RxStrategies does allege that CVS has a 60% market share for *specialty* drugs in the 340B Program. But RxStrategies does not allege how this figure translates to the 340B drug market as a whole, and importantly, CVS's share of the market.[2]

RxStrategies also alleges that "nearly 8,000 covered entities participate" in the 340B Program. Dkt. 30, p. 4. And since CVS's partnership with Wellpartner, 1,200 covered entities that previously used only RxStrategies as their 340B program administrator now use only Wellpartner. These figures, among others, help explain the alleged effects CVS's decision has had on some of the contract pharmacy market. But they are not enough to establish market power in the relevant market, especially when RxStrategies' geographic markets are local markets.

Though the Amended Complaint paints the picture of CVS's dominance in the retail pharmacy market, the facts do not establish the requisite market power. Accordingly, the Court will dismiss the claim, without prejudice.

Counts V and VI; Misappropriation of Trade Secrets, against both Defendants

A misappropriation **[**13]** claim requires a showing that "(1) the plaintiff possessed secret information and took reasonable steps to protect its secrecy and (2) the secret it possessed was misappropriated, either by one who knew or had reason to know that the secret was improperly obtained or by one who used improper means to obtain it." *Audiology Distribution, LLC v. Simmons, 812CV02427JDWAEP, 2014 U.S. Dist. LEXIS 196272, 2014 WL 12620835, at *1 (M.D. Fla. Jan. 8, 2014)*. RxStrategies brings two misappropriation claims: one under the *Defend Trade Secrets Act ("DTSA")*, codified at *18 U.S.C. 1836*, and the other under the *Florida's Uniform Trade Secrets Act ("FUTSA")*, codified at *Chapter 688 of Florida Statutes.*

The DTSA defines "misappropriation" as the "acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means" or "disclosure or use of a trade secret of another without express or implied consent by a person who . . . at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was . . . acquired under circumstances, which gives rise to a duty to maintain the secrecy or limit the use of the trade secret." *Temurian v. Piccolo, 18-CV-62737, 2019 U.S. Dist. LEXIS 67469, 2019 WL 1763022, at *10 (S.D. Fla. Apr. 22, 2019)* (citing *18 U.S.C. § 1839(5)*). The FUTSA provides an identical definition.

The DTSA defines a "trade **[**14]** secret" as

340B Program compliance violations. Dkt. 30, p. 17. Today, CVS allows each of its pharmacies to contract with more than one covered entity for the 340B Program.

[2] RxStrategies does allege that "[i]n 2016, CVS received $32 billion from specialty drugs, or 28% of all specialty drug prescription revenues." Dkt. 30, p. 15. But this fact does not allow the Court to glean CVS's market power in the relevant, 340B contract pharmacy market.

> all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if--
>
> (A) the owner thereof has taken reasonable measures to keep such information secret; and
>
> (B) the information derives independent economic value, actual or **[*1352]** potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information

18 U.S.C. § 1839. RxStrategies alleged Defendants misappropriated trade secrets, in the form of proprietary customer information and data processing solutions. Defendants argue that neither constitutes a trade secret and that RxStrategies failed to establish Defendants misappropriated the information. The Court discusses each category of information below.

Customer Information

Defendants first argue RxStrategies' customer information **[**15]** is not a trade secret because the information, such as a covered entity's "authorizing official and primary contact," is publicly available on a government website. Dkt. 36, p. 23. RxStrategies argues that each covered entity's 340B program administrator is not available on the website. As presented, the issue is a factual dispute, not a legal one.

Defendants also argue that RxStrategies' customers' "needs and goals" are too broad to be considered trade secrets. But RxStrategies alleged sufficient facts to establish, at this stage, that it expended effort to compile this information and transform it into a trade secret. For example, RxStrategies alleged it "devote[d] substantial resources and investment . . . to prospecting, identifying, and developing covered entities interested in participating in the 340B program. . . . [and] deploy[ed] its professionals to study a covered entity and the patient community it serves in order to understand the covered entity's needs and goals for participation in the 340B program, and to develop meaningful relationships with various individuals within the covered entity." Dkt. 30, p. 20. *See* *SMS Audio, LLC v. Belson, 9:16-CV-81308, 2016 WL 8739764, at *3 (S.D. Fla. Aug. 16, 2016)* ("Customer lists **[**16]** can constitute trade secrets where the lists are acquired or compiled through the industry of the owner of the lists and are not just a compilation of information commonly available to the public."). RxStrategies also alleged it took protective measures to prevent disclosure of the information including "restricting access to authorized users only via password-protected portals." *Id.* The Court concludes RxStrategies alleged sufficient facts to establish its customer lists are trade secrets.

Defendants also argue RxStrategies failed to allege any facts showing Defendants misappropriated any of the information. RxStrategies responded to Defendants' argument with caselaw the Court finds persuasive. And to allege misappropriation, RxStrategies alleged facts about its reliance on its NDA with CVS, among other things. At this stage, RxStrategies has alleged sufficient facts to support its claim.

Data Processing Solutions

Defendants also argue that RxStrategies failed to show its "proprietary data processing solutions" are trade secrets. As alleged, however, RxStrategies does more than allege "the existence of general categories of 'confidential information.'" *Elsevier Inc. v. Doctor Evidence, LLC, 17-CV-5540 (KBF), 2018 U.S. Dist. LEXIS 10730, 2018 WL 557906, at *6 (S.D.N.Y. Jan. 23, 2018)* **[**17]** . RxStrategies alleged that its data processing solution, "identifies and segregates eligible 340B prescription activity by an eligible covered entity's patients at the pharmacy level," and enables a drug's replenishment through a covered entity's 340B Program account, instead of other accounts. Dkt. 30, p. 22-23. The solutions included "reporting **[*1353]** and tracking mechanisms" to comply with the 340B program. *Id.* Based on RxStrategies' allegations of the complexities of compliance with the 340B Program and its efforts to create software solutions for such compliance, the allegations are sufficient to establish that the processing solutions are trade secrets.

Defendants again argue RxStrategies failed to allege enough to support any misappropriation of the processing solutions. Defendants focus on one of RxStrategies' allegations and deem it insufficient: Wellpartner transitioned customers from RxStrategies to Wellpartner at a quicker rate than it would have been able to absent information from RxStrategies' data processing solutions. But RxStrategies alleged other facts to indicate that Defendants disclosed or used RxStrategies' data processing solutions. Among them, RxStrategies **[**18]** alleges that CVS would not have been able to eliminate its one-to-one policy without RxStrategies' processing solutions. The alleged facts taken together plausibly establish misappropriation of the data processing solutions to survive a motion to dismiss.

Count II, Breach of Contract, against CVS

Defendants urge dismissal of RxStrategies' breach of contract claim for the same reasons Defendants argued the misappropriation claims should be dismissed. Because the Court rejected the arguments, the breach of contract claim remains.

Further, RxStrategies alleged that CVS and RxStrategies entered into an NDA, CVS breached the NDA, and RxStrategies suffered damages as a result of the alleged breach. With these allegations, RxStrategies plausibly alleged a breach of contract claim.

Counts III and IV, Tortious Interference with a Contractual Relationship and Tortious Interference with a Business Relationship, against both Defendants

A plaintiff must prove four elements to establish tortious interference with a contractual or business relationship: "(1) the existence of a business relationship or contract; (2) knowledge of the business relationship or contract on the part of the defendant; (3) an **[**19]** intentional and unjustified interference with the business relationship or procurement of the contract's breach; and (4) damage to the plaintiff as a result of the interference." *Howard v. Murray, 184 So. 3d 1155, 1166 (Fla. Dist. Ct. App. 2015)*.

RxStrategies alleged all four elements for each of its tortious interference claims. But Defendants argue that RxStrategies' claims fail because they are based on a failed antitrust claim and are otherwise preempted by FUTSA.

As to Defendants' preemption argument, FUTSA "displace[s] conflicting tort, restitutory, and other law[s] of [the state of Florida] providing civil remedies for misappropriation of a trade secret." *Fla. Stat. § 688.008(1)*. But it does not affect "[o]ther civil remedies that are not based upon misappropriation of a trade secret." *Fla. Stat. § 688.008(2)(b)*. Courts in this Circuit have concluded that "to pursue claims for additional tort causes of action where there are claims for misappropriation of a trade secret, there must be material distinctions between the allegations comprising the additional torts and the allegations supporting the FUTSA claim." *PB Legacy, Inc. v. Am. Mariculture, Inc., 2:17-CV-9-FTM-29CM, 2018 U.S. Dist. LEXIS 204892, 2018 WL 6325315, at *2 (M.D. Fla. Dec. 4, 2018)* (citing *New Lenox Indus., Inc. v. Fenton, 510 F. Supp. 2d 893, 908 (M.D. Fla. 2007))* (citation omitted). "Thus, the issue becomes whether allegations of trade secret **[*1354]** misappropriation alone comprise **[**20]** the underlying wrong; if so, the cause of action is preempted by the FUTSA." *Id.* (quotation and citation omitted).

RxStrategies' tortious interference claims do not consist only of allegations of misappropriation. For example, RxStrategies alleged CVS interfered with RxStrategies' contracts and business relationships by forcing customers to use Wellpartner as their exclusive 340B program administrator. The Court concludes that RxStrategies' tortious interference claims are not preempted by FUTSA. And because neither tortious interference claim depends on the success of RxStrategies' antitrust claim, the claims withstand Defendants' Motion to Dismiss.

Counts VII, VIII, IX, Fraud in the Inducement, Fraudulent Misrepresentation, and Negligent Misrepresentation, against CVS

Claims for fraudulent misrepresentation and fraudulent inducement require a showing of: "(1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on the representation." *Moriber v. Dreiling, 194 So. 3d 369, 373 (Fla. Dist. Ct. App. 2016)*. And "to establish negligent misrepresentation, a party is required **[**21]** to prove: (1) a misrepresentation of material fact that the defendant believed to be true but which was in fact false; (2) that defendant should have known the representation was false; (3) the defendant intended to induce the plaintiff to rely on the misrepresentation; and (4) the plaintiff acted in justifiable reliance upon the misrepresentation, resulting in injury." *Arlington Pebble Creek, LLC v. Campus Edge Condo. Ass'n, Inc., 232 So. 3d 502, 505 (Fla. Dist. Ct. App. 2017)*.

RxStrategies "must state with particularity the circumstances constituting [the] fraud or mistake" for these three claims. *Fed. R. Civ. P. 9*. This requires RxStrategies to allege "(1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud." *Smiley v. Nationstar Mortgage LLC, 202 F. Supp. 3d 1322, 1324 (M.D. Fla. 2016)* (citing *Garfield v. NDC Health Corp., 466 F.3d 1255, 1262 (11th Cir. 2006))* (citation omitted).

Defendants argue these three claims should be dismissed because the claims are preempted by FUTSA. Defendants also argue RxStrategies did not comply with *Rule 9(b)*'s particularity requirement and RxStrategies failed to allege that Defendants **[**22]** intended to deceive RxStrategies. The Court will discuss RxStrategies' claims for fraudulent inducement, fraudulent misrepresentation, and negligent misrepresentation together because Defendants' arguments for dismissal apply to each claim equally.

First, because these claims do not consist only of allegations relating to Defendants' alleged misappropriation of trade secrets, they are not preempted by FUTSA.

Second, in support of its claims, RxStrategies alleged that Christian Reid ("Reid"), the Senior Director of the 340B Program for CVS, and Jaclyn Baptista ("Baptista"), the "Senior Implementation Manager, Health System Alliances, for **[*1355]** CVS," falsely assured several RxStrategies' representatives (whom RxStrategies lists) that RxStrategies' software was going live soon but had technical issues. Dkt. 30, p. 46. These individuals also allegedly made representations that "a timeline for going live was pending." *Id.* RxStrategies alleges Reid and Baptista made these representations over the course of a few months, and specifically via email on July 5, 2017. These allegations meet *Rule 9(b)*'s pleading requirements.

And finally, RxStrategies alleged that Reid and Baptista, on behalf of CVS, "intended **[**23]** to induce RxStrategies to rely and act on the misrepresentations." Dkt. 30, p. 47, 49, 51. This satisfies the requirement that RxStrategies plead "intent" for each of the three claims. To the extent Defendants argue RxStrategies' allegations of intent lack detail, *Rule 9* specifically permits "[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally." *Fed. R. Civ. P. 9*. Accordingly, the Court will not dismiss RxStrategies' claims for fraudulent inducement, fraudulent misrepresentation, and negligent misrepresentation.

Count X Unjust Enrichment, against CVS

"A claim for unjust enrichment is an equitable claim, based on a legal fiction created by courts to imply a 'contract' as a matter of law." *Tooltrend, Inc. v. CMT Utensili, SRL*, 198 F.3d 802, 805 (11th Cir. 1999) (citing *Commerce Partnership 8098 Ltd. Partnership v. Equity Contracting Co., 695 So. 2d 383, 386 (Fla. Dist. Ct. App. 1997)* (en banc)). "[T]he law will, in essence, 'create' an agreement in situations where it is deemed unjust for one party to have received a benefit without having to pay compensation for it." *Id.*

The elements of a claim for unjust enrichment are: "(1) the plaintiff has conferred a benefit on the defendant; (2) the defendant voluntarily accepted and retained that benefit; and (3) the circumstances are such that it would be inequitable for the defendants to retain it without paying **[**24]** the value thereof." *Virgilio v. Ryland Grp., Inc., 680 F.3d 1329, 1337 (11th Cir. 2012)* (*citing* *Fla. Power Corp. v. City of Winter Park, 887 So. 2d 1237, 1241 n. 4 (Fla. 2004))*.

RxStrategies alleged each element required for the cause of action. But CVS argues RxStrategies' claim is preempted by FUTSA. The Court agrees that the alleged benefits RxStrategies conferred to CVS mimic the proprietary information and trade secrets found in RxStrategies' misappropriation claims. *See* *PB Legacy, 2:17-CV-9-FTM-29CM, 2018 U.S. Dist. LEXIS 204892, 2018 WL 6325315, at *2*. So, the unjust enrichment claim would ordinarily be preempted. But if no trade secrets exist, the claim would be proper. RxStrategies can therefore maintain its unjust enrichment claim for now, in the alternative.

CVS also argues it entered into a mutual NDA with RxStrategies, and the NDA governs the use (and misuse) of confidential information RxStrategies references in its unjust enrichment claim. The Court recognizes that "Florida courts have held that a plaintiff cannot pursue a quasi-contract claim for unjust enrichment if an express contract exists concerning the same subject matter." *Diamond "S" Dev. Corp. v. Mercantile Bank, 989 So. 2d 696, 697 (Fla. Dist. App. Ct. 2008)*. But this Court has allowed a claim for unjust enrichment to be pled in the alternative to a breach of contract claim. *See* *Bruggemann v. Amacore Group, Inc., 8:09-CV-2562-T-30MAM, 2010 U.S. Dist. LEXIS 66971, 2010 WL 2696230, at *5 (M.D. Fla. July 6, 2010)* (Moody, J.) ("although Defendants are correct **[**25]** that a plaintiff cannot recover under both unjust enrichment and breach of contract, both the Federal Rules of Civil Procedure and Florida law **[*1356]** permit a party to allege these claims in the alternative."). RxStrategies even argues that the "thrust of the claim-RxStrategies' uncompensated time and expense in developing the software solution for CVS-has nothing to do with confidential information and is not covered by the [NDA]." Dkt. 42, p. 20. Accordingly, the Court will allow the claim to remain.

Upon review and consideration, it is therefore

ORDERED AND ADJUDGED that:

1. Defendants' Motion (Dkt. 36) is GRANTED in part, as described herein.
2. Plaintiff's Count I is dismissed without prejudice.
3. Plaintiff may file an amended complaint within twenty-one (21) days from the date of this Order.

DONE and **ORDERED** in Tampa, Florida, this 29th day of May, 2019.

/s/ James S. Moody, Jr.

JAMES S. MOODY, JR.

UNITED STATES DISTRICT JUDGE

End of Document

Charah v. Sequoia Servs. LLC

North Carolina Superior Court, Guilford County

May 30, 2019, Decided

19 CVS 5795

Reporter

2019 NCBC LEXIS 87 *; 2019 NCBC Order 14

CHARAH, LLC, Plaintiff, v. SEQUOIA SERVICES LLC, Defendant.

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

Subsequent History: Dismissed by, in part *Charah, LLC v. Sequoia Servs., LLC, 2020 NCBC LEXIS 52, 2020 WL 1903953 (Apr. 17, 2020)*

Core Terms

designation, complex business, mandatory, anti trust law, tortious interference

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

Order by: Louis A. Bledsoe, III

Order

ORDER ON DESIGNATION

1. **THIS MATTER** is before the Court pursuant to the Order of the Honorable Cheri Beasley, Chief Justice of the Supreme Court of North Carolina, directing the undersigned to determine whether this action is properly designated as a mandatory complex business case in accord with *N.C. Gen. Stat. § 7A-45.4(a)* (the "Determination Order").

2. Plaintiff filed the Complaint initiating this action in Guilford County Superior Court on May 20, 2019, asserting claims for tortious interference with contract, and unfair and deceptive trade practices under *N.C. Gen. Stat. § 75-1.1*. Plaintiff timely filed the Notice of Designation ("NOD") on the same day.

3. Plaintiff contends that designation as a mandatory business case is proper under *N.C. Gen. Stat. § 7A-45.4(a)(3)* ("*7A-45.4(a)(3)*"), (NOD 1), which provides for designation of "an action that involves a material issue related to . . . [d]isputes involving ***antitrust law***, including disputes arising under Chapter 75 of the General Statutes that do not arise solely under *G.S. 75-1.1* or Article 2 of Chapter 75 of the General Statutes." Plaintiff does not seek to base designation on any provision of *7A-45.4(a)* other than *section 7A-45.4(a)(3)*.

4. In support of designation, Plaintiff argues that the factual allegations supporting its claims for tortious interference **[*2]** with contract and violation of Chapter 75 satisfy the requirements of *section 7A-45.4(a)(3)*. Plaintiff's Chapter 75 claim, however, is brought solely under *section 75-1.1* and Plaintiff does not reference, invoke, or otherwise seek recovery under any other provision of Chapter 75 in its Complaint. Nor does Plaintiff allege or

contend that the current action involves consideration and application of federal or state ***antitrust law***, other than *section 75-1.1*. As such, designation is improper because Plaintiff's Chapter 75 claim in this action arises solely under *N.C. Gen. Stat. § 75-1.1*, there has been no showing that the dispute otherwise involves ***antitrust law***, and Plaintiff has not identified any other basis for designation of this action as a mandatory complex business case. *See Market Am., Inc. v. Doyle, 15 CVS 9658, 2016 NCBC LEXIS 182*, Order at 2, ECF No. 36.

5. Based on the foregoing, the Court determines that this action is not properly designated as a mandatory complex business case in accord with *N.C. Gen. Stat. § 7A-45.4(a)* and thus shall not be assigned to a Special Superior Court Judge for Complex Business Cases.

6. Consistent with the Determination Order, the Court hereby advises the Senior Resident Superior Court Judge of Judicial District 18 that this action is not properly designated as a **[*3]** mandatory complex business case so that the action may be treated as any other civil action, wherein designation as a *Rule 2.1* exceptional case may be pursued with the Senior Resident Judge.

7. The Court's ruling is without prejudice to the right of any other party to seek designation of this matter as a mandatory complex business case as provided under *section 7A-45.4*.

SO ORDERED, this the 30th day of May, 2019.

/s/ Louis A. Bledsoe, III

Louis A. Bledsoe, III

Chief Business Court Judge

United States Bd. of Oral Implantology v. Am. Bd. of Dental Specialties

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

May 30, 2019, Decided; May 30, 2019, Filed

No. 18 CV 6520

Reporter
390 F. Supp. 3d 892 *; 2019 U.S. Dist. LEXIS 90460 **; 2019-1 Trade Cas. (CCH) P80,783; 2019 WL 2297468

UNITED STATES BOARD OF ORAL IMPLANTOLOGY, et al., Plaintiffs, v. AMERICAN BOARD OF DENTAL SPECIALTIES, et al., Defendants.

Core Terms

Implantology, Specialties, Dental, certifications, dentists, certifying, allegations, conspiracy, advertise, boards, entity, relevant market, conspired, misrepresentation, plaintiffs', complaint alleges, Sherman Act, monopoly power, defendants', newsletter, antitrust, monopoly, professional services, continuing education, Implantologists, anticompetitive, monopolization, deceptive trade practices, restraint of trade, motion to dismiss

Counsel: **[**1]** For United States Board of Oral Implantology, International Congress of Oral Implantologists, Plaintiffs: Michael Lacovara, LEAD ATTORNEY, Latham & Watkins LLP, New York, NY; Eric L Taffet, William O Reckler, PRO HAC VICE, Latham & Watkins LLP, New York, NY.

For American Board of Dental Specialties, American Board of Oral Implantology (Implant Dentistry), American Academy of Implant Dentistry, Cheryl Parker, Kevin O'Grady, Jaime Lozada, Kim Gowey, Defendants: James Franklin Herbison, Bryce Allen Cooper, Kevin Benjamin Goldstein, Michael P Mayer, LEAD ATTORNEY, Winston & Strawn LLP, Chicago, IL.

For Michael Mashni, Defendant: James Franklin Herbison, Bryce Allen Cooper, Kevin Benjamin Goldstein, Michael P Mayer, LEAD ATTORNEY, Winston & Strawn LLP, Chicago, IL Kevin Michael O'Hagan, Shane Bradwell, Sheri Angelina Tambourine, LEAD ATTORNEY, O'Hagan Meyer, LLC, Chicago, IL.

Judges: Manish S. Shah, United States District Judge.

Opinion by: Manish S. Shah

Opinion

[*897] MEMORANDUM OPINION AND ORDER

Certifications help consumers assess products. In the market for dental services, specialty boards issue certifications to dentists that meet certain criteria, and patients use those certifications to identify qualified dentists. Right **[**2]** now, allegedly, the only organization issuing certifications to dentists in the United States that specialize in oral implantology is one of the defendants, the American Board of Oral Implantology. This board has in turn received a certification from another defendant, the American Board of Dental Specialties (a certifier of certifiers). The plaintiffs—two entities that also issue certifications—allege that the defendants' market stronghold violates both *§ 1* and *§ 2 of the Sherman Act*. They add that the defendants have disparaged plaintiffs' goods in violation of the

Illinois Uniform Deceptive Trade Practices Act. The defendants say that nothing is preventing the plaintiffs from issuing their own certifications, and there is nothing illegal about defendants' conduct. They move to dismiss the complaint in its entirety.

I. Legal Standards

A complaint must contain a short and plain statement that plausibly suggests a right to relief. *Ashcroft v. Iqbal, 556 U.S. 662, 677-78, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*; *Fed. R. Civ. P. 8(a)(2)*. In ruling on a motion to dismiss, although a court must accept all factual allegations as true and draw all reasonable inferences in the plaintiffs' favor, the court need not do the same for legal conclusions or "threadbare recitals" supported by only "conclusory **[**3]** statements." *Ashcroft, 556 U.S. at 678, 680-82*. The plaintiff must provide "more than labels" or "a formulaic recitation of a cause of action's elements," *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, and the complaint must "contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Id. at 562*. When the allegations involve complex litigation, a "fuller set of factual allegations may be necessary to show that relief is plausible." *Tamayo v. Blagojevich, 526 F.3d 1074, 1083 (7th Cir. 2008)*.

II. Facts

People that need dental implants have imperfect information; they need a capable dentist but often lack the time and know-how to distinguish between a hack and a crackerjack. They might rely on someone else's opinion, especially if that someone is particularly skilled at telling the two apart. In the dentistry field, that someone could be a "specialty certifying board"; a group that issues certifications to dentists who meet certain criteria (and pay the required fee). *See* [1] ¶¶ 2-4.[1] The more that patients trust the specialty certifying board, the more dentists value their certifications. *See id.*

Ordinarily, specialty certifying boards would compete based on the quality of the information they provide. But state governments have regulated this **[**4]** market by, among other things, restricting dentists' **[*898]** ability to advertise their certifications. [1] ¶¶ 3, 48. Many states prohibit advertising a dental certification unless it was issued by a specialty certifying board that has been approved by the American Dental Association. [1] ¶¶ 3, 11, 12, 48, 49.[2]

The defendants include three entities that have changed this regulatory landscape. [1] ¶ 63. The American Academy of Implant Dentistry is an Illinois corporation with its principle place of business in Suite 750B of a building in Chicago. [1] ¶ 31. The Academy provides continuing education and training opportunities to its members, hosts conferences, and publishes an industry newsletter. *Id.* The American Board of Dental Specialties is an Illinois corporation based in Suite 750C. [1] ¶ 29. Like the American Dental Association, the Board of Dental Specialties reviews and approves specialty boards that wish to issue certifications. [1] ¶ 29. Since its creation in 1967, it has only approved one board in the field of oral implantology: the American Board of Oral Implantology. [1] ¶¶ 30, 60.

[1] Bracketed numbers refer to entries on the district court docket.

[2] This is a simplification. *See* [1] ¶ 11. Historically, state dental boards delegated to the American Dental Association the power to "(i) determine which fields of dentistry qualify as specialties, and (ii) authorize specialty certifying boards to certify dentists as specialists within a given field." *Id.* The American Dental Association recognizes nine specialties, but oral implantology (the "field of dentistry dealing with the diafvgnosis, surgical placement, prosthetic reconstruction, and maintenance of dental implants," [1] ¶ 5) is not one of them. [1] ¶ 50.

The American Board of Oral Implantology is an Illinois corporation that issues certifications **[**5]** to dentists that practice oral implantology (and provides other continuing education services). [1] ¶ 30. It is based in Suite 750. *Id.*[3]

These entities' efforts to change the status quo included lobbying and litigation. [1] ¶¶ 12, 63, 65. In New Jersey, the American Board of Dental Specialties petitioned the state's board of dentistry to relax its advertising restrictions. [1] ¶ 65. Elsewhere, the Academy filed a lawsuit alleging that Indiana violated the Sherman Act when it delegated regulatory authority to the American Dental Association. [1] ¶ 69. There are other examples, the earliest of which dates back to 2010. *See* [1] ¶¶ 63, 64, 70, 71. In the process, the defendants told state legislatures and courts that, if granted the authority to approve specialty certifying boards themselves, they would be neutral and impartial. [1] ¶¶ 14, 70, 72.

Defendants have also sought to influence public opinion. *See* [1] ¶ 73. During an interview, the Academy's general counsel (Frank Recker) said that the Board of Dental Specialties would "not consider competition, political decisions, or turf wars," and that its decisions would not be "made by a group of competitors who could be economically or politically **[**6]** affected by their own decisions." [1] ¶ 73. Ronald Brown, the former secretary of the Board of Dental Specialties, wrote that "[i]t is hoped for that the [Board of Dental Specialties] will take over from the ADA with respect to emerging dental specialties." *Id.* ¶ 74.

Their efforts have partially paid off: in at least six states, dentists are not restricted to advertising only ADA-approved certifications. [1] ¶¶ 13, 75; *see* footnote 8 **[*899]** below. Until one of them—Ohio—finishes amending its rules, dentists there can only advertise their certifications if they were issued by specialty certifying boards approved by either the American Dental Association or the American Board of Dental Specialties. [40] at 13 n.5.

The plaintiffs are in the business of oral implantology certifications, too. *See* [1] ¶ 7. Similar to the Academy, plaintiff International Congress of Oral Implantologists provides continuing education services. [1] ¶ 7. It also issues certifications to oral implantologists. [1] ¶ 44. In 2017, it formed plaintiff United States Board of Implantology, which wants to be approved by the American Board of Dental Specialties as a specialty certifying board (like the American Board of Oral Implantology) **[**7]** for dentists in the field of oral implantology. [1] ¶¶ 7, 45. It has designed its own rigorous process for determining whether an oral implantology specialist should receive a certification. [1] ¶ 46.

The United States Board of Oral Implantology set out to obtain that approval in early 2018. [1] ¶¶ 16, 87. It submitted an application to the American Board of Dental Specialties that, according to the complaint, satisfied all of the relevant criteria (and included the $7,500 filing fee). [1] ¶ 91. It heard back about a month later, when Cheryl Parker (the executive director of both the American Board of Dental Specialties and the Academy) replied in writing (copying Dr. Michael Mashni, president of the American Board of Dental Specialties) to say that they had "suspended applications pending a comprehensive update to the application form." [1] ¶ 92. She also returned the filing fee. *Id.*

The United States Board of Oral Implantology demanded that the American Board of Dental Specialties complete the revisions quickly, [1] ¶¶ 21, 92-98, 100-102, and even offered to assist with the finalization of the application, [1] ¶ 99, but the revised form did not arrive for eight months. [1] ¶ 103. When **[**8]** it came, it included only minor changes to the substantive requirements of the original application, [1] ¶¶ 23, 88-89, 104, plus two procedural changes: (1) any new applications had to be submitted by February 1, 2019, and would not be considered until January of 2020, *id.* ¶¶ 24, 105, and (2) any appeals would be limited to procedural issues. *Id.* ¶¶ 25, 106. The defendants say the United States Board of Oral Implantology has not submitted a new application. [42] at 7.

The plaintiff's theory is that these actions harmed competition. They acknowledge that the defendants' lobbying and litigation efforts are protected, [1] ¶ 76, but say that the way they have exercised their authority shows it "was all a sham" meant to further "deceptive, anticompetitive, monopolistic behavior." [1] ¶ 77. They also allege that the defendants have constructively denied their application, and that the delay itself is harmful. *See* [1] ¶¶ 21, 84, 107;

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[3] The Academy chartered the American Board of Oral Implantology in 1967, [1] ¶¶ 6, 31, which in turn (along with three other professional organizations) formed the American Board of Dental Specialties in 2013. [1] ¶ 55. The Board of Dental Specialties then approved one of its creators, the Board of Oral Implantology, as a certifier of dentists in the field of implantology. [1] ¶ 30.

[40] at 18-19.[4] Again, they allege that the intent was to protect the American Board of Oral Implantology's monopoly on certifying dentists as oral implantology specialists. *See* [1] ¶ 19. Without the approval of the American Board of Dental Specialties to issue **[**9]** certifications, the United States Board of Oral Implantology will have trouble attracting customers because its certifications will not come with the usual benefits (e.g., the ability to advertise the certification, charge more for performing procedures, and receive reimbursements from insurance companies at increased rates). [1] ¶¶ 16, 26, 51, 110. And, **[*900]** as a result, the United States Board of Oral Implantology will lose membership dues, certification fees, and revenues associated with providing other professional services. *Id.* ¶ 111. This in turn will affect membership in the International Congress of Implantologists, because members of the United States Board of Oral Implantology must also be members of the International Congress of Implantologists. [1] ¶ 112.

Lastly, plaintiffs allege the defendants have made false and misleading representations of fact. [1] ¶ 128. According to the complaint, defendants told graduates of a renowned implantology institute that the United States Board of Oral Implantology would never be recognized as an organization capable of certifying oral implantology specialists. [1] ¶ 81. The American Board of Oral Implantology also published a newsletter in **[**10]** which its president (Kevin O'Grady) said that the United States Board of Oral Implantology does not have "the experience, knowledge and history to administer a psychometrically and legally defensible examination." [1] ¶¶ 82, 128. O'Grady also allegedly urged members of the Academy to tell other dentists that the United States Board of Oral Implantology "is not a 'bona fide credential.'" *Id.*

All of this—the constructive denial of the application, the lobbying and litigation, the statements to the press, and the creation of a "front organization" (presumably, the American Board of Dental Specialties), combined with the fact that the defendants are attempting to redirect internet traffic to their website by including the term "ICOI" in their website metatags—are, according to the complaint, part of a conspiracy to restrain trade and maintain a monopoly in the market for oral implantology specialty certifications. *See* [1] ¶¶ 1-2, 5, 79.

Plaintiffs define the relevant markets as follows: "(i) the market for certifying dentists as oral implantology specialists, and (ii) the markets to provide professional services associated with such certifications (e.g., continuing education courses, journal **[**11]** and other publication subscriptions, and conferences)." *Id.* ¶ 113. They allege that there are no effective or reasonable substitutes in either market, *id.* ¶ 114, and that the relevant geographic market is the United States. [1] ¶ 115.

III. Analysis

A. Ripeness

The claims are ripe. "A claim is unripe when critical elements are contingent or unknown." *Marusic Liquors, Inc. v. Daley, 55 F.3d 258, 260 (7th Cir. 1995)*. Disputes over pending applications normally do not ripen until the application is denied. *See* *Hendrix v. Poonai, 662 F.2d 719, 722 (11th Cir. 1981)* (declining to address antitrust claims while doctor's application to be readmitted at a hospital was pending because the complaint asked the court to deliver an "opinion advising what the law would be upon a hypothetical state of facts"); *MD Pharmaceutical v. DEA, No. 95-1474, 95-1475, 1996 U.S. App. LEXIS 7263, 1996 WL 135318, at *1 (D.C. Cir. Feb. 2, 1996)*.

The allegations here are different. There is nothing pending; the application in question was returned without being approved. [1] ¶ 92. The defendants say this was not a denial of the application, *see* [34] at 15, but there is little difference between a denial and a declination to consider an application. And according to the complaint, it was all a ruse; their true intent was to permanently prevent the plaintiffs from entering the market. [1] ¶ 19; [40] at 18-19. The

[4] They add that the new review procedures "essentially ensure" that the American Board of Dental Specialties is able to "perpetually protect the [American Board of Oral Implantology's] status as the sole specialty certifying board in oral implantology." [1] ¶ 25.

harm here includes the refusal to consider **[**12]** the application, and that sets this case apart from those where the only **[*901]** alleged harm is the anticipated denial of the application.

The return of the application is harm enough. Even if the plaintiffs had immediately submitted a new application under the revised guidelines, and even if the defendants had granted that application, plaintiffs still would have suffered a two-year delay. [1] ¶ 87-89, 105. *See also* [1] ¶ 21 ("[d]elay meant more money for the [Academy] and [American Board of Oral Implantology], and always maintained the prospect that the [United States Board of Oral Implantology] would simply go away, with competition indefinitely foreclosed"). Delays can violate the Sherman Act. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 37, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*. Defendants' promises to abide by their new deadlines are better than nothing, but they cannot use those promises (and the possibility that the plaintiffs reapply) to manufacture a "contingent future event[s] that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States, 523 U.S. 296, 300, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998)*.

This case is also different than *Clapper v. Amnesty Int'l USA*, where there was only a "highly speculative fear" that respondents would be injured. *568 U.S. 398, 401, 410, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013)*. *See also* *Otrompke v. Hill, 592 Fed. App'x 495, 498 (7th Cir. 2014)* (plaintiff lacked standing to challenge constitutionality of rules **[**13]** governing admission to the Illinois bar when those rules were enacted after his original application had been denied, and when he declined to reapply). It is also not the harbinger that defendants make it out to be, *see* [42] at 8; deciding this dispute will have no bearing on standard application procedures. It will simply resolve whether defendants harmed competition when they prevented plaintiffs from entering the market. When "[t]he terms of the law are clear" and "their application straightforward," a claim is ordinarily ripe for decision. *Marusic Liquors, Inc., 55 F.3d at 260*. This case is no exception.

B. *Section 1* of the Sherman Act

Section 1 of the Sherman Act declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. Since it takes two to conspire, agreements do not violate the act if they are between a parent and a wholly-owned subsidiary, *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 759, 769-770, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*, or between "affiliated corporate entities [that] have a complete unity of interest." *D'Last Corp. v. Ugent, 863 F.Supp. 763, 768 (N.D. Ill. 1994)*, *aff'd*, *51 F.3d 275 (7th Cir. 1995)*. The deciding factor is whether the agreement results in the "sudden joining of two independent sources of economic power" that had been "previously pursuing separate interests." *Copperweld, 467 U.S. at 770-71*. "Substance, not **[**14]** form" controls. *Id. at 760*. *See also* *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 195, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)*.

Defendants see a *Copperweld* problem, but only because they read the complaint too narrowly. *See* [34] at 17-18. There is no allegation that any one defendant is a wholly owned (or even partially owned) subsidiary of another. There is no explicit allegation that any of them share profits. Absent the alleged conspiracy, each would be independent decision makers pursuing related but distinct economic interests: the Academy's interests in obtaining new, dues-paying members would be distinct from the American Board of **[*902]** Dental Specialties interest in receiving new, fee-generating applications from hopeful specialty certifying boards, which would be distinct from the American Board of Oral Implantology's interest in receiving new, fee-generating applications from hopeful oral implantology specialists. *See* [40] at 26-27.[5] Insofar as the complaint alleges that they all operate "as a single enterprise with common actors and common goals," it alleges that the conspiracy is what unites them. *See* [1] ¶ 62.

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[5] The complaint suggests, but does not quite allege, that in order to receive a certification from the American Board of Oral Implantology, dentists also must make payments to the Academy. *See* [1] ¶¶ 1, 4 (dentists seeking certifications "generally pay membership dues to their specialty certifying board and/or its sponsoring organization (such as the [Academy] or the [International Congress of Oral Implantologists])"). Assuming that is true, the Academy might have partially overlapping interests with the American Board of Oral Implantology (both the Academy and the American Board of Oral Implantology would receive

There is a snag, but not a determinative one. The complaint is so caught up with showing that collusion is happening that it neglects to describe a time when it was **[**15]** not. That makes it hard to know whether the three defendants ever acted in accordance with their theoretically distinct economic interests. This problem is especially acute with the allegations against the American Board of Dental Specialties; the complaint makes it seem as though the sole reason for its formation was to further the already-existing conspiracy. *See, e.g.*, [1] ¶ 1 (the American Board of Dental Specialties is a "front organization" meant to "ensure only that members of the [Academy] and [the American Board of Oral Implantology] could receive the coveted (and financially valuable) specialist certification"); [1] ¶ 8 (the American Board of Dental Specialties is a "shill organization," and "*all along* the intention was for it to be nothing more than an instrument of monopoly maintenance and destruction of competition") (emphasis added). *See also* [1] ¶ 31 (the Academy chartered the American Board of Dental Specialties "to act as its 'specialty certifying board branch'").

If true, there might be a *Copperweld* problem in alleging that the American Board of Dental Specialties conspired with anyone. But the complaint also contains facts that suggest the American Board of Dental **[**16]** Specialties remains (or at least was, at some point) independent. *See* [1] ¶ 57 (the American Board of Dental Specialties website says that it is "an independent organization," and that such independence is necessary for the "objective evaluation and determination of specialty areas"). A complaint should not be dismissed just because it has an internal contradiction, *Atkins v. City of Chicago, 631 F.3d 823, 832 (7th Cir. 2011)*, and drawing all reasonable inferences in the plaintiff's favor, *Ashcroft, 556 U.S. at 680-82*, the American Board of Dental Specialties was at some point independent enough to be considered separate for purposes of *Copperweld.* The conspiracy was possible.

But just because the conspiracy was possible does not mean it has been plausibly alleged. Conspiracies to restrain trade can be proven by either direct or circumstantial evidence. *In re Text Messaging Antitrust Litig., 630 F.3d 622, 629 (7th Cir. 2010)*. The parties agree that there is no direct evidence here. *See* [40] at 20-21. Circumstantial evidence can be enough if it includes "a mixture of parallel **[*903]** behaviors, details of industry structure, and industry practices, that facilitate collusion." *Id. at 627*. Parallel behaviors include those which "would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance **[**17]** understanding among the parties," and "conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement." *Id.* (citing *Bell, 550 U.S. at 557 n.4*).

Plaintiffs' circumstantial case is thin. They cite two[6] instances of parallel conduct, neither of which is all that unusual. *See* [40] at 22. The first is the forming of the American Board of Dental Specialties. *Id.* Leaving aside the observation that this was an action taken by the American Board of Oral Implantology and three non-defendants, [1] ¶ 55, forming an independent entity to serve as a body that approves specialty certifying boards is not an action so unusual or indicative of restricted freedom that it gives rise to an inference of an anticompetitive agreement.[7]

The only other allegedly parallel, non-protected action was the constructive denial of the United State Board of Oral Implantology's application. [40] at 22. But the complaint does not allege facts that suggest the defendants conspired together to accomplish that result; the American Board of Dental Specialties (along with defendants Parker and Mashni, discussed below) acted unilaterally. *See* [1] ¶ 86-106. The complaint **[**18]** says that their conduct "reveal[s] the hidden hands of [their] sponsors," [1] ¶ 107, but does not explain how or why. At most, one other application was denied without citation to a "legitimate, substantive" reason, [40] at 29 n.18, but without knowing the

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more money if more dentists applied for certifications from the American Board of Oral Implantology). But partial overlap is not enough—there must be "complete unity." *D'Last, 863 F.Supp. at 768*.

[6] The defendants engaged in parallel litigation and lobbying, but the complaint admits that such conduct is exempt under the *Noerr-Pennington* doctrine. *See* [1] ¶ 76; *E. R. R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*.

[7] That is, after all, fairly similar to what the International Congress of Oral Implantologists did when it formed the United States Board of Oral Implantology to serve as a body that approves certification applications from dentists.

total number of applications, these two instances fail to raise the inference that the decisions were anything other than routine, independent decisions by the certifying entity.

The other allegations do not push the plaintiffs' theory from possible to plausible. Allegations about market share could be used to suggest a vertical conspiracy, but such allegations are more compelling in the horizontal-agreement context (when they are necessary to show the conspiracy could have been effective). In the context of a vertical agreement, the fact that the American Board of Oral Implantology has a 100% market share is at most consistent with the inference the plaintiffs seek to raise, rather than a necessary precondition; the defendants are in theory depending on the American Board of Dental Specialties to perpetuate the monopoly, so the fact that the American Board of Oral Implantology has power is beside the point. Nor is the market naturally **[**19]** "ripe for collusion," at least not for the reason the plaintiffs say it is. The complaint does not explain in what way the American Board of Dental Specialties needed either the Academy or the American Board of Oral Implantology to restrict access to the relevant market. *See* [40] at 23. If there was a profit-sharing arrangement, the American Board of Dental Specialties might need the **[*904]** American Board of Oral Implantology or the Academy to pass along the money it received from its applicants and members, respectively, but there is no such allegation. Nothing else about the market for certifications suggests it is uniquely suited to collusion (other than, perhaps, the fact that there are only a few entities—the ADA and the American Board of Dental Specialties—that are empowered to approve the boards that issue the certifications).

The defendants did make public statements critical of the United States Board of Oral Implantology, but those statements do not "endorse[] an industry strategy to reduce ... output," or otherwise plausibly suggest concerted efforts to restrain trade. *Standard Iron Works v. ArcelorMittal, 639 F.Supp.2d 877, 897 (N.D. Ill. 2009)*. They simply reflect the belief that the United States Board of Oral Implantology's product was inferior. And **[**20]** even if the defendants had the opportunity to collude because they shared office space, [40] at 23-24, those allegations are less compelling in the context of a vertical conspiracy when there are plenty of "legitimate reasons to exchange information." *See* *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*. Taken together and as a whole, the allegations in the complaint fall short of plausibly suggesting a conspiracy.

For some of the defendants, the complaint is silent about their role in a conspiracy. Lozada is the vice president of the American Board of Oral Implantology, and has held positions at the Academy and American Board of Dental Specialties as well. [1] ¶ 36. Gowey is the director of the American Board of Oral Implantology and the secretary of the American Board of Dental Specialties. [1] ¶ 35. Together, the complaint alleges that they "directed" the conduct of the defendants, [1] ¶¶ 33-37, an accusation made somewhat more believable by the fact that they all shared office space. But that is it, and that is not enough. O'Grady is the president of the American Board of Oral Implantology (and a former president of both the Academy and the American Board of Dental Specialties). [1] ¶ 34. To the degree the complaint alleges that **[**21]** he was involved in the conspiracy, it ties his liability to the allegedly derogatory remarks he made in a summer newsletter. *See* [40] at 25; [1] ¶ 82. That, too, falls short of plausibly alleging that he conspired to violate the Sherman Act.

The complaint does not fare much better with the other individual defendants. First, directors of an organization cannot conspire with their organization—that is covered by *Copperweld, 467 U.S. at 769* ("officers or employees of the same firm do not provide the plurality of actors imperative for a *§ 1* conspiracy")—so Cherly Parker did not conspire with either the American Board of Dental Specialties or the Academy because she is a director of both. [1] ¶ 33. And Dr. Mashni did not conspire with the American Board of Dental Specialties because he is its president. [1] ¶ 37. At most, the complaint alleges that Parker participated in the denial of the United States Board of Implantology's application because she favored the Academy's interests over the American Board of Dental Specialties' interests. But a preference is not a suggestion of an agreement and is at most consistent with a conspiracy. *See, e.g.* *Iqbal, 556 U.S. at 678* ("[w]here a complaint pleads facts that are merely consistent with a defendant's **[**22]** liability, it stops short of the line between possibility and plausibility of entitlement to relief"); *Standard Iron Works, 639 F.Supp.2d at 900* ("[w]hile the complaint need not contain detailed 'defendant by defendant' allegations, it 'must allege that each individual **[*905]** defendant joined the conspiracy and played some role in it because, at the heart of an antitrust conspiracy is an agreement and a conscious decision by each defendant to join it'").

The Academy's alleged involvement is also minimal. It chartered the American Board of Oral Implantology in 1967, [1] ¶ 6, and almost fifty years later, engaged in protected lobbying and litigation. [1] ¶¶ 13, 70. "Generally," dentists have to make payments to both the specialty certifying board (the American Board of Oral Implantology) "and/or" its sponsoring organization (the Academy) in order to receive a certification, *see* [1] ¶¶ 1, 4, so the Academy may have had a motive for preserving the market share of the American Board of Oral Implantology. And it shared office space with the other defendants, so it had an opportunity. But nothing it did suggests an agreement to restrict competition; it was all either protected activity or innocuous and consistent with competitive instinct. **[**23]** *In re Text Messaging Antitrust Litig., 630 F.3d at 629*.

The allegations against the American Board of Oral Implantology are similarly modest. Allegedly, it has a monopoly in the market for oral implantology certifications. *See* [1] ¶ 5; [40] at 23. But it has that monopoly as a result of actions taken by a different entity (the American Board of Dental Specialties), and the complaint does not allege facts suggesting even basic details about the terms of an agreement the two might have shared. The complaint does allege that the American Board of Oral Implantology acted as "puppet-master" while pulling strings at the American Board of Dental Specialties, [1] ¶ 19, but neglects to include facts that elaborate on what, exactly, that means. It also shares office space with the other defendants and has overlapping leadership, [1] ¶ 62 (a)—(b), and one might imagine that its leaders sat down and agreed to restrict competition. But none of the Board of Oral Implantology's members played any role in the denial of the plaintiff board's application; Parker and Dr. Mashni are directors at the Academy and the American Board of Dental Specialties—not the American Board of Oral Implantology. [1] ¶¶ 33, 37. Again, their involvement in the conspiracy has **[**24]** not been plausibly alleged.

The allegations against the American Board of Dental Specialties are more detailed, but they also depict unilateral rather than parallel activity. According to the complaint, the American Board of Dental Specialties duped states into believing it would operate neutrally but then exercised its discretion to protect the American Board of Oral Implantologists' monopoly. *See* [1] ¶¶ 8, 30, 60 (the only specialty certifying boards that the American Board of Dental Specialties has ever approved are the four boards that helped found it). The American Board of Dental Specialties was also the only entity directly involved in the pretextual, constructive denial of the United States Board of Oral Implantology's application. [1] ¶ 107. As far as cooperation, the complaint again alleges that it met and conspired with other entity defendants behind closed doors in Suite 750 of a building in Chicago, and that it was particularly easy to do so because the defendants have overlapping leadership. [1] ¶ 62 (a)—(b). Cooperation was possible but not plausible.

Even if the complaint had sufficiently alleged a conspiracy, it does not allege a cognizable restraint on trade. "There **[**25]** can be no restraint of trade without a restraint." *Schachar v. Am. Acad. of Ophthalmology, Inc., 870 F.2d 397, 397 (7th Cir. 1989)*. Similarly, "'when a trade association provides information' (by giving its approval in that case, its disapproval in this case) 'but does not constrain **[*906]** others to follow its recommendations, it does not violate the antitrust laws.'" *Lawline v. Am. Bar Ass'n, 956 F.2d 1378, 1383 (7th Cir. 1992)*; *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 396 (7th Cir. 1993)* ("the failure of a private, standard-setting body to certify a product is not, by itself, a violation of *§ 1*" of the Sherman Act); *Patel v. American Bd. of Psychiatry & Neurology, Inc., No. 89 C 1751, 1989 U.S. Dist. LEXIS 14011, 1989 WL 152816, at *3 (N.D. Ill. Nov. 20, 1989)*; *Consol. Metal Prod., Inc. v. Am. Petroleum Inst., 846 F.2d 284, 292 (5th Cir. 1988)* ("a trade association that evaluates products and issues opinions, without constraining others to follow its recommendations, does not per se violate *section 1* when, for whatever reason, it fails to evaluate a product favorably to the manufacturer"). "This is so even where the organization at issue has a towering reputation." *Lawline, 956 F.2d at 1384*. *See also Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717, 736 (7th Cir. 2004)* ("vertical exclusive distributorships ... are presumptively legal").

The market and product alleged here make this like other cases involving professional-association endorsements. *See Schachar, 870 F.2d at 397*; *Lawline, 956 F.2d at 1384*. If the certifying entity lacks the power to prevent (or has not prevented) the professional from practicing without a certification, there has been no antitrust violation. Here, plaintiffs represent a type of rival certifier suing the group that issues a certification **[**26]** that plaintiffs would like to have. But the defendants have not prevented any dentists from practicing implantology and they have not prevented plaintiffs from issuing their own certifications. And they lack the authority to prevent dentists from advertising those certifications once they are issued.

The lack of restraint is apparent. According to the complaint, in forty-four states, dentists cannot advertise any certifications, and in six, dentists can advertise certifications that are backed by specialty certifying boards approved by the American Board of Dental Specialties. [1] ¶ 75. Absent is an allegation that dentists in those six states cannot also advertise certifications issued by the United States Board of Oral Implantology.[8] At most, in Ohio, there are restraints on advertising certifications issued by plaintiffs that do not apply equally to certifications issued by defendants (and, apparently, those restrictions are temporary). *See* [34] at 23. But even then, the culprit is the Ohio state government, not the defendants.

There are no other restraints occurring in the markets set out in the complaint. The plaintiffs say that the restraints are occurring in "(i) the market for **[**27]** certifying dentists as oral implantology specialists, and (ii) the markets to provide professional services associated with such certifications (e.g., continuing education courses, journal and other publication subscriptions, and conferences)." [1] ¶ 113. But they have failed to allege any restraint that prevents them from certifying dentists as oral implantology specialists and providing related professional services. Trade in that market occurs when dentists pay application fees to specialty certifying boards, and specialty certifying boards consider the dentists' credentials and, if justified, issue the certification. The defendants cannot prevent (and have not prevented, judging from the allegations in the complaint) dentists from paying an application fee to the **[*907]** United States Board of Oral Implantology in return for one of its certifications.

The American Board of Dental Specialties has the power to place (or decline to place) its seal of approval on a specialty certifying board. So if the defendants have restrained trade, they have done so in a different market: that for issuing certifications that are backed by the American Board of Dental Specialties. The problem is that "[p]roduct **[**28]** markets are not defined in terms of one trademark or another." *Generac Corp. v. Caterpillar Inc., 172 F.3d 971, 977 (7th Cir. 1999)*. For the same reason, the product market cannot be defined here in terms of the backing of the American Board of Dental Specialties.

The plaintiff's alleged harms derive from the defendants' "towering reputation," another give-away that this is not an antitrust violation. *Lawline, 956 F.2d at 1384*. The theory is that dentists will not value the plaintiffs' certifications if they are not backed by the American Board of Dental Specialties, and that this will cause the American Board of Oral Implantology to lose members (which will in turn cause the International Congress of Implantologists to lose members, too). [1] ¶¶ 111, 112. But that is just another way to say that the source of the harm is the American Board of Dental Specialties' reputation, and that is not enough. The *§ 1* claims are dismissed.

C. ***Section 2*** of the Sherman Act

Section 2 of the Sherman Act prohibits monopolization. *15 U.S.C. § 2*. There are two elements to a claim under *§ 2*: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." **[**29]** *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. When the plaintiff is a private party, it must also show that "the monopolization caused 'injur[y].'" *Comcast Corp. v. Behrend, 569 U.S. 27, 43, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)*.

The complaint alleges that all of the defendants violated *§ 2* of the Sherman Act, but only identifies one that has monopoly power: the American Board of Oral Implantology. *See* [40] at 22-23. The implication, albeit it one not

[8] The motion to dismiss cites state statutes, federal case law and other administrative rules showing that, in at least five of those remaining states, dentists can advertise certifications from the United States Board of Oral Implantology as freely as they can advertise certifications by the American Board of Oral Implantology. [34] at 23.

explicit in the complaint, is that the remaining defendants conspired to monopolize the market for certifying dentists as oral implantology specialists. *See* [1] ¶¶ 123-126. But the complaint adds no facts related to the conspiracy that are specific to the monopolization claim, *see id.*, and fails to adequately allege a conspiracy under *§ 1*, *see above*, so the complaint fails to allege facts that make it plausible that defendants conspired to monopolize the relevant market or willfully engaged in anticompetitive conduct. The *§ 2* claims against the defendants, other than the Board of Oral Implantology and Board of Dental Specialties, are dismissed. Even if the American Board of Dental Specialties did not possess monopoly power in the relevant market, they were at least in a position to help the American Board of Oral Implantology obtain it, so it is possible they combined **[**30]** or conspired to monopolize.

The parties agree that the plaintiffs must adequately allege a restraint applicable to the "relevant market." *Republic Tobacco Co., 381 F.3d at 738*. The relevant market consists of both "a product and a geographic dimension," *id.*, and is "comprised of those 'commodities reasonably interchangeable by consumers for the same purposes.'" *Fishman v. Estate of Wirtz, 807 F.2d 520, 531 (7th Cir. 1986)*. **[*908]** *See also Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)* ("[w]here the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted").

Plaintiffs have adequately alleged that sellers in the market for certifying dentists as oral implantology specialists reach consumers across the United States. Each individual state may restrict the ability to advertise those certifications, [34] at 26, but the certifications have value beyond the dentists' ability to advertise them (for instance, dentists can charge more if they have certain certifications, [40] at 33). The certifications **[**31]** are not geographically limited, either (i.e., they indicate to consumers that the recipient has qualifications that are valuable in any state). *See* [40] at 32. Their relevant geographic market is the United States.

But there is no plausible market power in an appropriate product market. "If rivals may design and offer a similar package for a similar cost, there is no barrier, and without a barrier there is no market power." *Will v. Comprehensive Accounting Corp., 776 F.2d 665, 672 (7th Cir. 1985)*. "[T]he power to control a given market's total output" is "a necessary prerequisite to obtaining power over price or monopoly power," and if there is no power to control output, "it matters little that high barriers to entry might exist to help that firm maintain monopoly power it could never achieve." *Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1415 (7th Cir. 1989)*. But at least in the "market for certifying dentists as oral implantology specialists,"[9] there is nothing preventing the plaintiffs from designing and offering a similar certification, in part because the plaintiffs have not alleged that there is anything enabling the defendants to limit the market's total output.

The complaint fails to allege monopoly power in the second market for similar (and additional) reasons. The second market is derivative of the **[**32]** first, *see* [1] ¶ 113 (the "markets to provide professional services associated with such certifications (e.g., continuing education courses, journal and other publication subscriptions, and conferences)"), so if there is no market power in the first market, there is none in the second market, either. It is also too vague to satisfy even the more modest pleading standards for non-conspiracy claims; it identifies at least four examples of products that might be sold in that market, and acknowledges the list is incomplete. *Hooper v. Proctor Health Care Inc., 804 F.3d 846, 851 (7th Cir. 2015)* (the plaintiff must plead "sufficient facts to put [the defendant] on notice of his claim"); **[*909]** *Republic Tobacco Co., 381 F.3d at 738* (the plaintiff must "precisely establish a relevant market"). Further, the complaint also alleges that other entities (notably, the American Dental

[9] The defendants might have limited output in "the market for certifications issued by specialty certifying boards that were approved by the American Board of Dental Specialties." But that is not the market alleged in the complaint. And again, "[p]roduct markets are not defined in terms of one trademark or another." *Generac Corp., 172 F.3d at 977*. *See also Kaiser Aluminum & Chem. Corp. v. F.T.C., 652 F.2d 1324, 1330 (7th Cir. 1981)* ("well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes," but the "boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors").

Association and the International Congress of Oral Implantology) are currently providing such professional services, and there is no allegation that any defendant has monopoly power in that market.

The complaint also does not allege any anticompetitive conduct. "***Antitrust law*** does not compel your competitor to praise your product or sponsor your work," *Schachar, 870 F.2d at 399 (7th Cir. 1989)*, and even false statements do not amount to anticompetitive conduct because **[**33]** they do not curtail output—they just "set the stage for competition in a different venue: the advertising market." *Sanderson v. Culligan Int'l Co., 415 F.3d 620, 623 (7th Cir. 2005)*. None of the defendants' alleged statements suffice as anticompetitive conduct, *see, e.g.*, [1] ¶¶ 13-14, 63-77, 81-83, even when taken in combination with the alleged power that the American Board of Dental Specialties has to approve specialty certifying boards. *Sanderson, 415 F.3d at 624* ("[c]ommercial speech is not actionable under the antitrust laws"). With regards to the denial of the application, the defendants were free to decline to deal with the plaintiffs. *See* *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)*. Plaintiffs' *§ 2* claim is dismissed.

D. The Illinois Uniform Deceptive Trade Practices Act

Diversity jurisdiction exists over plaintiffs' state-law claim. The plaintiffs are citizens of New Jersey and Washington D.C., and the defendants are citizens of Illinois, Ohio, Wisconsin and California. [1] ¶¶ 27-38; *28 U.S.C. § 1332*.[10]

Under Illinois law, "[a] person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, the person: (8) disparages the goods, services, or business of another by false or misleading representation of fact." *815 Ill. Comp. Stat. Ann. 510/2*. Neither party disputes that this claim sounds in fraud and must be **[**34]** alleged with particularity. *Fed. R. Civ. P. 9(b)*; *Borsellino v. Goldman Sachs Grp., Inc., 477 F.3d 502, 506-07 (7th Cir. 2007)*; [34] at 33; [40] at 40. That is, the complaint must allege "the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff." *Uni*Quality, Inc. v. Infotronx, Inc., 974 F.2d 918, 923 (7th Cir. 1992)*.

The misrepresentation must be sufficiently tied to Illinois. In order to **[*910]** state a claim under a similar act (the *Illinois Consumer Fraud and Deceptive Practices Act, 815 Ill. Comp. Stat. Ann. 505/1 et seq.*), a plaintiff must allege that the statements in question occurred "primarily and substantially in Illinois." *Avery v. State Farm Mut. Auto. Ins. Co., 216 Ill.2d 100, 187, 835 N.E.2d 801, 296 Ill. Dec. 448 (2005)* ("there is no single formula or bright-line test for determining whether a transaction occurs within this state" under *815 Ill. Comp. Stat. Ann. 505/1 et seq.*).[11] Illinois courts have considered "the place where a company policy is created or where a form document is drafted" to be

[10] The complaint also lists fifty unnamed Doe defendants "whose identities and roles will be developed through discovery and Plaintiffs' independent investigations." [1] ¶ 38. Normally, "'John Doe' defendants are not permitted in federal diversity suits" because "the existence of diversity jurisdiction cannot be determined without knowledge of every defendant's place of citizenship." *Howell by Goerdt v. Tribune Entm't Co., 106 F.3d 215, 218 (7th Cir. 1997)*. But "[a]n exception applies when the John Does are nominal parties—nothing more than placeholders 'in the event that during discovery [the plaintiff] identifie[s] any additional defendants he wishe[s] to add to the suit." *Pain Ctr. of SE Indiana LLC v. Origin Healthcare Sols. LLC, 893 F.3d 454, 459 (7th Cir. 2018)* (citing *Moore v. Gen. Motors Pension Plans, 91 F.3d 848, 850 (7th Cir. 1996))* ("[t]he 150 John Does are mere placeholders, so we can safely ignore them for purposes of diversity jurisdiction"). The Doe defendants in the complaint are "mere placeholders," so "jurisdiction is secure." *Id.*

[11] Other courts have applied this rule to the *Illinois Uniform Deceptive Trade Practices Act*. *See, e.g.,* *Underground Solutions, Inc. v. Palermo, No. 13 C 8407, 2014 U.S. Dist. LEXIS 132441, 2014 WL 4703925, at *10 (N.D. Ill. Sept. 22, 2014)*; *Purepecha Enters. v. El Matador Spices & Dry Chiles, No. 11 C 2569, 2012 U.S. Dist. LEXIS 120499, 2012 WL 3686776, at *15 (N.D. Ill. Aug. 24, 2012)*; *Maui Jim, Inc. v. SmartBuy Guru Enters., No. 1:16 CV 9788, 2018 U.S. Dist. LEXIS 10093, 2018 WL 509960, at *5 (N.D. Ill. Jan. 23, 2018)* ("[a]lthough the [U]DTPA does not contain text expressly confining its application to events or circumstances arising in Illinois, there is a 'long-standing rule of construction in Illinois which holds that a 'statute is without extraterritorial effect unless a clear intent in this respect appears from the express provisions of the statute'").

relevant to whether a statement or transaction occurred "primarily and substantially in Illinois." *Avery, 216 Ill. 2d at 187*. They have also found relevant the location "where the injury or deception took place." *Int'l Profit Assocs. v. Linus Alarm Corp., 2012 IL App (2d) 110958, ¶ 11, 971 N.E.2d 1183, 361 Ill. Dec. 661*. *See also* *Specht v. Google, Inc., 660 F.Supp.2d 858, 866 (N.D. Ill. 2009)* ("[c]ourts consider several factors to determine whether a transaction occurred 'primarily and substantially' in Illinois, bringing a claim under the ambit of the [Illinois Uniform Deceptive **[**35]** Trade Practices Act], including: (1) the plaintiff's residence, (2) where the misrepresentation was made, (3) where the damage to the plaintiff occurred, and (4) whether the plaintiff communicated with the defendant in Illinois"); *Shaw v. Hyatt Int'l Corp., No. 05 C 5022, 2005 U.S. Dist. LEXIS 28250, 2005 WL 3088438, at *2 (N.D. Ill. Nov. 15, 2005)*, *aff'd*, *461 F.3d 899 (7th Cir. 2006)*. In addition, a claim will lie "when the quality of [one's] goods or services is attacked," *Allcare, Inc. v. Bork, 176 Ill.App.3d 993, 1000, 531 N.E.2d 1033, 126 Ill. Dec. 406 (1st Dist. 1988)*, but not when the statement was an "expression[s] of opinion." *Soderlund Bros. v. Carrier Corp., 278 Ill.App.3d 606, 620, 663 N.E.2d 1, 215 Ill. Dec. 251 (1st Dist. 1995)* ("[m]atters of fact are distinguishable from expressions of opinion").

The complaint alleges that all defendants violated the Illinois Uniform Deceptive Trade Practices Act, but cites only a few statements, leaving most of the defendants out of the claim entirely. [1] ¶¶ 127-130. First, the complaint alleges that the American Board of Oral Implantology published a newsletter in which O'Grady was quoted as saying that the United States Board of Oral Implantology does not have the "experience, knowledge and history to administer a psychometrically and legally defensible examination." [1] ¶ 82. In the same newsletter, O'Grady said that the American Board of Oral Implantology is the "only bona fide credential in implantology." *Id.* Those statements **[**36]** are specific enough under *Federal Rule of Civil Procedure 9(b)*; the allegation includes "the identity of the person making the misrepresentation" (O'Grady and the American Board of Oral Implantology), the time, place, and content of the misrepresentation" (a summer, 2018 newsletter) and "the method by which the misrepresentation was communicated to the plaintiff" (publication). *Uni*Quality, Inc., 974 F.2d at 923*. The statements were phrased **[*911]** conclusively and without reference to probabilities or the possibility that O'Grady was incorrect; they were not phrased as opinions. And while a statement must be disparaging of the quality of a plaintiffs' goods, *Allcare, Inc., 176 Ill.App.3d at 999*, here, the goods in question are in part derivative of the plaintiffs' reputation, so it is enough to allege that the statements disparaged the plaintiffs themselves.

But the complaint does not adequately allege that this statement occurred "primarily and substantially" in Illinois. True, the American Board of Oral Implantology is an Illinois corporation with its headquarters in Chicago, [1] ¶¶ 30, 60, and the location where a document is drafted is relevant. O'Grady resides in Ohio and serves as president of the American Board of Oral Implantology. [1] ¶ 34. But the complaint does not allege where **[**37]** the newsletter was published, or whether its readers were located "primarily and substantially" in Illinois. [1] ¶ 82. That makes it too speculative to infer where the damage (and where the misrepresentation) actually occurred.

Second, the complaint alleges that the "defendants" told graduates of Misch Institute that "the USBOI will never be recognized as an organization capable of certifying oral implantology specialists." [1] ¶ 81. This allegation is not particular enough; it does not allege who said it or where they were located at the time. *Uni*Quality, Inc., 974 F.2d at 923*. The complaint also fails to allege that this statement was made "primarily and substantially in Illinois." *Avery. 216 Ill.2d at 187*.

The complaint also alleges that there were "myriad other [statements] made by all defendants, including, on information and belief, the Doe Defendants." [1] ¶ 130. But these allegations are insufficient to meet the pleading requirements under *Rule 9(b)*, and they also fail to allege that they were made primarily and substantially in Illinois. The complaint does not identify any other statements[12] particularly enough to survive the motion to dismiss, either; that count of the complaint is dismissed in its entirety.

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[12] Plaintiffs attached to their opposition an email that the Academy sent to its members saying it was the "only organization that serves implant dentists." [40-5] at 2. But even if misleading, the statement is not disparaging to the plaintiffs' goods or services; it does not even mention them. *See* *815 Ill. Comp. Stat. Ann. 510/2*.

IV. Conclusion

Defendants' **[**38]** motion to dismiss is granted. All dismissals are without prejudice. *See* *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana, 786 F.3d 510, 519 (7th Cir. 2015)*. A status hearing is set for June 28, 2019, at 9:30 a.m.

ENTER:

/s/ Manish S. Shah

Manish S. Shah

United States District Judge

Date: May 30, 2019

Estate of Schertz v. Jackson Nat'l Life Ins. Co.

United States District Court for the Central District of California

May 31, 2019, Decided; May 31, 2019, Filed

Case No.: CV 19-01926-CJC(PLAx)

Reporter
2019 U.S. Dist. LEXIS 242428 *; 2019 WL 13178510

THE ESTATE OF THOMAS E. SCHERTZ and LISA RICHARDSON SCHERTZ, Plaintiffs, v. JACKSON NATIONAL LIFE INSURANCE COMPANY, GBS INSURANCE & FINANCIAL SERVICES INC., f/k/a FLYNN ASSOCIATES, and DOES 1 through 50, inclusive, Defendants.

Subsequent History: Claim dismissed by *Schertz v. Jackson Nat'l Life Ins. Co., 2019 U.S. Dist. LEXIS 242429, 2019 WL 13178513 (C.D. Cal., July 19, 2019)*

Partial summary judgment denied by, Summary judgment granted by, Judgment entered by *Estate of Schertz v. Jackson Nat'l Life Ins. Co., 2020 U.S. Dist. LEXIS 175885 (C.D. Cal., Sept. 23, 2020)*

Core Terms

allegations, reinstated, motion to dismiss, elder abuse, mail, negligent misrepresentation, leave to amend, misrepresentation, brings, terms, fraudulent

Counsel: **[*1]** For The Estate of Thomas E. Schertz, Lisa Richardson Schertz, an individual, Plaintiffs: R Timothy O'Connor, LEAD ATTORNEY, R Timothy O'Connor Law Offices, Westlake Village, CA; Demos P Anagnos, Demos Anagnos Law Offices, Culver City, CA.

For Jackson National Life Insurance Company, a Michigan Corporation, Defendant: Austin D Schaefer, LEAD ATTORNEY, Craig R Bockman, Jones Bell Abbott Fleming and Fitzgerald LLP, Los Angeles, CA.

Judges: CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE.

Opinion by: CORMAC J. CARNEY

Opinion

ORDER GRANTING GBS INSURANCE & FINANCIAL SERVICES INC.'S MOTION TO DISMISS [Dkt. 11] AND GRANTING IN SUBSTANTIAL PART JACKSON NATIONAL LIFE INSURANCE COMPANY'S MOTION TO DISMISS [Dkt. 12]

I. INTRODUCTION

This action arises out of Defendant Jackson National Life Insurance Company's denial of Plaintiff Lisa Richardson Schertz's life insurance claim under the policy of her late husband, Thomas E. Schertz. On January 14, 2019, Plaintiff Schertz filed this action in Los Angeles County Superior Court against Defendants Jackson National Life

Insurance Company ("Jackson"), GBS Insurance & Financial Services Inc., formerly known as Flynn Associates ("GBS"), and Does 1 through 50, inclusive. (Dkt. 1-1 [Complaint]; **[*2]** *see* Dkt. 9 [Operative First Amended Complaint, hereinafter "FAC"].) On March 15, 2019, Defendants removed the action to this Court pursuant to diversity jurisdiction. (Dkt. 1 [Notice of Removal].) Before the Court are Defendants GBS and Jackson's separate motions to dismiss Plaintiff's First Amended Complaint. (Dkts. 11, 12.) For the following reasons, GBS's motion is **GRANTED**, and Jackson's motion is **GRANTED IN SUBSTANTIAL PART**.[1]

II. BACKGROUND

Plaintiff's late husband, Thomas E. Schertz, purchased a $500,000 life insurance policy (hereinafter "the Policy") from Valley Forge Life Insurance Company ("Valley Forge") on November 9, 1999. (FAC ¶ 12.) The Policy named Plaintiff Schertz as the sole beneficiary and was set to expire on November 1, 2042. (*See id.* ¶¶ 12, 15, 18.) On November 12, 1999, GBS's predecessor, Flynn Associates, "stamped and processed" the Policy. (*Id.* ¶ 16.) In September 2012, Jackson became the insurer of the Policy as a result of acquiring Valley Forge. (*Id.* ¶¶ 20, 22.) On July 19, 2013, Jackson sent Mr. Schertz a letter informing him that it had acquired the Policy. (*Id.* ¶ 23.) Jackson's letter allegedly "assured" Mr. Schertz that its acquisition "in no way alter[ed] **[*3]** the terms and conditions" of the Policy. (*Id.* ¶ 24.)

Some time in 2016, Jackson sent a letter to Mr. Schertz stating that the Policy had lapsed on March 3, 2016. (*Id.* ¶¶ 25-26.) Mr. Schertz then made "immediate" efforts to reinstate the Policy. (*Id.* ¶ 32.) He submitted a reinstatement application, which Jackson approved on July 13, 2016. (*Id.* ¶ 34.) Once Mr. Schertz paid the past-due premiums, Jackson returned the Policy to active status as of August 17, 2016. (*Id.*)

Mr. Schertz passed away on February 11, 2017, due to myocardial infarction, stroke, and hypertension. (*Id.* ¶ 36.) Plaintiff, as the Policy's sole beneficiary, timely filed a claim for the Policy's face value of $500,000. (*Id.*) On March 3, 2017, Jackson informed her that it would conduct a post-death investigation and review because Mr. Schertz's death occurred within two years of the Policy's reinstatement. (*Id.* ¶ 37.) On July 24, 2017, Jackson denied Plaintiff's claim. (*Id.* ¶ 39.) It explained that Mr. Schertz had failed to disclose certain health problems that would have caused Jackson to deny Mr. Schertz's application for reinstatement. (*Id.* ¶ 38.)

Plaintiff filed the instant action on January 14, 2019. She contends that **[*4]** Defendants were engaged in an "illicit scheme" to sell life insurance contracts to customers and then "knowingly deprive their heirs and beneficiaries of the proceeds from those contracts." (*Id.* ¶ 7.) In her capacity as personal representative for The Estate of Thomas E. Schertz[2] and as successor-in-interest to the decedent, she asserts claims for (1) financial elder abuse, (2) unfair business practices, (3) breach of contract, (4) breach of the implied covenant of good faith and fair dealing, (5) negligent misrepresentation, and (6 & 7) violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). She brings claims three and four against Jackson only. Both Defendants move to dismiss the claims against them pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. (Dkts. 11, 12.)

III. LEGAL STANDARD

A motion to dismiss under *Rule 12(b)(6)* tests the legal sufficiency of the claims asserted in the complaint. The issue on a motion to dismiss for failure to state a claim is not whether the claimant will ultimately prevail, but

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[1] Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* *Fed. R. Civ. P. 78*; Local Rule 7-15. Accordingly, the hearing set for June 3, 2019, at 1:30 p.m. is hereby vacated and off calendar.

[2] Jackson contends that The Estate of Thomas E. Schertz is not a proper party to this action. While The Estate of Thomas E. Schertz is listed on the caption page of the First Amended Complaint, Plaintiff does not name it as a party on any of the seven causes of action.

whether the claimant is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997)*. *Rule 12(b)(6)* is read in conjunction with *Rule 8(a)*, which requires only a short and plain statement of the claim showing that the pleader is **[*5]** entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. When evaluating a *Rule 12(b)(6)* motion, the district court must accept all material allegations in the complaint as true and construe them in the light most favorable to the nonmoving party. *Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994)*. The district court may also consider additional facts in materials that the district court may take judicial notice, *Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994)*, as well as "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading," *Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)*, *overruled in part on other grounds by* *Galbraith v. Cty. of Santa Clara, 307 F.3d 1119 (9th Cir. 2002)*.

However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*; *see also* *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (stating that while a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, courts "are not bound to accept as true a legal conclusion couched as a factual allegation" (citations and quotes omitted)). Dismissal of a complaint for failure to state a claim is not proper where a plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." *Twombly, 550 U.S. at 570*. In keeping with this liberal pleading standard, the district court should grant the plaintiff leave to amend if the **[*6]** complaint can possibly be cured by additional factual allegations. *Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995)*.

In federal court, a plaintiff alleging fraud must also "state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P. 9(b)*; *see* *Kearns v. Ford Motor Co., 567 F.3d 1120, 1145 (9th Cir. 2009)*; *UMG Recordings, Inc. v. Glob. Eagle Entm't, 117 F. Supp. 3d 1092, 1106 (C.D. Cal. 2015)*. Under *Rule 9(b)*, the plaintiff must set forth the "who, what, when, where, and how" of the alleged fraud. *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)*. When an artificial entity is the alleged perpetrator of the fraud, the plaintiff must "allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." *UMG Recordings, 117 F. Supp. 3d at 1107*.

IV. DISCUSSION

Financial Elder Abuse (Claim 1)

Plaintiff brings her first claim for financial elder abuse against both Defendants. The California Elder Abuse and Dependent Adult Civil Protection Act, *Cal. Welf. & Inst. Code § 15600 et seq.*, was enacted to "encourage private, civil enforcement of laws against elder abuse and neglect." *Negrete v. Fid. & Guar. Life Ins. Co., 444 F. Supp. 2d 998, 1001 (C.D. Cal. 2006)*. To qualify as an "elder" under the Act, an individual must be "65 years of age or older." *Cal. Welf. & Inst. Code § 15610.27*. An entity commits elder abuse when it "takes, secretes, appropriates, or retains real or personal property of an elder . . . for a wrongful use or with intent to defraud." *See id.* *§ 15610.30(a)(1)*. Any person or entity who assists in such conduct **[*7]** may also be held liable. *Id.* *§ 15610.30(a)(2)*. Plaintiff alleges that Defendants committed elder abuse by creating "an illicit scheme to make policy holders update their medical information even if there was a brief lapse in the policy as a condition of reinstatement." (FAC ¶ 45.)

Plaintiff has failed to state a plausible claim for financial elder abuse against either Defendant. Because this claim sounds in fraud, it must meet the heightened pleading standards of *Rule 9(b)*. *See* *Bertolina v. Wachovia Mortg., FSB, 2011 U.S. Dist. LEXIS 87937, 2011 WL 3473527, at *11 (N.D. Cal. Aug. 9, 2011)* (applying *Rule 9(b)* when "the gravamen of an alleged Elder Abuse Act violation is fraud"). The only allegations Plaintiff makes as to GBS are that its predecessor, Flynn Associates, stamped and processed Mr. Schertz's Policy on November 12, 1999. (FAC ¶ 16.) Although Mr. Schertz was over 65 years old when Jackson reinstated the Policy in 2016, he was only 51 years old when the only conduct alleged as to GBS occurred. Plaintiff has failed to explain how GBS took, appropriated, or retained—or assisted Jackson in taking, appropriating, or retaining—Mr. Schertz's property once he was 65. *See id.* § 15610.30(a)(1)-(2). Plaintiff's remaining allegations as to Jackson are likewise deficient. Plaintiff claims that Jackson "duped" policyholders like Mr. Schertz "by making **[*8]** them update their medical information." (*See* FAC ¶¶ 45-49.) However, Plaintiff fails to identify the "who, what, when, where, and how" of any purportedly fraudulent statement or act. *Cf.* Vess, 317 F.3d at 1106. Because it is not clear these deficiencies could not be cured by amendment, Plaintiff's first claim for financial elder abuse is **DISMISSED WITH FOURTEEN DAYS' LEAVE TO AMEND**.

B. Contract Claims (Claims 3, 4)

Plaintiff brings her third and fourth claims for breach of contract and breach of the implied covenant of good faith and fair dealing against Jackson only. To state a claim for breach of contract under California law, a plaintiff must plead: (1) the existence of a contract between the parties, (2) the plaintiff's performance or excuse for nonperformance, (3) the defendant's failure to perform, and (4) resulting damages. Harris v. Rudin, Richman & Appel, 74 Cal. App. 4th 299, 307, 87 Cal. Rptr. 2d 822 (1999). To state a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must show that the other party somehow injured its ability to "receive the benefits" of the contract. Careau & Co. v. Sec. Pac. Bus. Credit, Inc., 222 Cal. App. 3d 1371, 1393, 272 Cal. Rptr. 387 (1990). The covenant of good faith in fair dealing cannot "impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." **[*9]** Guz v. Bechtel Nat'l Inc., 24 Cal. 4th 317, 349-50, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 (2000).

Plaintiff has alleged sufficient facts in support of her contract-based claims. To satisfy federal pleading standards, "a plaintiff must describe the alleged terms of the contract in a sufficiently specific manner to give the defendant notice of the nature of the claim." Aspray v. Fed. Home Loan Mortg. Corp., 2011 U.S. Dist. LEXIS 46029, 2011 WL 1532326, at *3 (C.D. Cal. Apr. 20, 2011) (citation and quotation marks omitted); Plastino v. Wells Fargo Bank, 873 F. Supp. 2d 1179, 1191 (N.D. Cal. 2012). Although Plaintiff does not attach a copy of the Policy to her pleading, she identifies the basis for Jackson's alleged breach of its terms. She alleges Jackson acquired Mr. Schertz's Policy in 2012 and reinstated the Policy in 2016. The terms of that Policy provide for a death benefit of $500,000 and identify Plaintiff as the sole beneficiary. Mr. Schertz purportedly complied with his obligations under the Policy by paying the premiums, including the past-due amounts once the Policy was reinstated. According to Plaintiff, Jackson breached the Policy by then refusing to pay the death benefit based on a pretextual and biased post-death investigation. Contrary to Jackson's assertion, Plaintiff's allegations give Jackson fair notice of the nature of her claims. Accordingly, Jackson's motion to dismiss Plaintiff's contract-based claims is **DENIED**.

C. Negligent Misrepresentation [*10] (Claim 5)

Plaintiff brings her fifth claim for negligent misrepresentation against both Defendants. Under California law, "[t]he elements of negligent misrepresentation include: (1) misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce another's reliance on the misrepresentation, (4) ignorance of the truth and justifiable reliance on the misrepresentation by the party to whom it was directed, and (5) resulting damage." Glenn K. Jackson Inc. v. Roe, 273 F.3d 1192, 1201 n.2 (9th Cir. 2001). Plaintiff claims that "Defendants and their agents" misrepresented (1) that the face amount of the Policy would be paid as long as Mr. Schertz continued to pay the premiums, and (2) that the Policy had been reinstated after a brief lapse. (FAC ¶¶ 96-97.)

Plaintiff has failed to state a plausible claim for negligent misrepresentation as to either Defendant. Because this claim is based on Defendants' purported efforts to dupe Mr. Schertz into purchasing a Policy that Defendants never intended to carry out, it must be plead with particularity under Rule 9(b). *See* Francois & Co., LLC v. Nadeau, 2019 U.S. Dist. LEXIS 42754, 2019 WL 994402, at *5 (C.D. Cal. Jan. 8, 2019) (stating that a negligent misrepresentation claim "based in fraud" must satisfy Rule 9(b)). However, Plaintiff has failed to identify any specific **[*11]** misrepresentation, when it was made, or who made it. (*See* FAC ¶¶ 96-97 [lumping GBS and Jackson together as

"Defendants and their agents"]; *id.* ¶ 97 [stating that the "precise dates of these misrepresentations and further particulars are unknown"].) Further, it is unclear how either Defendant could have "misrepresented" that the Policy was reinstated. Plaintiff's own allegations aver that the Policy *was* reinstated. (*See id.* ¶ 34.) Rather, Plaintiff takes issue with Jackson's basis for denying her claim under the reinstated Policy. (*See id.* ¶¶ 38-39.) Accordingly, Plaintiff's fifth claim for negligent misrepresentation as to both Defendants is **DISMISSED WITH FOURTEEN DAYS' LEAVE TO AMEND**.

D. RICO (Claims 6, 7)

Plaintiff brings her sixth claim for violations of RICO and seventh claim for conspiracy to violate RICO against both Defendants. To state a civil RICO claim, a plaintiff must allege facts showing "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to plaintiff's 'business or property.'" *Living Designs, Inc. v. E.I. Dupont de Nemours & Co., 431 F.3d 353, 361 (9th Cir. 2005)*. To allege an "enterprise," a plaintiff must state facts that establish a group of persons (1) associated together **[*12]** for "a common purpose of engaging in a course of conduct," (2) have an "ongoing organization, formal or informal," and (3) "function as a continuing unit." *Odom v. Microsoft Corp., 486 F.3d 541, 548, 552 (9th Cir. 2007)*. To show "predicate acts," a plaintiff must allege that the defendant engaged in racketeering activity outlined in *18 U.S.C. § 1961(1)*. Here, Plaintiff claims that Jackson and GBS engaged in an enterprise to commit wire and mail fraud for the common purpose of "altering the terms of original life insurance policies when those policies have lapsed" and using those new terms as a basis for later denying claims for death benefits. (*See* FAC ¶ 104.)

Plaintiff fails to state a plausible RICO claim against either Defendant. First, Plaintiff's allegations fall far short of showing the existence of an "enterprise" between GBS and Jackson. As noted, Plaintiff's only specific allegation regarding GBS pertains to its predecessor's conduct in 1999. Plaintiff has not offered any facts that support finding that GBS had any "ongoing organization, formal or informal" with Jackson, or that the two "function as a continuing unit." (*See id.* ¶¶ 103-104.) Second, Plaintiff has failed to allege Defendants' supposed "predicate acts"—mail and wire fraud—with sufficient particularity. **[*13]** *See Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004)* (applying *Rule 9(b)* to civil RICO claims sounding in fraud). To state a claim for mail or wire fraud, Plaintiff must allege that Defendants used the mail or electronic means in furtherance of their scheme to defraud. *See 18 U.S.C. §§ 1341*, *1343*. Plaintiff contends that Defendants committed mail and wire fraud "because they altered the terms of the original Policy and . . . had no intention of paying the death benefit under the [P]olicy." (FAC ¶ 109.) But she at no point alleges any specific use of the mail or electronic means to carry out a scheme to defraud. (*Id.* ¶ 110 [stating, in conclusory fashion, that unspecified "communications took place by telephone and mail"].) Accordingly, Plaintiff's sixth and seventh claims under RICO are **DISMISSED WITH FOURTEEN DAYS' LEAVE TO AMEND**.

E. UCL (Claim 2)

Plaintiff brings her second claim for unfair, unlawful, and fraudulent business practices in violation of California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code § 17200 et seq.* "Unlawful" practices are those "forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory or court-made." *Saunders v. Superior Court, 27 Cal. App. 4th 832, 838, 33 Cal. Rptr. 2d 438 (1999)*. "Unfair" practices are "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit **[*14]** of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. Finally, "fraudulent," as used in California's UCL, requires only a showing that members of the public "are likely to be deceived." *Saunders, 27 Cal. App. 4th at 839* (citation and quotation marks omitted).

Plaintiff has failed to state a plausible claim under the UCL as to either Defendant. As with her other fraud-based claims, Plaintiff does not plead any specific business act or practice, attribute it to a specific Defendant, or describe when or how it occurred. Her vague allegation that Defendants "fraudulently, deceptively, and unfairly deprived Plaintiffs of their property and legal rights under the Policy" is insufficient to satisfy *Rule 9(b)*. (*See* FAC ¶ 57.)

Accordingly, Plaintiff's second claim for violation of California's UCL is **DISMISSED WITH FOURTEEN DAYS' LEAVE TO AMEND**.

V. CONCLUSION

For the foregoing reasons, GBS's motion to dismiss is **GRANTED** and Jackson's motion to dismiss is **GRANTED IN SUBSTANTIAL PART**. Plaintiff's first, second, fifth, sixth, and seventh claims are **DISMISSED WITH FOURTEEN DAYS' LEAVE TO AMEND**. Jackson's motion to dismiss Plaintiff's **[*15]** third and fourth claims is **DENIED**.

DATED: May 31, 2019

/s/ Cormac J. Carney

CORMAC J. CARNEY

UNITED STATES DISTRICT JUDGE

Mai Larsen Designs v. Want2Scrap, LLC

United States District Court for the Western District of Texas, San Antonio Division

June 3, 2019, Decided; June 3, 2019, Filed

CIVIL NO. SA-17-CV-1084-ESC

Reporter
2019 U.S. Dist. LEXIS 92215 *; 2019 WL 2343019

MAI LARSEN DESIGNS, Plaintiff, vs. WANT2SCRAP, LLC, MICHELLE PARRISH, CREATIVE SCRAP DESIGNS, Defendants.

Subsequent History: Reconsideration denied by, Claim dismissed by, Without prejudice, Motion dismissed by, As moot *Mai Larsen Designs v. Want2Scrap, LLC, 2019 U.S. Dist. LEXIS 103225 (W.D. Tex., June 20, 2019)*

Costs and fees proceeding at, Motion granted by, Motion denied by *Mai Larsen Designs v. Want2Scrap, LLC, 2019 U.S. Dist. LEXIS 212819 (W.D. Tex., Dec. 10, 2019)*

Core Terms

registration, designs, Defendants', Antitrust, copyright infringement, pleadings, parties, summary judgment motion, preempted, fraud claim, counterclaims, summary judgment, allegations, Copyright Act, inducing, copyright license, partial summary judgment, unfair competition, non-infringement, rights, media, scrap, declaratory judgment, motion for judgment, breach of contract, conversion claim, material fact, show cause, misrepresentation, lawsuit

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Judges: ELIZABETH S. ("BETSY") CHESTNEY, UNITED STATES MAGISTRATE JUDGE.

Opinion by: ELIZABETH S. ("BETSY") CHESTNEY

Opinion

ORDER ON MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTIONS FOR SUMMARY JUDGMENT

Before the Court in the above-styled cause of action are the following four dispositive motions: Defendants Wants2Scrap, LLC and Michele Parrish's Motion for Judgment **[*2]** on the Pleadings Pursuant to *Fed. R. Civ. P. 12(c)* [#58], Defendants Wants2Scrap, LLC and Michele Parrish's Motion for Summary Judgment [#61], Plaintiff and Counter-Defendants' Motion for Partial Summary Judgment or Alternatively to Exclude Evidence [#62], and Defendants Wants2Scrap, LLC and Michele Parrish's Supplemental Motion for Summary Judgment [#96]. In reviewing these motions, the Court has also considered the numerous responses and replies on file pertaining to the motions [#59, #66, #72, #80, #83, #86, #88, #89, #94, #95, #97, #98, #99]. The undersigned has authority to enter this Order as all parties have consented to the jurisdiction of a United States Magistrate Judge [#17, #18]. *See 28 U.S.C. § 636(c)(1)*. For the reasons set forth below, the Court will (1) grant Defendants' Supplemental Motion for Summary Judgment and dismiss Plaintiff's copyright claim for failure to obtain a copyright registration prior to filing suit; (2) order Defendants to show cause as to why their counterclaims for a declaratory judgment of non-infringement and claims of copyright infringement and breach of contract should not be dismissed *sua sponte* along with Plaintiff's copyright claim; (3) grant in part Defendants' motion for judgment **[*3]** on the pleadings and dismiss Plaintiff's conversion claim as preempted by the *Copyright Act*; (4) grant in part Defendants' motion for summary judgment on Plaintiff's fraud and *Texas Free Enterprise and Antitrust Act* claims; and (5) hold in abeyance Plaintiff's and Counter-Defendants' motion for partial summary judgment while the Court considers whether to dismiss Defendants' counterclaims *sua sponte* after receiving Defendants' show cause response.

I. Procedural Background

The procedural history of this case begins on October 24, 2017 in the Northern District of Indiana, where Defendant Want2Scrap, LLC filed suit seeking a declaration of non-infringement of copyright and asserting claims of breach of contract, copyright infringement, and other torts against Mabel Larsen and the two unincorporated entities through which she conducts business—Mai Larsen Designs and Creative Scrap Designs. The following day, Mai Larsen Designs filed this action against Want2Scrap and its owner Michele Parrish, asserting claims of copyright infringement, fraud, and theft by conversion in this district. (Orig. Compl. [#1].) The Indiana court transferred the Indiana case to this division, where it was assigned **[*4]** the cause number 5:18-CV-321-OLG. Following the transfer, the Court consolidated the Texas and Indiana cases and designated cause number 5:17-CV-1084-OLG as the lead case. (Consolidation Order [#14].)

Plaintiff Mai Larsen Designs subsequently filed her First Amended Complaint [#15] in the lead case; the parties consented to the jurisdiction of a United States Magistrate Judge; and the consolidated action was transfered to the undersigned's docket on May 22, 2018 [#19]. The undersigned thereafter realigned the parties post-consolidation, designating Mai Larsen Designs as Plaintiff (hereinafter "Larsen"),[1] Want2Scrap and Michele Parrish as Defendants/Counter-Plaintiffs (hereinafter "Defendants"), and Mabel Larsen, Creative Scrap Designs, and Mai Larsen Designs ("the Larsen Parties") as Counter-Defendants [#31].

The Court denied Defendants' motion to dismiss Plaintiff's First Amended Complaint [#28], and Larsen filed a Second Amended Complaint on December 12, 2018 [#41], again asserting claims of copyright infringement (Count I), fraud (Count II), fraud in the inducement (Count III), theft by deception and conversion (Count IV), and conspiracy and unfair competition in violation of the Texas **[*5]** Free Enterprise and Antitrust Act (Counts V and VI). Larsen's Second Amended Complaint alleges that Mai Larsen Designs is a designer of chipboard embellishment and craft designs for use in homemade scrapbooks that are original works that may be copyrighted under federal law. (Second Am. Compl. [#41] at ¶ 4.) Larsen accuses Defendants of infringing its copyrights by: selling her designs on Want2Scrap's website, at trade shows, and directly to retailers; failing to compensate Larsen for her designs as promised in an oral agreement between the parties; and harassing Larsen on social media to prevent her from competing with Want2Scrap in the sale of scrapbook designs and chipboard products. (*Id.* at ¶¶ 4-9.)

[1] The Court refers to Plaintiff as "Larsen" throughout this Order, as she is functionally the Plaintiff in this action because her entities are not registered with the State of Texas and she is the only individual associated with these assumed names. (Pl.'s Resp. [#94] at 3.)

In response, Defendants filed Counterclaims on December 26, 2018 [#42], seeking a declaratory judgment of non-infringement of copyright against the Larsen Parties (Count I); alleging a claim of breach of contract against Larsen (Count II); and asserting claims against the Larsen Parties for copyright infringement (Count III), tortious interference with business relations (Count IV), unfair competition (Count V), inducing copyright infringement (Count VI), and defamation (Count VII). **[*6]** Defendants allege that Want2Scrap and Larsen entered into a copyright license agreement whereby Want2Scrap was granted an exclusive license to Larsen's artwork that allowed Defendants to use all of the works at issue in this lawsuit. (Counterclaim [#42] at ¶ 73.) Defendants contend that Want2Scrap fullfilled all of its obligations under the copyright license agreement, but Larsen breached her contractual duties by advertising, selling, or distributing works substantially similar to the licensed works without Want2Scrap's permission. (*Id.* at ¶¶ 137-38.) Defendants further allege that the Larsen Parties made false and misleading statements about Want2Scrap to its prospective customers and publicized false statements harmful to the interests of Want2Scrap. (*Id.* at ¶¶ 148, 163.)

Defendants filed a motion for judgment on the pleadings pursuant to *Rule 12(c)* on March 7, 2019 [#58], arguing that Larsen's fraud, conversion, and unfair competition claims are all preempted by the Copyright Act and must be dismissed. Defendants thereafter filed a motion for summary judgment on March 14, 2019 [#61], arguing that Larsen's copyright claims fail as a matter of law because the parties' copyright license agreement **[*7]** operates as a complete defense to copyright infringement; there is no evidence of any oral agreement to compensate Larsen for its designs; and Larsen fails to allege an antitrust injury under the Texas Free Enterprise and Antitrust Act. The Larsen Parties filed a Motion for Partial Summary Judgment on the same day [#62], arguing that the identified copyright license agreement is unenforceable and seeking summary judgment on all of Defendants' counterclaims that are based on the agreement (the request for declaratory judgment and claims for breach of contract, copyright infringement, and inducing copyright infringement) or, alternatively, seeking an order excluding the agreement from evidence admitted at trial.

The Court held a pretrial status conference in this case on April 24, 2019, at which it heard argument on these three dispositive motions. At the close of the hearing, Defendants' counsel alerted the Court to a recent Supreme Court decision, *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC, ___ U.S. ___, 139 S. Ct. 881, 203 L. Ed. 2d 147 (2019)*, which interprets the Copyright Act's statutory preconditions to filing a civil suit under the Act. The Court ordered briefing on the impacts, if any, of *Fourth Estate* on the instant case. In response, Defendants filed their supplemental **[*8]** motion for summary judgment [#96] on May 2, 2019, which argues that Larsen's copyright claims must be dismissed for failure to obtain registered copyrights prior to instituting this lawsuit. All four dispositive motions are ripe for the Court's resolution.

II. Legal Standards

A. Judgment on the Pleadings

Rule 12(c) of the Federal Rules of Civil Procedure provides: "After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." *Fed. R. Civ. P. 12(c)*. The standard for dismissal under *Rule 12(c)* is the same as that for dismissal for failure to state a claim under *Rule 12(b)(6)*. *Johnson v. Johnson, 385 F.3d 503, 529 (5th Cir. 1999)*.

To survive a motion to dismiss under *Rule 12(b)(6)*, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Although a complaint "does not need detailed factual allegations," the "allegations must be enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555*. The allegations pleaded must show "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal, 556 U.S. at 678*.

Furthermore, a court must **[*9]** accept "all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Martin K. Eby Const. Co. v. Dallas Area Rapid Transit, 369 F.3d 464, 467 (5th Cir. 2004)*. However, a court need not credit conclusory allegations or allegations that merely restate the legal elements of a claim. *Chhim v. Univ. of Texas at Austin, 836 F.3d 467, 469 (5th Cir. 2016)* (citing *Iqbal, 556 U.S. at 678*). In short, a claim should not be dismissed unless the court determines that it is beyond doubt that the plaintiff cannot prove a plausible set of facts that support the claim and would justify relief. *Twombly, 550 U.S. at 570*.

B. Summary Judgment

Summary judgment is appropriate under *Rule 56 of the Federal Rules of Civil Procedure* only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*; *see also* *Fed. R. Civ. P. 56(c)*. A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Catrett, 477 U.S. at 323*. Once the movant carries its burden, the burden shifts to **[*10]** the nonmoving party to establish the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; *Wise v. E.I. Dupont de Nemours & Co., 58 F.3d 193, 195 (5th Cir. 1995)*. The non-movant must respond to the motion by setting forth particular facts indicating that there is a genuine issue for trial. *Miss. River Basin Alliance v. Westphal, 230 F.3d 170, 174 (5th Cir. 2000)*. The parties may satisfy their respective burdens by tendering depositions, affidavits, and other competent evidence. *Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir. 1992)*. The Court will view the summary judgment evidence in the light most favorable to the non-movant. *Rosado v. Deters, 5 F.3d 119, 123 (5th Cir. 1993)*.

"After the non-movant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the non-movant, summary judgment will be granted." *Westphal, 230 F.3d at 174*. However, if the party moving for summary judgment fails to satisfy its initial burden of demonstrating the absence of a genuine issue of material fact, the motion must be denied, regardless of the nonmovant's response. *Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994)* (en banc).

III. Analysis

The Court will grant Defendants' supplemental motion for summary judgment and dismiss Larsen's claim for copyright infringement for failure to obtain a copyright registration prior to filing this lawsuit. The Court will also (1) grant in part Defendants' motion for judgment on the pleadings and dismiss Larsen's conversion claim as preempted under the **[*11]** Copyright Act and (2) grant in part Defendants' motion for summary judgment as to Larsen's claims of fraud and claims under the Texas Free Enterprise and Antitrust Act. These rulings result in the dismissal of all of the claims asserted by Larsen in her Second Amended Complaint.

As to Defendants' counterclaims, the Court will hold in abeyance Plaintiff's partial motion for summary judgment while the Court considers whether to dismiss Defendants' request for declaratory judgment of non-infringement and counterclaims of copyright infringement and breach of contract *sua sponte* along with Larsen's copyright infringement claim in light of the Supreme Court's decision in *Fourth Estate*.

A. Defendants' Supplemental Motion for Summary Judgment [#96]

Defendants seek dismissal of Larsen's claim of copyright infringement (Count I of the Second Amended Complaint) on the basis that Plaintiff failed to satisfy the statutory precondition to bringing suit under the Copyright Act as interpreted by the Supreme Court's recent decision in *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC, __ U.S. __, 139 S. Ct. 881, 203 L. Ed. 2d 147 (2019)*. The Court agrees with Defendants that *Fourth Estate* requires dismissal of Larsen's copyright infringement claim.

The Copyright Act provides that "no civil action for infringement **[*12]** of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title." *17 U.S.C. § 411(a)*. On March 4, 2019, the Supreme Court issued its decision in *Fourth Estate*, which held that "registration . . . has been made" within the meaning of *Section 411(a)* when the Register of Copyrights "has registered a copyright after examining a properly filed application."[2] *139 S. Ct. at 892*. This decision resolved a split in the Circuit Courts of Appeals and rejected the interpretation of the Fifth and Ninth Circuits, which had previously held that registration has been made under *Section 411(a)* when the copyright claimant's complete application for registration is received by the Copyright Office. *See* *Cosmetic Ideas, Inc. v. IAC/Interactivecorp, 606 F.3d 612, 621 (9th Cir. 2010)*; *Lakedreams v. Taylor, 932 F.2d 1103, 1108 (5th Cir. 1991)*.

"*Section 411(a)*'s registration requirement is a precondition to filing a claim that does not restrict a federal court's subject-matter jurisdiction." *Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 157, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010)*. "[A]lthough an owner's rights exist apart from registration, . . . registration is akin to an administrative exhaustion requirement that the owner must satisfy before suing to enforce ownership rights . . . ." *Fourth Estate Public Benefit Corp., 139 S. Ct. at 887*. In the wake of *Fourth Estate*, district courts have dismissed copyright claims based on this administrative requirement, **[*13]** even if the suit was properly filed before *Fourth Estate* was decided, under Circuit law embracing the application approach, as here. *See, e.g.,* *Boost Beauty, LLC. v. Woo Signatures, LLC., No. 2:18-CV-02960-CAS-EX, 2019 U.S. Dist. LEXIS 82318, 2019 WL 2122984, at *2 (C.D. Cal. May 14, 2019)* (granting motion for judgment on the pleadings for failure to obtain registration of copyright for online advertisement which was subject of copyright claims).

Larsen instituted this suit on October 25, 2017 by filing an Original Complaint, which alleged that Larsen applied for copyright registrations with the United States Copyright Office in July 2017 and that the certificates of registration remained "pending." (Orig. Compl. [#1] at ¶ 2.) Larsen's First Amended Complaint was filed on April 25, 2018. This Complaint again stated that Larsen had applied for copyright protection in June 2017 but the applications still remained "pending." (First Am. Compl. [#15] at ¶ 4.) Larsen filed a Second Amended Complaint on December 12, 2018. This Complaint alleged that certificates of registration had been issued and were effective as of August 18, 2017, the date of application.[3] (Second Am. Compl. [#41] at ¶ 4.) The registrations were not attached to the Complaint, but Larsen provided the Court **[*14]** with two copyright registrations as part of her summary judgment evidence. (Certificate of Registration [#95-1]; Certificate of Registration [#95-2].)

The summary judgment record demonstrates that these two registrations award a certificate to Mabel Mai Larsen for hand drawn art, Registration Number VAu 1-184-921, with an effective date of August 7, 2014 [#95-1] and for 2-D artwork, Registration Number VAu 1-319-215, with an effective date of August 18, 2017 [#95-2]. The registrations do not indicate the date the applications were processed. The Court extrapolates from Larsen's pleadings, however, that the 2017 registration was processed and awarded sometime between April 25, 2018 (when the First Amended Complaint was filed) and December 12, 2018 (when the Second Amended Complaint was filed).

Larsen argues that it complied with *Section 411(a)*'s registration requirement because its copyright registrations were made effective on August 7, 2014 and August 18, 2017, before she filed suit on October 25, 2017. (Summ. J. Resp. [#97].) As a preliminary matter, the Court finds that the 2014 registration is not relevant to this suit. This registration is not referenced in any of Larsen's pleadings, nor are **[*15]** the 2014 copyrighted works. Rather,

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[2] The Supreme Court explained that "[i]n limited circumstances, copyright owners may file an infringement suit before undertaking registration. If a copyright owner is preparing to distribute a work of a type vulnerable to predistribution infringement—notably, a movie or musical composition—the owner may apply for preregistration." *Fourth Estate Pub. Benefit Corp., 139 S. Ct. at 888*. No party is asserting that this limited circumstance applies here.

[3] Copyright registrations, once approved, are retroactively effective from the date the application was filed. *17 U.S.C. § 410(d)*.

Larsen has repeatedly referred to Exhibit A to the Original and First and Second Amended Complaints as the works at issue in this lawsuit. (Orig. Compl. [#1] at ¶ 4; First Am. Compl. [#15] at ¶ 4; Second Am. Compl. [#41] at ¶ 4.) Exhibit A is a chart of the 2-D chipboard designs submitted to the Copyright Office on July 28, 2017 and August 18, 2017.[4] (Ex. A [#1] at 6-13; Ex. A [#15] at 7-18.) The drawings protected by the 2014 copyright registration are not chipboard designs; they are hand sketches of doll figures. (2014 Application [#95-3] at 12-47.) Larsen now attempts to argue that "several of [Larsen's] earlier drawings were her inspiration for later developed designs that Defendants have infringed." (Brief at 3.) This assertion is irrelevant, however, as Larsen has never claimed that Defendants have infringed upon the works protected by the 2014 registration. Accordingly, the 2014 registration has no bearing on her claim of copyright infringement in this lawsuit.

As to the 2017 registration, Larsen does not disclose to the Court the date on which she received notice that the registrations had been awarded. She simply argues the effective date **[*16]** of the registration predates the filing of this lawsuit, and therefore she satisfied the administrative preconditions to suit under the Copyright Act. To adopt Larsen's reasoning the Court would have to hold that *Fourth Estate* allows a plaintiff to file a lawsuit before copyright registrations have been awarded and to amend the pleadings after registration is obtained, so long as the effective date (i.e., the date of application) predates the filing of the lawsuit. The Court cannot square this argument with the holding of *Fourth Estate*, and Larsen's argument has been directly rejected by at least one federal district court since the Supreme Court issued its decision.

In *Malibu Media, LLC v. Doe*, the Southern District of New York addressed the issue of "whether a plaintiff that improperly filed suit before a copyright was registered can cure that defect by amending its complaint after the Register has completed registration of the copyright." *No. 18-CV-10956 (JMF), 2019 U.S. Dist. LEXIS 56578, 2019 WL 1454317, at *1 (S.D.N.Y. Apr. 2, 2019)*. The Court held that "such a prematurely filed suit must be dismissed notwithstanding a plaintiff's post-registration amendment." *Id.* The Court agrees with the Southern District of New York that embracing the argument advanced by Larsen "would **[*17]** make a meaningless formality out of *Fourth Estate*'s requirement that an application be approved prior to filing suit." *2019 U.S. Dist. LEXIS 56578, [WL] at *2*. Because Larsen's pleadings do not comply with *Section 411(a)*'s pre-suit registration requirement, the Court will dismiss Larsen's claim of copyright infringement (Count I of the Second Amended Complaint).[5]

Finally, although not addressed in any party's filings, the Court suspects that Defendants' counterclaims for a declaratory judgment of non-infringement (Count I), breach of contract (Count II), copyright infringement (Count III), and inducing copyright infringement (Count VI) should also be dismissed under *Fourth Estate*. The precondition of copyright registration applies with equal force to declaratory judgment actions of copyright non-infringement. *See BHL Boresight, Inc. v. Geo-Steering Sols., Inc., No. 4:15-CV-00627, 2016 U.S. Dist. LEXIS 44729, 2016 WL 8648927, at *4 (S.D. Tex. Mar. 29, 2016)*, *modified on reconsideration*, *No. 4:15-CV-00627, 2017 U.S. Dist. LEXIS 47196, 2017 WL 1177966 (S.D. Tex. Mar. 29, 2017)* (collecting cases). The other listed counterclaims are all various iterations of Defendants' allegation that the Larsen Parties infringed their copyright to use Larsen's designs based on an enforceable transfer of copyright ownership through the parties' license agreement. (Counterclaims [#42] at ¶¶ 133-146, **[*18]** 157-161.) However, the Court will give Defendants an opportunity to show cause as to why these claims should not be dismissed under the reasoning of *Fourth Estate* before dismissing these claims *sua*

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[4] Larsen explains in her briefing that she submitted an additional application to the Copyright Office on July 28, 2017 but has still not received a certificate of registration or a rejection notification regarding this application. (Pl.'s Brief [#95] at 3.) Larsen believes the application was closed or suspended due to an unknown administrative error. (*Id.*)

[5] In light of this holding, the Court need not and will not address Defendants' alternative arguments for summary judgment on Larsen's copyright claim related to their affirmative defense of a copyright license agreement between the parties governing Larsen's work at issue. However, the Court will note that it appears that the agreement attached to Defendants' answer and counterclaims, which was signed by Larsen on January 30, 2017, is enforceable. (Copyright License Agreement [#42-1] at 2-4.) The agreement grants Want2Scrap "an exclusive, transferable license to use [Larsen's] work in the course of its business." (*Id.*) The arguments raised by Larsen to support her contention that the agreement is invalid, such as her argument the agreement is invalid because it lacks Parrish's signature, do not appear to be supported by Texas or Indiana law (regardless of which applies) or the Copyright Act.

sponte. See Brown v. Taylor, 829 F.3d 365, 370 (5th Cir. 2016) ("[A] district court may only dismiss a case *sua sponte* after giving the [party] notice of the perceived inadequacy of the complaint and an opportunity for the [party] to respond.").

B. Defendants' Motion for Judgment on the Pleadings [#58]

Defendants move to dismiss all of the state-law claims in Larsen's Second Amended Complaint as preempted by the Copyright Act. The Court holds that Larsen's conversion claim is preempted and must be dismissed with prejudice. Larsen's claims of fraud, fraud in the inducement, and conspiracy and unfair competition under the Texas Free Enterprise and Antitrust Act, however, are not preempted.

The Copyright Act provides:

> all legal and equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by *section 106* in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by *sections 102* and *103*, whether created before or after that date and whether **[*19]** published or unpublished, are governed exclusively by this title . . . .

17 U.S.C. § 301(a). This provision has been interpreted as expressly preempting all causes of action falling within the scope of the Copyright Act, thereby accomplishing "the general federal policy of creating a uniform method for protecting and enforcing certain rights in intellectual property by preempting other claims." *Daboub v. Gibbons, 42 F.3d 285, 288 (5th Cir. 1995)*.

Courts have interpreted the provision as containing a two-step test for preemption. *Id. at 288-89*. First, the cause of action is examined to determine if it falls "within the subject matter of copyright." *Id. at 289*; *see, e.g., Brown v. Ames, 201 F.3d 654, 658 (5th Cir. 2000)* (tort claim of misappropriation did not fall under subject of copyright where misappropriation concerned name or likeness, which were non-copyrightable). Second, the cause of action is examined to determine if it protects rights that are "equivalent" to any of the exclusive rights of a federal copyright, as provided in *17 U.S.C. § 106*, which grants the holder of a copyright the exclusive right to reproduce, distribute, perform, and display the copyrighted work. *Daboub, 42 F.3d at 289*. The analysis required at this step is more complex. *Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 787 (5th Cir. 1999)*.

The Fifth Circuit evaluates equivalency through the "extra element" test. *Id.* According to this test, if the **[*20]** act or acts about which a plaintiff complains would violate both state law and copyright law, then the state right is deemed "equivalent to copyright." *Id.* "If, however, one or more qualitatively different elements are required to constitute the state-created cause of action being asserted, then the right granted under state law does not lie within the general scope of copyright, and preemption does not occur." *Id.* (internal quotation omitted).

i. Conversion (Count IV)

Larsen's conversion claim alleges that Defendants wrongfully converted Larsen's designs for their own illegal use and benefit. (Second Am. Compl. [#41] at ¶ 8.) This claim concerns the same material that is underlying Laren's infringement claim—Larsen's chipboard designs. This material is subject to copyright protection and therefore falls "within the subject matter of copyright." *See Daboub, 42 F.3d at 289*. The conversion claim also protects rights that are "equivalent" to the exclusive rights of federal copyright. *See id.* The elements of a conversion claim under Texas law are: (1) the plaintiff's legal possession or entitlement to property; (2) defendant's wrongful exercise of dominion and control over the property, excluding the plaintiff; **[*21]** (3) plaintiff's demand of the property's return; and (4) defendant's refusal. *Arthur W. Tifford, PA v. Tandem Energy Corp., 562 F.3d 699, 705 (5th Cir. 2009)*. Because there is no qualitatively different element that would remove the conversion claim from the scope of the Copyright Act's preemption provision, this claim should be dismissed with prejudice as preempted. *See Daboub, 42 F.3d at 289*.

ii. Fraud and Fraudulent Inducement (Counts II and III)

Larsen's fraud claims are not preempted. Larsen alleges that Parrish made numerous representations to Larsen that Larsen would be compensated for Defendants' sale of her designs but that Larsen only ever received $350.00 per month for development of Defendants' social media and YouTube presence pursuant to a separate oral agreement between the parties. (Second Am. Compl. [#41] at ¶¶ 6-7.) Larsen claims she would not have agreed to submit her designs to Defendants but for Defendants' misrepresentations about the additional compensation. (*Id.* at ¶ 7.) Larsen conceded at the Court's April 24, 2019 pretrial status conference that these fraud claims are related to the question of whether there is a valid copyright license agreement between the parties. The Court therefore finds that these particular fraud claims fall within the subject matter **[*22]** of copyright—step one of this Court's preemption inquiry—because they concern whether Larsen's copyrightable designs were distributed by Defendants illegally and without proper compensation to Larsen. *See* *Daboub, 42 F.3d at 289*.

However, the fraud claims fail the second step of the Court's preemption inquiry—the extra element test. The Fifth Circuit has held that claims requiring proof of fraud or misrepresentation are generally not preempted by the Copyright Act because they involve the extra element of a statement or misrepresentation that induced specific reliance and caused damages that are not attributable to copyright infringement. *See* *Computer Mgmt. Assistance Co. v. Robert F. DeCastro, Inc., 220 F.3d 396, 404-05 (5th Cir. 2000)* (*Louisiana Unfair Trade Practices Act* is not preempted by Copyright Act because it requires proof of fraud, misrepresentation, or unethical conduct); *McArdle v. Mattel Inc., 456 F. Supp. 2d 769, 779 (E.D. Tex. 2006)* (summarily concluding that fraud and negligent misrepresentation claims were not preempted by Copyright Act under Fifth Circuit law) (quoting *Computer Mgmt. Assistance Co., 220 F.3d at 404-05*). Indeed, Larsen's fraud claims require proof of a (1) a misstatement or omission; (2) of material fact; (3) made with the intent to defraud; (4) on which the plaintiff relied; and (5) which proximately caused the plaintiff's injury. *Williams v. WMX Techs., Inc., 112 F.3d 175, 177 (5th Cir. 1997)*. Larsen's fraud claims fail for other reasons, **[*23]** *see infra*, but the Court declines to find these claims preempted in light of the alleged misrepresentations by Defendants, which are acts above and beyond their alleged infringement.

iii. Texas Free Enterprise and Antitrust Act Claims (Counts V and VI)

Larsen's conspiracy and unfair competition claims under the Texas Free Enterprise and Antitrust Act are also not preempted. Larsen alleges that Parrish and her staff conspired with other named individuals to attack and defame Larsen on social media in order to prevent her from competing with Want2Scrap in the market for the sale of scrapbook designs and chipboard products. (Second Am. Compl. [#41] at ¶ 9.) A claim under the Texas Free Enterprise and Antitrust Act requires Larsen to prove that Defendants engaged in an illegal act that interfered with its ability to conduct its business. *See* *Settlement Capital Corp. v. BHG Structured Settlements, Inc., 319 F. Supp. 2d 729, 734 (N.D. Tex. 2004)*. "Although the illegal act need not necessarily violate criminal law, it must at least be an independent tort." *Id.* Here the focus is on alleged defamatory conduct of Defendants. This cause of action does not fall "within the subject matter of copyright" but instead addresses independent allegations of wrongdoing surrounding Defendants' and others' **[*24]** behavior on social media. *See* *Daboub, 42 F.3d at 289*. Accordingly, Larsen's claims under the Texas Free Enterprise and Antitrust Act are not preempted by the Copyright Act.

C. Defendants' Motion for Summary Judgment [#61]

Defendants alternatively move for summary judgment on all of Larsen's claims on the basis that Larsen cannot prove these claims as a matter of law. The Court has already determined Larsen's copyright infringement claim should be dismissed for failure to obtain a registration prior to filing this suit and Larsen's conversion claim is preempted by the Copyright Act. Accordingly, the Court only considers whether Larsen's claims of fraud, fraudulent inducement, conspiracy, and unfair competition should be dismissed because no genuine dispute of material fact exists as to these claims such that Defendants are entitled to judgment as a matter of law. Defendants are entitled to summary judgment on these claims.

i. Fraud and Fraudulent Inducement (Counts II and III)

As previously stated, Larsen's fraud claims allege that Parrish made numerous representations to Larsen that she would be compensated for Defendants' sale of her designs but that Larsen only ever received $350.00 per month for development **[*25]** of Defendants' social media and YouTube presence pursuant to a separate oral agreement between the parties. (Second Am. Compl. [#41] at ¶¶ 6-7.) Larsen claims she would not have agreed to submit her designs to Defendants but for Defendants' misrepresentations. (*Id.* at ¶ 7.) Defendants argue they are entitled to judgment as a matter of law on Larsen's claims of fraud because Larsen has failed to come forth with any evidence to show that Parrish made an oral promise to compensate Larsen for the designs beyond the compensation that has already been received.

Again, to prevail on her claim of fraud, Larsen must prove that (1) Defendants made a misstatement or omission; (2) of material fact; (3) made with the intent to defraud; (4) on which Larsen relied; and (5) which proximately caused Larsen's injuries. *See Williams, 112 F.3d at 177*. A claim of fraudulent inducement shares the same elements as a claim of fraud but with the additional requirement of an agreement between the parties, as the fraud arises only in the context of a contract. *Bohnsack v. Varco, L.P., 668 F.3d 262, 277 (5th Cir. 2012)*. Although Larsen does not reference the copyright license agreement in her pleadings, in her response to Defendants' motion for summary judgment, she states that her claim of **[*26]** fraud in the inducement rests on the allegation that Defendants fraudulently induced Larsen into signing a royalty free, exclusive copyright license agreement under duress. (Summ. J. Resp. [#94] at 2.) The Court agrees with Defendants that Larsen has failed to carry her burden to come forth with specific evidence establishing a genuine issue for trial as to these claims.

First and foremost, Larsen has not identified a misstatement of material fact by Parrish to support her fraud claims, regardless of whether or not the copyright license agreement is valid. Under Texas law, a "material" fact is one to which "a reasonable person would attach importance" and "would be induced to act on the information in determining his choice of actions in the transaction in question." *N. Cypress Med. Ctr. Operating Co., Ltd. v. Aetna Life Ins. Co., 898 F.3d 461, 474 (5th Cir. 2018)*. To constitute actionable fraud, false representations must relate to material facts, as distinguished from matters of opinion, judgment, probability, or expectation. *GMAC Commercial Mortg. Corp. v. E. Texas Holdings, Inc., 441 F. Supp. 2d 801, 806 (E.D. Tex. 2006)*; *see also See Transport Ins. Co. v. Faircloth, 898 S.W.2d 269, 276 (Tex. 1995)* ("[A] pure expression of opinion will not support an action for fraud.").

The only statements identified by Larsen in her summary judgment response are allegations of a vague promise by Parrish that "Larsen would prosper as Want2Scrap and Parrish **[*27]** prospered" and a January 2017 representation that Parrish "would financially compensate Larsen for her designs." (Summ. J. Resp. [#94] at 4, 9.) Larsen does not attach any evidence to her response to Defendants' motion for summary judgment to support these allegations—no deposition testimony, documents, affidavits, declarations—so as to raise a genuine issue for trial as to whether these statements were made, whether they were material, and whether they were false.[6] On this basis alone, the Court should grant Defendants' summary judgment on these claims.

Yet the summary judgment evidence submitted by Defendants—which is uncontroverted by Larsen—further establishes that Parrish did not make any specific promise to compensate Larsen. Parrish's declaration states that she never made any oral or written promise to pay Larsen for submitting her designs to Want2Scrap; that she offered to pay Larsen $5 for each kit sold and that she paid those amounts; and that her generalized statements regarding making more money referred to the sale of Larsen's kits and nothing more. (Parrish Decl. [#61-1] at 19-20.) The correspondence between the parties in the record supports Parrish's declaration. Again, **[*28]** Larsen has not presented the Court with any evidence of a promise to pay her for her designs. Text messages submitted to the Court by Defendant confirm that Parrish only made statements such as, "If I make more money, you make more money!" (Jan. 10, 2017 Text Message [#61-1] at 225). Moreover, when Parrish suggested Larsen receive a

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[6] Larsen did, however, attach an affidavit to her own motion for partial summary judgment, in which she simply reiterates that Parrish repeatedly told Larsen she would prosper from their relationship. (Larsen Decl. [#62-1] at ¶ 5.)

commission, Larsen declined and refused Parrish's offers of payment on several other occasions. (Jan. 10, 2017 Text Message [#61-1] at 228 ("nah I'm good I get gratification of seeing them create."); *id.* at 229 ("I don't need the money. I design for you remember."); *id.* at 231 ("I'm not worried about commission."); *id.* at 232 ("I don't need money for it hun."); April 4, 2017 Text Message [#61-1] at 233 ("No remember I said no more paying Hun.").). Additionally, Larsen admitted in her deposition that she was paid for some kit designs and when Larsen asked for payment in May 2017 and sent an invoice for outstanding expenses, Parrish paid her that amount. (Larsen Dep. [#61-1] at 72:9-13 ("She insisted on paying for that."); *id.* at 67:7-15, 145:3-18.) Larsen also admits she received additional payments for her work for Parrish in February and March 2017 over and above the $350 she was paid **[*29]** each month for social media development. (Larsen Dep. [#61-1] at 143:4-144:10, 147:6-15.) In light of this evidence and Larsen's failure to proffer evidence demonstrating a material misrepresentation by Parrish, Larsen cannot prove her allegations to the contrary.

ii. Texas Free Enterprise and Antitrust Act Claims (Counts V and VI)

Larsen's conspiracy and unfair competition claims under the Texas Free Enterprise and Antitrust Act allege that Parrish and her staff conspired with other named individuals to attack and defame Larsen on social media in order to prevent her from competing with Want2Scrap in the market for the sale of scrapbook designs and chipboard products. (Second Am. Compl. [#41] at ¶ 9.) Defendants argue Larsen lacks standing to sue them under the Texas Free Enterprise and Antitrust Act and therefore they are entitled to judgment as a matter of law on her conspiracy and unfair competition claims. The Court agrees.

The Texas Free Enterprise and Antitrust Act of 1983 ("Texas Antitrust Act"), codified at *Texas Business and Commerce Code § 15.01, et seq.*, has the stated purpose of "maintain[ing] and promot[ing] economic competition in trade and commerce occurring wholly or partly within the State of Texas and to provide the **[*30]** benefits of that competition to consumers in the state." *Tex. Bus. & Comm. Code § 15.04*. The Texas Antitrust Act grants a private right of action to bring suit to persons "whose business or property has been injured by reason of anything declared unlawful" in the Act. *Id.* at *§ 15.21(b)*. It is unlawful under the Act for "any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce." *Id.* at *§ 15.05(b)*.

Antitrust law imposes a threshold standing requirement upon persons seeking liability for antitrust violations, which involves more than the "case or controversy" requirement underlying constitutional standing. *McPeters v. LexisNexis, 11 F. Supp. 3d 789, 797 (S.D. Tex. 2014)* (collecting Texas case law); *Marlin v. Robertson, 307 S.W.3d 418, 424 (Tex. App.—San Antonio 2009, no pet.)* Whether a given plaintiff is the proper individual to bring an antitrust claim is a question of law and exist if the plaintiff shows the following: (1) injury-in-fact, which is an injury to the plaintiff proximately caused by the defendant's conduct; (2) antitrust injury; and (3) proper plaintiff status, which assures that other parties are not better situated to bring suit. *Marlin, 307 S.W.3d at 424* (citing *Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, Inc., 123 F.3d 301, 305 (5th Cir. 1997))*.

An antitrust injury is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (internal quotation **[*31]** omitted). "The injury should reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl—O—Mat, Inc., 429 U.S. 477, 498, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. "[I]njury, although causally related to an antitrust violation, nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anti-competitive aspect of the practice under scrutiny. . . ." *Atl. Richfield Co., 495 U.S. at 334* (internal quotation omitted). "On its own, the elimination of a single competitor" is not sufficient to state an antitrust injury; a plaintiff must "plead . . . a reduction of competition in the market in general and not mere injury to their own positions as competitors in the market." *In re Mem'l Hermann Hosp. Sys., 464 S.W.3d 686, 709 (Tex. 2015)* (internal quotation omitted). Allegations surrounding the removal of a single competitor must also suggest that this act "would adversely and unreasonably affect overall competitive conditions." *Id. at 710* (internal quotation omitted).

Larsen has not alleged an antitrust injury sufficient to establish her standing under the Texas Antitrust Act. Larsen claims that Parrish and various third parties targeted Larsen on social media in an attempt to prevent her from competing with Want2Scrap in the scrap book design market by "leaving **[*32]** nasty messages" about Larsen and "putting thumbs down" on Larsen's YouTube channel in response to her postings. (Second Am. Compl. [#41] at ¶ 9; Larsen Dep. [#61-1] at 94:10-15.) According to Larsen, these attacks were personal and concerned her family and her religion. (Resp. [#94] at 5.) Larsen alleges that she was eliminated from the crafting market due to this harassment and that Defendants have made other defamatory remarks about all crafters they believe to be their competitors in order to monopolize the scrap book design market. (Second Am. Compl. [#41] at ¶ 9.)

Yet the summary judgment evidence establishes that Larsen has not in fact been eliminated from the crafting market; rather, Larsen admitted in her deposition that she is still selling her designs for royalty payments through various websites that are still a part of the crafting market. (Larsen Dep. [#61-1] at 92:11-93:4.) Defendants submitted to the Court copies of these websites, which include Larsen's Creative Scrap Designs website, a British site entitled "Fernli Designs," and weCraft.com. (Fernli Designs Website [#61-1] at 210-12; Creative Scrap Designs Website [#61-1] at 213-17; weCraft Website [#61-1] at 298-47.) **[*33]** Larsen clarified in her deposition that the market exclusion she alleges through her Texas Antitrust Act claims is the loss of her YouTube channel, where she posted instructional videos on crafting, rather than exclusion from the scrap book market in its entirety. (Larsen Dep. [#61-1] at 93:1-4.) Larsen claims that she was forced to close her YouTube account due to the harassing behavior of Defendants and as a result she lost over 6,000 followers of her channel. (*Id.*)

Larsen's decision to close her YouTube channel, which is not in itself a commercial site, does not constitute an antitrust injury because Larsen fails to explain how Defendants' harassment of Larsen "adversely and unreasonably affect[ed] overall competitive conditions" in the scrap book design market. *See* *In re Mem'l Hermann Hosp. Sys., 464 S.W.3d at 709*. Again, the purpose of the Texas Antitrust Act is to protect *consumers* from the monopolization of any part of trade or commerce. *Tex. Bus. & Comm. Code § 15.05(b)*. Larsen has failed to allege how Defendants' and others' personal attacks of Larsen on social media reduced competition in the market in general beyond merely damaging her own reputation within the scrap book and crafting community. *See* *In re Mem'l Hermann Hosp. Sys., 464 S.W.3d at 709*. Larsen lacks standing to assert her claim under the **[*34]** Texas Antitrust Act because she has failed to allege an antitrust injury.

D. The Larsen Parties' Motion for Partial Summary Judgment [#62]

The Larsen Parties seek a partial summary judgment on Defendants' counterclaims and defenses relating to the copyright license agreement identified by Defendants. The Larsen Parties contend that the copyright license agreement is invalid and unenforceable and therefore cannot serve as a basis for Defendants' requested declaratory judgment of non-infringement or claims of breach of contract, copyright infringement, or inducing copyright infringement. As previously explained, the Court will order Defendants to show cause as to why these counterclaims should not be dismissed *sua sponte* along with Larsen's copyright infringement claim for failure to first obtain a copyright registration before filing suit as required by *Section 411(a) of the Copyright Act*. The Court will therefore hold in abeyance the Larsen Parties' motion for partial summary judgment while the Court awaits Defendants' show cause response. If the Court determines that these counterclaims should be dismissed, the Court will also dismiss the motion for partial summary judgment as moot. If the Court **[*35]** retains these counterclaims, it will issue a ruling on the Larsen Parties' motion.

IV. Conclusion

Having considered the parties' dispositive motions and the responses and replies thereto under the governing legal standards and in light of the record before the Court, the Court will grant Defendants' supplemental motion for summary judgment; order Defendants to show cause as to why the Court should not *sua sponte* dismiss their counterclaims for a declaratory judgment of non-infringement, copyright infringement, and breach of contract; grant in part Defendants' motion for judgment on the pleadings; grant in part Defendants' motion for summary judgment, and hold in abeyance the Larsen Parties' motion for partial summary judgment.

IT IS THEREFORE ORDERED that Defendants Wants2Scrap, LLC and Michele Parrish's Supplemental Motion for Summary Judgment [#96] is **GRANTED**. Larsen's claim of copyright infringement (Count I) is **DISMISSED WITHOUT PREJUDICE** for failure to obtain a copyright registration prior to filing suit.

IT IS FURTHER ORDERED that Defendants **SHOW CAUSE** why their counterclaims for a declaratory judgment of non-infringement, claims of copyright infringement, inducing copyright infringement, **[*36]** and breach of contract should not be dismissed along with Larsen's copyright infringement claim in light of the Supreme Court's holding in *Fourth Estate Public Benefit Corp. V. Wall-Street.com, LLC, 139 S. Ct. 881, 203 L. Ed. 2d 147 (2019)*, within **seven days of this Order**.

IT IS FURTHER ORDERED that Defendants Wants2Scrap, LLC and Michele Parrish's Motion for Judgment on the Pleadings Pursuant to *Fed. R. Civ. P. 12(c)* [#58] is **GRANTED IN PART**. Larsen's claim of conversion (Count IV) is **DISMISSED WITH PREJUDICE** as preempted by the Copyright Act.

IT IS FURTHER ORDERED that Defendants Wants2Scrap, LLC and Michele Parrish's Motion for Summary Judgment [#61] is **GRANTED IN PART**. Larsen's claims of fraud, fraudulent inducement, and conspiracy and unfair competition under the Texas Free Enterprise and Antitrust Act (Counts II, III, V, and VI) are **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that Plaintiff and Counter-Defendants' Motion for Partial Summary Judgment or Alternatively to Exclude Evidence [#62] is **HELD IN ABEYANCE** pending Defendants' response to the Court's order to show cause.

IT IS FINALLY ORDERED that in all other respects, the motions are **DENIED**.

SIGNED this 3rd day of June, 2019.

/s/ Elizabeth S. ("Betsy") Chestney

ELIZABETH S. ("BETSY") CHESTNEY

UNITED STATES MAGISTRATE JUDGE

[Chamber of Commerce of the United States v. City of Seattle]

United States District Court for the Western District of Washington

June 4, 2019, Decided; June 4, 2019, Filed

No. C17-0370RSL

Reporter

426 F. Supp. 3d 786 *; 2019 U.S. Dist. LEXIS 93355 **; 2019-1 Trade Cas. (CCH) P80,789; 2019 WL 2358666

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al., Plaintiffs, v. THE CITY OF SEATTLE, et al., Defendants.

Prior History: *Chamber of Commerce of the United States v. City of Seattle, 890 F.3d 769, 2018 U.S. App. LEXIS 12337 (9th Cir. Wash., May 11, 2018)*

Core Terms

discovery, drivers, summary judgment motion, anti trust law, ride, summary judgment, continuance, referral, selling, plaintiffs', commodity, oppose, per se rule, cooperation, coordinated, declaration, exemption, RENOTING, for-hire, parties, reasons, elicit

Counsel: **[**1]** For Chamber of Commerce of the United States of America, Plaintiff: Christian G Vergonis, Jacqueline M Holmes, Michael A Carvin, Robert Stander, LEAD ATTORNEYS, PRO HAC VICE, JONES DAY (DC), WASHINGTON, DC; Kathryn Comerford Todd, LEAD ATTORNEY, PRO HAC VICE, CHAMBER OF COMMERCE, WASHINGTON, DC; Lily Fu Claffee, LEAD ATTORNEY, PRO HAC VICE, WASHINGTON, DC; Steven P Lehotsky, Warren Postman, LEAD ATTORNEYS, PRO HAC VICE, WASHINGTON, DC; Timothy J O'Connell, STOEL RIVES (WA), SEATTLE, WA.

For Rasier, LLC, Plaintiff: Robert J Maguire, LEAD ATTORNEY, Douglas C. Ross, DAVIS WRIGHT TREMAINE (SEA), SEATTLE, WA.

For City of Seattle, Seattle Department of Finance and Administrative Services, Fred Podesta, in his official capacity as Director, Finance and Administrative Services, City of Seattle, Defendants: P. Casey Pitts, Stacey Leyton, Stephen P Berzon, LEAD ATTORNEYS, PRO HAC VICE, ALTSHULER BERZON LLP, SAN FRANCISCO, CA; Gregory Colin Narver, Josh Johnson, Michael K Ryan, Sara O'Connor-Kriss, SEATTLE CITY ATTORNEY'S OFFICE, SEATTLE, WA.

For Interested Party: William L. Messenger, LEAD ATTORNEY, PRO HAC VICE, C/O NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, SPRINGFIELD, VA.

Judges: Robert S. Lasnik, **[**2]** United States District Judge.

Opinion by: Robert S. Lasnik

Opinion

[*787] ORDER RENOTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on "Defendants' Motion to Permit Discovery Necessary to Oppose Summary Judgment." Dkt. # 103. Defendants argue that a continuance of plaintiffs' pending summary judgment motions is necessary so that they can conduct discovery regarding (a) whether the labor exemption to federal ***antitrust law*** applies to drivers covered by the City of Seattle Ordinance 124968 and (b) whether the for-hire transportation services offered by plaintiffs depend upon coordinated driver conduct, making the per se rules of unlawful conduct inapplicable. Having reviewed the memoranda and declaration submitted by the parties as well as the underlying motion for summary judgment, the Court finds as follows:

Rule 56(d) offers relief to a litigant who, when faced with a summary judgment motion, "shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition."[1] The party seeking a continuance bears the burden of showing the specific facts it hopes to elicit in discovery, that there is reason to believe the facts sought exist, and that **[**3]** the facts are essential to oppose summary judgment. *Family Home and Fin. Center, Inc. v. Fed. Home Loan Mortg. Corp., 525 F.3d 822, 827 (9th Cir. 2008)*. The party must also show that it has diligently pursued discovery. *Qualls By and Through Qualls v. Blue Cross of Cal., Inc., 22 F.3d 839, 844 (9th Cir. 1994)*. If the requesting party cannot support its request for a continuance, the Court may proceed to summary judgment. Id. If, on the other hand, an appropriate showing is made, the Court may "(1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." *Fed. R. Civ. P. 56(d)*.

By agreement of the parties, discovery in this matter has not yet commenced. See Dkt. # 98 at 1. Plaintiffs have filed a motion for summary judgment seeking a determination that the City's Ordinance is preempted by federal antitrust laws because it authorizes per se illegal group boycotts and/or price fixing.[2] Dkt. # 100. Defendants, in responding to the motion for summary judgment, intend to argue that the "labor" exemption to the federal antitrust laws applies. *15 U.S.C. § 17* ("The labor of a human being is not a commodity or article of commerce" subject **[*788]** to regulation under the Clayton Act). The argument is not frivolous,[3] and discovery from ride referral services and drivers regarding (a) whether the for-hire drivers are selling their **[**4]** labor, as opposed to a product or service that qualifies as a commodity under the antitrust laws, (b) the nature and scope of the drivers' entrepreneurial investments in training, vehicles, and other business expenditures, and (c) the drivers' control over the supply of whatever commodity they are selling is needed to support the argument. In addition, defendants hope to be able to show that the product the ride referral companies are selling - namely, ready access to a private car and driver at a predetermined (fixed) price - requires a certain degree of cooperation between and among the drivers in order to make the product available at all. If that is the case, the per se rules of illegality under the antitrust laws may be inapplicable, and the Court would have to decide whether the undeniable restraint on trade arising from that cooperation is nevertheless reasonable in that it allows the product to be offered and does not unnecessarily restrict competition or decrease output. See *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)*; *NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 98-103, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*. Discovery regarding what powers and authority the drivers cede to the ride referral companies, the process by which the ride referral applications can generate a single ride option at a fixed price, **[**5]** and the market appeal and efficiencies of the coordinated selling arrangement will inform the initial determination of whether the activities at issue here can only be carried out jointly.

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[1] *Subdivision (d) of Rule 56* "carries forward without substantial change the provisions of former *subdivision (f)*." *Fed. R. Civ. P. 56*, Advisory Committee Note to the 2010 Amendments.

[2] Seattle amended the Ordinance in January 2019 to eliminate the provisions authorizing collective bargaining over the nature and amount of payments between drivers and ride referral companies. See Dkt. # 100-1.

[3] Plaintiffs argue that the labor exemption applies only in the context of an employer-employee relationship, not to independent contractors. The exemption uses the phrase "labor of a human being," however, and a recent Supreme Court decision makes clear that, at the time the Clayton Act was written, even the narrower term "employment" encompassed both master-servant relationships and independent contractors. ***New Prime Inc. v. Oliveira, ___ U.S. ___, 139 S. Ct. 532, 542-44, 202 L. Ed. 2d 536 (2019)***.

Defendants have shown that the facts they hope to elicit from further discovery are essential to oppose summary judgment and, given the procedural posture of this case, they have not yet had an opportunity to pursue their investigation of these matters. For all of the foregoing reasons, the motion for a 56(d) continuance (Dkt. # 103) is GRANTED. In light of the delay in ruling on this motion, the Clerk of Court is directed to renote plaintiffs' motion for summary judgment (Dkt. # 100) on the Court's calendar for Friday, November 22, 2019.

Dated this 4th day of June, 2019.

/s/ Robert S. Lasnik **[**6]**

Robert S. Lasnik

United States District Judge

CRST Expedited, Inc. v. Swift Transp. Co of Ariz., LLC

United States District Court for the Northern District of Iowa, Cedar Rapids Division

June 4, 2019, Decided; June 4, 2019, Filed

No. 17-cv-25-CJW-KEM

Reporter
2019 U.S. Dist. LEXIS 93182 *; 2019 WL 2358407

CRST EXPEDITED, INC, Plaintiff, vs. SWIFT TRANSPORTATION CO OF ARIZONA, LLC, Defendant.

Subsequent History: Reconsideration denied by, in part, As moot, Clarified by, On reconsideration by, Request denied by, As moot *CRST Expedited, Inc. v. Swift Transp. Co of Ariz., LLC, 2019 U.S. Dist. LEXIS 108326, 2019 WL 2719797 (N.D. Iowa, June 28, 2019)*

Prior History: *Crst Expedited, Inc. v. Swift Transp. Co., 2018 U.S. Dist. LEXIS 81755, 2018 WL 2016274 (N.D. Iowa, Apr. 30, 2018)*

Core Terms

drivers, contracts, restrictive covenant, void, damages, tortious interference, affirmative defense, unenforceable, hiring, non-competition, summary judgment, contract claim, prospective economic advantage, matter of law, voidable, at-will, competitor, unjust enrichment, causation, training, injunctive relief, injunction, asserts, terms, argues, breaching, plaintiff's claim, defenses, alleged interference, employees

Counsel: **[*1]** For CRST Expedited, Inc, Plaintiff: Kevin J Visser, Paul D Gamez, LEAD ATTORNEYS, Simmons, Perrine, Moyer & Bergman, PLC, Cedar Rapids, IA.

For Swift Transportation Co of Arizona, LLC, Defendant: Kelly R Baier, Vernon Pellett Squires, LEAD ATTORNEYS, Bradley & Riley, Cedar Rapids, IA; Kevin M Cloutier, Mikela Therese Sutrina, Shawn D Fabian, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, Chicago, IL.

Judges: C.J. Williams, United States District Judge.

Opinion by: C.J. Williams

Opinion

MEMORANDUM OPINION AND ORDER

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This matter is before the Court on the parties' cross motions for summary judgment. (Docs. 127, 138). CRST Expedited ("plaintiff") moves for partial summary judgment, and Swift Transportation **[*2]** ("defendant") moves for complete summary judgment. Each party timely resisted the other party's motion (Docs. 146, 159), and each party timely filed a reply in support of its own motion (Docs. 154, 167). The Court heard oral argument on the motions on April 11, 2019. (*See* Doc. 168). For the following reasons, plaintiff's motion (Doc. 127) is **granted in part and denied in part**, and defendant's motion (Doc. 138) is **granted in part and denied in part**.

I. FACTUAL BACKGROUND

Plaintiff and defendant are both commercial trucking companies that provide freight-hauling services throughout the country. To operate a semi-trailer, an individual must possess a commercial driver's license ("CDL"). (Docs. 130-1, at 2; 146-1, at 2). The trucking industry, however, is facing a shortage of licensed drivers. (Docs. 130-1, at 1-2; 146-1, at 2). Plaintiff operates a driver training program that allows individuals to obtain their CDLs. (Docs. 130-1, at 2; 146-1, at 2). When individuals enroll in the training program, plaintiff advances the costs of transportation to the training site, lodging, drug tests, physicals, and tuition for the program. (*See* Docs. 130-1, at 2; 146-1, at 2). These advances are ultimately **[*3]** to be repaid to plaintiff either through a reduced rate of pay until the debt has been satisfied, or through a lump sum payment to plaintiff, as is explained below. (Docs. 140-1, at 8-9; 159-1, at 18, 20).

Before training commences, each trainee signs a Pre-Employment Agreement. (Docs. 43, at 2-3; 146-1, at 5; *see, e.g.*, Doc. 159-9, at 242-46). The training program consists of four phases (Docs. 140-1, at 6; 159-1, at 10), and upon completion of the first two phases, those students who are hired by plaintiff sign a Driver Employment Contract ("Driver Contract") (Docs. 140-1, at 12; 159-1, at 26). The Driver Contracts contain either an eight-month or a ten-month restrictive term, during which time the driver-signatory is prohibited from driving for one of plaintiff's "competitors."[1] (Docs. 130-2, at 51-52; 140-1, at 12; 159-1, at 28). If a driver is discharged or leaves employment before the restrictive term ends, the driver cannot work for any "CRST competitor" during the remainder of the restrictiveduring the remainder of the restrictive term.[2] (Docs. 130-2, at 51-52; 140-1, at 16; 159-1, at 38-39). In

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[1] In their pleadings, the parties refer to the restrictive term as being for ten months, even though certain contracts specify an eight-month restrictive term. For the sake of simplicity, the Court will refer to the restrictive term as being for ten months for all drivers at issue. Additionally, the parties have produced hundreds of Driver Contracts to the Court, all of which appear to contain the same material terms, with the exception of the duration of the restrictive term. The parties have not identified any material differences in any of the contracts, and the Court will cite to only one contract as representative of the entire body of contracts.

addition, a driver who leaves employment before his restrictive term ends is charged **[*4]** $6,500, regardless of the amount of time remaining on his restrictive term.[3] (Docs. 140-1, at 16; 159-1, at 38-39; *see also, e.g.*, Doc. 130-2, at 52 (a representative Driver Contract that contains a $6,500 liquidated damages provision)). Plaintiff asserts that if a driver repays the $6,500, he is released from the contract. (Doc. 159-1, at 39).

Plaintiff brought suit alleging that defendant has actively recruited and continues to actively recruit plaintiff's drivers, even though those drivers remain within the restrictive terms of their Driver Contracts. (Doc. 43, at 4). Specifically, plaintiff asserts that defendant is aware that the drivers at issue[4] remain within the restrictive terms of their contracts, and that defendant's conduct of actively recruiting its drivers is the cause of the drivers leaving plaintiff to drive for defendant. (*Id.*, at 5-10). By hiring drivers who obtained their CDL at plaintiff's expense, plaintiff asserts that defendant is able to gain the advantage of hiring licensed commercial truck drivers without undertaking the expense of training those drivers. (*Id.*, at 6-7). Based on these allegations, plaintiff brought claims for intentional interference with contract, intentional **[*5]** interference with prospective economic advantage, and unjust enrichment. (*Id.*, at 5-8). Plaintiff also seeks permanent injunctive relief "enjoining [defendant] from any further or continued interference with [plaintiff's] prospective economic advantage and/or contracts with its drivers . . .." (*Id.*, at 8-10).

An essential element of plaintiff's tortious interference with contract claim is that the contracts with the drivers were valid. *See* [Gen. Elec. Capital Corp. v. Commercial Servs. Grp., Inc., 485 F. Supp. 2d 1015, 1025 (N.D. Iowa 2007)] (citations omitted). Plaintiff's motion for summary judgment requests only that the Court find that the contracts were valid and that the Court "eliminate all affirmative defenses addressing that element." (Doc. 130, at 3). Defendant's motion seeks complete summary judgment as to each of plaintiff's claims. (Doc. 138).

II. APPLICABLE LAW

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." [Fed. R. Civ. P. 56(a)]. When asserting that a fact is undisputed or is genuinely disputed, a party must support the assertion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations **[*6]** . . ., admissions, interrogatory answers, or other materials." [Fed. R. Civ. P. 56(c)(1)(A)]; *see* [Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)]. Alternatively, a party may "show[ ] that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." [Fed. R. Civ. P. 56(c)(1)(B)]. More specifically, "[a]

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[2] It is unclear whether plaintiff considers a driver to be within the restrictive term of his contract until he has worked for plaintiff for ten months, or whether plaintiff considers the restrictive term to have lapsed ten months after the driver signed the contract. Defendant asserts that plaintiff operates under the former interpretation. (Doc. 140-1, at 16-17). Although plaintiff "[d]enie[s]" these assertions (Doc. 159-1, at 40-41), plaintiff does not clearly explain its interpretation of when the restrictive terms lapse. (*See* Doc. 130, at 11 ("Ten months after [plaintiff's] drivers fulfill the period for which they agreed to drive for [plaintiff], these previously unqualified drivers are available to [defendant] and other competitors . . ..")). Further, plaintiff asserts that when the restrictive terms expire is immaterial to the current issues because, plaintiff urges, "all of the drivers at issue herein were hired by [defendant] within the restrictive term of their respective contract obligations." (Doc. 159-1, at 41).

[3] The Court notes that the Pre-Employment Agreements provide that each trainee will repay plaintiff for the costs of training and also contain non-competition provisions. (*See, e.g.*, Doc. 159-9, at 243-44). The parties do not, however, argue their motions for summary judgment with respect to these provisions in the Pre-Employment Agreements. The Court's focus will, thus, remain on the Driver Contracts.

[4] Plaintiff has identified 250 drivers as being at issue in this case. (Docs. 140-1, at 33; 159-1, at 79). Plaintiff has provided a spreadsheet that identifies each of the drivers at issue. (Doc. 130-7, at 75-79). Although there are 251 individuals listed on the spreadsheet, one name appears twice. (*See id.*, at 75). Based on the parties' representations that only 250 drivers are at issue here, the Court assumes that the name that appears twice belongs to the same individual.

party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." *Fed. R. Civ. P. 56(c)(2)*.

A fact is "material" if it "might affect the outcome of the suit under the governing law . . .." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (citation omitted). "An issue of material fact is genuine if it has a real basis in the record," *Hartnagel v. Norman, 953 F.2d 394, 395 (8th Cir. 1992)* (citation omitted), or "when a reasonable jury could return a verdict for the nonmoving party on the question," *Woods v. DaimlerChrysler Corp., 409 F.3d 984, 990 (8th Cir. 2005)* (internal quotation marks and citation omitted). Evidence that presents only "some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, or evidence that is "merely colorable" or "not significantly probative," *Anderson, 477 U.S. at 249-50*, does not make an issue of fact genuine. In sum, a genuine issue of material fact requires "sufficient evidence supporting the claimed factual dispute" that it "require[s] a jury or judge to resolve the parties' differing versions of the truth **[*7]** at trial." *Id. at 249* (citation and internal quotation marks omitted).

The party moving for summary judgment bears "the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show a lack of a genuine issue." *Hartnagel, 953 F.2d at 395* (citation omitted). Once the moving party has met this burden, the nonmoving party must go beyond the pleadings and by depositions, affidavits, or other evidence designate specific facts showing that there is a genuine issue for trial. *See* *Mosley v. City of Northwoods, Mo., 415 F.3d 908, 910 (8th Cir. 2005)*.

In determining whether a genuine issue of material fact exists, courts must view the evidence in the light most favorable to the nonmoving party, giving that party the benefit of all reasonable inferences that can be drawn from the facts. *Tolan v. Cotton, 572 U.S. 650, 651, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014)*; *Matsushita, 475 U.S. at 587-88* (citation omitted); *see also* *Reed v. City of St. Charles, Mo., 561 F.3d 788, 790 (8th Cir. 2009)* (stating that in ruling on a motion for summary judgment, a court must view the facts "in a light most favorable to the non-moving party—as long as those facts are not so 'blatantly contradicted by the record . . . that no reasonable jury could believe' them" (alteration in original) (quoting *Scott v. Harris, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007))*). A court does "not weigh the evidence or attempt to determine the credibility of the witnesses." *Kammueller v. Loomis, Fargo & Co., 383 F.3d 779, 784 (8th Cir. 2004)* (citation omitted). **[*8]** "Rather, the court's function is to determine whether a dispute about a material fact is genuine . . .." *Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1376-77 (8th Cir. 1996)*.

The mere existence of cross motions for summary judgment does not mean the parties are taking inconsistent positions. *See* *Jacobson v. Md. Cas. Co., 336 F.2d 72, 75 (8th Cir. 1964)*. There may be genuine issues of material facts regarding one motion but not the other. *Id.* (citation omitted). When a court confronts cross motions for summary judgment, the court views the record in the light most favorable to plaintiff when considering defendant's motion, and the court views the record in the light most favorable to defendant when considering plaintiff's motion. *Weber v. Travelers Home & Marine Ins. Co., 801 F. Supp. 2d 819, 825 (D. Minn. 2011)*. On cross motions for summary judgment, a party concedes there are no factual issues and accepts the other party's allegations only for the purpose of the party's own motion. *C. Line, Inc. v. City of Davenport, 957 F. Supp. 2d 1012, 1024 (S.D. Iowa 2013)*. A court must consider each motion separately. *Wright v. Keokuk Cty. Health Ctr., 399 F. Supp. 2d 938, 946 (S.D. Iowa 2005)* (citations omitted). Indeed, the presentation of cross motions for summary judgment does not mandate that a court grant summary judgment in favor of one side or the other. *Hot Stuff Foods, LLC v. Houston Cas. Co., 771 F.3d 1071, 1076 (8th Cir. 2014)*. Similarly, the filing of cross motions for summary judgment does not mean that the parties have waived their right to trial. *See* *Wermager v. Cormorant Twp. Bd., 716 F.2d 1211, 1214 (8th Cir. 1983)* ("[T]he filing of cross motions for summary judgment does **[*9]** not necessarily indicate that there is no dispute as to a material fact, or have the effect of submitting the cause to a plenary determination on the merits." (citations omitted)).

III. NATURE OF CLAIMS AND CONTRACTS

The parties agree that the Court should apply Iowa law to the merits of plaintiff's claims. (Docs. 140, at 14, 37-38, 39; 159, at 13, 41, 44). The parties disagree, however, as to whether Iowa law governs the validity of the contracts themselves. Plaintiff argues that Iowa law should apply to determine the validity of the contracts. (Doc. 130, at 6 n.2). Defendant does not argue in favor of any specific body of law, but defendant does indicate that other states' laws may be applicable in determining the validity of the contracts. (Doc. 146, at 6 n.1; *see also* Doc. 92, at 57 (hearing transcript in which counsel for defendant agreed to the application of the Iowa standard for tortious interference but advocated for the application for different states' laws in determining the validity of the contracts at issue)). Defendant does not substantiate this argument or otherwise request that the Court engage in a conflict of laws analysis. Thus, the Court will not engage in a conflict **[*10]** of laws analysis and will, instead, apply Iowa law as to all issues. *See* *Wolgin v. Simon, 722 F.2d 389, 391 (8th Cir. 1984)* ("A federal court exercising jurisdiction solely on the basis of diversity of citizenship must apply the substantive law of the forum in which it sits." (citation omitted)).

Of plaintiff's four claims, two have the potential to be duplicative, either in whole or in part. Plaintiff's claims for tortious interference with contract and for tortious interference with prospective economic advantage are each based on a similar premise, and the claims have similar elements. The differences between the claims lie in the type of interference that is considered "improper," and whether the harm alleged is based on an existing contractual relationship as opposed to a relationship that *may* vest in the future. *Nesler v. Fisher & Co., 452 N.W.2d 191, 196-99 (Iowa 1990)*; *RTL Distrib., Inc. v. Double S Batteries, Inc., 545 N.W.2d 587, 590-91 (Iowa Ct. App. 1996)*. The type of interference that is considered "improper" is discussed below.

Plaintiff argues that defendant's interference is twofold. First, plaintiff argues that by hiring plaintiff's drivers, defendant has prevented—and continues to prevent—plaintiff's drivers from working for plaintiff. (Doc. 43, at 5-6 (alleging that defendant's actions deprive plaintiff of "a reliable source of professional truck drivers")). Second, **[*11]** plaintiff argues that by hiring plaintiff's drivers, defendant has caused—and continues to cause—plaintiff's drivers to breach their non-competition agreements. (*Id.*, at 7-8 ("[Defendant] has intentionally and improperly interfered with [plaintiff's] Employment Contracts by recruiting, encouraging, and/or otherwise assisting drivers to leave [plaintiff] during the [r]estrictive [t]erm . . ..")).

Under Iowa law, "contracts [that are] terminable at will are more properly protected as a prospective business advantage rather than as a contract." *Compiano v. Hawkeye Bank & Tr., 588 N.W.2d 462, 464 (Iowa 1999)* (citation omitted). *See also* *Mills v. Iowa, 924 F. Supp. 2d 1016, 1041 (S.D. Iowa 2013)*. Before addressing the merits of each claim, then, the Court must determine whether the drivers were employed on an at-will basis and whether the restrictive covenants were terminable at will. If the Court finds that either, or both, sets of contractual provisions were terminable at will, the Court will characterize the claim relating to that provision as a claim for tortious interference with a *prospective* economic advantage.

To be bound by an ongoing obligation requires a binding contract. Under Iowa law, "[i]t is fundamental that a valid contract must consist of an offer, acceptance, and consideration." *Margeson v. Artis, 776 N.W.2d 652, 655 (Iowa 2009)* (citation omitted). **[*12]** The Court finds that each Driver Contract at issue is supported by an offer, acceptance, and consideration. The parties do not dispute that each driver indicated acceptance, so the Court will assume that each driver accepted the contract offered to him. Likewise, the Court finds that the Driver Contracts were supported by an offer and consideration.

The parties do not dispute that an offer was made to each driver, and the Court agrees. The exact terms of those offers, however, requires some discussion. The Court finds that, in addition to the restrictive covenant discussed at length below, there are two paragraphs of the Driver Employment Contracts that are relevant for present purposes. Those paragraphs read as follows:

> 3. *TERM OF EMPLOYMENT*. The term of [plaintiff's] employment of Employee under this Contract shall be for a period of ten (10) months commencing as of the [date of signing the Contract] (the "Term") subject to termination prior to the end of the Term pursuant to Section 4 of this Contract. Following the Term, [plaintiff] shall employ Employee on an at-will basis, and either party may terminate the employment relationship at any time effective immediately[.]

> 4. *TERMINATION OF EMPLOYMENT* ***[*13]*** . During the Term[,] Employee's employment may be terminated only for the following reasons: 1) by [plaintiff] with or without Due Cause effective immediately, 2) by mutual agreement of [plaintiff] and Employee, or 3) upon the death of Employee. For purposes of this Contract, "Due Cause" means Employee's breach of this Contract and/or Employee's failure to satisfy or comply with any of the standards, requirements, obligations and conditions set forth in the [CRST Professional Driver's Handbook]. . . .

(Doc. 130-2, at 51).

Paragraph Three of the Driver Contracts would suggest that the drivers are not hired as at-will employees, but, rather, are hired for a defined term of employment. Paragraph Four, however, shows otherwise. Paragraph Four provides that plaintiff can terminate an employee's employment for cause, or for no reason at all, which amounts to plaintiff's reservation of the right to terminate an employee at any time. Thus, even though Paragraph Three purports to set forth a ten-month employment term, Paragraph Four modifies the purported employment term and is best characterized as an offer to employ an employee for an indefinite period of time. The offer that was made to each **[*14]** driver-signatory, then, was not an offer of employment for a period of ten months.

Neither party contends that any driver made a counter offer, so the Court will assume that no counter offers were made. Plaintiff offered to employ each driver for an indefinite period of time, and it is this offer that each driver at issue is alleged to have accepted. Employees who are hired for an indefinite period of time are considered at-will employees. *Allen v. Highway Equip. Co., 239 N.W.2d 135, 142 (Iowa 1976)*. *See also* *Fitzgerald v. Salsbury Chem., Inc., 613 N.W.2d 275, 281 (Iowa 2000)* ("[T]he traditional doctrine of [at-will employment] is now more properly stated as permitting termination at any time for any lawful reason." (citation, internal quotation marks, and emphasis omitted)). The Court concludes that the drivers at issue here were at-will employees.

The restrictive covenants were, however, for a defined period of time. The contracts specify that the restrictive covenants were for a period of ten months, and the restrictive covenants were not terminable at will by either party. (*See* Doc. 130-2, at 51-52). Although the offer of employment that was made was at-will, the offer to accept employment on condition of the restrictive covenant amounted to an offer to accept employment subject to an ongoing obligation. **[*15]** The contracts were, consequently, for employment at-will, subject to an ongoing obligation not to compete.

Defendant argues that the Driver Contracts were supported by the same consideration as were the Pre-Employment Agreements and were, therefore, invalid for lack of independent consideration. (Doc. 146, at 11-12). The Court disagrees. The consideration for the Pre-Employment Agreements was plaintiff providing training for the drivers. The consideration for the Driver Contracts was plaintiff hiring the drivers. Thus, each contract was supported by independent consideration.

Defendant suggests that plaintiff purports to rely on *continued* employment as consideration for the Driver Contracts. (*Id.*, at 12, n.5). The Court does not view plaintiff as arguing this theory, but the Court would reject the proposal if plaintiff were offering it. The contracts were for at-will employment and could not constitute an agreement for continued employment. Thus, any promise made by plaintiff to continually employ the drivers would have been illusory and could not constitute consideration. *See* *Raccoon Valley State Bank v. Gratias, No. 04-1854, 2006 Iowa App. LEXIS 1920, 2006 WL 3798902, at *3 (Iowa Ct. App. Dec. 28, 2006)* ("A promise is illusory when it fails to bind the promisor, who retains the option of discontinuing performance." (citing **[*16]** *17A AM. JUR. 2D Contracts § 130*, at 150-51 (2004))). This is inconsequential, however, because the mere act of hiring the drivers constituted consideration for the Driver Contracts.

The Court finds that all three elements necessary for formation of a valid contract are present with respect to the Driver Contracts. The contracts were, however, partially terminable at will and partially subject to an ongoing obligation. Because the drivers were at-will employees, plaintiff's claim that defendant actively recruited and hired plaintiff's drivers is best characterized as a claim for tortious interference with prospective economic advantage. *Compiano, 588 N.W.2d at 464*. The claim for interference with the restrictive covenants, on the other hand, amounts to a claim for interference with an ongoing contractual obligation and is best characterized as a claim for tortious interference with contract. *See Nesler, 452 N.W.2d at 196-99*. The Court will consider each claim consistent with these conclusions.

IV. CRST v. TransAm

This Court recently considered whether to grant summary judgment in a companion case that presented factual allegations nearly identical to those alleged in this case. *See CRST Expedited, Inc. v. TransAm Trucking, Inc., No. C16-52-LTS, 2018 U.S. Dist. LEXIS 135900, 2018 WL 3738017 (N.D. Iowa July 31, 2018)* ("*TransAm*"). In *TransAm*, however, **[*17]** the parties did not directly address the applicability of the at-will employment doctrine. Rather, the plaintiff in that case—which is also the plaintiff in this case—summarily asserted that the contracts at issue were not at-will contracts. (*See TransAm*, No. 16-cv-52-LTS, Doc. 167, at 22 n.12, 38). The Court therefore did not address whether the contracts were at-will contracts, in whole or in part.

In this case, by contrast, plaintiff has raised the at-will employment issue, and plaintiff has directly argued the applicability of the doctrine to the tortious interference claims. (*See, e.g., CRST v. Swift*, 17-cv-25-CJW-KEM, Doc. 159, at 23-24). Indeed, plaintiff's briefing in this case highlights plaintiff's argument that even if a contract is partially terminable at will, "when the obligation to refrain from working for a competitor is not at-will, but, instead, an ongoing obligation, a competitor makes a second, conscious decision beyond acquiring services in the open market—the competitor causes the breach by hiring the applicant . . .." (*Id.*, at 25). Because plaintiff, here, raises the at-will employment issue in a non-conclusory fashion and now applies the at-will employment doctrine to **[*18]** the facts of this case, the Court finds it appropriate to address the issue.

It is this application of the at-will employment doctrine that leads the Court to reach a different conclusion now than it did when considering *TransAm*. The Court notes, specifically, that when the drivers' status as at-will employees is considered separately from the restrictive covenants, the causation analysis reaches a different conclusion as to the restrictive covenants. That is, because plaintiff now successfully argues that the restrictive covenants were not terminable at will, the Court will address causation separately as to the restrictive covenants under plaintiff's tortious interference with contract claim. The Court did not do so in *TransAm* because the plaintiff did not fully set forth this argument, and the plaintiff did not address how the ongoing nature of the restrictive covenants impacted the causation analysis. The Court's causation analysis in *TransAm* closely mirrors the causation analysis the Court now engages in under plaintiff's tortious interference with prospective economic advantage claim. *See TransAm, 2018 U.S. Dist. LEXIS 135900, 2018 WL 3738017, at *15-17*.

V. DISCUSSION OF CLAIMS

A. Intentional Interference with Contract

Under Iowa law, the elements **[*19]** of intentional interference with contract are:

> 1) the plaintiff had a valid contractual relationship with a third party; 2) the defendant knew of that relationship; 3) the defendant intentionally interfered with that relationship; 4) the defendant's action caused the third party to breach its contractual relationship with the plaintiff or disrupted the contractual relationship between the third party and the plaintiff by making performance more burdensome or expensive; and 5) . . . damages.

Gen. Elec. Capital Corp., 485 F. Supp. 2d at 1025 (citations omitted). Defendant argues that plaintiff's interference with contract claim fails as a matter of law on each of the five elements. (Doc. 140, at 14-37). As discussed above, the Court will consider only plaintiff's claim that defendant tortiously interfered with the drivers' restrictive covenants under the intentional interference with contract claim. Plaintiff's claim that defendant interfered with the drivers' agreement to work for plaintiff will be considered under the tortious interference with prospective economic advantage claim.

1. Contract Validity and Enforceability

The bulk of the parties' arguments, including those in plaintiff's own motion for summary judgment, revolve around **[*20]** the validity of the Driver Contracts. In its affirmative motion, defendant asserts that the contracts are void 1) as a matter of law because the non-competition provisions are unsupported by a protectable interest, and 2) as against public policy. These flaws in the non-competition provisions, defendant argues, invalidate the entirety of the contracts.

Plaintiff argues that defendant can be liable for tortious interference with contract if defendant improperly interfered with a contract that was not void *ab initio* and had not been avoided at the time of the interference. (Doc. 130, at 12-14). From this premise, plaintiff reasons that if a contract was not actually avoided before defendant's alleged interference, defendant lacks standing to assert those defenses that would permit a contracting party to avoid a contract. (*Id.*). Plaintiff, consequently, seeks summary judgment as to defendant's affirmative defenses that would permit defendant to argue that the contracts are voidable. (*Id.*, at 14-23). In response, defendant maintains that the contracts were void from their inception, but argues that even if they were not, the Court should still find that the contracts are invalid. (Doc. 146, at 21-22). **[*21]** In support, defendant asserts that courts, including Iowa courts, no longer "emphasize the void versus voidable distinction," and that the *Restatement (Third) of Torts: Liability for Economic Harm* "does not even reference the void versus voidable distinction, but instead looks to whether the contract is 'valid.'" (*Id.*, at 22).

The Court rejects defendant's assertion that the void/voidable distinction is inapplicable. As this Court recognized in *TransAm*, "[t]he void/voidable distinction is far from outdated." *2018 U.S. Dist. LEXIS 135900, 2018 WL 3738017, at *9*. Iowa courts have continued to follow the *Restatement (Second) of Torts* for intentional interference cases. *See, e.g., Jones v. Univ. of Iowa, 836 N.W.2d 127, 151 (Iowa 2013)*; *Spreitzer v. Hawkeye State Bank, 779 N.W.2d 726, 737 (Iowa 2009)*; *Kern v. Palmer Coll. of Chiropractic, 757 N.W.2d 651, 663-64 (Iowa 2008)*; *Condon Auto Sales & Serv., Inc. v. Crick, 604 N.W.2d 587, 601 (Iowa 2000)*; *RTL Distrib., Inc. v. Double S Batteries, Inc., 545 N.W.2d 587, 590 (Iowa Ct. App. 1996)*. This Court has addressed the void/voidable distinction in this very case, as well as in two companion cases. *See TransAm, 2018 U.S. Dist. LEXIS 135900, 2018 WL 3738017, at *9-10*; *CRST Expedited, Inc. v. JB Hunt Transp., Inc., Nos. 17-CV-26 CJW & 17-CV-24 CJW, 2018 U.S. Dist. LEXIS 96434, 2018 WL 2768874, at *10-13 (N.D. Iowa June 8, 2018)* ("*JB Hunt*"); *CRST Expedited, Inc. v. Swift Transp. Co. of Ariz., LLC, No. 17-CV-25-CJW, 2018 U.S. Dist. LEXIS 81755, 2018 WL 2016274, at *7-9 (N.D. Iowa Apr. 30, 2018)* ("*Swift*"). Finally, the Court has been unable to find any Iowa caselaw adopting the *Restatement (Third) of Torts: Liability for Economic Harm*, which is still in draft form and has yet to be officially published. RESTATEMENT (THIRD) OF **[*22]** TORTS: LIABILITY FOR ECONOMIC HARM (AM. LAW INST., Tentative Draft No. 3, 2018).

When addressing the void/voidability distinction in this case previously, the Court engaged in the following discussion:

> The *Restatement (Second) of Contracts*, Section 766, Intentional Interference with Performance of Contract by Third Person, Comment f provides as follows:
>
> > *Voidable contracts*. The word "contract" connotes a promise creating a duty recognized by law. The particular agreement must be in force and effect at the time of the breach that the actor has caused; and if for any reason it is entirely void, there is no liability for causing its breach. Furthermore, it must be applicable to the particular performance that the third person has been induced or caused not to discharge. *It is not, however, necessary that the contract be legally enforceable against the third person. A promise may be a valid and subsisting contract even though it is voidable*. The third person may have a defense against action on the contract that would permit him to avoid it and escape liability on it if he sees fit to do so. *Until he does, the contract is a valid and subsisting relation, with which the actor is not permitted to interfere improperly*. Thus, by reason of **[*23]** the statute of frauds, formal defects, lack of mutuality, infancy, unconscionable provisions, conditions precedent to the obligation or even uncertainty of particular terms, the third person may be in a position to *avoid* liability for any breach. *The defendant actor is not, however, for that reason free to interfere with performance of the contract before it is avoided*.

> (emphasis added) (internal citations omitted). *Peterson v. First Nat'l Bank of Iowa, 392 N.W.2d 158, 165-66 (Iowa Ct. App. 1986)*. *See also* *Stone's Pharmacy, Inc. v. Pharmacy Accounting Mgmt., Inc., 875 F.2d 665, 668 (8th Cir. 1989)*. Further, the Supreme Court of Iowa has held that "[i]n the case of a voidable contract, if neither party seeks avoidance, the court cannot avoid the contract, and the contract remains valid." *Nichols v. City of Evansdale, 687 N.W.2d 562, 571 (Iowa 2004)* (citing *First State Bank v. Shirley Ag Serv., Inc., 417 N.W.2d 448, 452 (Iowa 1987))*.
>
> Whether the contracts are voidable, therefore, is a separate issue from whether the contracts were valid at the time of the alleged wrongful interference. Defendant appears to confuse the two concepts by arguing that should the drivers successfully argue that the contracts are substantively unenforceable, defendant cannot face any liability for its alleged interference. On the other hand, if any of the drivers successfully avoided their contracts prior to defendant's alleged interference, defendant would not be liable for any alleged interference with those contracts. **[*24]**

*Swift, 2018 U.S. Dist. LEXIS 81755, 2018 WL 2016274, at *8*. When asked to address the void/voidability distinction in *TransAm*, this Court again reached the same conclusion. *See* *TransAm, 2018 U.S. Dist. LEXIS 135900, 2018 WL 3738017, at *10*. The Court is unpersuaded that it should now abandon the void/voidability distinction.

Defendant has not identified any contract that defendant asserts was avoided.[5] The issue, then, is twofold. First, the Court must consider whether the contracts were void *ab initio*. If the Court answers that question in the negative, the Court will then address which of defendant's affirmative defenses, if any, assert principles of law that would permit a contracting party to *avoid* a contract. Those defenses that would permit a contracting party to avoid a contract cannot be properly asserted by defendant and must fail as a matter of law, unless defendant is able to identify contracts that it contends were avoided before defendant's alleged interference.

Defendant asserts that the contracts are void because the non-competition provisions contained within the contracts are not supported by a protectable interest, which, defendant argues, renders the contracts facially invalid. (Doc. 140, at 27, 27 n.7-8, 30). Defendant also argues that the contracts are void as a matter of law because **[*25]** the non-competition provisions operate as "indefinite, lifetime non-compete agreement[s]." (Doc. 140, at 30-33). The former argument addresses whether a non-competition provision renders a contract void when the reasons supporting the non-competition provision are insufficient, and the latter argument addresses whether a non-competition provision renders a contract void if the non-competition provision is in violation of public policy. The Court will address each issue in turn, considering whether either argument, if successful, would render the contracts void or merely voidable.

a. Lack of Protectable Interest

Under Iowa law, non-competition provisions are measured against a reasonability standard. *Mut. Loan Co. v. Pierce, 245 Iowa 1051, 65 N.W.2d 405, 407 (Iowa 1954)* ("It comes down to a question of reasonableness. The restraint will be enforced if reasonably necessary to afford a fair protection to the business interests of the party in favor of whom it is given."). *See also* *Ag Spectrum Co. v. Elder, 191 F. Supp. 3d 966, 971 (S.D. Iowa 2016)* (setting forth the relevant Iowa standards in assessing whether a contract is "enforceable"). If a non-competition provision is not reasonably necessary, it is "unenforceable." *Mut. Loan Co., 65 N.W.2d at 408*. Iowa courts have not squarely addressed what it means for a contract to be "unenforceable." That is, **[*26]** Iowa law is unclear as to whether a contract is "unenforceable" because it is void, or whether the contract is "unenforceable" because an unreasonable non-competition provision permits avoidance.

[5] The Court notes that although defendant has not identified any contract that defendant contends was avoided, plaintiff has not come forward with conclusive evidence that no contract was avoided. The Court, therefore, cannot conclusively find that defendant is unable to prove that any contract was avoided.

The Court finds that the use of the term "unenforceable," as opposed to "void," is intentional. The Iowa Supreme Court has repeatedly recognized the distinction between contracts that are unenforceable versus those that are void. *See Mincks Agric. Ctr., Inc. v. Bell Farms, Inc., 611 N.W.2d 270, 273-74 (Iowa 2000)* (recognizing that a contract is void if performance of the contract would require criminal conduct but explaining that a contract that violates a statutory provision without implicating criminal law calls the contract's enforceability into question); *Mut. Loan Co., 65 N.W.2d at 407-08* (adopting rule that a contract is *unenforceable* if not reasonably necessary but recognizing that at least one other court found that restraints on competition are *void*, except in special circumstances). The Iowa Supreme Court, in explaining the reasonability standard for enforcement of non-competition provisions, seemed to adopt the rule that "[r]estraints on competition are *void*, except in the special case where they are necessary in order to prevent the employee from unjustly enriching himself at the expense of **[*27]** his former employer." *Mut. Loan Co., 65 N.W.2d at 408* (emphasis added) (quoting *John Roane, Inc. v. Tweed, 32 Del. Ch. 90, 80 A.2d 290, 293 (Del. Ch. 1951)* (interpreting Maryland contract law), *rev'd 33 Del. Ch. 4, 89 A.2d 548 (Del. 1952))*.

Reading *Mutual Loan* more closely, however, reveals that the Iowa Supreme Court did not, in fact, hold that restraints on competition are void where not necessary. Rather, the *Mutual Loan* court quoted the Delaware Court of Chancery's decision in *John Roane, Inc. v. Tweed* for illustrative purposes only. Further, the *Mutual Loan* court cited *John Roane* for the proposition that a non-competition provision must be reasonably necessary. *See Mut. Loan Co., 65 N.W.2d at 408*. The *Mutual Loan* court did not reference *John Roane* to determine the legal implications of an improper non-competition provision. Had the *Mutual Loan* court intended to reference *John Roane* to determine the validity, as opposed to enforceability, of an improper non-competition provision, the *Mutual Loan* court likely would have discussed two separate principles.

First, the *Mutual Loan* court likely would have focused on the use of "void" in *John Roane* in an attempt to discern whether the *John Roane* court meant "void" in the traditional sense, or whether "void" was mistakenly used in place of "unenforceable." Second, the *Mutual Loan* court likely would have turned **[*28]** to the Delaware Supreme Court's review of the Court of Chancery's *John Roane* decision.[6] The Delaware Supreme Court, in reviewing the *John Roane* decision, spoke in terms of the "enforceability" of the contract at issue. *John Roane, Inc. v. Tweed, 33 Del. Ch. 4, 89 A.2d 548, 550 (Del. 1952)* ("[T]he essential question here concerns the enforceability of a contract admittedly in partial restraint of trade and competition."). The Delaware Supreme Court did not adopt the lower court's holding that "[r]estraints on competition are void" when special circumstances cannot be shown. *John Roane, Inc., 80 A.2d at 293*.

Had the Iowa Supreme Court intended to rely upon the Delaware Court of Chancery's proclamation regarding the validity of contracts, the Iowa Supreme Court likely would have either attempted to distinguish Iowa contract law from Maryland contract law, or would have explained the basis for the Iowa Supreme Court's disagreement with the Delaware Supreme Court. That the Iowa Supreme Court made no attempt to analyze the use or meaning of the term "void" indicates that the word "void" was not the Iowa Supreme Court's focus in *Mutual Loan* and was included in the opinion merely because the term was encompassed within a relevant quotation.

Moreover, in *Mutual* ***[*29]*** *Loan*, the Iowa Supreme Court referenced whether a contract would be "void," as discussed above, but went on to speak in terms of a contract's *enforceability*. That the court contemplated both validity and enforceability in the same decision indicates that the court spoke in terms of "enforceability," and reached a holding based on "enforceability," intentionally. The Iowa Supreme Court just as easily could have spoken in terms of validity and reached a holding based on the validity of the contract at issue. The court did not do so, however, and the case law leaves this Court persuaded that "void" and "unenforceable" are not synonymous in the Iowa non-competition clause context.

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[6] The Court notes that the Delaware Supreme Court's *John Roane* decision was issued two years before the Iowa Supreme Court's *Mutual Loan* decision. Thus, the Delaware Supreme Court's decision was available to the Iowa Supreme Court when the Iowa Supreme Court decided *Mutual Loan*.

Finally, this Court has been unable to find any Iowa state court decision, Iowa federal court decision, or Eighth Circuit Court of Appeals decision, other than *Mutual Loan*, referencing the lower court's *John Roane* decision,[7] or holding that an improper non-competition provision would render a contract—or the non-competition provision alone—void. If Iowa courts were of the opinion that a problematic non-competition provision renders a non-competition clause void, the Court finds it likely that this opinion would **[*30]** have been articulated in more than one decision and would not have been mentioned only in passing. The Court concludes that under Iowa law, a non-competition clause that is not reasonably necessary may be rendered unenforceable, but a finding that the clause is not reasonably necessary does not, alone, serve to void either the non-competition clause or the contract as a whole.[8]

As this Court has repeatedly found, if a third party interferes with a valid contract, that third party may be liable for tortious interference, if all other elements of the claim are met. The Court now finds that although a non-competition clause can be rendered unenforceable if it is not reasonably necessary, the lack of reasonable necessity does not render the contract void. Thus, the contract would remain a valid agreement and the contracting party against whom enforcement is sought could argue that the non-competition provision is unenforceable as to him. This defense, however, would not relieve an alleged tortious interferer because, as set out above, "[a] promise may be a valid and subsisting contract even though it is voidable." *Restatement (Second) of Torts, § 766, cmt. f* (AM. LAW INST. 2018).

Defendant argues that an unenforceable contract cannot support a claim for tortious interference with contract. (Doc. 140, at 24-25, 25 n.5 (citing *Iowa Office Supply, Inc. v. Access Techs., Inc.*, No. EQCV150495, 2013 WL 6511495, at *5 (Iowa Dist. Feb. 22, 2013))). The *Restatement (Second) of Contracts* and Eighth Circuit precedent, however, counsel otherwise. *Rucker v. Taylor, 828 N.W.2d 595 (Iowa 2013)* (relying on numerous provisions of the **[*32]** *Restatement (Second) of Contracts*)). The *Restatement (Second) of Contracts* provides, and the Eighth Circuit has agreed, that "[w]here a party to a contract which is unenforceable against him refuses . . . to perform the contract . . ., the other party is justified in suspending any performance for which he has not already received the agreed return . . .." *RESTATEMENT (SECOND) OF CONTRACTS, § 141(2)* (AM. LAW INST. 2019); *Black v. Hesse, 869 F.2d 420, 422 (8th Cir. 1989)* (stating common law principle). Under the *Restatement (Second) of Contracts* and *Black v. Hesse*, a wronged party *may* suspend performance but is not required to. Until the wronged party chooses to suspend performance, then, the parties are free to operate as though the contract is fully enforceable. The recognition that the subject contract would be unenforceable as to only *one* contracting party also implies that the contract remains valid. This is because an invalid contract would not be enforceable against *any* party. Again, the Court finds a distinction between validity of a contract and enforceability.

In support of its position that an improper non-competition provision renders the provision, and the contract, void rather than voidable, defendant cites a number of cases. The first, *Iowa Office Supply, Inc.* ***[*33]*** *v. Access*

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[7] The Iowa Supreme Court has, on one occasion, referenced the Delaware Supreme Court's *John Roane* decision. *See Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368, 370 (Iowa 1971)* (referring to *John Roane, Inc. v. Tweed* as *Roane, Inc. v. Tweed*). It is the lower court's *John Roane* decision, however, that this Court is concerned with.

[8] The ***Restatement (Second) of Contracts, Section 8*** addresses this very issue. ***Section 8*** reads: "An unenforceable contract is one for the breach of which neither the remedy of damages nor the remedy of specific performance is available, but which is recognized in some other way as creating a duty of performance, though there has been no ratification." ***Comment a to Section 8*** elaborates:

> *a. Distinction between "voidable" and "unenforceable."* Just as a contract may be voidable by one party or by either party, so it may be enforceable by one and not by the other or it may be unenforceable by either. Similarly, one party to an unenforceable contract may have a power to make the contract enforceable by all the usual remedies, and both voidable and unenforceable contracts may have collateral consequences. Voidable contracts might be defined as one type of unenforceable contract. As defined here, however, the term unenforceable contract refers to rules under which the duty of performance does not depend solely on the election of one party. In the transactions here classified as unenforceable, some legal consequences other than the **[*31]** creation of a power of ratification follow without further action by either party.

Technologies, Inc., is cited only for a sentence contained in the Iowa District Court's conclusion paragraph: "Because the agreement is unenforceable, [plaintiff's] claim for intentional interference with a contract must necessarily fail." (Doc. 140, at 24-25, 25 n.5). As discussed, the Court finds that there is a distinction between contracts that are unenforceable and those that are void. Further, the cited proposition is accompanied by no analysis and can be viewed as a conclusory holding that the defense of unenforceability falls into the "void category." The Court declines to adopt this conclusory holding when the state case law and *Restatement (Second) of Contracts* instruct that the Court should reach a different conclusion.

Next, defendant turns to a case from the Fifth Circuit Court of Appeals, *NCH Corp. v. Share Corp., 757 F.2d 1540 (5th Cir. 1985)*, for the proposition that "unreasonable noncompetes are void rather than voidable 'because of the public policy against restraints of trade,' and [can] not support tortious interference claim[s]." (Doc. 140, at 26 (quoting *NCH Corp., 757 F.2d at 1543*)). The Court recognizes that the Fifth Circuit, in applying Texas law, held that a defendant could assert unenforceability as a defense to a tortious interference **[*34]** with contract claim. *NCH Corp., 757 F.2d at 1543-44*. Defendant does not, however, argue that the Court should apply Texas law to determine the validity of the contracts at issue. Indeed, defendant does not argue in favor of application of any specific body of law. As noted above, the Court is, thus, applying Iowa law throughout its analysis, including in determining the validity of the contracts. Had defendant argued in favor of applying Texas law to determine the validity of the contracts, perhaps the outcome would be different. Under Iowa law, however, defendant is precluded from asserting unenforceability as a defense in this action.

Defendant cites to five other cases in support of its argument that the absence of a protectable interest renders a non-competition clause, and the accompanying contract, void. (*See* Doc. 140, at 26, 27 n.7-8, 30). Each of the cited cases, however, relies on the laws of a state other than Iowa. *Spectrum Creations, L.P. v. Carolyn Kinder International, LLC, No. SA-05-CV-750-XR, 2008 U.S. Dist. LEXIS 10603, 2008 WL 416264 (W.D. Tex. Feb. 13, 2008)*, was decided by a federal court sitting in Texas that applied Florida law, in relevant part. *See 2008 U.S. Dist. LEXIS 10603, 2008 WL 416264, at *66*. Two of defendant's other cited cases, *GPS Industries, LLC v. Lewis, 691 F. Supp. 2d 1327 (M.D. Fla. 2010)*, and *In re Maxxim Medical Group, Inc., 434 B.R. 660 (M.D. Fla. 2010)*, likewise applied Florida law. As has already been discussed, the **[*35]** Court is applying Iowa law throughout its analysis, and the Court does not find it necessary to look beyond the Iowa case law to determine whether defendant can assert the defense of unenforceability. Even if the Court were inclined to look beyond the Iowa case law, however, these three cases would be of limited value to the Court.

Florida has codified limitations on restrictive covenants: "Any restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable." *FLA. STAT. § 542.335(1)(b)*. Each of the three cases decided under Florida law cite to this statute in addressing the validity of the restrictive covenants at issue. *In re Maxxim Med. Grp., Inc., 434 B.R. at 684-85, 685 n.182*; *GPS Indus., LLC, 691 F. Supp. 2d at 1333*; *Spectrum Creations, L.P., 2008 U.S. Dist. LEXIS 10603, 2008 WL 416264, at *66*. Iowa does not have an analogous statute that addresses the legal effects of a restrictive covenant that is not supported by a protectable interest. The cases decided under Florida law, then, are not on point because they were decided with reference to a law that is not implicated here.

Defendant cites to *Rebsamen Insurance v. Milton, 269 Ark. 737, 600 S.W.2d 441, 444 (Ark. Ct. App. 1980)*, in which the Arkansas Court of Appeals held that a restrictive covenant was unreasonable and therefore "against public policy, unenforceable and void." To determine whether to uphold the restrictive covenant at issue, the *Rebsamen* court considered **[*36]** the reasonableness of the covenant. *600 S.W.2d at 443-44*. The *Rebsamen* court ultimately concluded that the restrictive covenant was "broader than necessary to protect [the plaintiff's] legitimate business interests," which led the court to conclude that the restrictive covenant was unreasonable. *Id. at 444*.

Although the test employed by the *Rebsamen* court is similar to the test employed under Iowa law, the *Rebsamen* court did not explain why it found the contract "unenforceable and void." *Id.* There is no indication that the *Rebsamen* court found a distinction between contracts that are "unenforceable" and those that are "void." As discussed *supra*, however, the Court is persuaded that Iowa law does distinguish between contracts that are "unenforceable" and those that are "void." *Rebsamen* is, thus, distinguishable.

Finally, defendant cites to *Cytimmune Sciences, Inc. v. Paciotti, No. PWG-16-1010, 2016 U.S. Dist. LEXIS 121188, 2016 WL 4699417, at *2 (D. Md. Sept. 8, 2016)*, in which the District of Maryland held that a restrictive covenant was not enforceable because it was not supported by a legally protected interest and was contrary to public policy. The *Cytimmune Sciences* court, however, was faced with a very different issue than this Court is confronted with. In *Cytimmune Sciences*, the plaintiff **[*37]** brought a motion for preliminary injunction to enforce a restrictive covenant that would have prevented the defendant from working for a competitor. Because the movant only sought to *enforce* the restrictive covenant, the *Cytimmune Sciences* court did not need to consider whether the unenforceability of the restrictive covenant would render either the restrictive covenant or the entire contract void. Instead, the court could—and did—decide only the narrower question of whether to enforce the restrictive covenant. *See* *2016 U.S. Dist. LEXIS 121188, [WL] at *4*. *Cytimmune Sciences*, then, does not assist this Court in determining whether the contracts in this case would be rendered void, as opposed to voidable, if the Court were to find that the restrictive covenants were unenforceable.

The Court rejects defendant's argument that defendant is entitled to summary judgment because the potential lack of a protectable interest renders the contracts void. The Court, instead, finds that any lack of a protectable interest would render the contracts voidable. As defendant does not argue that any contracts at issue were avoided before defendant's alleged interference, defendant cannot presently rely upon the defense of a lack of a protectable **[*38]** interest. *See* *Nichols, 687 N.W.2d at 571* (holding that when a contract has not been avoided, the contract remains valid (citation omitted)). The Court need not consider whether plaintiff has a protectable interest sufficient to support the non-competition provisions because the Court's conclusion on this issue would be of no consequence as to the issues before the Court.

b. Violation of Public Policy

Defendant next argues that the contracts are void as a matter of law because the non-competition provisions "operate[ ] as . . . indefinite and lifetime non-competition restriction[s], again violative of the public interest." (Doc. 140, at 26). Additionally, defendant argues that the contracts are procedurally and substantively unconscionable, which renders them void as a matter of law. (*Id.*, at 26 n.6; *see also* Doc. 146, at 17-21). The Court rejects both arguments.

When addressing the defense of unconscionability, Iowa courts consider whether to *enforce* contracts. *See, e.g.,* *Lakeside Boating & Bathing, Inc. v. Iowa, 402 N.W.2d 419, 422 (Iowa 1987)* ("We have held that a bargain will be deemed unenforceable if it is such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." (citations and internal quotation marks omitted)). **[*39]** *See also* *In re Marriage of Shanks, 758 N.W.2d 506, 513 (Iowa 2008)* ("We next consider whether the agreement is unconscionable and therefore unenforceable."). The Court has already determined that "unenforceable" is not synonymous with "void." The Court thus concludes that an unconscionability defense permits a party to *avoid* a contract, but an unconscionability defense, if successful, does not render the underlying contract *void.* This is consistent with this Court's holding in *TransAm* and with the *Restatement (Second) of Torts. See* *TransAm, 2018 U.S. Dist. LEXIS 135900, 2018 WL 3738017, at *10*; *Restatement (Second) of Torts § 766 cmt. f* ("[B]y reason of . . . unconscionable provisions, . . . the [contracting party] may be in a position to avoid liability for any breach. The defendant actor is not, however, for that reason free to interfere with the performance of the contract before it is avoided."). Because defendant has not argued that any driver avoided his contract with plaintiff, the defense of unconscionability would be of no benefit to defendant, and defendant does not have standing to raise the defense, unless defendant can show that one or more drivers avoided his contract.

Defendant next argues that the restrictive covenants are "indefinite, lifetime non-compete agreement[s]," that violate public policy. (Doc. 140, at 30). This argument, **[*40]** if successful, would render the non-competition clauses void from their inception. *See* *Harvey v. Care Initiatives, Inc., 634 N.W.2d 681, 684 n.4 (Iowa 2001)*. The invalidity of the non-competition clauses would relieve defendant from liability on plaintiff's tortious interference with contract claim because the entirety of plaintiff's contract claim rests on the restrictive covenants. Because no other contractual provision is implicated in the contract claim, whether the invalidity of the restrictive covenants would render any other contract term invalid or void is irrelevant. The Court, however, finds that the restrictive covenants do not operate as "indefinite, lifetime non-compete agreements." (Doc. 140, at 30).

Defendant argues that plaintiff's interpretation of the restrictive covenants turns the restrictive covenants into a lifetime ban of each driver-signatory from the trucking industry. (Doc. 140, at 31-33). The restrictive term contained in the contracts reads as follows:[9]

> The term of [plaintiff's] employment of Employee under this Contract shall be for a period of ten (10) months commencing as of the Effective Date (the "Term") . . .. Following the Term, [plaintiff] shall employ Employee on an at-will basis, and either party may terminate the **[*41]** employment relationship at any time effective immediately[.]

(Doc. 130-2, at 51). The "Effective Date" is the date a driver enters into the contract. (*Id.*). The contracts go on to state that "Employee agrees and covenants that for a period equal to the greater of the [r]estrictive [t]erm and the duration of [plaintiff's] employment of Employee, Employee will not directly or indirectly provide truck driving services to any CRST Competitor within the continental United States of America." (*Id.*). The "[r]estrictive [t]erm" is defined as "the Term including any period of the Term remaining after the termination of [plaintiff's] employment of Employee with or without cause by either party . . .." (*Id.*, at 52). The Term can lapse if the employee pays back the full amount that plaintiff advanced for that driver's training. (*Id.*).

Defendant argues that plaintiff's interpretation of the restrictive covenants is such that, for example, a driver with a ten-month restrictive term who leaves plaintiff's employ after five months cannot work for one of plaintiff's competitors until the driver returns to plaintiff and works for another five months. (Doc. 140, at 31). Thus, even a driver who left plaintiff's **[*42]** employ ten years ago would be barred from working for a competitor if the driver had any time remaining on his restrictive term. (*Id.*). In support, defendant cites to the testimony of plaintiff's former chief executive officer, who provided that "if a driver does not either complete his contract term or pay off his contract, he cannot work for another motor carrier for the rest of his life."[10] (Docs. 140, at 31; 140-1, at 16; 140-2, at 16).

In response, plaintiff states that "equating [the contractual exclusive driving and non-compete] terms to a lifetime ban ignores obvious and critical contract terms." (Doc. 159, at 18). Plaintiff goes on to explain that the restrictive covenants are only applicable to plaintiff's competitors and not to the motor carrier industry as a whole. (*Id.*). Additionally, plaintiff reiterates that a driver-signatory can "simply pay off [his] contract, thus extinguishing the brief ten (10) month exclusive driving commitment." (*Id.*). Plaintiff does not directly address whether it interprets the restrictive covenants to extend, potentially, for life. Nor does plaintiff address whether its own interpretation of the restrictive covenants matters when considering **[*43]** the validity of the covenants or the underlying contracts.

The plain meaning of the restrictive covenants does not support defendant's "lifetime ban" interpretation. *See* *Pro-Edge L.P. v. Gue, 419 F. Supp. 2d 1064, 1084-85 (N.D. Iowa 2006)* ("[I]n interpreting written contracts[,] . . . the intent of the parties controls, [but] this intent is determined by the language of the contract unless it is ambiguous. . . . [I]t is a court's duty to give effect to the language of the contract in accordance with its plain and ordinary meaning." (citations omitted)); *DuTrac Cmty. Credit Union v. Radiology Grp. Real Estate, L.C., 891 N.W.2d 210,*

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[9] As explained above, some contracts are for a term of ten months and others are for a term of eight months. (*Compare* Doc. 130-2, at 51, *with id.*, at 57). This difference is immaterial in considering whether the restrictive covenants operate as a lifetime ban. Further, the parties do not argue that this difference is material, nor do the parties point to any other differences in the restrictive covenants contained in the various contracts at issue.

[10] The Court notes that the witness did not, himself, make this statement. Rather, defense counsel asked: "And, in fact, it is the position of CRST that if a driver does not either complete his contract term or pay off his contract, he cannot work for another motor carrier for the rest of his life?" (Doc. 140-2, at 16). The witness responded "Correct." (*Id.*). Plaintiff does not take issue with this characterization of the testimony, however, and the Court will therefore consider the characterization to be inconsequential.

216 (Iowa 2017) (recognizing that restrictive covenants are contracts and that contract-based rules of construction should apply). The restrictive covenants limit the time a driver agrees not to compete with plaintiff to the greater of "a period equal to" 1) the time remaining on the Restrictive Term, or 2) "the duration of [plaintiff's] employment of Employee." (Doc. 130-2, at 51). The Court finds that this language is not ambiguous and, thus, the language of the restrictive covenants determines the intent of the contracting parties.

Defendant addresses only the first possibility in arguing that the restrictive covenants operate as a "lifetime ban." The plain, commonly understood meaning of "a period equal to" would **[*44]** mean, for example, that a driver with a ten-month restrictive term who leaves plaintiff's employ after five months would be bound for five months after his employment ended. The plain, commonly understood meaning does not support an interpretation that the driver would be bound indefinitely until he either returned to work for plaintiff for an additional five months or repaid plaintiff for the costs of the driver's training. Indeed, the drivers at issue here are only those who ceased working for plaintiff while still within their restrictive terms. (*See* Docs. 130, at 3 n.1; 130-7, at 75-79 (identifying the drivers at issue)). Even if plaintiff's employees, including its chief executive officer, interpret the restrictive terms more expansively, the plain meaning of those covenants controls. The plain meaning of the restrictive terms does not support defendant's "lifetime ban" theory.

Defendant does not advance any other arguments as to why the Court should find that the contracts were void *ab initio*, and the Court thus concludes that they were not void *ab initio*. Defendant has not carried its burden of establishing that plaintiff lacked a valid contractual relationship with each driver **[*45]** at the time of defendant's alleged interference, and defendant is, thus, not entitled to summary judgment on the first element of plaintiff's tortious interference with contract claim. Defendant's motion for summary judgment is **denied** to the extent it seeks a finding that plaintiff did not have a valid contractual relationship with each of the drivers at issue.

Plaintiff's motion for partial summary judgment seeks, in part, to establish the existence of valid contractual relationships with the drivers. The Court finds that plaintiff is entitled to summary judgment to the extent plaintiff's motion seeks to establish that the Driver Contracts, and the restrictive covenants contained therein, are valid. Plaintiff's motion is **granted** to this limited extent. Plaintiff is not, however, entitled to a finding that plaintiff had valid contracts with the drivers for the drivers' continued employment because, as explained above, the drivers were at-will employees.

2. Knowledge

Plaintiff argues that defendant had actual and constructive knowledge of the contracts at issue at the time of defendant's alleged interference. (Doc. 159, at 18-21). The Iowa Supreme Court has directly addressed the issue **[*46]** of constructive knowledge in the context of tortious interference with contract: "It is not necessary that the [d]efendant had actual knowledge of the specific contract. It is sufficient that the [d]efendant had knowledge of facts which, if followed by reasonable inquiry, would have led to the disclosure of the contractual relationship . . .." Revere Transducers, Inc. v. Deere & Co., 595 N.W.2d 751, 764 (Iowa 1999) (citation and internal quotation marks omitted). Defendant agrees that plaintiff sent defendant "Contract Notice Letters" advising defendant that certain drivers were "under contract" with plaintiff.[11] (Doc. 140, at 3). Defendant maintains, however, that it did not have notice of the restrictive covenants contained within the Driver Contracts. In doing so, defendant's argument is limited to asserting that "[n]othing in the record suggests [defendant] or anyone at [defendant] had any knowledge as to what 'under contract' means." (Doc. 140, at 33). In ascertaining whether the drivers at issue were subject to ongoing contractual obligations, however, defendant was not limited to the "Contract Notice Letters."

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[11] Defendant has not advised whether a "Contract Notice Letter" was sent for each driver at issue here. From prior proceedings in this case, the Court understands that defendant inquires as to a driver's past employment history with other trucking companies before hiring the driver. Mistakes can happen, however, especially when dealing with such a large volume of drivers. Defendant does not argue that it was not advised that any of the drivers at issue were "under contract," and the Court will therefore assume that defendant received a "Contract Notice Letter" for each of the 250 drivers at issue here.

In response to an interrogatory, defendant stated "that it possesses a limited number of Driver Contracts . . .." (Doc. 140-6, at 32). If defendant **[*47]** came into possession of these contracts before hiring the driver-signatories of those contracts, defendant would have had actual notice of the contracts and of the restrictive covenants contained therein. Defendant's argument that it did not have actual notice of the restrictive covenants because defendant did not know what "under contract" meant fails. Defendant had the contracts themselves and had every opportunity to interpret the relevant provisions itself. That defendant declined to do so, or declined to act upon the interpretation defendant attributed, does not equate to a lack of knowledge. At the very least, the Court finds that defendant could have had actual knowledge of those Driver Contracts that defendant received.

Further, a reasonable factfinder could conclude that the Driver Contracts are standardized such that each driver employed by plaintiff signs an identical contract. If the factfinder were to reach this conclusion, the factfinder could likewise find that actual notice of one contract provided defendant with constructive notice of all other contracts that defendant knew to exist. That is, if defendant had actual notice of any contract, regardless of whether a driver **[*48]** at issue was a signatory to that contract, receipt of the Contract Notice Letter for any other driver could vest defendant with constructive notice of the terms of the contract referenced in the Contract Notice Letter. Likewise, a reasonable factfinder could find that upon receipt of the Contract Notice Letters, defendant should have inquired as to the meaning of "under contract," and that such an inquiry would have led defendant to learn of the restrictive covenants. Under *Revere Transducers*, this finding would be sufficient to establish the knowledge element of plaintiff's contract claim. *595 N.W.2d at 764*.

Neither party has provided the Court with the date on which defendant first came into possession of one of the Driver Contracts, nor has either party otherwise given the Court enough information to determine, definitively, the earliest date on which defendant could have had either actual or constructive knowledge of the Driver Contracts and their terms. Indeed, based on the facts the Court has, a reasonable factfinder could conclude that defendant first received a Driver Contract before defendant recruited or hired any of the drivers at issue. Drawing all conclusions in plaintiff's favor, as the **[*49]** Court must, the Court finds that defendant is not entitled to summary judgment on the knowledge element of plaintiff's contract claim for any of the contracts at issue. Based on the evidence presented to the Court, there is a genuine issue of material fact as to whether defendant had actual, constructive, or inquiry notice of all of the Driver Contracts and the restrictive covenants contained therein.

3. Intentional and Improper Conduct

This Court has previously addressed the issue of intentional and improper conduct in the context of tortious interference claims. *See, e.g., Gen. Elec. Capital Corp., 485 F. Supp. 2d at 1026-27*. Plaintiff must prove that defendant's conduct was intentional *and* improper to succeed on its tort claims; satisfaction of one standard without the other is insufficient to make out a *prima facie* case. *Id. See also Green v. Racing Ass'n of Cent. Iowa, 713 N.W.2d 234, 244 (Iowa 2006)*. That a defendant interferes intentionally does not necessarily mean that the interference was improper. *Gen. Elec. Capital Corp., 485 F. Supp. 2d at 1026-27*; *Green, 713 N.W.2d at 244* (citations omitted).

"The 'impropriety' or 'wrongfulness' of conduct alleged to be tortious interference is determined according to somewhat different standards, depending upon whether the claim is for tortious interference with an existing contract or for tortious interference with a prospective **[*50]** or potential contract or business relationship." *Gen. Elec. Capital Corp., 485 F. Supp. 2d at 1026*. To determine whether conduct was improper in the case of a tortious interference with contract claim, the factors to be considered include: 1) the nature of the conduct; 2) the defendant's motive; 3) the interests of the party with which the conduct interferes; 4) the interest sought to be advanced by the defendant; 5) the social interests in protecting the freedom of action of the defendant and the contractual interests of the other party; 6) the nearness or remoteness of the defendant's conduct to the interference; and 7) the relations between the parties. *Green, 713 N.W.2d at 244* (citing *Revere Transducers, Inc., 595 N.W.2d at 767*; *Restatement (Second) of Torts § 767*).

"In determining whether the interference is improper, it may become very important to ascertain whether the actor was motivated, in whole or in part, by a desire to interfere with the other's contractual relations. If this was the sole motive the interference is almost certain to be held improper." *Nesler, 452 N.W.2d at 197* (quoting *Restatement (Second) of Torts § 767 cmt. d*). The Iowa Supreme Court has further elaborated:

> [I]f there is no desire at all to accomplish the interference and it is brought about only as a necessary consequence of the conduct of the actor engaged in for an entirely different purpose, his knowledge of this **[*51]** makes the interference intentional, but the factor of motive carries little weight toward producing a determination that the interference was improper.

Berger v. Cas' Feed Store, Inc., 543 N.W.2d 597, 599 (Iowa 1996) (quoting *Restatement (Second) of Torts § 767 cmt. d*). *Accord* *Green, 713 N.W.2d at 244*. Finally, to show that the alleged interference was intentional requires plaintiff to establish that defendant's interference with plaintiff's "contractual relations was either desired by [defendant] or known by him to be a substantially certain result of [defendant's] conduct." *Restatement (Second) of Torts § 767 cmt. d*. *See also* *Nesler, 452 N.W.2d at 197*.

Here, the questions of whether defendant's alleged interference was intentional and improper are questions of material fact that are genuinely in dispute. The Court, thus, is not permitted to answer those questions at the summary judgment stage. The question of defendant's motive, specifically, is so fraught with factual determinations that the Court could not properly determine the weight to attribute to this factor without weighing the facts of this case. Plaintiff argues, for instance, that defendant changed its hiring practices in August 2016 to permit defendant's recruiters to begin hiring plaintiff's drivers. (Doc. 159, at 24). This change in policy, plaintiff urges, shows that defendant was motivated by a desire to interfere **[*52]** with those drivers' restrictive covenants in the contracts the drivers had with plaintiff. (*Id.*). Importantly, plaintiff argues that defendant's knowledge of the contracts, in combination with the change in defendant's hiring practices, generates a genuine issue of material fact as to whether defendant's conduct was intentional and improper. (*Id.* ("[Defendant's] decision to hire [plaintiff's] drivers *knowing it would breach those drivers'* [*contracts*] with [plaintiff], alone, makes [defendant's] actions improper." (emphasis added))).

Plaintiff is correct. Although the evidence plaintiff turns to is circumstantial, the evidence is sufficient for a reasonable jury to find that defendant changed its hiring practices to facilitate interference with plaintiff's Drivers Contracts.[12] This conclusion, were the jury to reach it, would encompass findings of both intentional interference and improper interference. If plaintiff shows that defendant had knowledge of the contracts and interfered with the contracts anyway, this showing will satisfy the intent prong. If plaintiff shows that defendant acted specifically for the purpose of interfering with the contracts, this showing will satisfy the impropriety **[*53]** prong. The Court thus finds that there are genuine issues of material fact as to whether defendant's conduct was intentional and improper, and summary judgment is therefore inappropriate as to this element.

Although these factual determinations do not make up the entirety of the improper interference element, these determinations are so integral that the Court could not determine, here, whether defendant's conduct was either intentional or improper without considering defendant's motive and desire to interfere. As the Court is not permitted to engage in such factual determinations at this stage as to material facts that are genuinely disputed, the Court is precluded from granting defendant's motion for summary judgment on the improper interference element. Defendant's motion is **denied** as to this element.

4. Causation

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[12] As is discussed below, plaintiff's intentional interference with prospective economic advantage claim requires plaintiff to show that defendant acted with the intent to damage plaintiff. *Compiano, 588 N.W.2d at 464*. Should the jury find that defendant intended to interfere with the contracts, it does not necessarily follow that defendant did so because defendant wanted to damage plaintiff. Because the two concepts differ, the Court's differing conclusions on the two claims are not inconsistent with each other.

When considering a tortious interference with contract claim, the causation inquiry is whether the alleged tortfeasor's actions caused the breaching party not to perform his contract, or made performance more burdensome or expensive. *Gibson v. ITT Hartford Ins. Co., 621 N.W.2d 388, 399 (Iowa 2001)*. Here, then, the Court's inquiry is whether plaintiff can produce sufficient evidence such that a reasonable jury could find that defendant's **[*54]** alleged interference caused the drivers not to perform, or that defendant's alleged interference made performance more burdensome or expensive. *See* *Anderson, 477 U.S. at 249*. That is, the issue is whether defendant's act of hiring the drivers caused the drivers to breach their restrictive covenants.

The *Restatement (Second) of Torts* is instructive on the issue of causation:

> An employment contract . . . may be only partially terminable at will. Thus it may leave the employment at the employee's option but provide that he is under a continuing obligation not to engage in competition with his former employer. Under these circumstances a defendant engaged in the same business might induce the employee to quit his job, but he would not be justified in engaging the employee to work for him in an activity that would mean violation of the contract not to compete.

§ 768 cmt. i.

Here, the restrictive covenants prohibit driver-signatories from "directly or indirectly provid[ing] truck driving services to any CRST Competitor within the continental United States of America." (Doc. 130-2, at 51). The wording of the restrictive covenants makes it impossible for a driver-signatory to be in breach without the assistance of a "CRST **[*55]** Competitor." That is, even if a driver-signatory were to quit working for plaintiff, the only way he could breach his restrictive covenant would be by beginning work for a "CRST Competitor" during the driver's restrictive term. He could not do this unless a competitor agreed to hire him. As a result, the competitor's act of hiring the driver-signatory could directly cause a driver-signatory to breach his restrictive covenant. The Court, thus, finds that defendant's act of hiring drivers who were still within their restrictive terms could be sufficient to establish the causation element of plaintiff's tortious interference with contract claim. *See* *Books Are Fun, Ltd. v. Rosebrough, No. 4:05-cv-00644-JEG, 2007 U.S. Dist. LEXIS 105304, 2007 WL 9711266, at *36 (S.D. Iowa Mar. 29, 2007)* (finding that the defendant could be liable for tortious interference with contract by inducing employees to become independent contractors with the defendant while bound by non-competition agreements with the plaintiff). *See generally* *Revere Transducers, Inc., 595 N.W.2d at 768* (citing persuasive authority for the proposition that "defendant, a competitor of plaintiff, had [a] right to persuade plaintiff's employees to work for defendant, so long as defendant did not induce employees to breach any existing contracts").

This finding **[*56]** extends to all drivers who were within their restrictive terms when defendant hired them, regardless of whether the drivers left plaintiff and immediately began working for defendant, left plaintiff and refrained from driving for a period before beginning to work for defendant, or left plaintiff and worked for a different trucking company for a period before beginning to work for defendant. If the Court were to hold that defendant could not be held liable for causing the latter two groups of drivers to breach their restrictive covenants, the focus would shift from considering whether the drivers were still bound by their restrictive covenants when hired by defendant to whether the drivers were still employed by plaintiff when they were hired by defendant.

Whether the drivers were employed by plaintiff when the drivers breached their contracts could be relevant to whether defendant hiring the drivers was the actual cause of the drivers breaching their contracts. Plaintiff's *prima facie* case, however, requires the existence of a valid contract, not an existing employment relationship. The validity of the contracts at issue—the restrictive covenants—turns on whether each driver's restrictive **[*57]** term had lapsed by the time defendant hired him. If the Court were to hold that defendant could not be held liable for the latter two groups of drivers breaching their restrictive covenants, the Court would be holding that the fact of employment is an essential element of plaintiff's contract claim. As explained *supra*, this is not the case.

The Court notes, however, that a reasonable jury could find that the drivers would have breached their restrictive covenants by going to work for a different CRST Competitor, even if defendant had not hired those drivers. This conclusion would be wholly consistent with the Court's recognition that defendant's act of hiring the drivers *could* lead the drivers to breach their restrictive covenants, which is different from the factual determination of whether the act of hiring the drivers *actually* led the drivers to breach their restrictive covenants. The issue of whether defendant hiring the drivers actually caused the drivers to breach their contracts is a factual question that must be submitted to the factfinder. Defendant's motion for summary judgment is, thus, **denied** on the element of causation.

5. Damages

Finally, defendant asserts that plaintiff **[*58]** cannot establish that plaintiff incurred damages as a result of defendant's alleged interference. (Doc. 140, at 35-37). At the heart of defendant's argument is the assertion that plaintiff's alleged damages are too speculative to sustain recovery. Further, a close reading of defendant's brief reveals that defendant's damages argument is made only with respect to damages plaintiff allegedly sustained by plaintiff's drivers leaving plaintiff to work for defendant. (*See, e.g.*, Doc. 140, at 35 ("[Plaintiff] is apparently seeking damages for the profits it claims it would have earned if the [d]rivers had not gone to [defendant].")). That argument, however, is more properly attributed to plaintiff's prospective economic advantage claim. Defendant's argument does not address damages sustained under plaintiff's tortious interference with contract theory.

Plaintiff's contract claim is concerned with breaches of the restrictive covenants and damages that resulted from defendant's alleged conduct leading to those breaches. If the drivers ceased working for plaintiff but did not begin working for defendant while still within their restrictive terms, those drivers would not be encompassed by plaintiff's **[*59]** contract claim, but they could be encompassed by plaintiff's prospective economic advantage claim. Whether the drivers stopped working for plaintiff, then, is inconsequential to plaintiff's damages under the contract claim. A proper measure of damages for the contract claim would center around the contract at issue. For instance, the value attributed to the restrictive covenants, including the value the restrictive covenants hold, if any, in discouraging drivers from leaving plaintiff's employ,[13] could be a proper measure of damages. Defendant has not argued that plaintiff is unable to prove a proper measure of damages relating to breaches of the restrictive covenants and summary judgment is, therefore, improper as to the damages element of plaintiff's contract claim.

The Court will, however, note that plaintiff's argument that the damages are too speculative would fail, even if defendant had advanced that argument with respect to damages associated with the restrictive covenants themselves.

> As a general rule, the party seeking damages bears the burden of proving them; if the record is uncertain and speculative as to whether a party has sustained damages, the factfinder must deny recovery. **[*60]** There is a distinction between proof of the fact that damages have been sustained and proof of the amount of those damages. If the uncertainty lies in the amount of damages sustained, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated. Thus, some speculation on the amount of damages sustained is acceptable, but a plaintiff cannot recover overly speculative damages.

St. Malachy Roman Catholic Congregation of Geneseo v. Ingram, 841 N.W.2d 338, 351 (Iowa 2014) (alteration and internal citations and quotation marks omitted).

A reasonable factfinder could find that plaintiff suffered damages from the drivers breaching their restrictive covenants, and defendant does not argue otherwise. As the example above shows, a reasonable factfinder could determine that the restrictive covenants have value because they encourage driver retention, which likely increases plaintiff's profit margin. The Court likewise finds that the factfinder could attribute a reasonably certain measure of damages to plaintiff's alleged harm. One possible method of calculating those damages would be to consider the liquidated damages provision in the restrictive covenants. The liquidated damages figure has already been set forth and is a definitive dollar **[*61]** amount. (*See, e.g.*, Doc. 130-2, at 52). Should plaintiff choose to pursue the liquidated damages as its theory of recovery, plaintiff's damages would not be speculative because the factfinder would have a basis from which to infer or approximate damages. Based on the Court's finding that a reasonable

[13] The Court notes that the fact of drivers leaving plaintiff's employ in spite of the restrictive covenants could be relevant to determining whether the restrictive covenants are effective in encouraging retention. This, however, is a different inquiry than assessing damages stemming from the drivers leaving plaintiff's employ.

factfinder could find that plaintiff suffered damages, and that a reasonable basis for the measure of those damages exists, the Court finds that defendant is not entitled to summary judgment on the damages element of plaintiff's contract claim. Defendant's motion for summary judgment is, thus, **denied** as to the damages element of plaintiff's contract claim.

The Court has addressed each element of plaintiff's tortious interference with contract claim, and the Court has found that defendant's arguments fail as to each element. Defendant has failed to defeat any essential element of plaintiff's tortious interference with contract claim, and the claim may properly proceed to trial. The Court reiterates, however, that this holding extends only to the issue of whether defendant tortiously interfered with the restrictive covenants that may have existed between the drivers at issue and plaintiff. **[*62]** Plaintiff's claim that defendant wrongfully induced the drivers to leave plaintiff's employ and instead begin working for defendant is more properly considered under plaintiff's prospective economic advantage claim and is not contemplated in this section. Defendant's motion for summary judgment as to the tortious interference with contract claim is **denied**.

B. Intentional Interference with Prospective Economic Advantage

Under Iowa law, the elements of intentional interference with prospective economic advantage are 1) the plaintiff had a prospective contractual or business relationship; 2) the defendant knew of the prospective relationship; 3) the defendant intentionally and improperly interfered with the relationship; 4) the defendant's interference caused the relationship to fail to materialize; and 5) damages. *Gen Elec. Capital Corp., 485 F. Supp. 2d at 1025* (citations omitted).

As the Court has already explained, the drivers were at-will employees and any relationship plaintiff may have had with the drivers was prospective. The facts here could support a reasonable factfinder's determination that a prospective relationship actually existed. For example, the drivers were employed by plaintiff for at least some period of time. Any **[*63]** potential for that employment relationship to continue would lend itself to a finding that a prospective relationship existed. Likewise, the Court finds that a reasonable factfinder could find that defendant knew of the prospective relationship. The Court's analysis on this second element is identical to the Court's analysis of the knowledge element of plaintiff's contract claim.

As to damages, the Court finds that although certain theories of recovery could be overly speculative, plaintiff could pursue a theory of recovery based on the liquidated damages clauses contained in the Driver Contracts. This theory would be proper because the liquidated damages could be found to be based on plaintiff's expectation that the drivers would each work for plaintiff for the entire duration of his restrictive term. Failure to do so could be found to implicate the liquidated damages provision.

Plaintiff must also show that defendant's interference was intentional and improper. Tortious interference with prospective economic advantage claims require a higher standard of proof than tortious interference with contract claims. Under prospective economic advantage claims, the plaintiff is required to produce **[*64]** "substantial evidence that the defendant's predominant or sole motive was to damage the plaintiff." *Compiano, 588 N.W.2d at 464*.

Assuming, for the sake of argument, that defendant's interference was intentional, plaintiff has produced no evidence that would permit a reasonable factfinder to determine that defendant was motivated, even in part, to damage plaintiff. Indeed, plaintiff's theory as to defendant's motive is speculative and addresses the knowledge component of the prospective economic interference claim, as opposed to the motive component of the claim. (*See* Doc. 159, at 41-43). Although plaintiff asserts that the circumstantial evidence would permit a reasonable jury to conclude defendant was acting under an improper motive, the evidence plaintiff turns to is probative on the knowledge component of the claim. (*Id.*). Plaintiff fails to draw a connection between the circumstantial evidence of defendant's knowledge and any motive at all, much less an improper motive. (*Id.*). Plaintiff's inability to make a showing of defendant's motive renders plaintiff wholly incapable of showing that defendant's primary or sole motive was to injure plaintiff. The Court thus finds that plaintiff's tortious interference **[*65]** with prospective economic advantage claim fails on the element of improper conduct.

Finally, the Court will turn to the causation element, which also fails. Although the parties have briefed the issue of causation under different standards, the issue of factual causation is the same under both standards and is dispositive here.[14] (*Compare* Doc. 140, at 15-17 *with* Doc. 159, at 22-25). The Iowa Supreme Court has addressed factual causation:[15]

> "But for" is an absolute minimum for causation because it is merely causation in fact. Any attempt to find liability absent actual causation is an attempt to connect the defendant with an injury or event that the defendant had nothing to do with. Mere logic and common sense dictate[ ] that there be some causal relationship between the defendant's conduct [and] the injury or event for which damages are sought.

Rieger v. Jacque, 584 N.W.2d 247, 251 (Iowa 1998) (citation and internal quotation marks omitted).

The only interference at issue under plaintiff's prospective economic advantage claim is the loss of plaintiff's drivers, who were at-will employees. The only evidence plaintiff has that defendant caused the **[*66]** loss of plaintiff's drivers is that the drivers at issue went to work for defendant at some point after they worked for plaintiff. This is insufficient to establish causation. The fact that the drivers accepted employment with defendant can only show that the drivers found defendant's employment terms acceptable, but the drivers' acceptance of employment with defendant, alone, cannot shed any light on why the drivers chose to end their employment with plaintiff. Why the drivers decided to end their employment with plaintiff is the operative question, and plaintiff has come forward with no evidence that would show that the drivers left because of any action taken by defendant.

Even if plaintiff were able to show that defendant recruited plaintiff's drivers, that recruitment would likely be justified. The record before the Court shows that any recruitment strategies defendant may have employed amounted to promises of a different work environment and perhaps better pay. The *Restatement (Second) of Torts* explains that competing for employees in this fashion is proper:

> *i. Contracts terminable at will*. The rule . . . that competition may be an interference that is not improper also applies **[*67]** to existing contracts that are terminable at will. If the third person is free to terminate his contractual relation with the plaintiff when he chooses, there is still a subsisting contract relation; but any interference with it that induces its termination is primarily an interference with the future relation between the parties, and the plaintiff has no legal assurance of them. As for the future hopes he has no legal right but only an expectancy; and when the contract is terminated by the choice of the third person there is no breach of it. The competitor is therefore free, for his own competitive advantage, to obtain the future benefits for himself by causing the termination. Thus he may offer better contract terms, as by offering an employee of the plaintiff more money to work for him . . ., and he may make use of persuasion or other suitable means, all without liability.

§ 768 cmt. i. The conduct alleged in this case falls squarely within *Section 768*, and defendant was well within its rights to compete with plaintiff for the future benefit of the drivers' services. The Court, thus, finds that plaintiff cannot establish causation on its tortious interference with prospective economic advantage **[*68]** claim and that defendant is entitled to summary judgment on that claim.

As explained above, the prospective economic advantage claim concerns the recruitment of the drivers themselves and does not address whether defendant caused the drivers to breach their restrictive covenants. Defendant's motion for summary judgment is **granted** as to plaintiff's claim for tortious interference with prospective economic

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[14] In *Thompson v. Kaczinski, 774 N.W.2d 829, 836-38 (Iowa 2009)* the Iowa Supreme Court adopted a modified approach to considering proximate cause in cases addressing physical and emotional harm. The Iowa Supreme Court has not been called on to determine if this modified approach also applies to cases involving purely economic torts. This Court need not consider the issue, however, because factual causation is dispositive.

[15] In *TransAm*, this Court found that "nothing in *Thompson*, or the subsequent decisions of the Iowa Supreme Court, [suggests] that Iowa's adoption of the causation principles set forth in the [*Restatement (Third) of Torts: Liability for Physical and Emotional Harm*] has changed the traditional analysis of factual causation under Iowa law." *2018 U.S. Dist. LEXIS 135900, 2018 WL 3738017, at *15*. The Court's conclusions remain unchanged, even when considering cases that were decided after *TransAm*.

advantage. Plaintiff's claim for tortious interference with contract encompasses only defendant's alleged interference with the restrictive covenants and, thus, survives the grant of summary judgment as to the prospective economic advantage claim.

C. Unjust Enrichment

The equitable doctrine of unjust enrichment "is based on the principle that a party should not be permitted to be unjustly enriched at the expense of another or receive property or benefits without paying just compensation." *Iowa Dep't of Human Servs. ex rel. Palmer v. Unisys Corp., 637 N.W.2d 142, 154 (Iowa 2001)* (citations omitted) ("*Palmer*"). "[U]njust enrichment can be distilled into three basic elements of recovery. They are: 1) [the] defendant was enriched by the receipt of a benefit; 2) the enrichment was at the expense of the plaintiff; and 3) it is unjust to allow the defendant to retain the benefit **[*69]** under the circumstances."[16] *Id. at 154-55* (citations and footnotes omitted).

"[U]njust enrichment is a broad principle with few limitations." *Id. at 155*. The benefits a defendant receives can be direct or indirect and need not be conferred directly by the plaintiff. *Id.* (citation omitted). Further, benefits conferred by third parties can be sufficient under an unjust enrichment claim. *Id.* (citation omitted). "The critical inquiry is that the benefit be received at the expense of the plaintiff." *Id.* (citation omitted).

Here, defendant correctly argues that the drivers were enriched by undergoing training at plaintiff's expense then later breaching their restrictive covenants with plaintiff.[17] By doing so, the drivers retained the benefit of the training without the obligation of working exclusively for plaintiff for the duration of the drivers' restrictive terms. When the drivers went to work for defendant, however, defendant indirectly benefitted from plaintiff paying the costs to train the drivers. Those benefits included defendant having the ability to hire trained drivers in the midst of a driver shortage. (*See* Doc. 159-3, at 165 & 171 (defendant's acknowledgment of driver shortage), 201 **[*70]** (defendant's 2017 Form 10-K identifying the driver shortage as an operational risk)).

When the drivers began working for defendant, the drivers carried with them their pre-existing CDLs, meaning that defendant did not have to invest any funds in training the drivers so that they would be employable. This saved defendant the expense of training these drivers through defendant's own training program, as defendant does with certain unlicensed individuals who are hired as drivers. (*See id., at 134-36* (discussing defendant's training program and costs)). This, presumably, increased defendant's profit margin. The difference between defendant's actual profit margin for each driver at issue and the lesser profit margin defendant would have realized had it been required to train the drivers at issue are profits that defendant indirectly obtained as a result of plaintiff paying the training costs.

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[16] In *Palmer*, the Iowa Supreme Court acknowledged in a footnote that "[t]he court of appeals . . . identified four elements of recovery on the basis of unjust enrichment, including the element that there be no at-law remedy available to the plaintiff. *See Iowa Waste Sys., Inc. v. Buchanan Cty., 617 N.W.2d 23, 30 (Iowa Ct. App. 2000)*." *Palmer, 637 N.W.2d at 154 n.2*. *See also Union Pac. R.R. Co. v. Cedar Rapids & Iowa City Ry. Co., 477 F. Supp. 2d 980, 1000 (N.D. Iowa 2007)* (holding that an element of an unjust enrichment claim is that "there is no at-law remedy that can appropriately address the claim" (citations omitted)). The Iowa Supreme Court went on to agree that "[t]he adequacy of a legal remedy is a general limitation on the exercise of equity jurisdiction and is properly considered when restitution is sought in equity." *Palmer, 637 N.W.2d at 154 n.2*. The Iowa Supreme Court stopped short of adopting the Court of Appeals' holding, however, in determining that "no independent principle exists that restricts restitution to cases where alternative remedies are inadequate." *Id.* (citation omitted). The parties have not addressed the adequacy of a legal remedy with respect to plaintiff's unjust enrichment claim, and the Court will, thus, decline to address the issue, including the issue of whether the adequacy of a legal remedy is a separate and distinct element of plaintiff's claim.

[17] Under Iowa law, unjust enrichment is "an equitable doctrine based on the concept of an implied contract." *EAD Control Sys., LLC v. Besser Co. USA, No. C 11-4029-MWB, 2012 WL 2357572, at *3 (N.D. Iowa June 19, 2012)* (citation and internal quotation marks omitted). "[A]n express contract and an implied contract cannot coexist with respect to the same subject matter, and the law will not imply a contract where there is an express contract." *Id.* (citations, alterations, and internal quotation marks omitted). The parties have not raised an issue as to whether an express contract is implicated as to plaintiff's unjust enrichment claim, and the Court, therefore, will not address the issue.

See Brown v. Kerkhoff, 504 F. Supp. 2d 464, 544-45 (S.D. Iowa 2007) (recognizing that increased profits can be realized either directly or indirectly and can constitute a benefit under an unjust enrichment claim). Thus, the benefit of additional profits was received at plaintiff's expense.[18]

Having found that the first two elements of plaintiff's **[*71]** unjust enrichment claim are capable of satisfaction, the Court must consider whether plaintiff would be able to show that it would be unjust to permit defendant to retain the benefit. *See* Schildberg Rock Prods. Co. v. Brooks, 258 Iowa 759, 140 N.W.2d 132, 138-39 (Iowa 1966). Unjust enrichment can occur, for example, "when a person retains money or benefits which in justice and equity belong to another." Id. at 139. Whether it would be unjust to allow a defendant to retain the benefit it received depends on the circumstances implicated. *See* Palmer, 637 N.W.2d at 154-55 (holding that the third element of an unjust enrichment claim is that "it is unjust to allow the defendant to retain the benefit *under the circumstances*" (emphasis added)).

To determine whether, under the circumstances here, principles of justice and equity counsel that the benefits defendant realized belong to plaintiff would require the Court to make findings of genuinely disputed material facts. Specifically, the Court would have to consider the circumstances of this case and would have to make a conclusive finding as to whether it would be just to allow defendant to retain any benefits it may have realized at plaintiff's expense. Defendant argues that it is standard in the trucking industry to hire drivers who have been trained at a competitor's **[*72]** expense. (Doc. 140, at 40). The issue of whether this practice outweighs other considerations that may weigh in favor of plaintiff's position, however, is a question of fact that is in dispute.

Defendant may well be able to persuade the factfinder that it would not be unjust to permit defendant to retain the benefits it realized at plaintiff's expense. Should defendant be able to make this showing, the Court will have to enter judgment in defendant's favor on the unjust enrichment claim. At this stage, however, there exist genuine issues of material fact regarding whether defendant should be permitted to retain the benefits. These factual issues preclude summary judgment.[19] *See* Kammueller, 383 F.3d at 784.

Finally, defendant seeks to limit plaintiff's damages under the unjust enrichment claim and, in support, asserts that "in Iowa, the proper measure of damages for unjust enrichment is limited to the value of the benefit conferred, not a defendant's profits." (*Id.* (citations omitted)). This Court has previously addressed the damages issue. In doing so, the Court acknowledged that the Iowa Court of Appeals "has explained that '[d]amages under a claim of unjust enrichment are limited to the value of what was inequitably **[*73]** retained.'" Catipovic v. Turley, 68 F. Supp. 3d 983, 996 (N.D. Iowa 2014) (alteration in original) (quoting Iowa Waste Sys., Inc., 617 N.W.2d at 30). The Court went on to explain that "the value of what was inequitably retained" could be "the value of the services provided," depending on the case. *Id.* (citation omitted). Further, the doctrine of unjust enrichment is based, in part, on the principle that a party should not be permitted to receive benefits without paying just compensation. Palmer, 637 N.W.2d at 154.

The question, then, becomes what "just compensation" is for the benefits defendant received. If defendant were required to disgorge all additional profits it received by hiring drivers who did not need to be trained, defendant would not be "compensating" plaintiff for training the drivers. Rather, defendant would be disgorging the entire benefit it received. This measure of damages goes beyond what is required by the doctrine of unjust enrichment.

The doctrine permits a party to receive benefits as long as the party pays just compensation. To require defendant to disgorge the entire benefit it received would be tantamount to prohibiting a defendant who was unjustly enriched from retaining any benefits from that unjust enrichment. This is not consistent with the doctrine of unjust enrichment, and **[*74]** the Court will not impose such a prohibition. The Court therefore concludes that the proper measure of

[18] The measure of defendant's benefit is not necessarily the same as the measure of damages plaintiff may recover. The issue of damages is addressed below.

[19] Under Iowa law, "[t]he doctrine of unjust enrichment is an equitable principle." Johnson v. Dodgen, 451 N.W.2d 168, 175 (Iowa 1990). Iowa generally does not afford the right to a jury trial on those claims that sound in equity. Weltzin v. Nail, 618 N.W.2d 293, 296-97 (Iowa 2000). Here, the parties have demanded a jury trial. (Docs. 43, at 10; 44, at 1). Before trial, the Court may be called upon to address whether to submit plaintiff's unjust enrichment claim to the jury.

damages here is damages that amount to "just compensation," without being in excess of "just compensation." Whether "just compensation" is the costs plaintiff incurred in training the drivers, or whether "just compensation" is measured by some other theory, is for the factfinder to determine. The Court is able to determine, however, that "just compensation" is not disgorgement of defendant's profits. Defendant's motion for summary judgment is **granted in part** to the extent defendant seeks to limit plaintiff's damages, and **denied** to the extent defendant seeks dismissal of plaintiff's unjust enrichment claim.

D. Injunctive Relief

Plaintiff's prayer for permanent injunctive relief is narrow. "[Plaintiff] demands the entry of a permanent injunction enjoining [defendant] from any further or continued interference with [plaintiff's] prospective economic advantage and/or contracts with its drivers . . .." (Doc. 43, at 10). Although plaintiff's request for injunctive relief does not rest, directly, on plaintiff's tortious interference claims, the same facts and legal arguments that form the **[*75]** basis for the tort claims form the basis for plaintiff's request for injunctive relief.

To obtain a permanent injunction, the requesting party must show actual success on the merits of its claim. *PIC USA v. N.C. Farm P'Ship, 672 N.W.2d 718, 723 (Iowa 2003)* (citation omitted). Having found that plaintiff's prospective economic advantage claim fails, the Court likewise finds that plaintiff's request for permanent injunctive relief must fail, to the extent plaintiff's request rests on the same basis as the tortious interference with prospective economic advantage claim. The only issue remaining to be considered under plaintiff's request for injunctive relief is whether injunctive relief could be proper under plaintiff's claim that defendant has interfered, and continues to interfere, with plaintiff's "contracts with its drivers."

Under Iowa law, "[a]n injunction is warranted when necessary to prevent irreparable injury and when the plaintiff has no adequate remedy at law." *Opat v. Ludeking, 666 N.W.2d 597, 603 (Iowa 2003)* (citations omitted). A party is entitled to a permanent injunction only if proof exists that the injunction would effectively prevent the irreparable harm from occurring. *Hockenberg Equip. Co. v. Hockenberg's Equip & Supply Co. of Des Moines, Inc., 510 N.W.2d 153, 158 (Iowa 1994)* (citation omitted). "[A] party requesting injunctive relief must establish 1) an invasion or threatened **[*76]** invasion of a right, 2) substantial injury or damages will result unless an injunction is granted, and 3) no adequate legal remedy is available." *Opat, 666 N.W.2d at 603-04* (citation and internal quotation marks omitted). "In deciding whether an injunction should be issued, the court must weigh the relative hardships on the parties by the grant or denial of injunctive relief." *Id.* (citation omitted).

The Court will assume for present purposes that defendant has improperly interfered, and continues to improperly interfere, with plaintiff's Driver Contracts. The harm caused by this interference is the breach of the restrictive terms contained in the Driver Contracts. The loss of trained drivers would fall under plaintiff's request for injunctive relief to prohibit "continued interference with [plaintiff's] prospective economic advantage," which the Court has already found to be an improper basis for injunctive relief. The Court will thus address plaintiff's request for injunctive relief only with respect to the allegation that defendant has caused, and continues to cause, the breach of the restrictive terms contained in the Driver Contracts.

The Court has determined that defendant's act of hiring the drivers satisfies **[*77]** the causation element of plaintiff's contract claim. This, however, does not establish that barring defendant from engaging in this causative action will prevent plaintiff's drivers from breaching their restrictive covenants. The drivers can be in breach of their restrictive covenants by "provid[ing] truck driving services to *any* CRST Competitor within the continental United States of America." (Doc. 130-2, at 51 (emphasis added)). If the Court were to grant the injunctive relief sought, the injunction would not prevent the drivers from breaching their restrictive covenants. Rather, the injunction would only prevent the drivers from breaching their contracts in favor of working for one of many CRST Competitors.[20]

[20] The Court finds that there is no real dispute as to whether plaintiff competes with a number of companies, as opposed to just with defendant. This case is one in a series of four cases filed in this Court against purported CRST Competitors, and each of the cases rests on the same basic allegations and factual assertions. *See TransAm*, 1:16-cv-00052-LTS; *CRST Expedited, Inc.*

Because an injunction against defendant would not prevent the drivers from breaching their restrictive covenants and thereby causing plaintiff harm, the Court finds injunctive relief inappropriate. *See* *Hockenberg Equip. Co., 510 N.W.2d at 158* (citation omitted).

Plaintiff has neither alleged nor shown that an injunction would prevent its drivers from breaching their restrictive covenants. Plaintiff argues only that an **[*78]** injunction would prevent defendant from causing plaintiff irreparable harm. (Doc. 159, at 49-53). This argument, however, does not amount to an argument that the irreparable harm will not occur anyway. To truly protect against the irreparable harm alleged, plaintiff would either need to obtain injunctive relief against all of its competitors—or at least a substantial number—or plaintiff would need to obtain injunctive relief against the drivers themselves. Plaintiff is not pursuing either course here.

The Court recognizes that in a proper case, a party could argue that the injunction sought would not, on its own, provide a guarantee against the irreparable harm, but would provide such a guarantee when considered in conjunction with other factors or additional injunctions. That is not this case, however, and the Court thus finds that this theory, if proper, cannot save plaintiff's request for injunctive relief. Defendant's motion for summary judgment is therefore **granted** as to plaintiff's request for injunctive relief.[21]

VI. AFFIRMATIVE DEFENSES

As part of its motion for summary judgment, plaintiff seeks a ruling that eight affirmative defenses fail as a matter of law[22] on the **[*79]** basis that those affirmative defenses assert arguments that would render the Driver Contracts voidable, as opposed to void. (Doc. 130, at 23). The challenged affirmative defenses read as follows:

> First Affirmative Defense: The claims are barred, in whole or in part, because [p]laintiff's Employment Contracts are void, unenforceable, and/or unconscionable.
>
> Second Affirmative Defense: The claims are barred, in whole or in part, because the Employment Contracts at issue harm and inhibit driver mobility.
>
> Sixth Affirmative Defense: Plaintiff's claim for permanent injunctive relief is barred, in whole or in part, because such relief constitutes a restraint of trade and violates antitrust laws.

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v. Knight Transp., Inc., 1:17-cv-00024-CJW-KEM; *CRST Expedited, Inc. v. JB Hunt Transp., Inc.*, 1:17-cv-00026-CJW-KEM. Knight and Swift merged in 2017 to form Knight-Swift Transportation Holdings, Inc. Thus, the Court will consider Knight-Swift Transportation Holdings to be one company that competes with plaintiff, rather than two separate entities that both compete with plaintiff. That the number of companies plaintiff competes with was reduced by one, however, is of no consequence to the Court's analysis because there remain three separate competitor companies—TransAm, JB Hunt, and Knight-Swift Transportation Holdings—that the Court can readily identify.

[21] The Court notes that defendant argues this section of its motion for summary judgment with reference to Iowa state law, but plaintiff's arguments in resistance are made largely with reference to federal law. (*Compare* Docs. 140, at 42-45 *with* 159, at 49-58). Regardless of which body of law applies, the Court's conclusions would be the same because the Court finds that the injunctive relief sought would not remedy the harm alleged. *See* *Winter v. Nat. Res. Def. Council, 555 U.S. 7, 32, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)* ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." (citation omitted)); *Weinberger v. Romero-Barcelo, 456 U.S. 305, 313, 102 S. Ct. 1798, 72 L. Ed. 2d 91 (1982)* ("[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." (citations omitted)).

[22] In its Motion for Partial Summary Judgment, plaintiff requests that the Court "dismiss[ ]" the subject affirmative defenses. (Doc. 127, at 2). In its brief, however, plaintiff only requests that the Court find that the subject affirmative defenses "fail as a matter of law." (Doc. 130, at 23). Plaintiff has not asserted a procedural basis upon which the Court can strike the affirmative defenses, and plaintiff's arguments regarding the affirmative defenses are offered with reference to summary judgment law. (*See, e.g., id.*, at 5). The Court will, thus, construe plaintiff's motion as seeking a judgment that the subject affirmative defenses fail as a matter of law, and the Court will not consider plaintiff's motion as seeking to strike the affirmative defenses.

> Twenty-Second Affirmative Defense: The claims are barred, in whole or in part, because the requested relief potentially violates the blacklisting statutes of different states, including but not limited to *Iowa Code §§ 730.1* and *730.2* and *Arizona Revised Statutes § 23-1361(A)*.
>
> Twenty-Third Affirmative Defense: The claims are barred, in whole or in part, to the extent [d]efendant's compliance with [p]laintiff's demands and/or requested relief may also be subject to violation of the blacklisting statutes of different states, including but not limited to *Iowa Code §§ 730.1* and *730.2* and *Arizona Revised Statutes § 23-1361(A)* **[*80]** .
> Twenty-Sixth Affirmative Defense: The claims are barred, in whole or in part, to the extent [p]laintiff breached its Employment Contracts by failing to honor such contracts with its drivers.
> Twenty-Seventh Affirmative Defense: The claims are barred, in whole or in part, for lack of a protectable interest supporting the underlying Employment Contracts.
> Twenty-Eighth Affirmative Defense: The claims are barred, in whole or in part, for lack of consideration supporting the underlying Employment Contracts.

(Doc. 44, at 13-17).

A. Voidability Defenses

The Court has already determined that the Driver Contracts are supported by consideration and are valid. Thus, defendant's twenty-eighth affirmative defense, which asserts that the contracts are unsupported by consideration, must fail as a matter of law. Similarly, the Court has already found that the defense that the contracts are not supported by a protectable interest would permit a signatory to avoid the contract, and defendant does not argue that any driver actually did avoid his contract. The twenty-seventh affirmative defense, which relies on defendant's theory that the contracts are not supported by a protectable interest is, **[*81]** consequently, unavailable to defendant and must fail as a matter of law, unless defendant can show that one or more drivers avoided his contract on this basis.

The twenty-sixth affirmative defense purports to defeat plaintiff's claims by asserting that plaintiff breached the contracts. Without reaching the issue of whether plaintiff did breach the contracts, the Court finds that this defense is unavailable to defendant, unless defendant can show that one or more drivers avoided his contract on this basis. When a party to a contract breaches the contract, the contract becomes *voidable*, not *void*, at the wronged party's option. *JB Hunt, 2018 U.S. Dist. LEXIS 96434, 2018 WL 2768874, at *13* (citing *Hubbard v. Hartford Fire Ins. Co., 33 Iowa 325, 329 (1871))*. Defendant has not asserted that any driver attempted to avoid his Driver Contract, and the twenty-sixth affirmative defense therefore must fail as a matter of law if defendant cannot show that a driver attempted to avoid his contract on this basis.

Likewise, the Court has already addressed whether the defense that a contract is "unenforceable" necessarily renders the contract void. The Court answered that question in the negative. Thus, to the extent the first affirmative defense asserts that the Driver Contracts are void, either facially or because they **[*82]** are "unenforceable," the defense must fail as a matter of law. To the extent the "unenforceable" defense asserts a voidability defense, defendant does not have standing to pursue the defense, and the defense therefore must fail as a matter of law, unless defendant can show that one or more drivers attempted to avoid his contract on an "unenforceability" basis. This finding amounts to a finding that the "unenforceable" defense, as articulated in the first affirmative defense, must fail in its entirety as a matter of law on the record currently before the Court.

Finally, the first affirmative defense asserts that the Driver Contracts are unconscionable. As the Court has already determined, this defense would permit a driver-signatory to *avoid* his contract, but the unconscionability would not render the contracts *void. See* *Bartlett Grain Co., LP v. Sheeder, 829 N.W.2d 18, 26-27 (Iowa 2013)* (holding that when a contract is unconscionable, a court *may* refuse to enforce the contract, in whole or in part). Defendant, thus, cannot assert this defense absent actual avoidance, and the defense must fail as a matter of law unless defendant can show that one or more drivers avoided his contract as unconscionable. The first affirmative defense, in its entirety, **[*83]** fails as a matter of law on the record currently before the Court. Plaintiff's motion for summary judgment is **granted** to the extent plaintiff seeks a determination that the first, twenty-sixth, twenty-seventh, and twenty-eighth affirmative defenses fail as a matter of law on the record currently before the Court.

B. Remaining Defenses

The defenses that remain to be considered are the second, sixth, twenty-second, and twenty-third affirmative defenses. The twenty-second and twenty-third affirmative defenses both address blacklisting statutes, and the second affirmative defense could be read as implicating blacklisting issues. Plaintiff argues that defendant cannot rely on state blacklisting statutes because the statutes are simply inapplicable here. (*See* Doc. 130, at 17-19). In response, defendant argues that the contracts are void *ab initio* under state blacklisting statutes because the restrictive covenants amount to lifetime bans on commercial driving. (Doc. 146, at 15-16). Defendant's argument rests entirely on the idea that the restrictive covenants amount to lifetime bans, which the Court has already rejected. Thus, to the extent the second, twenty-second, and twenty-third affirmative **[*84]** defenses seek to show the invalidity of the contracts, the defenses fail as a matter of law.

Plaintiff's motion, however, does not address any potential value the second, twenty-second, and twenty-third affirmative defenses could have in defendant's attempts to resist plaintiff's prayer for injunctive relief. To the extent the second, twenty-second, and twenty-third affirmative defenses may be relevant in defending against plaintiff's request for injunctive relief, the defenses survive. The Court notes, however, that even though the second, twenty-second, and twenty-third affirmative defenses do not fail as a matter of law as to plaintiff's prayer for injunctive relief, the Court has found injunctive relief inappropriate. Thus, to the extent the defenses do not fail, they are of no benefit to defendant.

Finally, the sixth affirmative defense directly implicates ***antitrust law***, and the second affirmative defense could be read as implicating ***antitrust law***. Plaintiff argues that the defenses must fail for two separate reasons. First, plaintiff asserts that the defenses fail because the parties have not entered into an agreement not to recruit each other's drivers. Next, plaintiff argues **[*85]** that defendant "cannot show that its ability to compete in the marketplace is somehow endangered if drivers who received specialized training . . . are required to either pay for that training or drive for [plaintiff]." (Doc. 130, at 8-10). As to the first argument, even if plaintiff is correct that no agreement exists between the parties, the lack of an agreement would not defeat the defense's applicability in assessing whether injunctive relief is proper. If the Court were to grant the injunctive relief plaintiff seeks, which the Court has already determined it will not do, defendant could be prohibited from hiring plaintiff's drivers. Abiding by a negative injunction is different from agreeing to refrain from certain conduct, and plaintiff has not argued that the defense of limited driver mobility would be inapplicable to the Court's equitable consideration of whether to grant injunctive relief.

Similarly, plaintiff has not addressed whether defendant could face antitrust liability for abiding by a negative injunction. In other words, plaintiff has not addressed the competing interests of the antitrust laws and a Court order mandating conduct that would ordinarily be prohibited under **[*86]** the antitrust laws. The Court cannot find, at this stage, that the second affirmative defense, to the extent it implicates ***antitrust law***, and the sixth affirmative defense fail as a matter of law. Again, however, the Court notes that even though these defenses do not fail as a matter of law, the Court has already rejected plaintiff's request for injunctive relief, and these defenses would therefore be of no benefit to defendant, to the extent the defenses would be relevant in arguing against an injunction.

Plaintiff's motion for summary judgment seeking a determination that the second, twenty-second, and twenty-third affirmative defenses fail as a matter of law on the record currently before the Court is **granted** to the extent they seek to show the invalidity of the Driver Contracts. Plaintiff's motion is **denied** to the extent the second affirmative defense implicates ***antitrust law***. Plaintiff's motion is **denied** as to the sixth affirmative defense. To the extent not otherwise addressed, plaintiff's motion for a determination that certain affirmative defenses fail as a matter of law is **denied**.

VII. CONCLUSION

For the aforementioned reasons, plaintiff's Motion for Partial Summary Judgment **[*87]** (Doc. 127) is **granted in part and denied in part**, and defendant's Motion for Summary Judgment (Doc. 138) is **granted in part and denied in part**. Consistent with this Order, plaintiff's claim for tortious interference with contract survives, plaintiff's claim for tortious interference with prospective economic advantage fails as a matter of law, plaintiff's claim for unjust enrichment survives in part, and plaintiff's request for a permanent injunction fails as a matter of law.

IT IS SO ORDERED this 4th day of June, 2019.

/s/ C.J. Williams

C.J. Williams

United States District Judge

Northern District of Iowa

California v. Allergan PLC

United States District Court for the Northern District of California

June 6, 2019, Decided; June 6, 2019, Filed

3:17-cv-00562-WHO

Reporter
2019 U.S. Dist. LEXIS 124674 *; 2019 WL 3251470

The State of California, Ex Rel, et al., Plaintiffs vs. Allergan PLC, formerly known as Actavis PLC and Actavis Inc. et al., Defendants

Core Terms

Generic, Settlement, settlement agreement, Manufacturing, Pharmaceuticals, disclosure, provisions, Allocated, notice, Marketing, Parties, termination, documents, Patent, business day, confidentiality, antitrust, costs, third party, compliance, contingent, believes, entity, notify, terms, terms and conditions, written notice, per unit, Infringement, Injunction

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For Watson Laboratories, Inc., now a Subsidiary of Teva Pharmaceutical Industries LTD, Defendant: Patrick Maben Hammon, LEAD ATTORNEY, Skadden Arps Slate Meagher Flom, Palo Alto, CA; Karen Hoffman Lent, PRO HAC VICE, Skadden Arps Slate Meagher Flom LLP, New York, NY; **[*2]** Michael Menitove, PRO HAC VICE, Skadden, Arps, Slate, Meagher and Flom, LLP, New York, NY; Steven C. Sunshine, Timothy Grayson, PRO HAC VICE, Skadden Arps Slate Meagher and Flom LLP, Washington, DC.

For Endo International plc, Endo Pharmaceuticals Inc., Miscellaneous: Daniel B. Asimow, LEAD ATTORNEY, Arnold & Porter Kaye Scholer LLP, San Francisco, CA.

Judges: Honorable William H. Orrick.

Opinion by: William H. Orrick

Opinion

SETTLEMENT AGREEMENT AND STIPULATED ORDER FOR PERMANENT INJUNCTION AND MONETARY RELIEF

This Settlement Agreement and Stipulated Order ("ASO") is made and entered into this 7th day of May, 2019 ("Effective Date"), by the Attorney General of the State of California ("California" or "Attorney General"), on the one hand, and Endo Pharmaceuticals Inc. and Endo International plc (collectively "Endo"), on the other (California and Endo, collectively, the "Parties").

WHEREAS, Endo Pharmaceuticals is or was engaged in the manufacturing, marketing, and/or selling certain pharmaceuticals, including but not limited to Lidoderm®, throughout the United States;

WHEREAS, the State of California alleges that it has reason to believe that Endo Pharmaceuticals entered into an agreement that foreclosed competition **[*3]** from generic equivalents of the brand-name drug Lidoderm® for a period of time in violation of federal antitrust and state antitrust and consumer protection laws;

WHEREAS, California initiated an investigation of Endo with respect to the above alleged actions;

WHEREAS, California has filed an enforcement Complaint ("Complaint") against Endo in this Court alleging such violations of federal and state laws;

WHEREAS, Endo denies that it engaged in any wrongful or unlawful conduct and asserts that it has, at all times, operated within the law and within industry standard practices; and

WHEREAS, nothing in this ASO will be construed as a finding or admission of any violation of law on the part of Endo.

The Parties have agreed to resolve California's concerns identified through the investigation and the allegations in the Complaint by entering into this ASO, as follows:

FINDINGS

1. This Court has jurisdiction over the Parties and the subject matter of this action. Endo has stipulated that, for purposes of this ASO alone, the Court has jurisdiction over Endo Pharmaceuticals Inc. and Endo International plc.

2. Venue for these matters is proper in this Court under *15 U.S.C. § 22* and *28 U.S.C. § 1391(b)* and *(c)*.

3. The Complaint alleges **[*4]** that Endo engaged in violations of 'federal antitrust and state antitrust and consumer protection laws by entering an agreement that foreclosed competition from generic equivalents of the brand-name drug Lidoderm® and later reduced competition between sellers of generic lidocaine patches.

4. Endo admits the facts necessary to establish the personal and subject matter jurisdiction of this Court in this matter only.

5. Endo denies the charges in the Complaint and disputes that California is entitled to obtain relief.

6. This Order does not constitute any evidence against Endo, or an admission of liability or wrongdoing by Endo, in this case or in any other litigation. This ASO shall not be used in any way, as evidence or otherwise, in any other litigation or proceeding; *provided, however*, that this provision shall not prevent California or Endo from using this ASO in any proceeding regarding enforcement or modification of this ASO or as otherwise required by law.

7. Entry of this ASO is in the public interest. California and Endo have agreed to stipulate to entry of this ASO to finally resolve the claims and litigation between them.

STIPULATIONS

1. California stipulates that it will not file **[*5]** litigation or any other proceedings against Endo asserting, or seeking remedies based on, Released Claims, other than any legal proceeding regarding enforcement or modification of this ASO.

2. Upon entry of this ASO by the Court, the Complaint shall be deemed dismissed with prejudice.

I. DEFINITIONS

IT IS ORDERED that, as used in this ASO, the following definitions shall apply:

A. "*505(b)(2)* Application" means an application filed with the United States Food and Drug Administration pursuant to *Section 505(b)(2)* of the Federal Food, Drug and Cosmetic Act, U.S.C. *§ 355(b)(2)*.

B. "ANDA" means an Abbreviated New Drug Application filed with the United States Food and Drug Administration pursuant to *Section 505(j)* of the Federal Food, Drug and Cosmetic Act, *21 U.S.C. § 355(j)*.

C. "Authorized Generic" means a Drug Product that is manufactured pursuant to an NDA and Marketed in the United States under a name other than the proprietary name identified in the NDA.

D. "Brand/Generic Settlement" means any agreement or understanding that settles a Patent Infringement Claim in or affecting Commerce in the United States.

E. "Brand/Generic Settlement Agreement" means a written agreement that settles a Patent Infringement Claim in or affecting Commerce in the United **[*6]** States.

F. "Branded Subject Drug Product" means a Subject Drug Product Marketed in the United States under the proprietary name identified in the NDA for the Subject Drug Product.

G. "Commerce" has the same definition as it has in *15 U.S.C. § 44*.

H. "Control" or "Controlled" means the holding of more than fifty percent (50%) of the common voting stock or ordinary shares in, or the right to appoint more than fifty percent (50%) of the directors of, or any other arrangement resulting in the right to direct the management of, the said corporation, company, partnership, joint venture, or entity.

I. "Contingent Supply Agreement" means a Supply Agreement that: (i) is contingent on the Generic Filer's inability to market the Generic Subject Drug Product on or after the Generic Entry Date because (x) the FDA has not granted final approval of the Generic Filer's ANDA or *505(b)(2)* Application for the Generic Subject Drug Product and/or (y) the Generic Filer cannot manufacture commercial quantities of the Generic Subject Drug Product; and (ii) terminates within thirty (30) days after the Generic Filer has final FDA approval and can manufacture commercial quantities of the Generic Subject Drug Product using good **[*7]** faith, commercially reasonable efforts, *provided, however*, the Generic Filer may take delivery of, Market, and sell quantities of Authorized Generic ordered prior to termination of the Supply Agreement ***so long as*** the total quantity of Authorized Generic delivered to the Generic Filer following termination of the Supply Agreement: (i) does not exceed the total quantity needed by the Generic Filer (as reflected in forecasts provided to the NDA Holder prior to termination of the Supply Agreement) during the eight (8) months following (x) termination of the Supply Agreement, if termination occurs after the Generic Entry Date, or (y) the Generic Entry Date, if termination occurs before the Generic Entry Date; and (ii) is delivered within eight (8) months of termination of the Supply Agreement.

J. "Drug Product" means a finished dosage form (e.g., tablet, capsule, solution, or patch), as defined in *21 C.F.R. § 314.3(b)*, approved under a single NDA, ANDA or *505(b)(2)* Application, that contains a drug substance, generally, but not necessarily, in association with one or more other ingredients.

K. "Endo Pharmaceuticals" means Endo Pharmaceuticals Inc., any joint venture, subsidiary, division, group, or affiliate **[*8]** Controlled currently or in the future by Endo Pharmaceuticals Inc., their successors and assigns, and the respective directors, officers, employees, agents, and representatives acting on behalf of each.

L. "Endo International" means Endo International plc, any joint venture, subsidiary, division, group, or affiliate Controlled currently or in the future by Endo International plc, their successors and assigns, and the respective directors, officers, employees, agents, and representatives acting on behalf of each.

M. "Endo" means Endo Pharmaceuticals and Endo International.

N. "Exception" means the following in a Brand/Generic Settlement:

1. compensation for saved future litigation expenses, ***but only if*** the total compensation the NDA Holder agrees to provide to the Generic Filer during the sixty (60) day period starting thirty (30) days before and ending thirty (30) days after executing the Brand/Generic Settlement Agreement does not exceed a maximum limit, which is initially set at seven million, two hundred sixty-two thousand, eight hundred seventy-nine dollars ($7,262,879)[1] and shall be increased (or decreased) as of January 1 of each year following entry of this ASO by an amount equal **[*9]** to the percentage increase (or decrease) from the previous year in the annual average Producer Price Index for Legal Services (Series Id. PCU5411--5411--) published by the Bureau of Labor Statistics of the United States Department of Labor or its successor;

2. the right to Market, as of an agreed upon Generic Entry Date: (i) Generic Product(s) in the United States under an ANDA or *505(b)(2)* Application (x) that is controlled by the Generic Filer and was not transferred to the Generic Filer by the NDA Holder, or (y) to which the Generic Filer has a license from a party other than the NDA Holder; or (ii) an Authorized Generic of the Subject Drug Product; provided that this Exception shall apply regardless of whether or not the Generic Filer must pay for the right to Market and, if so, the terms and conditions governing such payment;

3. provisions to facilitate, by means other than the transfer of goods or money, the Generic Filer's ability to secure or maintain final regulatory approval, or commence or continue the Marketing, of a Generic Product, by, *inter alia*, providing covenants, waivers, permissions, releases, dismissals of claims, and/or authorizations;

4. waiver or limitation of **[*10]** a claim for damages or other monetary relief based on prior Marketing of the Generic Subject Drug Product, ***but only if*** the NDA Holder and the Generic Filer do not agree, and have not agreed, to another Brand/Generic Settlement for a different Drug Product during the sixty (60) day period starting thirty (30) days before and ending thirty (30) days after the execution of the Brand/Generic Settlement Agreement; or

5. a continuation or renewal of a pre-existing agreement between an NDA Holder and a Generic Filer ***but only if*** (i) the pre-existing agreement was entered into at least 90 days before the relevant Brand/Generic Settlement Agreement, (ii) the terms of the renewal or continuation, including the duration and the financial terms, are substantially similar to those in the pre-existing agreement, and (iii) entering into the continuation or renewal is not expressly contingent on agreeing to a Brand/Generic Settlement.

O. "Exempted Agreement" means a Materials Agreement or Supply Agreement that meets all of the following conditions:

1. the price is above the Fully Allocated Manufacturing Cost, meaning:

[1] For avoidance of doubt, this amount is intended to be equivalent to the maximum limit in the definition of Exception in the FTC Order, but is adjusted herein to reflect to the subsequent annual changes in the Producer Price Index as provided for in the FTC Order.

a. if the Agreement is a Materials Agreement, the Materials Price charged by the NDA **[*11]** Holder for Materials provided through the Materials Agreement is at or above the Fully Allocated Manufacturing Cost incurred by the NDA Holder per unit of the relevant Materials, or

b. if the Agreement is a Supply Agreement, the Supply Price charged by the NDA Holder for the Authorized Generic of the Subject Drug Product is at or above the Fully Allocated Manufacturing Cost incurred by the NDA Holder per unit of the Authorized Generic of the Subject Drug Product provided under the agreement;

2. the Brand/Generic Settlement Agreement containing or incorporating the Materials Agreement or Supply Agreement is the only Brand/Generic Settlement Agreement that the NDA Holder and the Generic Filer have entered, or agreed to enter, during the sixty (60) day period starting thirty (30) days before and ending thirty (30) days after the execution of the Brand/Generic Settlement Agreement;

3. within fourteen (14) days after signing the Brand/Generic Settlement Agreement containing or incorporating the Materials Agreement or Supply Agreement, Endo Submitted to the Monitor a full and complete copy of the Brand/Generic Settlement Agreement, including any Materials Agreement and/or Supply Agreement;

[*12] 4. within fourteen (14) days after the NDA Holder provides to the Generic Filer the Materials Price or Supply Price, as applicable, Endo Submitted to the Monitor notification of the relevant Materials Price or Supply Price;

5. within thirty (30) days after beginning supply under the relevant Materials Agreement or Supply Agreement, the NDA Holder Submitted to the Monitor:

a. if a Materials Agreement, a verified written statement containing (i) the Fully Allocated Manufacturing Cost per unit for the Materials and (ii) a detailed calculation of the Fully Allocated Manufacturing Cost for the Materials, stated separately by cost component and on a per-unit basis; and

b. if a Supply Agreement, a verified written statement containing (i) the Fully Allocated Manufacturing Cost per unit for the relevant Authorized Generic of the Subject Drug Product and (ii) a detailed calculation of the Fully Allocated Manufacturing Cost for the Authorized Generic of the Subject Drug Product, stated separately by cost component and on a per-unit basis; and

6. if the NDA Holder is not Endo, the Materials Agreement or Supply Agreement, as applicable, requires the NDA Holder to (i) provide the notification required **[*13]** by subparagraphs 1.0.5. and (ii) cooperate with any reasonable request by the Monitor or staff of the FTC for documents and information to determine the relevant Fully Allocated Manufacturing Cost, including without limitation and subject to any demonstrated legally recognized privilege, providing the Monitor reasonable access to personnel, books, documents, and records kept in the ordinary course of business;

7. notwithstanding subparagraph 1.0.5. and subparagraph 1.0.6., a Materials Agreement or Supply Agreement in which Endo is the Generic Filer shall also be considered an Exempted Agreement if it complies with subparagraphs 1.0.1. to 4. ***and***:

a. if a Materials Agreement, Endo Submits to the Monitor within thirty (30) days of beginning to receive the Materials, a verified written statement containing (i) Endo's best estimate of what would be the Fully Allocated Manufacturing Cost per unit for the Materials if manufactured or sourced by the Generic Filer, including a separate estimate of each cost component on a per-unit basis, and (ii) a description of the terms and conditions of any agreement(s), offer(s), purchase order(s), or price quote(s) Endo has entered into or received for **[*14]** supply of the Materials in connection with manufacture of the Subject Drug Product and other facts and circumstances, if any, that Endo deems relevant to understanding such terms and conditions; and

b. if a Supply Agreement, it is a Contingent Supply Agreement and Endo Submits to the Monitor within thirty (30) days of beginning to receive the Authorized Generic, a verified written statement containing (i) Endo's best estimate of what would be the Fully Allocated Manufacturing Cost per unit for the Subject Drug Product if manufactured by the Generic Filer and (ii) a detailed calculation of the estimated Fully Allocated Manufacturing Cost, including an estimate of each cost component on a per-unit basis.

P. "FTC" means the United States Federal Trade Commission.

Q. "FTC Order" means the Stipulated Order for Permanent Injunction entered in the UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, in *Federal Trade Commission v. Endo Pharmaceuticals Inc.*, Civ. Action No. 17-cv-00312 (Document 25, February 2, 2017).

R. "Fully Allocated Manufacturing Cost" means: (1) direct costs incurred to produce or, if applicable, to acquire, the Subject Drug Product or Materials, determined **[*15]** in accordance with GAAP, as consistently applied in accordance with past practice and in the ordinary course of business, including, but not limited to (x) acquisition costs or (y) if applicable, materials, labor, manufacturing costs, packaging, labeling, testing, quality control, storage, insurance, and product maintenance; (2) the cost to ship the Subject Drug Product or Materials to the Generic Filer, and (3) administrative and overhead expenses associated with production or, if applicable, the acquisition of the Subject Drug Product or Materials, including, but not limited to, administrative labor costs, maintenance, information technology, quality assurance, insurance, depreciation of the equipment, and depreciation of the facility, allocated in accordance with past practice and in the ordinary course of business. To the extent the NDA Holder does not allocate administrative and overhead expenses associated with the Subject Drug Product to the Subject Drug Product, for purposes of this ASO such administrative and overhead expenses shall be calculated as a proportion of the NDA Holder's COGS of the Subject Drug Product to the NDA Holder's total COGS (for purposes of this definition, **[*16]** COGS means the NDA Holder's cost of goods sold, determined in accordance with GAAP, as consistently applied in accordance with past practice and in the ordinary course of business).

S. "Generic Entry Date" means the date in a Brand/Generic Settlement Agreement, whether certain or contingent, on or after which a Generic Filer is authorized by the NDA Holder to begin manufacturing, using, importing or Marketing the Generic Subject Drug Product.

T. "Generic Filer" means a party to a Brand/Generic Settlement who controls an ANDA or *505(b)(2)* Application for the Subject Drug Product or has the exclusive right under such ANDA or *505(b)(2)* Application to distribute the Subject Drug Product.

U. "Generic Product" means a Drug Product manufactured and/or sold under an ANDA or pursuant to *505(b)(2)* Application.

V. "Generic Subject Drug Product" means the Generic Product that is the subject of the Patent Infringement Claim being resolved by the Brand/Gperic Settlement.

W. "Lidoderm Settlement Agreement" means the Settlement and License Agreement between Endo Pharmaceuticals Inc. and Watson Laboratories, Inc. resolving the ANDA patent litigation involving the brand-name drug Lidoderm that is the subject **[*17]** of the Complaint in this action.

X. "Market," "Marketed," or "Marketing" means the promotion, offering for sale, sale, or distribution of a Drug Product.

Y. "Materials" means components or ingredients used in the manufacturing of a Subject Drug Product, including, but not limited to, hard-to-source excipients, hard-to-source active pharmaceutical ingredients, hard-to-source packaging, devices, or kits for injectables.

Z. "Materials Agreement" means provisions in, or incorporated into, a Brand/Generic Settlement Agreement providing for the supply of Materials to the Generic Filer by the NDA Holder for securing and/or maintaining regulatory approval, or manufacturing and Marketing by the Generic Filer of the Subject Drug Product, including the terms and conditions of any such supply.

AA. "Materials Price" means the total actual per-unit price charged by the NDA Holder for Materials provided through a Materials Agreement, including any transfer price and royalty to be paid by the Generic Filer, net of any discounts, allowances, rebates, or other reductions.

BB. "Monitor" means an individual appointed pursuant to Paragraph IV of the FTC Order.

CC. "Multistate Agreement" means a similar single **[*18]** settlement agreement with multiple states related to the Covered Conduct (as defined in II.A below) containing similar enforcement, notification and reporting provisions as this ASO.

DD. "NDA" means a New Drug Application filed with the United States Food and Drug Administration pursuant to *Section 505(b)* of the Federal Food, Drug and Cosmetic Act, *21 U.S.C. § 355(b)*, including all changes or supplements thereto that do not result in the submission of a new NDA.

EE. "NDA Holder" means a party to a Brand/Generic Settlement that controls the NDA for the Subject Drug Product or has the exclusive right to distribute the Branded Subject Drug Product in the United States.

FF. "No-AG Commitment" means any agreement with, or commitment or license to, the Generic Filer that prohibits, prevents, restricts, requires a delay of, or imposes a condition precedent upon the research, development, manufacture, regulatory approval, or Marketing of an Authorized Generic, *provided, however*, that agreement by the Generic Filer to pay royalties to the NDA Holder for the right to Market the Generic Subject Drug Product or an Authorized Generic of the Subject Drug Product, including agreement on the terms and conditions governing payment of **[*19]** such royalties, shall not be considered a No-AG Commitment.

GG. "Patent Infringement Claim" means any allegation threatened in writing or included in a complaint filed with a court of law that a Generic Product may infringe one or more U.S. Patents held by, or licensed to, an NDA Holder.

HH. "Payment by the NDA Holder to the Generic Filer" means a transfer of value, other than a No-AG Commitment, by the NDA Holder to the Generic Filer (including, but not limited to, money, goods, or services), regardless of whether the Generic Filer purportedly transfers value in return, where such transfer is either (i) expressly contingent on entering a Brand/Generic Settlement Agreement, or (ii) agreed to during the sixty (60) day period starting thirty (30) days before and ending thirty (30) days after executing a Brand/Generic Settlement Agreement.

II. Subject Drug Product" means the Drug Product for which one or more Patent Infringement Claims are settled under a given Brand/Generic Settlement. For purposes of this ASO, the Drug Product of the NDA Holder and the Generic Filer to the same Brand/Generic Settlement shall be considered to be the same Subject Drug Product.

JJ. "Supply Agreement" means **[*20]** provisions in, or incorporated into, a Brand/Generic Settlement Agreement providing for the supply of the Subject Drug Product to the Generic Filer by the NDA Holder for the Marketing by the Generic Filer of an Authorized Generic on or after the Generic Entry Date, including the terms and conditions of any such supply.

KK. "Supply Price" means the total actual per-unit price charged by the NDA Holder for supply provided through a Supply Agreement, including any transfer price and royalty to be paid by the Generic Filer for the right to sell an Authorized Generic of the Subject Drug Product, net of any discounts, allowances, rebates, or other reductions.

LL. "U.S. Patent" means any patent issued by the United States Patent and Trademark Office, including all renewals, derivations, divisions, reissues, continuations, continuations-in part, modifications, or extensions thereof.

MM. "Verified Written Report" means a report that must be submitted to the FTC pursuant to Paragraph V of the FTC Order.

NN. "Effective Date" means the date on which California receives the Settlement Payment described in Section III below.

II. RELEASED CLAIMS

IT IS FURTHER ORDERED that:

A. **Release**. In consideration of **[*21]** the injunctive provisions and Settlement Amount contained herein, the State of California will be deemed, upon the Effective Date, to have fully, finally, and forever released Endo and affiliated entities and their current and former officers, directors, employees, agents, other associated persons and attorneys (collectively "Releasees") from any and all manner of claims, counterclaims, set-offs, demands, actions, rights, liabilities, costs, debts, expenses, attorneys' fees, and causes of action of any type, whether or not accrued in whole or in part, known or unknown, under federal or state law, arising from the Lidoderm Settlement Agreement and from the facts, matters, transactions, events, occurrences, acts, disclosures, statements, omissions, or failures to act arising from said agreement ("Covered Conduct") that were asserted or alleged, or could have been asserted or alleged, in the Complaint by its Attorney General in his sovereign capacity as the chief law enforcement officer of the State of California. The State of California is otherwise deemed to have stipulated and agreed that, in light of the terms of this settlement agreement and the class settlement reached on behalf **[*22]** of California natural persons in *In re Lidoderm Antitrust Litigation*, No. 14-md-02521-WHO (N.D. Cal.), which includes a waiver of *Section 1542 of the California Civil Code*, neither it nor its Attorney General will assert any claim in any capacity or any claim on behalf of its departments, commissions, divisions, districts and other agencies, and the predecessors, successors, administrators and assigns of any of the foregoing against Endo arising from the Covered Conduct that were asserted or alleged, or could have been asserted or alleged, in its Complaint. This agreement does not relate to or release the Excluded Claims defined below. In addition, in connection with the release provided above, the Parties expressly waive, release, and forever discharge any and all provisions, rights, and benefits conferred by *§ 1542 of the California Civil Code*, which reads:

> ***Section 1542*. General Release; extent**. A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor;

or by any law of any state or territory of the United States or other jurisdiction, or principle of common law, which is similar, **[*23]** comparable or equivalent to *§ 1542 of the California Civil Code*. A Party may hereafter discover facts other than or different from those which he, she, or it knows or believes to be true with respect to the Released Claims, but each Party hereby expressly waives and fully, finally, and forever settles, releases, and discharges, upon this ASO becoming final, any known or unknown, suspected or unsuspected, asserted or unasserted, contingent or non-contingent claim that would otherwise fall within the definition of Released Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. This provision shall not in any way expand the scope of the Released Claims and shall not convert what is a limited release into a general release.

B. **Excluded Claims**. The release provided herein shall not have an effect on the following Excluded Claims and such Excluded Claims shall not be included within the Released Claims:

(1) claims for alleged violations of state revenue codes;

(2) claims based on alleged breach of expressed or implied warranty claims or other liability for defective or deficient products and services provided by Endo;

(3) claims based on alleged **[*24]** failure to deliver goods or services due; or

(4) any claim for liability under common law, any statute, regulation, or rule lawfully promulgated under California's administrative code or other enabling legislation for any conduct other than the Covered Conduct, including but not limited to:

i. claims regarding Medicare or Medicaid fraud, false claims, unlawful kickbacks, off-label marketing, unfair or deceptive representations, false advertising or product liability;

ii. claims for criminal liability; or

iii. claims for breach of this ASO.

C. **Res Judicata**. The ASO shall be deemed to have rendered any Released Claim as res judicata.

III. SETTLEMENT PAYMENT

IT IS FURTHER ORDERED that:

A. Endo Pharmaceuticals Inc. shall make a payment to California in the amount of U.S. $760,000 ("Settlement Amount") within the later of thirty (30) calendar days after the Effective Date or thirty (30) calendar days after receiving written payment processing instructions and any related documentation reasonably requested by Endo. In accordance with *Section 162(f) of the Internal Revenue Code*, the Settlement Amount is an amount paid to come into compliance with the antitrust, consumer protection and other laws of California as cited in the Complaint. No **[*25]** portion of that Settlement Amount represents reimbursement to California or any other person or entity for the costs of any investigation or litigation. In addition, the Parties understand and agree that no portion of the Settlement Amount represents or can be characterized as the payment of fines, penalties, or other punitive assessments. Each Party agrees to perform such further acts and to execute and to deliver such further documents as may reasonably be necessary to carry out this Agreement.

Notwithstanding the foregoing regarding what the Settlement Amount represents, upon receipt of the Settlement Amount, California shall have sole discretion as to its use and the allocation of settlement, and Endo shall have no responsibility for or influence with respect to such use(s) or allocation(s). California shall provide Endo Pharmaceuticals Inc. with written payment processing instructions for payment of the Settlement Amount by electronic transfer.

The payment may be used by the California Attorney General for any one or more of the following purposes, as the Attorney General, in his sole discretion, sees fit: (i) antitrust or consumer protection law enforcement; (ii) for deposit of **[*26]** monies received under the Cartwright Act into a state antitrust or consumer protection account for use in accordance with the state laws governing that account; (iii) for deposit into a fund exclusively dedicated to assisting the California Attorney General enforce the antitrust laws; or (iv) for such other purpose as the California Attorney General deems appropriate, consistent with state law.

B. Endo warrants that, as of the date of this Settlement Agreement, it is not insolvent, nor will its Settlement Payment render it insolvent within the meaning of and/or for the purposes of the United States Bankruptcy Code. If (i) a case is commenced with respect to Endo under Title 11 of the United States Code (Bankruptcy), or a trustee, receiver or conservator is appointed under any similar law, and (ii) a court of competent jurisdiction enters a final order determining the Settlement Payment, or any portion thereof, by or on behalf of Endo Pharmaceuticals Inc., to be a preference, voidable transfer, fraudulent transfer or similar transaction, and (iii) pursuant to an order of a court of competent jurisdiction monies paid by Endo Pharmaceuticals Inc. pursuant to this Settlement Agreement are **[*27]** either not delivered or are returned to Endo Pharmaceuticals Inc. or the trustee, receiver, or conservator appointed by a court in any bankruptcy proceeding with respect to Endo Pharmaceuticals Inc., the releases given and judgment entered in favor of Endo pursuant to this Settlement Agreement shall be null and void.

IV. PERMANENT INJUNCTION

IT IS FURTHER ORDERED that:

A. In connection with any actions in or affecting Commerce, Endo shall cease and desist from, either directly or indirectly, or through any corporate or other device, individually or collectively entering into a Brand/Generic Settlement that includes:

1. (i) a No-AG Commitment and (ii) an agreement by the Generic Filer not to research, develop, manufacture, or Market the Subject Drug Product for any period of time; or
2. (i) any Payment by the NDA Holder to the Generic Filer that is not an Exception or an Exempted Agreement and (ii) an agreement by the Generic Filer not to research, develop, manufacture, or Market the Subject Drug Product for any period of time,

Provided, however, that any agreement entered into by an entity prior to that entity becoming part of Endo is not subject to the terms of this ASO.

B. In the event **[*28]** of a material change in the law governing the antitrust implications of Brand/Generic Settlements, California will consider, in good faith, modifications to this ASO proposed by Endo.

C. Nothing in this ASO shall prohibit Endo from entering a written agreement, including a Brand/Generic Settlement, for which Endo has submitted to California a request for prior approval of the agreement, which shall include any information provided to the FTC pursuant to Paragraph III of the FTC Order, ***so long as*** (1) within thirty (30) days of California's receipt of the request for prior approval under this provision, California has not notified Endo in writing that, after considering the request in good faith, it believes the relevant agreement raises substantial questions regarding violation of state or federal ***antitrust law*** or any other applicable law that its Attorney General has authority to enforce and of the reasons for such a belief, or (2) Endo has received California's prior approval.

D. Nothing in this Section IV shall prohibit Endo from executing a written agreement ***so long as*** such agreement contains a provision or provisions expressly stating: (1) Endo will submit to California a request **[*29]** for prior approval of the agreement, and (2) the agreement is not effective, and shall not become effective, until and unless (i) thirty (30) days have passed since the request for prior approval was submitted to California and California has not notified Endo in writing that it believes the agreement raises substantial questions regarding violation of state or federal ***antitrust law*** or any other applicable law that its Attorney General has authority to enforce, or (ii) California has approved of the agreement.

V. ENFORCEMENT AUTHORITY

IT IS FURTHER ORDERED that:

A. The Attorney General of the State of California shall have exclusive responsibility for enforcing this ASO running in favor of California.

B. If California believes that Endo is not in compliance with the terms of this ASO, it shall give Endo written notice of such alleged non-compliance and the reasons why it believes that Endo is not complying with this ASO. Endo shall have twenty (20) business days from the date of receipt of such notice to respond in writing unless otherwise agreed by the Parties. If California is not satisfied with Endo's response, it shall so notify Endo in writing, and Endo shall have seventy-five (75) **[*30]** calendar days from the date of receipt of such notice to cure such alleged non-compliance.

C. In the event that California believes that Endo remains in non-compliance with any of the provisions of this ASO other than those in Section IV (Permanent Injunction) following the notice and cure period provided in Section V.B., above, California may seek to enforce such provisions of this ASO by filing a motion in this Court, seeking such relief as is available under applicable laws, including, if so available, fees and costs thereof, and civil penalties. Such civil enforcement proceedings shall be governed by a preponderance of the evidence standard, absent an applicable statutory provision or other binding legal authority to the contrary

D. In the event that California believes that Endo remains in non-compliance with any of the provisions of Section IV (Permanent Injunction) of this ASO following the notice and cure period provided in Section V.B., above, California shall request that the FTC review Endo's compliance with the corresponding provisions of Paragraph II of the FTC Order and consider pursuing coordinated enforcement proceedings under this ASO and the FTC Order. In the event **[*31]** that the FTC declines or fails to agree after forty-five (45) days from such a request by California to take action to enforce Paragraph II of the FTC Order, California may then seek to enforce Section IV of this ASO by filing a motion in this Court, seeking such relief as is available under applicable laws, including, if so available, fees and costs thereof, and civil penalties. Such civil enforcement proceedings shall be governed by a preponderance of the evidence standard, absent an applicable statutory provision or other binding legal authority to the contrary. California shall provide written notice to Endo within three (3) business days of any request(s) to the FTC provided herein.

E. Nothing in this Section V, however, prohibits California from pursuing immediate enforcement for alleged non-compliance with this ASO upon a showing that delay would cause irreparable harm or would prevent California from seeking adequate enforcement of the ASO.

VI. REPORTING AND MONITORING OBLIGATIONS

IT IS FURTHER ORDERED that:

A. Each Verified Written Report that Endo is required to submit to the FTC shall also be submitted to California within five (5) business days of submission to the FTC.

B. Each **[*32]** Branded/Generic Settlement Agreement submitted to the FTC pursuant to *Section 1112(a)* of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 shall also be submitted to California within five (5) business days of submission to the FTC

C. Endo shall consent to the FTC providing California with a copy of each written report that the Monitor is required to submit to the FTC under the FTC Order within five (5) business days of submission to the FTC.

D. Endo shall consent to the FTC providing California with copies of any and all of its submissions to the FTC under the FTC Order made between February 2, 2017 and the entry of this ASO, provided that: (a) Endo shall have five (5) business days after the entry of this ASO to notify the necessary third parties of the pending disclosure; (b) such third parties shall have twenty (20) business days from the entry of this ASO to assert an objection to this Court; and (c) Endo's consent shall not be effective until, either: (i) twenty-six (26) business days from the entry of this ASO have passed without a third party having asserted an objection to this Court; or (ii) if a third party has asserted an objection, this Court has issued a ruling **[*33]** permitting such disclosure over any such objection(s).

E. Except as provided in Section VI.F. below, any agreements, information, or documents submitted by Endo to California pursuant to this ASO ("Endo Materials") shall be kept confidential pursuant to *California Government Code sections 11180 et seq.* and may be divulged or disclosed by California only to a person or entity who is California's authorized representative or retained consultant or expert, who is engaged in matters pertaining to the implementation or enforcement of this ASO, and who has agreed to be bound by the provisions of this Section VI.D. To the extent California retains private counsel to investigate or assert potential claims against Endo in matters that are not related to the implementation or enforcement of this ASO, then no Endo Materials may be disclosed or divulged to those private counsel.

F. Notwithstanding the foregoing Section VI.D,

1. Endo Materials may be disclosed in the course of a legal proceeding between Parties to this ASO to enforce or modify this ASO, provided all parties to such a proceeding take reasonable steps to prevent disclosure of such Endo Materials to persons or entities who are not Parties to this ASO and Endo is given at least ten **[*34]** (10) business days' advance written notice and a reasonable opportunity to preserve the confidentiality of Endo Materials sought to be disclosed;
2. California may disclose Endo Materials in response to a discovery request or other legal process in a legal proceeding to which it is a party, or as otherwise required by law (other than a grand jury proceeding), provided California shall reasonably attempt to preserve the confidentiality of such Endo Materials by proceeding under any applicable protective order and/or utilizing sealing procedures provided by law or court rule and by providing Endo with at least ten (10) business days' advance written notice and a reasonable opportunity to preserve the confidentiality of Endo Materials sought to be disclosed before disclosing such Endo Materials to a third party; and
3. Endo Materials may be disclosed to the FTC or the United States Department of Justice, provided Endo is given at least ten (10) business days' advance written notice of such disclosure,

4. Endo Materials may be disclosed to another state that has reached a similar settlement agreement with Endo with respect to Lidoderm, provided that (i) such state agrees to be bound by the **[*35]** confidentiality protections set forth at *California Government Code sections 11180, et seq*, (ii) Endo is given at least ten (10) business days written notice of such disclosure, and (iii) such disclosure shall not be made until the time period regarding notice to third parties and the opportunity to object provided for in Section VI.D. above has passed.

F. California acknowledges and agrees that (i) the production of Endo Materials to California is compelled by the terms of this ASO; (ii) Endo may mark any such Endo Materials, where appropriate, as trade secrets or otherwise exempt from public disclosure ("Confidential Endo Materials"); (iii) Endo does not waive any claimed exemption from public disclosure under any law with respect to Confidential Endo Materials, and (iv) nothing in this ASO shall prevent Endo from seeking appropriate relief under California law concerning public disclosures. In the event of a request for production of any Endo Materials pursuant to any law regarding public disclosure of documents in California's possession (a "Records Request Notice"), the Attorney General staff, to the extent not prohibited by law, shall (a) promptly provide Endo with notice and a copy of the Records Request Notice, (b) designate **[*36]** any Confidential Endo Materials as falling within any trade secret or similar exemptions from disclosure under California laws, and (c) notify Endo in advance of any disclosure of any Endo Materials in order to afford Endo the ability to seek appropriate relief under California law with respect to the disclosure of such Endo Materials.

G. Said documents and reports to be produced to California as specified in the preceding paragraphs shall be addressed to its Attorney General, with an electronic copy provided to the Senior Assistant Attorney General of the ***Antitrust Law*** Section at Kathleen.Foote@doj.ca.gov .

H. An enforcement action in this Court pursuant to this ASO shall be the exclusive remedy for violation of this ASO. Neither the terms of this ASO nor any reports or notices provided by Endo under this ASO shall operate as a waiver of any future claims by any third party. Further, any such reports or notices provided by Endo to California under this ASO shall not be deemed to constitute actual or constructive notice of any claims as to any third party. No provision in this ASO may be used as evidence by the Parties in a proceeding other than an enforcement action pursuant to this **[*37]** ASO.

VII. PROPOSED CHANGE OF CORPORATE CONTROL

IT IS FURTHER ORDERED that:

A. Endo shall notify California at least thirty (30) days prior to:

1. Any proposed dissolution of Endo; or
2. Any proposed acquisition, merger, or consolidation of Endo; or
3. Any other change in Endo, including, but not limited to, assignment and the creation, sale or dissolution of subsidiaries, if such change might affect the compliance obligations arising out of this ASO.

B. Endo shall notify California within ten (10) days after any filing by Endo of a petition in bankruptcy.

C. Endo shall submit any notice required under this paragraph to California, addressed to its Attorney General, with an electronic copy provided to the Senior Assistant Attorney General of the ***Antitrust Law*** Section at Kathleen.Foote@doj.ca.gov .

VIII. ACCESS TO INFORMATION

IT IS FURTHER ORDERED that:

A. For the purpose of determining or securing compliance with this ASO, subject to and without limiting any legally recognized privilege, and upon written request with reasonable advance notice, Endo shall:

1. timely respond to and cooperate with California's reasonable request for production of documents or information related to compliance, including **[*38]** permitting any duly authorized representative of California to access, during office hours and in the presence of counsel, all facilities and access to inspect and copy all non-privileged business records and documentary material (which may be redacted for privilege) related to compliance with this ASO, including without limitation, electronically stored information as defined in *Rule 2.7(a)(1)* and *(2)*, *16 C.F.R. §2.7(a)(1)*, and books, ledgers, accounts, correspondence, memoranda, written justifications, economic models, and other records and documents (in whatever form such records and documents are kept) in the possession or under the control of Endo, which copying services shall be provided by Endo in a timely manner at California's request;

2. permit any duly authorized representative of California to interview officers, directors, or employees of Endo, who may have counsel present, regarding any such matters; and

3. agree to accept service of process of any motion filed with the Court hereunder and, subject to any objections Endo may assert, cooperate with any subpoenas issued by California in connection with any motion to enforce this ASO.

B. California shall to the fullest extent possible coordinate any requests for **[*39]** information under this Section with the FTC, Department of Justice, and any other state that has reached a similar settlement agreement with Endo with respect to Lidoderm, if involved.

IX. EFFECT OF SUBSEQUENT SETTLEMENTS WITH OTHER STATES

A. If following the filing or entry of this ASO, Endo enters into a Multistate Agreement, California will join the enforcement and reporting provisions in the Multistate Agreement. The Parties will submit an amended ASO reflecting that California's enforcement authority and each of Endo's notification and reporting obligations, including but not limited to the provisions reflected in paragraphs IV.B, IV.C, and V through VIII (with the exception of VI.F regarding confidentiality) above, have been replaced by the corresponding provisions in the Multistate Agreement.

B. If following the filing or entry of this ASO, Endo enters into a similar settlement agreement with another state, or a series of similar agreements with individual states, but has not entered into a Multistate Agreement, California shall coordinate its enforcement actions, and Endo's reporting obligations with such other state(s). The Parties will use their best efforts to negotiate an **[*40]** agreement among and between Endo, California and the other settling states to coordinate enforcement authority and Endo's notification and reporting obligations under the respective settlement agreement(s) with Endo and will submit any such agreement to this Court as an amendment to this ASO.

X. JURISDICTION

IT IS FURTHER ORDERED that this Court shall retain jurisdiction over these matters for purposes of construction, modification, and enforcement of this ASO.

XI. TERMINATION

IT IS FURTHER ORDERED that this ASO shall terminate on February 2, 2027.

XI. DISMISSAL WITH PREJUDICE

IT IS FURTHER ORDERED that within five (5) days of the Effective Date, California shall file a notice of voluntary dismissal with prejudice of its Complaint against Endo. Each party to bear its own costs aside from the Settlement Amount paid to California.

SO ORDERED this 6th day of June, 2019.

/s/ William H. Orrick

The Honorable William H. Orrick

PNE Energy Supply LLC v. Eversource Energy

United States District Court for the District of Massachusetts

June 7, 2019, Decided; June 7, 2019, Filed

Civil Action No. 18-11690

Reporter

396 F. Supp. 3d 200 *; 2019 U.S. Dist. LEXIS 95764 **; 2019-1 Trade Cas. (CCH) P80,810; 2019 WL 2410132

PNE ENERGY SUPPLY LLC, on behalf of themselves and others similarly situated, Plaintiffs, v. EVERSOURCE ENERGY, a Massachusetts voluntary association, and AVANGRID, INC., a New York corporation, Defendants.

Subsequent History: Affirmed by *PNE Energy Supply LLC v. Eversource Energy, 2020 U.S. App. LEXIS 28506 (1st Cir. Mass., Sept. 9, 2020)*

Core Terms

electricity, natural gas, wholesale, rates, filed rate doctrine, transmission, pipeline, contracts, purchasers, secondary, no-notice, prices, reservation, spot market, energy, alleges, anticompetitive conduct, antitrust, tariff, challenging, markets, transportation, consumers, damages, adjust, regulated, asserts, antitrust claim, commodity, entities

Counsel: **[**1]** For PNE Energy Supply LLC, on behalf of itself and all others similarly situated, Plaintiff: Anthony Tarricone, LEAD ATTORNEY, Kreindler & Kreindler, Boston, MA; Austin B. Cohen, PRO HAC VICE, Keith J. Verrier, Levin Sedran & Berman LLP, Philadelphia, PA.

For Eversource Energy, a Massachusetts voluntary association, Defendant: Chong S. Park, LEAD ATTORNEY, Ropes & Gray LLP - DC, Washington, DC; Douglas Green, Shannen Coffin, PRO HAC VICE, Steptoe & Johnson LLP, Washington, DC; John D. Donovan, Jr., Ropes & Gray LLP - MA, Boston, MA.

For Avangrid, Inc., a New York Corporation, Defendant: Allyson M. Maltas, Marguerite M. Sullivan, PRO HAC VICE, Latham & Watkins LLP, Washington, DC; U. Gwyn Williams, Latham & Watkins LLP, Boston, MA.

Judges: Denise J. Casper, United States District Judge.

Opinion by: Denise J. Casper

Opinion

[*203] **MEMORANDUM AND ORDER**

CASPER, J.

I. Introduction

PNE Energy Supply LLC ("PNE"), on behalf of a putative class of wholesale electricity purchasers located in New England, has filed this lawsuit against Eversource Energy ("Eversource") and Avangrid, Inc. ("Avangrid") (collectively, "Defendants"), alleging violations of the Sherman Act, *15 U.S.C. § 2*, and various state consumer protection and antitrust laws. D. 1. Specifically, **[**2]** PNE asserts that Defendants manipulated pipeline capacity for natural gas transmission and, as a result, artificially inflated the price of natural gas and electricity at wholesale in New England. Id. ¶ 1. PNE seeks damages and injunctive relief, including under the Clayton Act, *15 U.S.C. § 26*. Id. (Request for Relief). Defendants have filed a joint motion to dismiss. D. 21. For the reasons set forth below, the Court ALLOWS Defendants' motion.

II. Standard of Review

To survive a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, a pleading must allege claims that are plausible. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. To satisfy this standard, the pleading must provide "for more than a sheer possibility that a defendant has acted unlawfully.'" *Saldivar v. Racine, 818 F.3d 14, 18 (1st Cir. 2016)* (quoting *Iqbal, 556 U.S. at 678*). A claim must contain sufficient factual matter that, accepted as true, would allow the Court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678* (citing *Twombly, 550 U.S. at 556*).

As with other claims, "it is not enough merely to allege a[n] [antitrust] violation in conclusory terms." *E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc., 357 F.3d 1, 9 (1st Cir. 2004)*. Instead, the "complaint **[**3]** must make out the rudiments of a valid claim." Id. Therefore, "[w]hen the requisite elements are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint." *In re Carbon Black Antitrust Litig., No. Civ.A.03-10191-DPW, 2005 U.S. Dist. LEXIS 660, 2005 WL 102966, at *5* (quoting *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984))*. Still, the Court should dismiss a complaint "only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him **[*204]** to relief." Id. (citations and internal quotation marks omitted).

III. Factual Background

Unless otherwise noted, the following facts are drawn from complaint, D. 1, and are accepted as true for the consideration of the pending motion.

PNE is an energy supplier that purchases electricity at wholesale to be resold to retail customers in New England. D. 1 ¶ 4. The price of natural gas in New England heavily influences the price of wholesale electricity for purchasers like PNE because natural gas-fired power plants generate forty-eight percent of electricity in the region. Id. ¶¶ 97, **[**4]** 102. Accordingly, an increase in natural gas prices due to a shortage in natural gas supply will cause the price of wholesale electricity to increase as well. Id. ¶ 102. PNE alleges that Defendants used their influence over the transmission of natural gas to New England to restrict the supply of gas available for other purchasers, inflating the commodity market price of natural gas and, in turn, resulting in higher wholesale electricity prices. See, e.g., id. ¶ 15. The Court now turns to the New England energy markets purportedly impacted by Defendants' alleged anticompetitive conduct.

A. Natural Gas and Electricity Markets

1. FERC's Authority to Regulate Certain Natural Gas and Electric Rates

As part of the Natural Gas Wellhead Decontrol Act of 1989, Congress eliminated the Federal Energy Regulatory Commission's ("FERC") authority to impose price regulations on "first sales" of natural gas at the wellhead.[1] Id. ¶ 55. The commodity price of natural gas thereafter has been determined by market forces. Id.; see E. & J. Gallo Winery v. EnCana Corp., 503 F.3d 1027, 1038 (9th Cir. 2007). In 1992, FERC issued Order No. 636, which permanently severed the sale of natural gas as a commodity from the sale of natural gas transportation as a service. D. 1 ¶ 56. By contrast **[**5]** to the sale of gas as a commodity, FERC retains the authority to regulate the sale of natural gas transmission services. See 15 U.S.C. § 717(b).

The Federal Power Act ("FPA"), 16 U.S.C. § 791a et seq., authorizes FERC to regulate both the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). In particular, the FPA obligates FERC to "oversee all prices for those interstate transactions and all rules and practices affecting such prices." F.E.R.C. v. Elec. Power Supply Ass'n, __ U.S. __, 136 S. Ct. 760, 782, 193 L. Ed. 2d 661 (2016).

2. Natural Gas Markets

The natural gas market encompasses two transactions: (1) the purchase of natural gas; and (2) the transmission of natural gas from seller to purchaser. With respect to sales of the commodity itself, natural gas is sold to consumers either directly from gas producers via contracts called "gas futures" or in the "spot market." D. 1 ¶ 61. Futures contracts allow gas producers to sell a specific quantity of gas at some predetermined future time. Id. Purchasers with a steady natural gas demand, such as load distribution companies ("LDCs"), which distribute gas to retail customers, id. ¶ 17 n.11, typically utilize futures contracts, id. ¶ 61. Entities with variable or less predictable natural gas demand, **[**6]** including natural gas-fired electricity **[*205]** generators, purchase gas on the spot market. Id. ¶ 61. LDCs and other direct purchasers often find themselves holding title to excess amounts of natural gas that can be resold to other purchasers on the spot market. Id. ¶ 62. According to PNE, the spot market price of natural gas is not regulated by FERC and is, instead, determined by supply and demand, *i.e.* the spot market price of natural gas increases when the amount of available natural gas decreases. Id. ¶ 63.

As mentioned, purchasers must also pay for the transmission (or transportation) of natural gas to its destination. In New England, a network of pipelines facilitates the transmission of natural gas from the wellhead to a destination determined by the purchaser. Id. ¶ 76. The Algonquin Gas Transmission Pipeline ("Algonquin Pipeline"), which is partially owned by Defendant Eversource, is a major pipeline that transmits natural gas to New England. Id. Similar to the process for purchasing natural gas as a commodity, reserving pipeline transmission capacity in New England differs depending upon the nature of the purchaser. Id. ¶¶ 78, 80. According to PNE, purchasers with long-term capacity **[**7]** needs utilize the primary capacity market whereas short-term capacity transactions occur in the secondary capacity market. See id. ¶¶ 32, 78.

a) Primary Capacity Market

As part of the primary capacity market, LDCs have the option to enter "no-notice" transportation contracts, which give them the power to reserve transmission capacity on a pipeline for a given day and time, and to adjust that reservation "upward or downward" throughout the day without penalty. D. 1 ¶ 59. Transmission capacity reservations play an important role in determining the supply of natural gas available to gas purchasers in New England because there is a fixed amount of pipeline capacity on any given day. Id. ¶ 79. In other words, the transmission capacity reserved by one purchaser limits how much capacity is available for other purchasers' natural gas needs. See id. Even when LDCs adjust their capacity reservations downward or cancel a reservation, that capacity is not automatically released for others to use. Id. ¶ 116 (explaining that "shrinking [a capacity] reservation does not make . . . now-empty [pipeline] capacity available to be filled by others;" rather, "capacity must be affirmatively released by the **[**8]** contract-holder" before it can be resold).

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[1] First sales are sales of natural gas not preceded by a sale to an interstate pipeline, intrastate pipeline, local distribution company or retail consumer. D. 1 ¶ 55.

b) Secondary Capacity Market

Capacity release programs[2] allow LDCs and other pipeline customers who have flexibility to adjust their capacity reservations to release excess capacity into what PNE describes as the "secondary capacity market," id. ¶¶ 60, 64, and this excess capacity is then used to transport natural gas for purchasers in the spot market, including gas-fired electricity generators. Id. ¶ 64. The "secondary capacity market" includes all short-term natural gas and capacity transactions, including the spot market for natural gas and the excess capacity release market through which excess capacity holders can sell or transfer capacity along a given pipeline. Id. ¶ 1 n.3 (explaining that the "term 'secondary capacity market' refers to all short-term transactions for pipeline capacity, including the gas 'spot market' for bundled transportation and commodity transactions and the 'excess capacity release market' administered by the pipeline for gas transportation **[*206]** capacity, exclusive of the physical commodity"); id. ¶ 32 (explaining that the "'secondary capacity market' . . . includes the spot market for the sale of natural gas and the related **[**9]** 'excess capacity release' market for gas transmission services"). PNE alleges that the secondary capacity market is not regulated by FERC and, instead, is subject to supply and demand. Id. ¶ 17.

3. Wholesale Electricity Market

Wholesale electricity is typically sold by electricity generators to load serving entities ("LSEs"), which then deliver electricity to retail consumers. Id. ¶ 83 n.22. Wholesale electricity is primarily purchased through auctions between electricity generators and LSEs. See id. ¶¶ 82-83. The auctions are administered and overseen by intermediaries called Independent System Operators ("ISOs") or Regional Transmission Organizations ("RTOs"), which are independent non-profit organizations that FERC has charged with facilitating an efficient market for wholesale electricity while also ensuring reliability for consumers. Id. ¶¶ 70-72.

In the six states constituting the New England region, wholesale electricity is bought and sold in auction markets administered by ISO-New England ("ISO-NE") under a tariff approved by FERC. See id. ¶ 74. The auction process is as follows. ISO-NE first obtains orders from LSEs indicating how much electric energy is needed over a given **[**10]** period of time. Id. ¶ 85. It also obtains bids from electricity generators specifying how much electricity can be produced during the relevant time period and how much they propose to charge for it. Id. Then, ISO-NE matches the offers and bids to set the Locational Marginal Price ("LMP") to reflect the relevant market clearing price. Id. ¶ 86.

B. Alleged Anticompetitive Conduct

PNE asserts that Defendants "each coordinated the activities of their member companies to restrict the supply of natural gas, thereby driving up the prices of natural gas, with the purpose and intent of raising prices and realizing excessive profits on their sales of electricity in New England's wholesale electricity market." Id. ¶ 1. The complaint acknowledges that this alleged anticompetitive conduct "stem[s] from the same [allegations of] misconduct" considered in *Breiding v. Eversource Energy et al., 344 F. Supp. 3d 433 (D. Mass. 2018)*, D. 1 ¶ 2, where this Court dismissed all claims, including state and federal antitrust claims, against Defendants Avangrid and Eversource. *Breiding, 344 F. Supp. 3d at 460*. PNE nevertheless contends that the allegations here differ from those at issue in Breiding in at least the following ways: (1) whereas the Breiding plaintiffs claimed injury as retail electricity consumers, **[**11]** PNE is a purchaser in the wholesale electricity market allegedly targeted by Defendants' scheme, id. ¶ 3, (2) PNE alleges that Defendants' anticompetitive conduct occurred in the unregulated "secondary capacity market," which purportedly includes the spot market for natural gas and the excess capacity release market, id. ¶¶ 11-12, 32, and which was not mentioned in the Breiding complaint.[3]

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[2] Capacity release programs were implemented by FERC as part of Order No. 636. Id. ¶ 58.

[3] The complaint in Breiding does not mention the "secondary capacity market" nor does it suggest that the spot market for natural gas and the process for releasing excess capacity together form a single market relevant to the Court's consideration of

1. Defendants' Alleged Market Power

PNE points to several aspects of Defendants' energy businesses to suggest that Defendants controlled New England's natural **[*207]** gas supply and transmission and, therefore, the secondary capacity market that allegedly impacted the price of wholesale electricity. First, New England's principal natural gas pipeline, the Algonquin Pipeline, is owned, in part, by Defendant Eversource. Id. ¶ 76. Second, Eversource and Avangrid also own and operate, through their subsidiaries, substantial "natural gas utilities" known as LDCs—which purchase natural gas directly from gas producers and, in turn, distribute natural gas to retail consumers. Id. ¶ 103. Half of the eight largest LDCs in New England are owned by Eversource or Avangrid.[4] Id. As a result of their LDC operations, **[**12]** Eversource and Avangrid possess a large number of no-notice contracts for natural gas transmission capacity along the Algonquin Pipeline. Id. ¶ 105. These contracts allow LDCs to adjust their transmission capacity reservations upward or downward at any time and without penalty. Id.

2. Defendants' Alleged Monopolization Scheme

PNE alleges that Defendants artificially restricted natural gas supply by refusing to release excess natural gas transmission capacity into the secondary capacity market, raising wholesale natural gas prices and, in turn, increasing the clearing price of wholesale electricity. Id. ¶¶ 110-12. No-notice contracts for natural gas transmission capacity provided the method by which Defendants perpetuated the alleged scheme. See, e.g., id. ¶ 117. No-notice contracts allow LDCs to reserve natural gas transmission capacity on the Algonquin Pipeline and to adjust such reservations at any time without penalty. Id. ¶¶ 59, 79. Because there is a fixed amount of pipeline capacity on a given day, PNE asserts that the excess capacity reserved and not released by LDCs, including those owned by Defendants' subsidiary companies, restricted the pipeline transmission capacity available **[**13]** to meet the needs of other consumers, including natural gas-fired electricity generators participating in the spot market for natural gas. Id. ¶¶ 115-17.

PNE assert that Defendants' conduct was unique. Id. ¶ 129. As compared to the utility company with the next highest "last-minute" capacity cancellations, Eversource and Avangrid cancelled 40 and 184 times more of their natural gas capacity than this other company, respectively. Id. ¶ 130. In addition, Defendants could have (but did not) release their excess capacity to be sold to other gas purchasers. Id. ¶ 140.

3. Market Advantages Stemming from Defendants' Alleged Anticompetitive Conduct

PNE alleges that Defendants artificially increased demand for, value attributed to and prices paid to non-natural gas-fired power plants, including power plants owned by Defendants, by restricting available natural gas supply and increasing the spot market price for natural gas. Id. ¶¶ 108, 136-39.

4. Plaintiffs' Alleged Injury

PNE is not a purchaser of natural gas transmission capacity. Nor does it purchase natural gas on the spot market where prices were allegedly inflated. PNE alleges, however, that it was injured by Defendants' anticompetitive conduct **[**14]** to the extent it increased the price of wholesale electricity between eighteen and twenty percent on average. Id. ¶¶ 30, 123.

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whether Eversource and Avangrid engaged in anticompetitive conduct through their use of no-notice contracts. See Amended Complaint, *Breiding, 344 F. Supp. 3d 433* (No. 17-cv-12274), D. 33.

[4] Eversource owns NSTAR Gas Co. and Yankee Gas Co. and Avangrid owns Connecticut Natural Gas Co. and Southern Connecticut Gas Co. D. 1 ¶ 103.

C. Class Definitions

PNE asserts federal and state law claims against Avangrid and Eversource **[*208]** on behalf of itself and similarly situated classes of persons pursuant to *Fed. R. Civ. P. 23(a)* and *Rule 23(b)(2)*. Id. ¶¶ 151-57. Defendants, their parent companies, subsidiaries and affiliates and governmental entities are excluded from all classes defined below. Id.

1. Federal Injunctive Class

PNE seeks equitable and injunctive relief under federal ***antitrust law*** on behalf of itself and a class of similarly situated electricity purchasers (the "Federal Injunctive Class"). Id. ¶ 151. The Federal Injunctive Class is defined as "[a]ll persons and entities located in ISO-NE electricity market who purchased wholesale electricity in the day-ahead and real-time energy markets from December 1, 2012 through the present." Id.

2. Federal Damages Class

PNE seeks monetary damages under federal ***antitrust law*** on behalf of itself and a class of similarly situated electricity purchasers (the "Federal Damages Class"). Id. ¶ 152. The Federal Damages Class is defined as "[a]ll persons and entities located in ISO-NE electricity **[**15]** market who purchased wholesale electricity in the day-ahead and real-time energy markets from December 1, 2012 through the present." Id.

3. Statewide Class

PNE brings claims for damages and other relief under Massachusetts law against Avangrid and Eversource on behalf of itself and a class of similarly situated wholesale electricity customers located throughout New England (the "Statewide Class"). Id. ¶ 154. The Statewide Class is defined as "[a]ll persons and entities located in the ISO-NE electricity market who purchased wholesale electricity in the day-ahead and real-time energy markets from December 1, 2012 through the present." Id.

4. State Specific Class

PNE brings claims for damages and other relief under relevant Massachusetts and New Hampshire laws against Avangrid and Eversource on behalf of itself and a class of similarly situated wholesale electricity customers located throughout New England (the "State Specific Classes"). Id. ¶ 156. The State Specific Classes are defined as "[a]ll persons and entities located in Massachusetts [or New Hampshire] who purchased wholesale electricity in the day-ahead and real-time energy markets from December 1, 2012 through the present." Id.

[16] IV. Procedural History**

On August 10, 2018, PNE instituted this action against Defendants. D. 1. Defendants have now moved to dismiss. D. 21. The Court heard the parties on the pending motion and took the matter under advisement. D. 31.

V. Discussion

A. The Filed Rate Doctrine Bars PNE's Claims

This Court recently held that the filed rate doctrine bars federal and state law claims premised on the alleged abuse of Avangrid and Eversource's right to adjust and withhold excess natural gas transmission capacity pursuant to no-notice contracts approved by FERC, even where such conduct allegedly resulted in increased prices in downstream wholesale and retail electricity markets. See *Breiding, 344 F. Supp. 3d at 451* (dismissing antirust and consumer protection claims against Avangrid and Eversource where the "requested relief would require the Court to determine the reasonableness of [wholesale electricity] rates and tariffs approved by FERC"). Defendants, relying on the Court's ruling in Breiding, contend **[*209]** that the filed rate doctrine similarly bars PNE's claims. See D. 22 at 7-8. PNE asserts that Breiding is not dispositive here because (1) the filed rate doctrine does not bar challenges to anticompetitive conduct in the allegedly **[**17]** unregulated secondary capacity market, D. 26 at 24-25; (2) PNE's claims concern Defendants' anticompetitive business practices (as opposed to the lawful exercise of rights under contracts approved by FERC and protected under the filed rate doctrine), id. at 25-28; and (3) PNE is not asking the Court to alter wholesale electric rates; rather, it seeks to recover "fuel cost" overcharges baked into the price of wholesale electricity as a result of Defendants' anticompetitive conduct, id. at 28-31.

The filed rate doctrine requires that "utility filings with the regulatory agency prevail over . . . other claims seeking different rates or terms than those reflected in the filings with the agency." *Town of Norwood, Mass. v. F.E.R.C., 217 F.3d 24, 28 (1st Cir. 2000)* ("Town of Norwood II"). This doctrine is a "form of deference and preemption, which precludes interference with the rate setting authority of an administrative agency." *Wah Chang v. Duke Energy Trading & Mktg., LLC, 507 F.3d 1222, 1225 (9th Cir. 2007)*. "The strict application of the [filed rate doctrine] is necessary to promote the congressional policy of preventing unjust discrimination in rates." *Town of Norwood v. New England Power Co., 23 F. Supp. 2d 109, 115-16 (D. Mass. 1998)*, aff'd in part, remanded in part sub nom., *Town of Norwood, Mass. v. New England Power Co., 202 F.3d 408 (1st Cir. 2000)* (citations and internal quotation marks omitted) ("Town of Norwood I"). The filed rate doctrine bars federal and state antitrust claims, as well as state tort **[**18]** actions, that require setting aside or second guessing rates approved by FERC. *Wah Chang, 507 F.3d at 1225* (describing the filed rate doctrine's fortification against "direct attack" as "impenetrable;" "[i]t turns away both federal and state antitrust actions").

1. The Filed Rate Doctrine's Application to the Secondary Capacity Market

PNE argues that the filed rate doctrine does not bar the claims alleged here because the "secondary capacity market," where Defendants' anticompetitive conduct allegedly restricted natural gas supply and increased prices, is not regulated by FERC. See D. 26 at 24-25. Specifically, PNE asserts the short-term excess capacity release market, which PNE alleges is one component of the secondary capacity market, see D. 1 ¶ 32, is "explicitly *unregulated*," see D. 26 at 25 (emphasis in original). For support, PNE cites *18 C.F.R. § 284.8(b)(2)*, which states in relevant part that "no rate limitation applies to the release of capacity for a period of one year or less if the release is to take effect on or before one year from the date on which the pipeline is notified of the release." *18 C.F.R. § 284.8(b)(2)*. As this Court has explained, however, FERC's rendering of rate determinations to market forces is not a dispositive factor in determining **[**19]** whether FERC retains overall authority to regulate a particular energy transaction. See *Breiding, 344 F. Supp. 3d at 446 n.5* (explaining that "the Court does not distinguish between market-based rates and rates formally filed with FERC for the purpose of determining whether the filed rate doctrine bars [p]laintiffs' claims"). The Natural Gas Act ("NGA") grants FERC power to regulate "the transportation of natural gas in interstate commerce," *15 U.S.C. § 717(b)*, and the responsibility of ensuring that market-based rates, including those set in the excess capacity release market, are "just and reasonable," *15 U.S.C. § 717c(a)* (explaining that "[a]ll rates and charges made, demanded, or received . . . **[*210]** in connection with the transportation or sale of natural gas subject to the jurisdiction of [FERC], and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable"). The filed rate doctrine applies with no less force where regulated rates have been left to the free market. *Town of Norwood I, 202 F.3d at 419* (rejecting the plaintiff's assertion that the "filed rate doctrine should not apply where 'regulated' rates have been left to the free market").

The Court, however, need not decide today whether FERC's broad regulatory authority over the transportation **[**20]** of natural gas extends to the excess capacity release market (or, by extension, the secondary capacity market). The secondary capacity market is bookended by what PNE describes as the primary capacity market, where Defendants allegedly abused no-notice contracts, and the wholesale electricity market, where PNE allegedly paid supracompetitive prices as a result of Defendants' anticompetitive conduct. There is no dispute that these markets are regulated by FERC. See D. 1 ¶ 1 n.3 (stating that "the 'primary capacity market,' which includes long-term contracts for pipeline capacity between the pipeline and a primary contract holder transacted at FERC-regulated prices"); id. ¶¶ 26, 73 (explaining that the price of wholesale electricity in New England is determined via auctions run by ISO-NE, an entity created in response to FERC Order No. 888). PNE's claims challenging rates and conduct within these markets must comport with the filed rate doctrine. See, e.g., *Ark. La. Gas Co. v. Hall, 453 U.S. 571, 577-78, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981)*. Accordingly, the Court turns to PNE's arguments that it challenges neither conduct approved by FERC pursuant to no-notice contracts nor wholesale electric rates within FERC's regulatory authority.

*2. The Filed Rate Doctrine Bars **[**21]** PNE's Challenge to No-Notice Contract Rights Approved by FERC*

Defendants assert that PNE, like the plaintiffs in Breiding, attempts to enjoin transmission capacity reservation practices permitted under the terms of federally approved no-notice contracts. See D. 22 at 18. No-notice contracts grant Defendants and other long-term natural gas purchasers the power to reserve transmission capacity on a pipeline for a given day and time, to adjust that reservation upward or downward throughout the day without penalty and, at the contract holder's discretion, the power to affirmatively release capacity to be resold via capacity release programs. D. 1 ¶¶ 59, 79, 116-117. The Court recognized in Breiding that "the filed rate doctrine protects not only agency authority over tariffed rates but also 'ancillary conditions and terms included in the tariff,' including, for example, no-notice contracts and relevant provisions allowing LDCs to cancel capacity reservations at any time without penalty." *Breiding, 344 F. Supp. 3d at 448* (quoting *Town of Norwood I, 202 F.3d at 416*).

PNE contends as an initial matter that no-notice contracts are not a "necessary part of the conduct comprising Defendants' alleged anticompetitive scheme." D. 26 at 26. PNE's argument is undermined **[**22]** by numerous allegations in the complaint that suggest the success of Defendants' scheme depended upon the purported abuse of no-notice contracts. See D. 1 ¶ 105 (explaining that "[a]s a result of their LDC operations, Eversource and Avangrid possess a large number of no-notice contracts," which "give them power to reserve transmission capacity on the Pipeline for a given day and then adjust that reservation upward or downward at the last minute without penalty"); id. ¶ 107 (alleging that **[*211]** "[h]aving control of capacity on the Pipeline gave Eversource and Avangrid the ability to restrict supply in the secondary capacity market particularly on days when capacity was already scarce"); id. ¶ 119 (asserting that Eversource and Avangrid, "by reduc[ing] the Pipeline's daily effective capacity" and "withholding this amount of capacity from the secondary market," purportedly caused a "more than 50% increase in the spot-market price of gas and an almost 20% increase in the wholesale electricity price"). Although the Court need not accept conclusory legal conclusions in the complaint as true, it also cannot ignore the factual allegations that form a line between Defendants' alleged capacity reservation **[**23]** practices under no-notice contracts and PNE's alleged injury in the wholesale electricity market. See id. ¶¶ 105, 107, 119; see also ¶ 102 (explaining that "[b]ecause so much of New England's electricity is generated by natural-gas-fired power plants, the unregulated spot market price of natural gas heavily influences the wholesale price of electricity" such that a shortage of natural gas supply will increase the spot market price of natural gas and wholesale electricity).

Alternatively, PNE contends that it does not question the propriety of no-notice contracts approved by FERC, instead, it asks the Court to consider whether Defendants' anticompetitive exercise of no-notice contract rights violated the operative FERC-approved tariff's mandate that service agreements be consistent with valid laws, including ***antitrust law***. Id. For support, PNE primarily relies upon *Brown v. MCI WorldCom Network Services, Inc., 277 F.3d 1166, 1171-72 (9th Cir. 2002)* and Town of Norwood I.[5] In Brown, the court held that the filed rate doctrine did not bar the plaintiff's claims challenging conduct that was inconsistent with a tariff filed with the Federal Communications Commission. See *Brown, 277 F.3d at 1172* (concluding that the filed rate doctrine did not preclude

[5] PNE also cites to *California Motor Transportation Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*, but that case does not address the filed rate doctrine's preclusive effect on antitrust laws.

the plaintiff's antitrust claim since the **[**24]** tariff at issue did not authorize an additional fee that defendants had charged him). Here, by contrast, there is no dispute that FERC authorized Defendants' capacity adjustments pursuant to no-notice contracts. See D. 1 ¶¶ 58-59 (explaining that FERC Order No. 636 authorized no-notice transportation contracts, which "give an LDC the power to reserve space, or transmission capacity on the pipeline . . . then adjust that reservation . . . at the last minute without penalty"). In lieu of enforcing a filed tariff provision or preventing conduct inconsistent with the same (as was the case in Brown), PNE appears to challenge Defendants' business choices with respect to FERC-approved no-notice contracts, including the routine "down-scheduling" of capacity reservations. D. 26 at 27. As the Brown court recognized, however, the filed rate doctrine "bars suits challenging services, billing, or other practices when such challenges, if successful, would have the effect of changing the filed tariff." *Brown, 277 F.3d at 1170*. The holding in Town of Norwood I also does not support PNE's position. There, the First Circuit mostly affirmed the district court's dismissal of plaintiff's antitrust claims, holding that "any meaningful **[**25]** relief as to the [alleged anticompetitive scheme] would require the *alteration* of tariffs." *Town of Norwood I, 202 F.3d at 420* (emphasis in original). PNE's requested relief likewise requires interfering with Defendants' right to adjust and withhold excess capacity as approved **[*212]** by FERC as part of the operative filed tariff. In sum, PNE "cannot escape the fact that FERC authorized the business choices that allegedly caused Plaintiffs' injury." *Breiding, 344 F. Supp. 3d at 450*.

PNE's claims call into question Defendants' exercise of no-notice transportation practices and, therefore, trigger the filed rate doctrine's bar on challenges to the terms and conditions of tariffs approved by FERC. In other words, "[t]o the extent [PNE] seek[s] to enjoin Defendants from exercising rights pursuant to contracts subject to a filed tariff, [PNE] ask[s] the Court do exactly what the First Circuit has declared it cannot, *i.e.*, to alter the terms of tariffs approved by FERC." *Breiding, 344 F. Supp. 3d at 448*.

3. The Filed Rate Doctrine Prohibits Setting Aside Wholesale Electric Rates

Even if the filed rate doctrine did not bar PNE's claims because they require altering contracts approved by FERC, such claims are barred for the additional reason that they require the Court to second guess or set aside **[**26]** wholesale electric rates ratified by FERC through the ISO-NE auction process. PNE alleges injuries stemming from inflated wholesale electric prices caused by the same anticompetitive conduct at the heart of the state and federal antitrust and consumer protection claims dismissed in Breiding, but nonetheless argues that it does not seek to alter FERC-approved rates. See D. 1 ¶ 8 (alleging that "[e]ven through Plaintiff's damages are based on prices in the wholesale electricity market, they do not implicate any regulatory authority or related doctrines"). According to PNE, it does not seek the adjustment of wholesale electric rates; rather, it challenges "fuel cost" overcharges that were passed on to PNE as a component of wholesale electric rates. D. 26 at 28. PNE alleges that the price of natural gas, *i.e.*, fuel costs, factor into the bids indicating the price at which electricity generators will supply electricity to wholesale electricity purchasers in the ISO-NE auction process. D. 1 ¶ 9. Because fuel costs are a purportedly unregulated component of wholesale electric rates, PNE argues that the filed rate doctrine does not bar claims challenging such fuel costs. D. 26 at 28-29.

To **[**27]** ascertain whether and to what extent fuel costs were artificially inflated by Defendants' alleged anticompetitive conduct, the Court would be required to determine the difference between wholesale electric rates during the class period and hypothetical rates that would have been charged but for Defendants' conduct. The filed rate doctrine prohibits this analysis. See *Wah Chang, 507 F.3d at 1226*; Transmission Agency of N. Cal. v. Sierra Pac. Power Co., *295 F.3d 918, 930 (9th Cir. 2002)*; *Cnty. of Stanislaus v. Pac. Gas & Elec. Co., 114 F.3d 858, 863 (9th Cir. 1997)* (quoting *Cost Mgmt. Servs. v. Wash. Natural Gas Co., 99 F.3d 937, 944 (9th Cir. 1996))*.

The cases PNE relies on for support do not compel a different result. In Town of Norwood I, for example, the court specifically held that the filed rate doctrine bars claims challenging wholesale electric rates. See *Town of Norwood I, 202 F. 3d at 419* (noting that "FERC is still responsible for ensuring 'just and reasonable' rates and, to that end, wholesale power rates continue to be filed and subject to agency review," which "triggers the filed rate doctrine") (citation omitted). PNE's reliance on Gallo does not warrant a different conclusion for the reasons articulated by Defendants. D. 29 at 7 (citing *Breiding, 344 F. Supp. 3d at 447*). Additionally, the Court does not share PNE's view of the facts at issue in Ice Cream Liquidation, Inc. v. Land **[*213]** O'Lakes, Inc., 253 F. Supp. 2d 262 (D. Conn. 2003). The plaintiffs in that case overpaid for a wholesale product that was never governed by a federal agency's rate setting authority. See Ice Cream Liquidation, 253 F. Supp. 2d at 275-76 (explaining that "plaintiff **[**28]** is not challenging . . . the minimum milk rates set [under the USDA]" and "concede[s] . . . any claim challenging [USDA] orders or the rates themselves clearly would be barred by the filed rate doctrine"). By contrast to plaintiffs in Ice Cream Liquidation, PNE alleges here that Defendants' conduct caused wholesale electric prices to increase by at least eighteen percent. Id. ¶¶ 30, 123. FERC undoubtedly regulates the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). Other courts have also recognized the limited applicability of Ice Cream Liquidation where "the difference between what [the plaintiff's] paid and what they would have paid absent Defendants' conduct" required the court to estimate "the difference between [a] filed rate, and the . . . rate that . . . would have [been] set had the input data . . . not been inflated by Defendants' actions." In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig., 767 F. Supp. 2d 880, 895 (N.D. Ill. 2011) (distinguishing Ice Cream Litigation where "[p]laintiffs do not propose, nor can the Court conceive of, a method for calculating damages in either case that would not require the Court to engage in just the type of ratemaking that the [filed rate] doctrine precludes"). Finally, Composite Co., Inc. v. Am. Int'l Grp., Inc. **[**29]** is inapposite because that decision did not concern a filed rate. See Composite Co., 988 F. Supp. 2d 61, 77 (D. Mass. 2013) (holding that the filed rate doctrine did not apply because "the experience-modifier at issue in this case is not a filed rate"). Here, PNE "seeks a refund of some portion of [FERC-approved] rates," but has "failed to explain how the court could calculate their damages award without first determining the natural gas rate they would have faced" given that FERC "precludes the court from making such a determination." Jacquet v. Dominion Transmission, Inc., No. CIV.A. 2:05-0548, 2010 U.S. Dist. LEXIS 137665, 2010 WL 5487248, at *9 (S.D.W. Va. Dec. 30, 2010).

At bottom, PNE requires the Court to question the reasonableness of wholesale electric rates and conduct that FERC mandated as part of no-notice contracts. The Court, therefore, holds that the doctrine bars the claims alleged in the complaint.

B. PNE Has Not Stated Cognizable Antitrust Claims

PNE's antitrust claims fail even if the filed rate doctrine did not bar them in the first instance. First, PNE lacks standing to bring its antitrust claims. Federal courts are constitutionally limited to deciding cases or controversies. Merrimon v. Unum Life Ins. Co. of Am., 758 F.3d 46, 52 (1st Cir. 2014). A plaintiff, therefore, must establish that it has standing in federal court by demonstrating that the complaint alleges **[**30]** a case or controversy recognized under Article III of the Constitution. See Katz v. Pershing, LLC, 672 F.3d 64, 71 (1st Cir. 2012). The "plaintiff must establish . . . injury, causation, and redressability." Id. (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). At the pleading stage, "[a]n antitrust plaintiff must show both constitutional standing and antitrust standing." In re Aluminum Warehousing Antitrust Litig., 833 F.3d 151, 157 (2d Cir. 2016). To determine whether a plaintiff has standing to bring an antitrust cause of action, the Court conducts "an analysis of prudential considerations aimed at preserving the effective enforcement of the antitrust laws." RSA **[*214]** Media, Inc. v. AK Media Grp., Inc., 260 F.3d 10, 13 (1st Cir. 2001) (quoting Serpa Corp. v. McWane, Inc., 199 F.3d 6, 10 (1st Cir. 1999)) (internal quotation marks omitted).

Of the factors the Court considers, lack of injury, in particular, will defeat standing. See Sterling Merch., Inc. v. Nestlé, S.A., 656 F.3d 112, 121 (1st Cir. 2011). A proper plaintiff for the purpose of alleging antitrust injury is generally "a customer who obtains services in the threatened market or a competitor who seeks to serve that market." SAS of P.R., Inc. v. P.R. Tel. Co., 48 F.3d 39, 44 (1st Cir. 1995). PNE argues that it is an appropriate plaintiff to bring this action because it was injured in the market targeted by Defendants' anticompetitive scheme (*i.e.*, the wholesale electricity market). PNE alleged, however, that Defendants' unlawful conduct "involved artificially restricting supply in the secondary capacity market." D. 1 ¶ 169. PNE is not a customer or a competitor in either market that comprises **[**31]** the secondary capacity market. PNE nonetheless claims support from Ice Cream Liquidation, where the court held that plaintiffs bringing claims under Section 1 of the Sherman Act suffered an antitrust injury despite the fact that defendants were participants in the market in which prices were allegedly fixed and plaintiffs were participants in the market that experienced artificially inflated prices as a result of the alleged price-fixing scheme. *Ice Cream Liquidation, 253 F. Supp. 2d at 272-73*.

Even assuming that PNE could establish antitrust injury and the remaining antitrust standing analysis,[6] PNE's failure to allege plausibly that Eversource and Avangrid each had monopoly power in the relevant market is fatal to the claims alleged here. *Section 2* of the Sherman Act makes it illegal to "monopolize, or attempt to monopolize . . . any part of the trade or commerce" among several states. *Díaz Aviation Corp. v. Airport Aviation Servs., Inc., 716 F.3d 256, 265 (1st Cir. 2013)* (quoting *15 U.S.C. § 2*) (internal quotation marks omitted). "To prove a violation of this statute, a plaintiff must demonstrate (1) that the defendant possesses 'monopoly power in the relevant market,' and (2) that the defendant has acquired or maintained that power by improper means." *Town of Concord, Mass. v. Bos. Edison Co., 915 F.2d 17, 21 (1st Cir. 1990)*. To prove attempted monopolization, a plaintiff must demonstrate "(1) that the defendant has **[**32]** engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. "Market power can be shown through two types of proof," either through "direct evidence of market power," such as "actual supracompetitive prices and restricted output," or "circumstantial evidence of market power." *Coastal Fuels of P. R., Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 196-97 (1st Cir. 1996)*.

[*215] PNE asserts that the relevant market for assessing market power in this case is the "secondary capacity market," which includes the spot market for natural gas and the excess capacity release market, id. ¶ 32, and the wholesale electricity market, id. ¶ 33. As Defendants correctly point out, PNE has failed to allege that Eversource or Avangrid individually possess monopoly power in those markets. D. 22 at 25-26; D. 29 at 12-13. PNE instead asserts that "[t]ogether, Eversource and Avangrid" reduced natural gas supply in the secondary capacity market, causing purported supracompetitive prices in wholesale electricity market. Id. ¶ 119. Courts in the First Circuit have rejected monopolization claims based on a "shared monopoly" theory of liability. See *PSW, Inc. v. VISA U.S.A., Inc., No. C.A. 04-347T, 2006 U.S. Dist. LEXIS 12157, 2006 WL 519670, at *11 (D.R.I. Feb. 28, 2006)* (explaining **[**33]** that "to state any claim under Section Two's actual or attempted monopoly clauses, a claimant is required to assert that the *individual* market power of a defendant is sufficient to constitute a monopoly, in this analysis, the combined monopoly power of competitors is irrelevant and insufficient") (emphasis in the original). The complaint's vague assertion that "Eversource and/or Avangrid could possess the vast majority of excess Pipeline capacity" when "capacity was already scarce," id. ¶ 107, without more, does not constitute a plausible allegation regarding the Defendants' individual monopoly power in the secondary capacity market, especially where the gravamen of PNE's complaint turns on Defendants' alleged refusal to participate in that market in the first instance.

Accordingly, PNE has not stated cognizable antitrust claims against Defendants.

C. PNE's State Law Claims Are Also Dismissed

PNE also bring claims for damages and injunctive relief under various Massachusetts and New Hampshire antitrust, consumer protection and unfair trade statutes. The filed rate doctrine applies with equal force to PNE's state law claims. See *Pub. Util. Dist. No. 1 of Snohomish Cnty. v. Dynegy Power Mktg., Inc., 384 F.3d 756, 761 (9th Cir. 2004)* (explaining that the filed rate **[**34]** doctrine preempted antitrust and unfair competition claims grounded in

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[6] In Breiding, the Court concluded that retail electricity consumers who had alleged the same anticompetitive conduct against Defendants did not have standing after considering the six factors germane to antitrust standing analysis, especially where plaintiffs' antitrust injury was "indirect and only remotely connected to [d]efendants' alleged anticompetitive conduct" and the "nature of any damages is attenuated" given the uncertainty around reconstructing prices and behavior across multiple, independent natural gas and electricity markets over the course of several years to calculate damages. *Breiding, 344 F. Supp. 3d at 455-56*.

state law where such claims required the court to determine rates that "would have been achieved in a competitive market") (internal quotation marks omitted). PNE's state law claims are also dismissed.[7]

VI. Conclusion

For the foregoing reasons, the Court ALLOWS Defendants' motion to dismiss, D. 21.

So Ordered.

/s/ Denise J. Casper

United States District Judge

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[7] In light of this ruling, the Court does not reach Defendants' additional arguments for dismissal, see D. 22 at 21 n.9.

Brooks v. Tarsadia Hotels

United States District Court for the Southern District of California

June 11, 2019, Decided; June 11, 2019, Filed

Case No.: 3:18-cv-2290-GPC-KSC

Reporter

2019 U.S. Dist. LEXIS 98166 *; 2019 WL 2436395

JASON BROOKS, Inmate Booking No. 150014, Plaintiff, vs. TARSADIA HOTELS; 5TH ROCK, LLC; MKP ONE, LLC; GASLAMP HOLDING, LLC; TUSHAR PATEL; B.U. PATEL; GREGORY CASSERLY; PLAYGROUND DESTINATION PROPERTIES, INC.; DOES 1-50, Defendants.

Subsequent History: Reconsideration denied by *Brooks v. Tarsadia Hotels, 2019 U.S. Dist. LEXIS 132848, 2019 WL 3718663 (S.D. Cal., Aug. 7, 2019)*

Prior History: *Brooks v. Tarsadia Hotels, 2018 U.S. Dist. LEXIS 200801, 2018 WL 6181399 (S.D. Cal., Nov. 27, 2018)*

Core Terms

motion to dismiss, statute of limitations, cause of action, Defendants', alleges, tolling, violations, disclose, notice, contract of purchase, misrepresentation, rescission, right to rescind, rights, anti-fraud, discovery, buyers, unfair, discovery rule, two year, leave to amend, scienter, argues, prong, diligent, discover, omission, expired, securities law, concealed

Counsel: **[*1]** Jason Brooks, Plaintiff, Pro se, Sterling, CO.

For Tarsadia Hotels, a California corporation, 5th Rock, LLC, a Delaware limited liability company, MKP One, LLC, a California limited liability company, Gaslamp Holding, LLC, a California limited liability company, Defendants: Cathy Tran Moses, Frederick H. Kranz, Jr, LEAD ATTORNEYS, Cox Castle & Nicholson, LLP, Irvine, CA.

For Playground Destination Properties, Inc., a Washington corporation and a real estate brokerage, Defendant: Thomas W McNamara, LEAD ATTORNEY, Cornelia Julianna Boleyn Gordon, McNamara Smith LLP, San Diego, CA.

Judges: Hon. Gonzalo P. Curiel, United States District Judge.

Opinion by: Gonzalo P. Curiel

Opinion

ORDER GRANTING IN PART AND DENYING IN PART TARSADIA DEFENDANTS' MOTION TO DISMISS AND GRANTING PLAYGROUND'S MOTION TO DISMISS

[Dkt. Nos. 26, 27.]

Before the Court is Defendants Tarsadia Hotels, 5th Rock LLC, MKP One, LLC, Gaslamp Holdings, LLC, Tushar Patel, B.U. Patel, and Gregory Casserly's motion to dismiss the first amended complaint. (Dkt. No. 26.) Also before the Court is Defendant Playground Destination Properties, Inc.'s motion to dismiss the first amended complaint. (Dkt. No. 27.) Plaintiff filed oppositions to both motions. (Dkt. Nos. **[*2]** 31, 32.) Replies were filed by all Defendants. (Dkt. Nos. 33, 34.) Based on the reasoning below, the Court GRANTS in part and DENIES in part Tarsadia Defendants' motion to dismiss with leave to amend and GRANTS Playground's motion to dismiss with leave to amend.

Procedural Background

On September 25, 2018[1], Jason Brooks, a prisoner proceeding *pro se* and *in forma pauperis*, filed the original complaint against Defendants Tarsadia Hotels, 5th Rock, LLC, MKP One, LLC, Gaslamp Holdings, LLC, Gregory Casserly, B.U. Patel, and Tushar Patel ("Tarsadia Defendants") as well as Defendant Playground Destination Properties, Inc. ("Playground") (collectively "Defendants"). (Dkt. No. 1.) On March 18, 2019, Plaintiff filed the operative first amended complaint ("FAC") against Tarsadia Defendants and Playground alleging violations of the anti-fraud provision of the *Interstate Land Sales Disclosure Act ("ILSA")*, *15 U.S.C. §§ 1703(a)(2)(A)*, *(B)* and *(C)*; violations of *California Corporations Code sections 25401*, *25501*, *25504.1* and *Rule 10b* of the *1934 Securities Exchange Act*; fraud; negligence; and violations pursuant to *California Business & Professions Codes sections 17200 et seq.* (Dkt. No. 24.)

In May 2006, Plaintiff and Brian Thielen, as co-purchasers, entered into a Purchase Contract and Escrow Instruction **[*3]** ("Purchase Contract") with Defendants for the purchase of a newly constructed residential condominium unit called the Hard Rock Hotel & Condominium ("Hard Rock") located in San Diego. (Id. ¶¶ 17, 21.) Specifically, Plaintiff claims that under ILSA, Defendants failed to disclose and intentionally concealed that buyers had an absolute right to rescind their Purchase Contracts within two years of the date of signing and making affirmative misrepresentations to prevent Plaintiff from exercising his rescission rights. (Id.) He also asserts that Defendants' failure to disclose or affirmatively concealing his right to rescind within two year of the date of the Purchase Contract constitute violations of state and federal securities fraud statutes.

This case relates to two prior cases that were before the Court and are now concluded. In one case, Salameh v. Tarsadia Hotels, Case No. 09cv2739, the purported class plaintiffs representing purchasers of Hard Rock Hotel San Diego Investment Securities alleged *inter alia*, violations of federal and California securities statutes. (Case No. 09cv2739, Dkt. No. 86, SAC.) On March 22, 2011, the Court granted Defendants' motions to dismiss with prejudice. **[*4]** *Salameh v. Tarsadia Hotels, No. 09cv2739 DMS(CAB), 2011 U.S. Dist. LEXIS 30375, 2011 WL 1044129 (S.D. Cal. Mar. 22, 2011)*. The Court's ruling was affirmed on appeal. *Salameh v. Tarsadia Hotel, 726 F.3d 1124 (9th Cir. 2013)*. Relevant to this case, the Ninth Circuit concluded that based on the plaintiffs' pleadings, the Purchase Contract and the subsequent Rental Management Agreement ("RMA") did not constitute a "security" under federal and state securities laws. *Id. at 1132*.

In the second case, Beaver v. Tarsadia Hotels, Case No. 11cv1842, the purported class action plaintiffs filed an action on behalf of persons who purchased units at the Hard Rock Hotel between May 2006 and December 2007 alleging Defendants failed to disclose and intentionally concealed the plaintiffs' right to rescind their purchase contracts within two years of the date of signing the Purchase Contracts and made affirmative misrepresentations to prevent Plaintiffs from exercising the right. (Case No. 11cv1842, Dkt. No. 69, TAC.) In Beaver, the Third Amended

[1] Under the prison mailbox rule, the Court deems the Complaint filed on the date Plaintiff signed the Complaint on September 25, 2018. See *Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988)* (establishing prison mailbox rule in habeas petition context); see also *Douglas v. Noelle, 567 F.3d 1103, 1107-1109 (9th Cir. 2009)* (applying mailbox rule to *§ 1983* complaint); *James v. Madison St. Jail, 122 F.3d 27, 28 (9th Cir. 1997)* (per curiam) (applying mailbox rule to trust-account statements filed pursuant to *28 U.S.C. § 1915(a)(2)*); *Caldwell v. Amend, 30 F.3d 1199, 1201 (9th Cir. 1994)* (mailbox rule applied to *Rule 50(b)* motion); *Faile v. Upjohn Co., 988 F.2d 985, 989 (9th Cir. 1993)* (mailbox rule applied to discovery responses).

Complaint ("TAC") alleged, *inter alia*, violations of the anti-fraud provisions of ILSA, *15 U.S.C. §§ 1703(a)(2)(A)-(C)*, fraud, negligence, and violation of *California Business and Professions Code sections 17200 et seq.* The Beaver case involved extensive motion practice which raised numerous novel issues. The Ninth Circuit affirmed the Court's order on reconsideration of the parties' cross-motions **[*5]** for summary judgment, *Beaver v. Tarsadia Hotels, 29 F.Supp.3d 1294 (S.D. Cal. 2014)*. *Beaver v. Tarsadia Hotels, 816 F.3d 1170 (9th Cir. 2016)*. On remand, the case settled as a class action and the Court granted Plaintiffs' motion for final approval of class action settlement and judgment on September 28, 2017, *Beaver v. Tarsadia Hotels, Case No. 11cv1842-GPC(KSC), 2017 U.S. Dist. LEXIS 160214, 2017 WL 4310707 (S.D. Cal. Sept. 28, 2017)*. In its order, the Court noted that one member, Jason Brooks, who was a co-purchaser of Unit 1042, excluded himself from the Class. *2017 U.S. Dist. LEXIS 160214, [WL] at *15*.

Extracting allegations from the operative complaints in the Salameh and Beaver cases, in this case, Jason Brooks alleges that around 2005 Tarsadia Defendants, through 5th Rock, began to develop a residential condominium consisting of 420 Units called the "Hard Rock Hotel & Condominium" ("Hard Rock") located at 205 Fifth Avenue in San Diego, CA. (Dkt. No. 24, FAC ¶ 16.) Defendants marketed the Units through the Internet, marketing materials, brochures and verbal statements. (Id.) Playground was the real estate broker for the Hard Rock. (Id. ¶ 20.)

Around May 18, 2006, Plaintiff and Brian Thielen, as co-purchasers, executed a pre-printed standardized Purchase Contract and Escrow Instructions that was prepared by Defendants for the purchase of Unit 1042 at the Hard Rock. (Id. ¶¶ 21, 100.) He claims he was induced to purchase **[*6]** the Unit because he understood that Tarsadia Defendants would manage the property through the Rental Management Agreement ("RMA"). (Id. ¶ 21.) Plaintiff was required to sign three agreements: (1) the Contract, (2) the Unit Management and Operating Agreement ("OA") and (3) the RMA. (Id. ¶ 23.) Tarsadia Defendants had Playground prepare a document entitled "Tarsadia's Optional Rental Management Program FAQ" where Defendants represented that investors were not required to participate in the RMA but that representation was false as the purchasers were mandated to participate in the RMA. (Id. ¶¶ 22-24.)

Plaintiff claims that the Contract, the OA and the RMA were in essence a single contract as they could not be separated due to what was required in the agreements but Defendants intentionally separated the offer of the OA/RMA and the Contract in order to avoid the securities law. (Id. ¶ 25.) Defendants furthered the fraudulent scheme by having Playground create closing materials that included misstatements by threatening Plaintiff with the loss of his deposit if he did not timely close. (Id. ¶ 26.) Plaintiff reluctantly closed escrow in the late summer or fall of 2007. (Id. ¶ 27.)

According **[*7]** to the FAC, ILSA was enacted to protect consumers from fraud and abuse in the sale of subdivided lots, including condominium units, and requires developers and their agents to comply with certain registration and disclosure requirements. (Id. ¶ 44.) Developers and their agents must comply with ILSA unless they fall within an exemption but no exemptions applied to the Hard Rock. (Id. ¶ 45.)

Specifically, ILSA requires a developer to register a project with the U.S. Department of Housing and Urban Development ("HUD") and to provide buyers with an ILSA property report that discloses material facts regarding the sales transaction. (Id. ¶ 46.) If a developer does not obtain an ILSA property report to be distributed to buyers before they sign the purchase contract (or in the alternative, in California, where a developer fails to provide buyers with an ILSA compliant Public Report issued by the Department of Real Estate), ILSA imposes a two-year right to rescind from the date of contract for the benefit of the buyers where the right to rescind must be disclosed in the purchase contract, *15 U.S.C. § 1703(c)*. (Id.)

Plaintiff claims that Defendants failed to obtain an ILSA property report from HUD and obtained a **[*8]** Public Report from the DRE that was not ILSA compliant. (Id. ¶ 47, 70.) The Public Report failed to provide buyers notice of any rescission rights and instead disclosed a three-day right to rescind. (Id. ¶¶ 70, 71.) Moreover, Plaintiff claims that under *15 U.S.C. § 1703(d)(2)* of ILSA, a developer is required to include in the buyer default provision of the purchase contract written notice of a 20-day opportunity for the buyer to remedy default or breach of contract. (Id. ¶¶ 48, 73-76.) If such a notice is omitted, the buyer is entitled to an absolute two year right to rescind his purchase agreement from the date he signed it. (Id.) Plaintiff claims he received the "Final Subdivision Public Report, File No.

120249LA-F00" concerning the Hard Rock which was issued by the DRE on April 4, 2006 but it does not include the buyer's rescission rights under ILSA. (Id. ¶ 49.)

Because Defendants failed to comply with their disclosure requirements under ILSA and concealed the two-year rescission rights, they engaged in a scheme to defraud in violation of *§ 1703(a)(2)(A) of ILSA*. (Id. ¶ 50.) Defendants also obtained money from Plaintiff by means of omitting the two-year rescission right in the contract and the Public Report in violation of **[*9]** *§ 1703(a)(2)(B)* and otherwise engaged in a practice or course of business that operated as a fraud upon Plaintiff in violation of *§ 1703(a)(2)(C)*. Plaintiff further claims that ILSA imposed an ongoing obligation to amend the Public Report to disclose the two year right to rescind and Defendants failed to do so. (Id. ¶ 84.)

Because he was denied the right to rescind, Plaintiff was forced to quit-claim the deed of the property to his co-purchaser, Brian Theilan, in January 2008. (Id. ¶ 53.) If he had known of his right to rescind he would never have closed on the Unit and was deprived the use of his $50,000 to seek legal counsel to uncover Defendants' wrongful conduct. (Id. ¶ 114.) He also would have used the $50,000 to continue paying his attorney to prevent a default judgment of $18 million against him in June 2008. (Id. ¶116.) He claims he did not respond to that lawsuit because he ran out of money to pay his attorneys at the time. (Id.) He further claims he would never have been sent to prison and he would not be currently paying $40,800 monthly interest penalty on an "illegally induced plea". (Id.) In sum, he seeks $35 million in damages. (Id. ¶ 118.)

Plaintiff has been incarcerated in a Colorado prison since **[*10]** May 24, 2009 and received notice of the class action lawsuit ("Class Notice") in June 2017. (Id. ¶ 54.) Pursuant to the Class Notice, he timely opted out of the class action settlement on August 25, 2017. (Id.; Dkt. No. 17-3, Ds' RJN, Ex. D at p. 67-68.) He inadvertently filed a complaint in the District Court for the District of Colorado on December 29, 2017, and the complaint was dismissed for improper venue on September 14, 2018. (Dkt. No. 24, FAC ¶ 13; see also Dkt. No. 27-3, Tarsadia Ds' RJN[2], Ex. A.) After conducting a review of the complaint, the Colorado district court also denied the Plaintiff's motion to transfer the case to this district. (Brooks v. Tarsadia Hotels, Civ. No. 17cv3172-PAB-KMT, Dkt. Nos. 64, 68 (D. Colo.).) The Complaint in this case was filed on September 25, 2018. (Dkt. No. 1.)

Discussion

A. Legal Standard as to *Federal Rule of Civil Procedure 12(b)(6)*

Federal Rule of Civil Procedure ("Rule") 12(b)(6) permits dismissal for "failure to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. Dismissal under *Rule 12(b)(6)* is appropriate where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. See *Balistreri v. Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir. 1990)*. Under *Federal Rule of Civil Procedure 8(a)(2)*, the plaintiff is required only to set forth a "short and plain statement of the claim showing that the pleader **[*11]** is entitled to relief," and "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

A complaint may survive a motion to dismiss only if, taking all well-pleaded factual allegations as true, it contains enough facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 570*). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. "In sum, for a complaint to survive a motion to dismiss, the non-

[2] The Court grants Tarsadia Defendants' request for judicial notice of the complaint filed in the District of Colorado as unopposed and subject to judicial notice. See *Fed. R. Evid. 201*; *Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006)* (court may take judicial notice of court filings and other matters of public record);

conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009)* (quotations omitted). In reviewing a *Rule 12(b)(6)* motion, the Court accepts as true all facts alleged in the complaint, and draws all reasonable inferences in favor of the plaintiff. al-*Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009)*.

Where a motion to dismiss is granted, "leave to amend should be granted 'unless the court determines that the allegation of other facts consistent with the challenged **[*12]** pleading could not possibly cure the deficiency.'" *DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992)* (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986))*. In other words, where leave to amend would be futile, the Court may deny leave to amend. See *DeSoto, 957 F.2d at 658*; *Schreiber, 806 F.2d at 1401*.

B. Legal Standard as to *Federal Rule of Civil Procedure 9(b)*

Where a plaintiff alleges fraud in the complaint, *Rule 9(b)* requires a plaintiff to "state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Fed. R. Civ. P. 9(b)*. *Rule 9(b)* requires that the circumstances constituting the alleged fraud "be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.'" *Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009)* (internal quotation omitted). A party must set forth "the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Odom v. Microsoft Corp., 486 F.3d 541, 553 (9th Cir. 2007)* (internal quotation marks omitted). As such "[a[verments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Kearns, 567 F.3d at 1124* (citing *Vess v. Ciba-Geigy Corp. U.S.A., 317 F.3d 1097, 1106 (9th Cir. 2003))*. Thus, to satisfy the specificity requirement of *Rule 9(b)*, a plaintiff is required "to plead evidentiary facts" and the court must "consider what inferences these facts will support—despite **[*13]** the pitfalls and inefficiencies of such an analysis at the pleading stage . . . ." *Fecht v. Price Co., 70 F.3d 1078, 1082 (9th Cir. 1995)* (emphasis added).

C. Tarsadia Defendants' Motion to Dismiss

1. Statute of Limitations

On a motion to dismiss based on the statute of limitations, the Court must assess whether "the running of the statute is apparent on the face of the complaint." *Huynh v. Chase Manhattan Bank, 465 F.3d 992, 997 (9th Cir. 2006)* (quoting *Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980)* ("When a motion to dismiss is based on the running of the statute of limitations, it can be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled.")). Because the statute of limitations is an affirmative defense, the "defendant has the burden of proving the action is time-barred." *Grisham v. Philip Morris, Inc., 670 F. Supp. 2d 1014, 1020 (C.D. Cal. 2009)* (citation omitted).

Tarsadia Defendants argue that the ILSA and fraud claims are barred by the three-year statute of limitations from the date of the Purchase Contract, May 18, 2006, and therefore, these causes of actions expired on May 18, 2009. They also argue that the negligence claim is barred by the Court's prior ruling in the Beaver case. Further, they claim that the securities fraud is barred by either the two year or five year limitations period under *California Corporations Code section 25506*. Finally, they assert **[*14]** the UCL claims are barred by the four-year statute of limitations. In response, Plaintiff argues that he did not discover the alleged failure to disclose rescission rights under ILSA until June 2017 when he received the Beaver Class Notice. He also contends that several tolling theories apply to his case.

a. ILSA Anti-Fraud Statute of Limitations

Plaintiff alleges violations of the anti-fraud provisions of the ILSA, *15 U.S.C. §§ 1703(a)(2)(A)*, *(B)*, *(C)*.[3] The statute of limitations for these provision accrues from "three years after discovery of the violation or after discovery should have been made by the exercise of reasonable diligence." *15 U.S.C. § 1711(a)(2)*.

Under the discovery **[*15]** rule, incorporated into ILSA, "a cause of action accrues (1) when the plaintiff did in fact discover, or (2) when a reasonably diligent plaintiff would have discovered, 'the facts constituting the violation' -- whichever comes first." *Merck & Co., Inc. v. Reynolds, 559 U.S. 633, 637, 130 S. Ct. 1784, 176 L. Ed. 2d 582 (2010)*. The Court in Merck held that the statute of limitations does not begin to run when the plaintiff discovers facts that put the plaintiff on "inquiry notice" when the facts "would have prompted a reasonably diligent plaintiff to begin investigating." *Id. at 653*. Instead, the claim accrues when the plaintiff discovers or a reasonably diligent plaintiff would have discovered "the facts constituting the violation . . . irrespective of whether the actual plaintiff undertook a reasonably diligent investigation." Id. "A fact is considered 'discovered' when 'a reasonably diligent plaintiff would have sufficient information about that fact to adequately plead it in a complaint . . . with sufficient detail and particularity to survive a 12(b)(6) motion to dismiss.'" *Rieckborn v. Jefferies LLC, 81 F. Supp. 3d 902, 915 (N.D. Cal. 2015)* (quoting *City of Pontiac Gen. Employees' Ret. Sys. v. MBIA, Inc., 637 F.3d 169, 175 (2d Cir. 2011))*.

Tarsadia Defendants argue that the statute of limitations on the ILSA anti-fraud claims expired on May 18, 2009 which is three years from when Plaintiff signed the purchase contract on May 18, 2006. **[*16]** [4] They summarily contend that May 18, 2006 is when Plaintiff knew of or should have been able to discover by reasonable diligence all the facts that constituted the alleged ILSA violations. In response, Plaintiff argues that he did not discover the alleged violations until he received the Class Notice in June 2017. Because he was forced to quit-claim his deed to the Unit to his co-purchaser in January 2008, he did not receive any reports on the property. Moreover, he explains that the ILSA is complex that even if he compared the Purchase Contract and Public Report with ILSA's requirement he would not have known that Tarsadia Defendants violated any laws.

The FAC alleges that Plaintiff had no reason to suspect any of Defendants' representations in the Contract, Public Report, Closing Notice or FAQ concerning his rescission rights to be false or misleading. (Dkt. No. 24, FAC ¶ 52.) He claims that because of his incarceration and indigence, he could never have discovered his two-year rescission rights under ILSA. (Id. ¶ 110.) He also claims due to the complexity of the ILSA and securities laws, he was unable to discover his rescission rights. (Id. ¶ 111.) He only discovered the violations **[*17]** when he was provided with the Class Notice in June 2017. (Id. ¶ 110.) Pursuant to that Class Notice, he opted out. (Id. ¶ 112.) He asserts that any

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[3] ILSA's anti-fraud provision provides:

(a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails— . . .

(2) with respect to the sale or lease, or offer to sell or lease, any lot not exempt under *section 1702(a)* of this title--

> (A) to employ any device, scheme, or artifice to defraud;
>
> (B) to obtain money or property by means of any untrue statement of a material fact, or any omission to state a material fact necessary in order to make the statements made (in light of the circumstances in which they were made and within the context of the overall offer and sale or lease) not misleading, with respect to any information pertinent to the lot or subdivision;
>
> (C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser

15 U.S.C. § 1703(a)(2)(A)-(C).

[4] In his opposition, Plaintiff claims that he does not know the specific date when he signed the contract, either May 18, 2006 or December 12, 2006; therefore, his FAC cannot be dismissed as untimely, (Dkt. No. 31 at 10); however, the FAC alleges he signed the contract on May 18, 2006, (Dkt. No. 24, FAC ¶ 100), and incorporates by reference the Purchase Contract he signed which is dated May 18, 2006. (See Dkt. No. 17-3, Tarsadia Ds' RJN, Ex. A at 35-49.) Therefore, the Court concludes the Plaintiff has alleged he signed the Purchase Contract on May 18, 2006.

exercise of reasonable diligence would not have lead to the discovery of Plaintiff's rescission rights due to his incarceration and involuntary act of quit-claiming the deed to his co-purchaser. (Id. ¶ 113.)

Here, Plaintiff alleges that he did not discover the alleged violations until he received the Class Notice in June 2017 and reasons why discovery would not have been possible. Tarsadia Defendants merely assert that Plaintiff knew about or should have discovered by reasonable diligence all facts that constituted the alleged ILSA violations as of May 18, 2006 but do not provide any supporting facts to support their conclusion. First, Tarsadia Defendants have not carried their burden in demonstrating that Plaintiff discovered the facts or should have discovered with reasonable diligence facts to support a cause of action under ILSA on May 18, 2006. Second, the question of when Plaintiff was on notice about Tarsadia Defendants' alleged failure to disclose and intentionally concealing the buyers' two year right to rescind for purposes of **[*18]** applying the discovery rule is a question of fact not amenable on a motion to dismiss. See *Kramas v. Security Gas & Oil Co., Inc., 672 F.2d 766, 770 (9th Cir. 1982)* (fact questions are usually involved determining when a plaintiff discovered the violation); *Toombs v. Leone, 777 F.2d 465, 468 n. 4 (9th Cir. 1985)* (finding that unresolved fact questions precluded disposition of the *section 12(2)* claim on statute of limitations grounds); see also *Rafton v. Rydex Series Funds, No. 10cv1171-LHK, 2011 U.S. Dist. LEXIS 707, 2011 WL 31114, at *9 (N.D. Cal. Jan. 5, 2011)* ("the determination of inquiry notice is 'fact intensive' and is usually not appropriate at the pleading stage"). Therefore, the Court concludes it is not apparent from the allegations in the FAC that the ILSA anti-fraud claims are time barred. Accordingly, at this early stage, the Court DENIES Tarsadia Defendants' motion to dismiss the anti-fraud provisions of ILSA based on the statute of limitations.

b. Fraud and California Securities Statute of Limitations

The FAC alleges claims of fraud and violations of *California Corporations Code sections 25401*, *25501*, *25504.1*.[5] (Dkt. No. 24 FAC ¶¶ 134-137.) In California, an action for fraud has a three-year statute of limitations and is "not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." *Cal. Civ. Proc. § 338(d)*. On the state securities claims, the statute of limitations expires "five years **[*19]** after the act or transaction constituting the violation or the expiration of two years after the discovery by the plaintiff of the facts constituting the violation, whichever shall first expire." *Cal. Corp. Code § 25506*. *Section 25506*'s discovery refers to inquiry notice rather than actual notice. *Deveny v. Entropin, Inc., 139 Cal. App. 4th 408, 422-23, 42 Cal. Rptr. 3d 807 (2006)*.

Tarsadia Defendants argue that the fraud cause of action is barred by the three year statute of limitations because Plaintiff knew or should have been able to discovery by reasonable diligence all the facts that constituted the ILSA violations on May 18, 2006 when he signed the Purchase Contract, and the securities fraud claims are barred by the two and five year statute of limitations because the limitations period began to run on May 18, 2006, and expired on May 18, 2009 or May 18, 2011. Because Plaintiff filed his complaint in 2018, his claims are not timely.

Contrary to the federal discovery rule, under the California discovery rule, as it relates to the fraud causes of action, the statute of limitations begins to run when a plaintiff "suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her." *Jolly v. Eli Lilly & Co., 44 Cal. 3d 1103, 1110, 245 Cal. Rptr. 658, 751 P.2d 923 (1988)*; *Norgart v. The Upjohn Co., 21 Cal. 4th 383, 397, 87 Cal. Rptr. 2d 453, 981 P.2d 79 (1999)* ("the plaintiff discovers the cause of action when he at least suspects **[*20]** a factual basis . . . for its elements"); see also *O'Connor v. Boeing N. American, Inc., 311 F.3d 1139, 1148 (9th Cir. 2002)* (noting difference between California and federal discovery rule and "reject[ing] an interpretation of the federal discovery rule that would commence limitations periods upon mere suspicion of the elements of a claim."). In California, the statute of limitations begins once "the plaintiff has notice or information of circumstances to put a reasonable person on inquiry . . . ." *Jolly, 44 Cal. 3d at 1110-11* (internal citation and quotation marks omitted). Once on inquiry, the plaintiff has an obligation to discover facts and cannot sit on his rights but must go find them himself. *Id. at 1111*.

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[5] The Court notes Tarsadia Defendants do not move to dismiss the federal securities claim based on statute of limitations.

In order for the discovery rule to delay the accrual of a cause of action, a complaint must plead facts to "show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." *Fox v. Ethicon Endo-Surgery, Inc., 35 Cal. 4th 797, 808, 27 Cal. Rptr. 3d 661, 110 P.3d 914 (2005)* (quoting *McKelvey v. Boeing N. American, Inc., 74 Cal. App. 4th 151, 160, 86 Cal. Rptr. 2d 645 (1999))*. The plaintiff "must conduct a reasonable investigation of all potential causes of that injury. If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run on that cause of action when the investigation would have brought such information to light." *Id. at 808-09*.

As to the first factor, the **[*21]** FAC alleges that Plaintiff discovered the alleged violations in June 2017 when he received the Class Notice but the FAC is devoid of any allegation that he conducted any investigation of potential causes of his injury prior to that time. He claims that his incarceration is an extraordinary circumstance[6] beyond his control but provides no caselaw in support. Despite his incarceration, he has not alleged he made any diligent efforts to investigate.[7] On this basis, the Court GRANTS Tarsadia Defendants' motion to dismiss for failing to allege that California's discovery rule applies to his state law causes of action for fraud and securities fraud.

As to the five-year statute of limitations under *section 25506*, Plaintiff relies on *California Civil Procedure Code section 352.1* that the statute of limitations is tolled for up to two years during imprisonment, *Cal. Civ. Proc. Code § 352.1(a)* (If a person entitled to bring an action . . . *at the time the cause of action accrued*, imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life, the time of that disability is not a part of the time limited for the commencement of the action, not to exceed two years.") (emphasis added), but the tolling applies only when Plaintiff was **[*22]** in prison at the time the cause of action accrued. Here, Plaintiff was imprisoned on May 24, 2009. If the cause of action accrued either on May 18, 2006, when the Purchase Contract was signed, as Tarsadia Defendants assert, or August 2007, when the closing documents were completed, which Plaintiff appears to assert may be the accrual date for some of his causes of action, Plaintiff was not yet incarcerated. Therefore, *section 352.1* does not support Plaintiff's argument that the fraud causes of action are timely.

Furthermore, if "five years after the act or transaction constituting the violation" occurred on May 18, 2006, as Tarsadia Defendants assert, or August 2007, as Plaintiff claims, his state securities claims are barred because the five year period is a strict limit that may not be tolled. *In re Verisign, Inc. v. Derivative Litig., 531 F. Supp. 2d 1173, 1221 (N.D. Cal. 2007)* (citing *SEC v. Seaboard Corp., 677 F.2d 1301, 1308 (9th Cir. 1982))*; *KKMB, LLC v. Khader, Case No. CV 18-5170-GW(JPRx), 2018 U.S. Dist. LEXIS 197114, 2018 WL 6012225, at *6 (C.D. Cal. Oct. 4, 2018)* (referencing *section 25506(b)* as an absolute limitation period). Because *section 25506* applies to whichever date expires first, based on Plaintiff's argument that he did not discover the cause of action until June 2017[8], the earliest expiration date for the statute of limitations would have been the five year absolute statute of limitations accruing in August 2007 and expiring in August **[*23]** 2012.

American Pipe would not save the state securities claims. In American Pipe, the United States Supreme Court held that commencement of a purported class action "tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status."

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[6] Extraordinary circumstance is used to demonstrate the application of equitable tolling. For equitable tolling to apply, Plaintiff must demonstrate "some extraordinary circumstance stood in his way" and prevented timely filing. *Holland v. Florida, 560 U.S. 631, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010)*. In the habeas context, ignorance of the law or limited legal knowledge do not constitute extraordinary circumstances. *Rasberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006)* (an inmates "ignorance of the law" and "lack of legal sophistication" is not an extraordinary circumstance warranting equitable tolling). However, here, the Court is considering application of the discovery rule under California law, not equitable tolling.

[7] The Court notes that the FAC alleges that "Plaintiff reluctantly closed escrow in the late summer or fall of 2007." (Dkt. No. 24, FAC ¶ 27.) It is not clear why Plaintiff was reluctant to close escrow and whether his reluctance constitutes suspicion of some wrongdoing.

[8] The Court questions Plaintiff's claim that he did not discover the securities claims until June 2017 when he received Class Notice of the Beaver action. The Beaver action did not involve securities fraud claims.

414 U.S. 538, 553, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974) (class action on federal statutes of *Sherman Act*, *Clayton Act* and *False Claims Act*). This rule was extended in Crown, Cork to allow tolling where plaintiffs sought to file an entirely new action and the statute of limitations is tolled for all members of the class "until class certification is denied." *Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 354, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983)*. Similarly, when certification has been granted, the statute begins running anew from the date when the class member exercises the right to opt out because before this time, the class member is deemed to be actively prosecuting her rights. See *Appleton Electric Co. v. Graves Truck Line, Inc., 635 F.2d 603, 608-10 (7th Cir. 1980)*, cert. denied, *451 U.S. 976, 101 S. Ct. 2058, 68 L. Ed. 2d 357 (1981)*; *Wood v. Combustion Engineering, Inc., 643 F.2d 339 (5th Cir. 1981)*. However, American Pipe does not apply to toll the securities causes of action when the Beaver action was filed on May 18, 2011, as these securities claims were not causes of action in that case. See *Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 467, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975)* (tolling in American Pipe "depended heavily on the fact that (the prior) **[*24]** filings involved exactly the same cause of action subsequently asserted.").

Accordingly, based on the allegations in the FAC, the Court GRANTS Tarsadia Defendants' motion to dismiss the fraud with leave to amend and GRANTS Tarsadia Defendants' motion to dismiss the state securities causes of action as time barred.

c. Negligence

The FAC alleges a negligence per se claim based on violations of the disclosure provision of ILSA and arises from *§ 1703(d)(2)* and *§ 1703(a)(1)(C)*. (Dkt. No. 24, FAC ¶¶ 46, 48, 56 69, 72, 73, 74, 147-153). Violations of the disclosure provisions must be brought "within three years after the signing of the contract. . . ." *15 U.S.C. § 1711(a)(1)* & *(b)*.

The elements of a negligence cause of action are: (a) a legal duty to use due care; (b) a breach of such legal duty; and (c) the breach as the proximate or legal cause of the resulting injury. *Ladd v. County of San Mateo, 12 Cal. 4th 913, 917, 50 Cal. Rptr. 2d 309, 911 P.2d 496 (1996)*. Because the negligence cause of action is based on a violation of a federal statute, the statute or regulation may be adopted as a standard of care in a negligence action. *Di Rosa v. Showa Denko K.K., 44 Cal. App. 4th 799, 808, 52 Cal. Rptr. 2d 128 (1996)*. In this case, Plaintiffs have asserted a per se negligence theory based on Tarsadia Defendants' violation of ILSA. Plaintiffs identify three duties that were violated: (1) a duty to disclose Plaintiffs' **[*25]** two-year right to rescind in the Public Report; (2) a duty to replace the language in the Contract concerning the three-day right to rescind with language disclosing this two-year right, and (3) a duty to otherwise disclose to Plaintiffs their two-year right to rescind. (Dkt. No. 24, FAC ¶ 148.)

In the Court's prior order in Beaver, based on the exact same negligence allegation, it determined that the negligence per se theory of liability was dependent on an underlying statutory violation, (11cv1842, Dkt. No. 153 at 35 (the "presumption arising from the doctrine of negligence per se is dependent and requires an analysis of the underlying causes of action pursuant to *15 U.S.C. § 1703(a)(1)(C)* and *15 U.S.C. § 1703(d)(2)*.").) Because the plaintiffs, in the Beaver action conceded that the causes of action under *§§ 1703(a)(1)(C)* and *(d)(2)* were time barred, the negligence per se cause of action necessarily failed. (See Case No. 11cv1842, Dkt. No. 20 at 5.)

In opposition, Plaintiff does not dispute Tarsadia Defendants' argument and it is not clear whether Plaintiff acknowledges that the claims under *§§ 1703(a)(1)(C)* and *(d)(2)* are time barred. In any event, to the extent Plaintiff did not oppose the argument that the negligence cause of action is time barred, the Court GRANTS Tarsadia **[*26]** Defendants' motion to dismiss.

d. UCL Statute of Limitations

In this case, the UCL "unlawful prong" claim is based on violations of ILSA, the state securities laws and *Rule 10b* of the 1934 Securities Exchange Act. (Dkt. No. 24, FAC ¶ 156.) The FAC also alleges claims under the "unfair" and "fraudulent" prongs of the UCL. (Id. ¶¶ 155, 158.)

The Tarsadia Defendants argue that claims under the "unlawful" prong of the UCL for violations of ILSA, and federal and state securities laws by failing to provide the disclosures or registering the agreements as securities are barred by the four-year statute of limitations. In Beaver, the Ninth Circuit held that the UCL cause of action has a four-year statute of limitations and is governed by common law accrual rules looking at when the harm was completed. The plaintiffs in Beaver claimed the harm was completed in the fall of 2007 when they were required to close escrow and when they suffered cognizable financial harm. *Beaver, 816 F.3d at 1178*.

The UCL statute of limitations provides, "[a]ny action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective **[*27]** date of this section shall be revived by its enactment." *Cal. Bus. & Prof. Code § 17208*. The discovery rule applies to the UCL. See *Aryeh v. Canon Bus. Solutions, Inc., 55 Cal. 4th 1185, 1198, 151 Cal. Rptr. 3d 827, 292 P.3d 871 (2013)* ("the UCL is governed by common law accrual rules to the same extent as any other statute."); *Cover v. Windsor Surry Co., No. 14-cv-5262-WHO, 2015 U.S. Dist. LEXIS 94173, 2015 WL 4396215, at *3 (N.D. Cal. July 17, 2015)* ("Accordingly, I am bound by Aryeh . . . and I conclude that the discovery rule is available to toll the statute of limitations on [Plaintiff's] UCL claim."); *Plumlee v. Pfizer, Inc., Case No. 13cv414 LHK, 2014 U.S. Dist. LEXIS 23172, 2014 WL 695024, at *8 (N.D. Cal. Feb. 21, 2014)* ("delayed discovery rule is available to toll the statute of limitations under the . . . UCL.").

As discussed above, to allege the application of the California discovery rule, Plaintiff must allege "(1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." *Fox, 35 Cal. 4th at 808*. Because the Court concluded Plaintiff did not allege the second factor, that he made a reasonably diligent effort to investigate yet was unable to make a discovery, on this basis, the Court GRANTS Tarsadia Defendants' motion to dismiss the UCL claim.

2. Tolling Arguments

Alternatively, Plaintiff submits several tolling theories but does not differentiate which tolling argument applies to which cause of action as some tolling theories **[*28]** only apply to federal claims and others apply only to state law claims. Plaintiff alleges the following theories: 1) *Rule 15* relation back doctrine such that his FAC relates back to the original complaint in the Beaver case on May 18, 2011; 2) imprisonment tolling under *California Civil Procedure Code section 352.1*; 3) the class action tolling rule under American Pipe and Crown, Cork & Seal and during the time he attempted to file the same suit against Defendants in Colorado district court; 4) the continuous violation doctrine; 5) equitable tolling; and 6) equitable estoppel.

First, the Court concludes that the relation back rule under *Rule 15* does not apply in this case. *Rule 15(c)(1)* provides that "an amendment to a pleading relates back to the date of the original pleading" when certain conditions are met. *Fed. R. Civ. P. 15(c)(1)*. The rule allows a party to relate an amended pleading to an original pleading in the same action. Here, Plaintiff seeks relation-back of his FAC to a complaint in a different case. The Colorado District Court that considered Plaintiff's complaint held that *Rule 15* does not apply to a separately filed claim. See Brooks v. Tarsadia Hotels, District of Colorado, Case No. 17cv3172-PAB, KMT, Dkt. No. 68 at p. 9-10, Mar. 11, 2019) (citing *Benge v. United States, 17 F.3d 1286, 1288 (10th Cir. 1994)* (stating that a "separately **[*29]** filed claim, as opposed to an amendment or supplementary pleading, does not relate back to a previously filed claim")). Plaintiff does not provide any authority to the contrary.

Second, the imprisonment tolling provision under *California Civil Procedure Code section 352.1* also does not appear to apply because Plaintiff must allege that he was imprisoned at the time his state law causes of action accrued. *Section 352.1* allows a plaintiff to file an action if "at the time the cause of action accrued" is "imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life, the time of that disability is not a part of the time limited for the commencement of the action, not to exceed two years." *Cal. Civ. Proc. Code § 352.1*. Thus, Plaintiff must be incarcerated when his claims accrued. See *Groce v. Claudat, 603 F. App'x 581, 582 (9th Cir. 2015)* ("The district court correctly determined that all of [the plaintiff's] claims . . . were time-barred because [the plaintiff] was not incarcerated when his claims accrued."). To the extent Plaintiff's claims that the discovery rule tolls the statute of limitations until June 2017, *section 352.1* is not applicable as his state law claims would be timely. To the extent the state law causes of action accrued prior to his imprisonment on May 24, 2009, *section 352.1* **[*30]** is also not applicable. It appears that the relevant accrual dates would be either May 18, 2006, the date the Purchase Contract was signed, or August 2007, when Plaintiff closed escrow on the Unit. Based on these potential accrual dates, *section 352.1* would be inapplicable.

The Court declines to dismiss based on equitable tolling and equitable estoppel as these theories often depend on matters outside the pleadings and they "[are] not generally amenable to resolution on a *Rule 12(b)(6)* motion." *Cervantes v. City of San Diego, 5 F.3d 1273, 1276 (9th Cir. 1993)*; see *Shropshire v. Fred Rappoport Co., 294 F. Supp. 2d 1085, 1097-98 (N.D. Cal. 2003)* ("Because all of these [equitable estoppel] factors turn on disputed facts, it is improper for the Court, on a *Rule 12(b)(6)* motion—the purpose of which is test the sufficiency of the pleadings—to resolve this issue.").

As to the remaining tolling issues under American Pipe/Crown Cork & Seal, and the continuous violation doctrine, the Court declines to address them as not fully briefed. The Court notes that Tarsadia Defendants do not address the continuous violation doctrine in their reply. If the Court determines that the last act constituting the violation occurred in August 2007, then with the application of American Pipe/Crown Cork & Seal tolling, Plaintiff's UCL claims may be timely. Tarsadia Defendants summarily argue **[*31]** that American Pipe tolling does not apply to the state law causes of action; however, California court have applied American Pipe to state law causes of action under certain circumstances. See *Falk v. Children's Hospital Los Angeles, 237 Cal. App. 4th 1454, 188 Cal. Rptr. 3d 686 (2015)* (applying American Pipe tolling to some cause of actions and not others). Because these complex and fact specific tolling issues were not fully briefed, the Court declines to consider them at this time.

Because it is not clear that Plaintiff's allegations could not be amended to show that he is entitled to certain theories of tolling, a statute of limitations dismissal would be improper. In sum, the Court GRANTS in part and DENIES in part Tarsadia Defendants' motion to dismiss based on the statute of limitations with leave to amend.

3. *Rule 12(b)(6)* - ILSA and Fraud Claims

Tarsadia Defendants contend that the ILSA and fraud claims should be dismissed based on the Court's prior decision in *Beaver v. Tarsadia Hotels, 978 F. Supp. 2d 1124 (S.D. Cal. 2013)* where the Court determined, on summary judgment, that the evidence did not demonstrate that Tarsadia Defendants knew the representations or affirmative representations were false when made or that Tarsadia Defendants had an intent to deceive Plaintiffs. However, the Court's ruling was on summary judgment after discovery had **[*32]** been completed and based on the facts alleged in the TAC of Case No. 11cv1842.

Here, on a motion to dismiss on a similar but not identical complaint, the Court looks to the allegations in the FAC to determine if Plaintiff has alleged the Tarsadia Defendants knew the representations were false when they were made or had an intent to deceive Plaintiff. Tarsadia Defendants reliance on the Court's prior summary judgment ruling in another case with different named plaintiffs is without merit and cannot be the basis for dismissal of the FAC in this case. Because Tarsadia Defendants have failed to demonstrate that the allegations in the FAC are deficiently pled, the Court DENIES Tarsadia Defendants' motion to dismiss on the ILSA and fraud causes of action. While Plaintiff, with discovery, may not ultimately be able to demonstrate an issue of fact whether Tarsadia Defendants knew the representations were false at the time they were made, at this early stage of the proceeding, the Court cannot dismiss the FAC based on a summary judgment ruling in the Beaver case.

4. *Rule 9(b)* — Fraud, Negligence, ILSA and Securities Fraud Claims

Finally, Tarsadia Defendants argue that the claims under ILSA, securities **[*33]** fraud, fraud and negligence must be dismissed for failure to comply with *Rule 9(b)* because Plaintiff has not sufficiently pled causation, which is a necessary element of all his claims, and also justifiable reliance. Plaintiff does not address these arguments in his opposition.

Under California law, the elements of common law fraud are "misrepresentation, knowledge of its falsity, intent to defraud, justifiable reliance and resulting damage." *Gil v. Bank of Am., N.A., 138 Cal. App. 4th 1371, 1381, 42 Cal. Rptr. 3d 310 (2006)*. For an ILSA fraud claim, courts apply California's fraud standard. *Irving v. Lennar Corp., No. Civ. S-12-290 KJM EFB, 2013 U.S. Dist. LEXIS 47206, 2013 WL 1308712, at *10 (E.D. Cal. Apr. 1, 2013)* (applying California fraud standard on ILSA anti-fraud claim) (citing *Lazar v. Superior Ct., 12 Cal. 4th 631, 638, 49 Cal. Rptr. 2d 377, 909 P.2d 981 (1996))*; *Dexter v. Lake Creek Corp., No. 7:10-cv-226-D, 2013 U.S. Dist. LEXIS 64703, 2013 WL 1898381, at *6 (May 7, 2013)* (elements of state fraud cause of action applicable to ILSA's anti-fraud provision). But under ILSA, a plaintiff need not demonstrate a showing of reliance. *Keanneally v. Bank of Nova Scotia, 711 F. Supp. 2d 1174, 1186 (S.D. Cal. 2010)*; see also *Irving, 2013 U.S. Dist. LEXIS 47206, 2013 WL 1308712, at *11*. Under *§ 10(b)*[9] a plaintiff must allege "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 37-38, 131 S. Ct. 1309, 179 L. Ed. 2d 398 (2011)* (internal **[*34]** quotation omitted). The elements of a negligence cause of action are: (a) a legal duty to use due care; (b) a breach of such legal duty; and (c) the breach as the proximate or legal cause of the resulting injury. *Ladd v. County of San Mateo, 12 Cal. 4th 913, 917, 50 Cal. Rptr. 2d 309, 911 P.2d 496 (1996)*.

The FAC alleges that Defendant's fraudulent concealment prevented him from timely exercising rescission rights and seeking other legal options. (Dkt. No. 24, FAC ¶ 114.) He claims that if he had been allowed to rescind, he would not have closed on the property and would not have incurred damages of his loss of $50,000 which he could have used to hire an attorney to uncover Defendants' wrongful conduct or would have been able to pay his attorney to prevent a default judgment of $18 million entered against him in June 2008, would not have been sent to prison and not be currently paying $40,800 monthly interest penalty on an illegally induced plead. (Id. ¶¶ 114-116.) The Court concludes these are not conclusory allegations of causation and satisfy the particularity requirement of *Rule 9(b)*.

As for justifiable reliance, in Beaver, the Court held that the plaintiffs sufficiently alleged reliance by claiming "they relied on Defendants' misleading representations regarding their right to **[*35]** rescind, which caused them to miss the opportunity to timely exercise their right to rescind under the ILSA." (Case No. 11cv 1842, Dkt. No. 34 at 7.) Here, similarly, the FAC alleges that he relied on the material misstatements or wrongful omissions and had Plaintiff been informed of his two-year rescission rights, he would not closed on the Unit or would not have quit claimed his deed to his co-purchaser in early 2008 and would have rescinded his Contracts and recovered his purchase money. (Dkt. No. 24, FAC ¶¶ 109, 115, 144.) Plaintiff sufficiently alleges justifiable reliance. The Court DENIES Defendants' motion to dismiss pursuant to *Rule 9(b)*.

In sum, the Court GRANTS in part and DENIES in part Tarsadia Defendants' motion to dismiss on the statute of limitations grounds and DENIES Tarsadia Defendants' motion to dismiss pursuant to *Rule 12(b)(6)* and *Rule 9*.[10]

D. Playground Destination's Motion to Dismiss

1. ILSA and Fraud

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[9] Tarsadia Defendants do not argue that the state securities fraud claim should be dismissed under *Rule 9(b)*. (Dkt. No. 27-1 at 22-23.)

[10] Additionally, Tarsadia Defendants argue that the federal and state securities claims are barred by the Ninth Circuit ruling in Salameh that the transactions at issue did not constitute a "security." *726 F.3d at 1132*. While Tarsadia Defendants claim that the securities law claims in the Salameh and Brooks case are "identical" they have not claimed or demonstrated that the factual assertions to support the claims are identical. Accordingly, the Court declines to rely on the Salameh ruling on Tarsadia Defendants' motion to dismiss.

Playground argues that the first cause of action for ILSA fraud violations and third cause of action for fraud fail because the FAC does not sufficiently plead Playground's knowledge of the non-disclosure of the two-year rescission right relying on the Court's ruling **[*36]** in the Beaver case filed on May 12, 2012. (Case No. 11cv1842, Dkt. No. 34.) Plaintiff argues that the facts supporting his claims differ from those in the Beaver case.

Plaintiff alleges violations of the anti-fraud provisions of ILSA, *15 U.S.C. §§ 1703(a)(2)(A)*, *(B)*, and *(C)*. In California, a plaintiff alleging fraud must show "(1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage." *Ryder v. Lightstorm Entm't, Inc., 246 Cal. App. 4th 1064, 1079, 201 Cal. Rptr. 3d 110 (2016)* (internal quotations omitted). California's fraud standard applies to ILSA's anti-fraud statute except there is no need to demonstrate reliance for violations of the anti-fraud provisions of the ILSA. See *Irving, 2013 U.S. Dist. LEXIS 47206, 2013 WL 1308712, at *10, 11* (applying California fraud standard on ILSA anti-fraud claim); *Keanneally, 711 F. Supp. 2d at 1186*.

The FAC alleges that Playground failed to disclose the rescission provisions in the sales documents and misled Plaintiff about his rescission rights. Playground was the real estate broker for Hard Rock acting as an agent for the Defendants. (Dkt. No. 24, FAC ¶ 20.) Playground developed marketing materials that threatened to take Plaintiff's $50,000 deposit if he did not close on his unit to further develop Tarsadia **[*37]** Defendants' scheme. (Id. ¶ 43.) Playground, as a real estate broker, is well versed in ILSA's disclosure obligations and the anti-fraud provisions of state and federal laws. (Id. ¶ 68.) Tarsadia Defendants provided the standardized contract and the Public Report from the DRE to Playground, their real estate broker. (Id. ¶ 94.) Around May 5, 2006, Playground distributed to prospective buyers a "Perspectives and Prices" publication which provided drawings of the Units and the prices. (Id. ¶ 95.) Playground, in its capacity as real estate broker, had a statutory duty to disclose all facts known to it that materially affects "the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties" as provided in *California Civil Code section 2079.16*. (Id. ¶ 96.) A seller has a duty to disclose to buyers any material facts affecting the value or desirability of the property. (Id. ¶ 97.) According to Plaintiff, Playground has to have known of this right as well, yet failed to disclose it to Plaintiff, or "consciously chose to ignore the fact that Developer Defendants were engaged in a scheme to ensure sales of the condos at the Hard Rock could not be rescinded." (Id. **[*38]** ¶ 98.) Around August 2007, Playground distributed the Closing Notices that informed the purchasers that they would lose their deposits if they did not close by the end of August. (Id. ¶ 101.) Playground wrongfully mislead buyers to believe they would lose their deposits if they did not close. (Id. ¶ 108.) Playground distributed the Closing Notice with the full knowledge and consent of Tarsadia Defendants. (Id. ¶ 102.) By distributing the Closing Notice, Playground perpetuated Tarsadia Defendants' scheme and their own interest. (Id. ¶ 102.) The FAC then summarily alleges that "Defendants knowingly and willingly devised and carried out a common plan, scheme or artifice to defraud Plaintiff by purposefully omitting the two year right of rescission from the Contract and the Public Report and instead intentionally misrepresenting in the Contract that only a three-day right of rescission existed." (Id. ¶ 107.)

In its prior order in Beaver, based on almost identical allegations concerning knowledge, (Compare 11cv1842, Dkt. No. 21, SAC ¶¶ 63-65, 67-71, 73-74 with Dkt. No. 24, FAC ¶¶ 93-95; 100-105, 107-109), the Court concluded that the plaintiffs' theory of knowledge as to Playground was imputing **[*39]** Tarsadia Defendants' knowledge and concealment of the buyers' right to rescind onto Playground based on *California Civil Code section 2332*.[11] (Case No. 11cv1842, Dkt. No. 34 at 6.) However, the Court concluded that *section 2332* only imputes the agent's knowledge to the principal and not the reverse. (Id.) Similarly, in this case, to the extent Plaintiff alleges Playground's knowledge is based on Tarsadia Defendants' knowledge, the Court concludes that Plaintiff has not sufficiently alleged Playground's knowledge as to his rescission rights.

In opposition, Plaintiff contends that he has asserted additional misrepresentations made by Playground that were not alleged in the Beaver case and have nothing to do with rescission rights. He alleges that Defendants had

[11] "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." *Cal. Civ. Code § 2332*.

Plaintiff prepare a "Tarsadia's Optional Rental Management Program FAQ" where they knowingly and materially assisted each other in representing that investors were not required to participate in the RMA and that the decision was voluntary but in fact that representation was false as investors were mandated to participate in the RMA. (Dkt. No. 24, FAC ¶¶ 24, 142.) They also knowingly and materially assisted each other in misrepresenting that the Hard Rock guests would be placed **[*40]** in a consistent rotational system that would "rent all suites equitably" but there was no way to live up to this representation, and this representation induced Plaintiff to buy the condominium. (Id. ¶¶ 34-35, 143.) Instead, Defendants rented the rooms that generated the most income and they had no system to ensure all units would be rented equitably. (Id.) He also argues that Defendants knew that the liquidated damages provision, which allowed them to retain the $50,000 deposit, was unreasonable but they still threatened purchasers with the loss of their deposit if they did not close. (Id. ¶¶ 74, 75 101.)

First, these additional facts do not appear to be the bases of his claims under the fraud or ILSA causes of action. Therefore, Plaintiff's arguments in opposition do not bar dismissal of the FAC for the fraud causes of action for lack of knowledge. To the extent Plaintiff seeks to add additional allegations, he may do so in a Second Amended Complaint ("SAC"). Moreover, as noted by Playground, many of these additional allegations refer to "Defendants" generally without indicating which Defendant was involved in which misrepresentation. If Plaintiff files a SAC, he shall indicate which **[*41]** Defendant made each of the alleged misrepresentations and provide sufficient facts to support a reasonable inference that Playground had knowledge about these misrepresentations.

As currently plead, the FAC fails to allege facts to permit a reasonable inference that Playground knew of the disclosure requirements of ILSA. See *Iqbal, 556 U.S. at 678*. Accordingly, the Court GRANTS Playground's motion to dismiss the first and third cause of action.

2. Federal and State Securities

Playground argues that because Plaintiff failed to plead knowledge of the alleged misrepresentations or omissions, he cannot state a claim under *Section 10(b)* of the Securities Exchange Act and under *California Corporations Code sections 25401*, *25501*, *25504.1* as these provisions require scienter as an element. Plaintiff argues that scienter is not required to plead a violation of *sections 25401* and *25501*.

As stated above, under *§ 10(b)*, a plaintiff must allege "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Matrixx Initiatives, Inc., 563 U.S. at 37-38* (internal quotation omitted). Scienter is "the defendant's intention 'to deceive, manipulate, or defraud.'" **[*42]** *Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)*. Corporations Code *section 25504.1* also provides "any person who materially assists in any violation of *Section . . . 25401*, . . . with intent to deceive or defraud, is jointly and severally liable with any other person liable under this chapter for such violation." *Cal. Corp. Code § 25504.1*. *Section 25504.1* requires a showing that the defendant had an "intent to deceive or defraud." *Orloff v. Allman, 819 F.2d 904, 907 (9th Cir. 1987)* overruled on other grounds by *Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1575 (9th Cir. 1990)*.

Plaintiff does not dispute that scienter must be alleged for a violation of *§ 10(b)* and *section 25504.1*. Therefore, the Court GRANTS Playground's motion to dismiss for failing to sufficiently allege scienter on these claims.

Corporations Code *section 25401* prohibits the sale of securities "by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary to make the statements made, in the light of the circumstances under which the statements were made, not misleading." *Cal. Corp. Code § 25401*. Corporations Code *section 25501* creates a private cause of action for violation of *section 25401*, with exceptions for instances where the plaintiff knew about the facts of the untruth or the defendant exercised reasonable care and did not know of the untruth or omission. *Cal. Corp. Code § 25501*.

In opposition, Plaintiff argues that scienter is not required to assert a violation of California **[*43]** securities law under *sections 25401* and *25501*. Playground does not address this argument in its reply. The Court agrees with Plaintiff that scienter is not an element of *sections 25401* and *25501*. See *I-Enterprise Co. LLC v. Draper Fisher Jurvetson Mgmt. Co. V, LLC, No. C-03-1561-MMC, 2005 U.S. Dist. LEXIS 39481, 2005 WL 3590984, at *27 (N.D. Cal. Dec. 30, 2005)* (violations of *sections 25401* and *25501* does not require proof of intent); *BayStar Capital Mgmt. LLC v. Core Pacific Yamaichi Int'l (H.K.) Ltd., CV 05-1091 ABC (CWx), 2007 WL 9711373, at *4 (C.D. Cal. Apr. 16, 2007)* (reliance and scienter need not be shown for *section 25501*). Thus, the Court DENIES Playground's motion to dismiss the state securities claims under *sections 25401* and *25501* for failing to allege scienter.

Next, Playground contends that the federal and state securities law claims also fail because the transactions do not constitute a security as the Ninth Circuit held in *Salameh v. Tarsadia Hotel, 726 F.3d 1124, 1132 (9th Cir. 2013)* and any claims would be barred by the relevant statutes of repose as the Court held in its order granting the defendants' motion to dismiss the state and federal securities claims filed on March 22, 2011. (Case No. 09cv2739, Dkt. No. 158 at 13-15.) However, while the SAC in Salameh may be similar to the FAC in this case, they are not identical and Playground fails to point to the deficiencies in the FAC as required on a motion to dismiss.

Section 3(a)(10) of the Securities Exchange Act defines "security" **[*44]** as *inter alia*, a "note, stock, treasury stock, bond, [or] investment contract." *15 U.S.C. § 78c(a)(10)*. Congress defined "security" to be "sufficiently broad to encompass virtually any instrument that might be sold as an investment" but did not "intend to provide a broad federal remedy for all fraud." *Reves v. Ernst & Young, 494 U.S. 56, 61, 110 S. Ct. 945, 108 L. Ed. 2d 47 (1990)* (internal quotations omitted). Courts should look not to the form but to the "economic realities of the transaction." *United Hous. Fdn. v. Forman, 421 U.S. 837, 838, 95 S. Ct. 2051, 44 L. Ed. 2d 621 (1975)*.

In Howey, the Court defined whether an investment contract is a security under the Securities Act and held that an investment contract is "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." *SEC v. W.J. Howey Co., 328 U.S. 293, 298-99, 66 S. Ct. 1100, 90 L. Ed. 1244 (1946)*. Howey's three-part test requires "(1) an investment of money (2) in a common enterprise (3) with an expectation of profits produced by the efforts of others." *SEC v. Rubera, 350 F.3d 1084, 1090 (9th Cir. 2003)* (internal quotation marks omitted).

In Salameh, the Ninth Circuit, relying on its *en banc* ruling in *Hocking v. Dubois, 885 F.2d 1449 (9th Cir. 1989)*, held that the sale of the condos at the Hard Rock and the later RMA together did not constitute the sale of a security because the plaintiffs had not alleged that the Purchase Contracts and **[*45]** the RMAs were offered as a package. *Id. at 1131*. The Ninth Circuit noted that "Plaintiffs allege no facts showing that the Purchase Contracts and the Rental Management Agreements were offered as a package. They do not allege that the Rental Management Agreement was promoted at the time of the sale. They do not allege that Defendants told them that the Rental Management Agreement would be forthcoming. They do not allege that they were told that the Rental Management Agreement would result in investment-like profits." Id. They also did not allege when the respective agreements were signed. Id. Instead, the defendants informed the court that the RMAs were executed 8-15 months after the Purchase Contract. Id.

Taking the Ninth Circuit ruling into consideration and attempting to cure the deficiencies noted in the opinion, Plaintiff summarily alleges that the Purchase Contract, OA[12] and RMA were offered as a single package even though they were offered as independent documents. (Dkt. No. 24, FAC ¶ 25.) He claims that Defendants intentionally separated the OA and the RMA from the Purchase Contract in order to avoid the securities laws. (Id.) All three documents induced Plaintiff into buying the condominium. **[*46]** (Id.) Even though he read the disclaimer that the purchase of the Unit was not an investment, the economic and practical realities established the transaction was an investment and constituted a sale of a security. (Id. ¶ 22.) The FAC also asserts that whether the investors made money depended on the managerial efforts of Defendants. (Id. ¶ 32.) Despite Plaintiff's attempt to cure the deficiencies noted by the Ninth Circuit, the alleged facts are mere "threadbare recitals" of the elements of a "security" under Howey and Hocking, but no additional facts are presented to create a reasonable inference that the

[12] The Ninth Circuit opinion did not address the OA as part of its ruling.

Purchase Contract, the OA, and the RMA were securities. (See Dkt. No. 24, FAC ¶¶ 21-25.) In addition, Plaintiff does not allege when he signed the RMA or OA. Plaintiff's facts are insufficient to allege a security. Accordingly, the Court GRANTS Playground's motion to dismiss the federal and state securities claims.

3. Negligence

The FAC alleges a negligence per se claim based on violations of the ILSA disclosure provisions pursuant to *§ 1703(d)(2)* and *§ 1703(a)(1)(C)*. (Dkt. No. 24, FAC ¶¶ 46, 48, 56 69, 72, 73, 74, 147-153). These violations must be brought "within three years after the signing of the contract. **[*47]** . . ." *15 U.S.C. §§ 1711(a)(1)* & *(b)*.

Playground argues that because the negligence per se claim arises from the disclosure provisions of ILSA, they are time barred as the statute of limitations began to run on May 18, 2006 and expired on May 18, 2009. In response, Plaintiff does not appear to dispute Playground's argument but instead contends that his negligence per se claims are not only based on ILSA's disclosure provisions but also Defendants' negligent misrepresentation that the RMA was not a mandatory condition of ownership, knowledge that rooms would not be placed into an equitable rotational system, and understanding that the liquidated damages provision was unreasonable. However, because Plaintiff does not dispute Playground's argument and the additional allegations he claims to support his negligence cause of action are not specifically asserted in the FAC on the negligence cause of action, the Court GRANTS Playground's motion to dismiss with leave to amend.

4. UCL

The UCL "unlawful prong" claim is based on violations of ILSA, the state securities laws, and *Rule 10b* of the 1934 Securities Exchange Act. (Dkt. No. 24, FAC ¶ 156.) The FAC also alleges claims under the "unfair" and "fraudulent" prongs of the UCL. **[*48]** (Id. ¶¶ 155, 158-59.)

The unlawful prong of the UCL incorporates "violations of other laws and treats them as unlawful practices." *Cel-Tech Comms., Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. This prong creates an "independent action when a business practice violates some other law." *Walker v. Countrywide Home Loans, Inc., 98 Cal. App. 4th 1158, 1169, 121 Cal. Rptr. 2d 79 (2002)*. A UCL claim "stands or falls depending on the fate of antecedent substantive causes of action." *Krantz v. BT Visual Images, 89 Cal. App. 4th 164, 178, 107 Cal. Rptr. 2d 209 (2001)*.

Playground argues that the unlawful prong based on violations of ILSA and federal and state securities laws fail to sufficiently allege its knowledge of the alleged omission in the Purchase Contract. Because the Court dismissed the ILSA and securities claims, the UCL cause of action based on these allegations necessarily fails, and the Court GRANTS Playground's motion to dismiss. See id.

Playground also argues that the unfair prong should also be dismissed because Plaintiff fails to allege facts to support "unfair" conduct. Plaintiff opposes.

A business act or practice is "unfair" when the conduct "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Comms., Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 & n. 12 (1999)* (applying "unfair" test to **[*49]** anti-competitive practices and not consumer actions). As the Court explained in the Beaver case, post-Cel-Tech, California appellate courts are divided as to which test of "unfair" applies to consumer cases. *29 F. Supp. 3d at 1314*; see also *Hodsdon v. Mars, Inc., 891 F.3d 857, 866 (9th Cir. 2018)* (recent case noting the term "unfair" is still in flux in California courts). In *Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 736 (9th Cir. 2007)*, the Ninth Circuit held that two tests, "the Cel—Tech test where the unfairness is tied to a "legislatively declared" policy, or the former balancing test under South Bay,[13] which involves balancing the harm to the consumer against the utility of the defendant's practices, would apply to consumer cases. *Id. at 1315*. In order to be a "legislatively declared" policy, there must be a "close nexus between the challenged act and the legislative policy." *Hodsdon, 891 F.3d at 866* (citing *Cel-Tech, 20 Cal. 4th at 187*) (holding that for an act to be "unfair," it must "threaten[ ]" a violation of law or "violate[] the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law").

In Beaver, the plaintiffs applied the tethering test arguing that its unfair claim is tied to Playground's violation of its statutory duty as a real estate agent to "disclose all facts known to the [it] materially affecting the value **[*50]** or desirability of the property that are not known to, or within the diligent attention and observation of, the parties pursuant to *Cal. Civ. Code § 2079.16*." The Court granted Playground's motion for summary judgment concluding that the plaintiffs "do not allege or show that the failure to disclose or affirmative misrepresentation is predicated on a public policy and that the conduct threatened to violate the letter, policy, or spirit of the antitrust laws or that it harms competition. . . . Plaintiffs only argue that the unfair practices are tethered to the disclosure policies, not public policy." *Id. at 1315*. "Moreover, Plaintiffs have not alleged or demonstrated that such acts are against public policy, immoral, unethical, oppressive, or unscrupulous." Id. Even though the Court's order was on summary judgment, it noted that the plaintiffs did not even allege that the alleged conduct was predicated on a public policy.

Similarly, in this case, Plaintiff argues that the UCL claim is tethered to *California Civil Code sections 2079.16(b)* & *(c)* which requires Playground to act in an honest, fair dealing and good faith manner as well as disclosing all facts known to the agent that materially affects the value or desirability of the property under Civil Code *section 2079.16*. (Dkt. **[*51]** No. 32 at 11.) The FAC claims that Defendants concealed information Plaintiff was entitled to receive prior to closing, including his two year right to rescind and these actions were unfair because they offended established anti-fraud statutes and the harm Plaintiff suffered greatly outweighs any benefits associated with those practices. (Dkt. No. 24, FAC ¶ 158.) California has a legislative policy requiring that real estate brokers disclose all facts materially affecting the desirability or value of the property that are not known to, or within diligent attention and observation of the parties. (Id. ¶ 159.)

As in Beaver, Plaintiff, in this case, has not sufficiently alleged that the failure to disclose or misrepresentations are predicated on "legislatively declared" policy mandating a "close nexus between the challenged act and the legislative policy." See *Hodsdon, 891 F.3d at 866*. Accordingly, because Plaintiff has failed to allege facts to support a claim under the "unfair" prong, the Court GRANTS Playground's motion to dismiss.

Finally, Playground contends that the FAC fails to plead a fraudulent or deceptive act because Plaintiff has not alleged Playground had a duty to disclose those undisclosed material **[*52]** facts. To state a claim under the fraudulent prong of the UCL, "it is necessary only to show that members of the public are likely to be deceived" by the business practice. *Prakashpalan v. Engstrom, Lipscomb and Lack, 223 Cal. App. 4th 1105, 1134, 167 Cal. Rptr. 3d 832 (2014)*. But "a failure to disclose a fact one has no affirmative duty to disclose is [not] 'likely to deceive' anyone within the meaning of the UCL." *Daugherty v. American Honda Motor Co., Inc., 144 Cal. App. 4th 824, 838, 51 Cal. Rptr. 3d 118 (2007)*.

The Court agrees. Plaintiff relies on the real estate broker's duties under Civil Code *section 2079.16* ("A Seller's agent . . .has the following affirmative obligations: . . . (c) A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties.") which requires knowledge of the alleged failure to disclose. Here, Plaintiff must allege that Playground knew about the ILSA disclosure provisions which the Court concluded above he has not sufficiently alleged. Accordingly, the Court GRANTS Playground's motion to dismiss the fraudulent prong of the UCL.

E. Leave to Amend

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[13] *South Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 85 Cal. Rptr. 2d 301 (1999)*.

Plaintiff seeks leave to amend to correct any deficiencies in the FAC. Tarsadia Defendants and Playground ask the Court to grant their motions to dismiss with prejudice without leave to amend as **[*53]** Plaintiff has had a couple of attempts to file a complaint without success. The Ninth Circuit has directed that "a district court should grant the plaintiff leave to amend if the complaint can possibly be cured by additional factual allegations." *Zixiang Li v. Kerry, 710 F.3d 995, 999 (9th Cir. 2013)*. Here, as a pro per Plaintiff, the Court liberally construes the FAC, and concludes that leave to amend would not be futile. See *Schreiber Distrib. Co., 806 F.2d at 1401*. The Court GRANTS Plaintiff leave to file a second amended complaint.

Conclusion

Based on the above, the Court GRANTS in part and DENIES in part Tarsadia Defendants' motion to dismiss and GRANTS Playground's motion to dismiss. Plaintiff is granted leave to file a second amended complaint and shall file it on or before **July 8, 2019**.

IT IS SO ORDERED.

Dated: June 11, 2019

/s/ Gonzalo P. Curiel

Hon. Gonzalo P. Curiel

United States District Judge

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In re Processed Egg Prods. Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

June 11, 2019, Decided; June 11, 2019, Filed

No. 08-md-2002

Reporter

392 F. Supp. 3d 498 *; 2019 U.S. Dist. LEXIS 97522 **; 2019 WL 2463221

IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION. THIS DOCUMENT APPLIES TO: ALL DIRECT ACTION PLAINTIFF CASES

Subsequent History: Motion denied by *In re Processed Egg Prods. Antitrust Litig. This Document Applies To: All Direct Action Plaintiff Cases, 2019 U.S. Dist. LEXIS 182345 (E.D. Pa., Oct. 22, 2019)*

Prior History: *In re Processed Egg Prods. Antitrust Litig., 881 F.3d 262, 2018 U.S. App. LEXIS 2698 (3d Cir. Pa., Jan. 22, 2018)*

Core Terms

egg, products, shell, conspiracy, prices, producers, Foods, antitrust, summary judgment motion, alleged conspiracy, summary judgment, damages, causation, liquid, reduction, flock, expert report, factors, purchasers, regression, eBay's, raw, documentary evidence, co-conspirators, defendants', suppliers, district court, processed, impacted, layers

Counsel: **[**1]** For SANDRA A. JESKIE, Special Master: SANDRA A. JESKIE, LEAD ATTORNEY, DUANE, MORRIS LLP, PHILADELPHIA, PA.

Judges: GENE E.K. PRATTER, UNITED STATES DISTRICT JUDGE.

Opinion by: GENE E.K. PRATTER

Opinion

[*501] **MEMORANDUM**

INTRODUCTION

In 2016, the Court granted the defense motion for summary judgment on Direct Action Plaintiffs' egg product-related claims on the grounds that they lacked standing. The DAPs successfully appealed that ruling and the Court of Appeals for the Third Circuit remanded the case for further disposition. The defendants then filed joint and individual motions for summary judgment on the DAPs' egg product-related claims. This Memorandum addresses those motions.

The defendants jointly argue that the DAPs failed to demonstrate that any alleged antitrust violation caused injuries. The Court must deny this motion because the DAPs have proffered enough evidence that a reasonable jury could arguably rule in their favor.

Certain defendants also filed individual motions for summary judgment on the grounds that, given the opinion from Court of Appeals for the Third Circuit, some or all of the DAPs lack standing. The Court denies these motions because under the theory being pursued by the DAPs (a theory that is permitted **[**2]** by current applications of ***antitrust law***) the defendants can be jointly and severally liable for damages even if certain DAPs did not directly purchase egg products from them.

BACKGROUND[1]

This motion focuses on egg products as opposed to shell eggs. The DAPs[2] are **[*502]** purchasers of egg products who claim that they paid more for those egg products than they should have because of the defendants' alleged conspiracy. The discussion of the facts relevant to the pending motions proceeds in three parts: (1) information about egg products during the alleged conspiracy; (2) a review of each of the remaining defendants, and; (3) a brief summary of the expert report by Dr. Michael R. Baye as it relates to the DAPs' egg products claims.

I. Egg Products

For the most part, the facts regarding egg products are undisputed. Shell eggs are eggs that are processed by being cleaned, packaged, and sold in their shells. Egg products are eggs, either whole or separated, that have been removed from their shells and are then processed into dried, frozen, or liquid forms. The primary purchasers of egg products are food manufacturers that use the egg products as ingredients in goods ranging from frozen waffles to salad **[**3]** dressing to mayonnaise. During the alleged conspiracy period, at least 18 companies, including 15 non-defendants, sold processed egg products. At least some of these companies do not themselves own any egg-laying hens.

Some facilities produce shell eggs, which leave the facility still in the shell and can be used for either shell eggs or be broken "off-line" for use in egg products. Other facilities, called "in-line" facilities, break the eggs in the facility and then transport the raw unpasteurized liquid egg via produce tankers. The defendants allege that eggs from in-line facilities are better for egg products because they have a lower bacterial count than liquid eggs broken off-line. This raw unpasteurized liquid egg is unfit for human consumption and cannot legally be sold to anyone in that form other than egg products manufacturers, who then process the raw egg. Not every egg products company both produces and processes raw liquid egg—some companies only produce the raw liquid egg and others only process it The latter companies have no layers of their own and must purchase the raw liquid egg they then process.

During the alleged conspiracy, the DAPS contend that overall egg production **[**4]** increased at a slower rate than it would have had the conspiracy not been in place. However, as is allegedly important for understanding the dynamics of this case, egg production in Iowa increased at a much higher rate than it did in other parts of the country. Between 2000 and 2008, the U.S. flock size increased by about 3%, from 328 million layers to 339 million layers. During that same period, the flock size in Iowa increased by about 88%, from 28 million layers to 53 million layers. The defendants contend that this rapid growth in Iowa was particularly important for egg products because

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[1] This case has been pending for a number of years, during which all the allegations and various industry terms, as well as parties, events and such, have been repeatedly discussed in a number of opinions. Accordingly, this opinion assumes familiarity with the prior pertinent material docketed generally under this action.

[2] The DAPs include the Kroger Co., Safeway Inc., Walgreen Co., Hy-Vee, Inc., Albertsons LLC, Great Atlantic & Pacific Tea Company, Inc., H.E. Butt Grocery Company, Conopco, Inc., Publix Super Markets, Inc., Supervalu, Inc., Giant Eagle, Inc., Kraft Foods Global, Inc., the Kellogg Company, General Mills, Inc., Nestle USA, Inc., Winn-Dixie, Inc., Roundy's Supermarkets, Inc., C&S Wholesale Grocers, Inc., and H.J. Heinz Company, L.P.

Iowa producers are well-positioned to supply eggs to egg products companies. For example, Iowa producers are advantaged by low feed costs but are at a disadvantage in supplying shell eggs to urban areas because of increased transportation costs relative to other egg-producing states such as California, Ohio, Georgia, and Pennsylvania. This leads Iowa producers to break eggs near production locations and sell liquid egg to egg products companies, such as Michael Foods.

II. Defendants

The defendants remaining in this portion of the case are Michael Foods, Rose Acre, Cal-Maine, R.W. Sauder, United Egg **[**5]** Producers, Inc. (UEP), and United **[*503]** States Egg Marketers (USEM).[3] Each of these defendants, with the exception of Michael Foods, also filed an individual motion for summary judgment.

A. Michael Foods[4]

Sales of egg products by Michael Foods make up the majority of sales for most of the DAPs' damages. Most of the eggs used in Michael Foods' egg products come from outside suppliers, and of those eggs, the great majority were supplied by non-Defendants. Seventy-two percent (72%) of the eggs purchased by Michael Foods were from companies that are not UEP certified. And Michael Foods paid very different prices for eggs from different suppliers because it negotiated prices based on grain prices (in some cases) and egg market prices (in other cases). Michael Foods contends that it entered into long-term contracts based on grain prices because grain prices are historically more stable than egg prices. Michael Foods also entered into such long-term contracts with suppliers from Iowa to take advantage of the inherent advantages of that market.

B. Rose Acre

Certain DAPs also purchased egg products from Rose Acre Farms. Rose Acre produces both shell eggs and eggs for breaking into egg products, **[**6]** and the company can move eggs between shell eggs and eggs for breaking with some ease. With that being said, Rose Acre purchased as much as 21.6% of its eggs for egg products from outside suppliers, including from non-Defendants.

Rose Acre contends that the following DAPs did not purchase any egg products directly from it: Giant Eagle, Hy-Vee, Publix, and Safeway. Although the DAPs admit that Safeway did not purchase egg products directly from Rose Acre, they dispute whether Hy-Vee, Publix, and Giant Eagle did. All parties agree that the remaining DAPs made egg product purchases from entities other than Rose Acre.

C. Cal-Maine Foods, Inc.

Cal-Maine has resolved disputes related to both shell eggs and egg products with all DAPs other than Conopco, Inc. and the four DAPs in the Kraft case (Kraft Foods Global, Inc., Nestle USA, Inc., General Mills, Inc, and the Kellogg Company). It is undisputed that the five DAPs with remaining claims against Cal-Maine did not purchase egg products directly from Cal-Maine.

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[3] At the time these summary judgment motions were filed, Ohio Fresh Eggs, LLC was still a defendant in the DAPs' case. Ohio Fresh and the DAPs have since entered into a stipulation of dismissal. *See* Doc. No. 1861.

[4] The Kroger Co., Safeway Inc., Walgreen Co., Hy-Vee, Inc., Albertsons LLC, Great Atlantic & Pacific Tea Company, Inc., H.E. Butt Grocery Company, Publix Super Markets, Inc., Supervalu, Inc., Giant Eagle, Inc., Winn-Dixie, Inc., and Roundy's Supermarkets, Inc., entered into a stipulation of dismissal with Michael Foods. *See* Doc. Nos. 1495, 1503.

D. R.W. Sauder

R.W. Sauder alleges that none of the DAPs purchased egg products directly from the company. The DAPs contend that Supervalu purchased egg products from R.W. Sauder.

E. United [7] Egg Producers, Inc. and United States Egg Marketers**

As discussed in detail in previous opinions, UEP and USEM do not produce eggs or egg products. UEP is a cooperative that provides services to its members, including lobbying and marketing, concerning principally animal welfare, food safety, and environmental **[*504]** issues. USEM is a cooperative involved in the export of eggs. UEP and USEM did not sell egg products in any capacity, let alone to the DAPs.

III. Dr. Baye's Expert Report as It Pertains to Egg Products

The DAPs used Dr. Michael Baye, a PhD economist and Professor of Business Economics and Public Policy at Indiana State University Kelley School of Business, to produce an expert report in this case. At the first step of his analysis, Dr. Baye used USDA data to look at the overall production of eggs during the relevant time frame. Dr. Baye conducted two separate regression analyses to determine whether the alleged conspiracy reduced the total size of the U.S. layer flock and total number of eggs produced compared to what these data points would have been without the conspiracy. Dr. Baye found that, even though egg producers increased production during the alleged conspiracy, the conspiracy **[**8]** limited the amount of growth during that time frame to fall short of what unrestrained growth would have been.

Dr. Baye analyzed both flock size and egg production to ensure, he contends, that a decrease in flock size was not offset by an increase in the number of eggs laid per hen. In addition to the elements of the conspiracy, Dr. Baye's model allows for a number of supply and demand factors such as grain prices, electricity, diesel, and agricultural wages, real national income, population, interest rates, changes in consumer preferences over time (such as increased preferences for cage-free or other specialty eggs), and seasonal fluctuations. Dr. Baye concluded that the conspiracy—in particular, the cage-size restrictions and ban on backfilling—was statistically significant in reducing the overall flock size and egg production.

Dr. Baye then used a two-stage least squares model to isolate the effect of the supply reduction on the prices of 68 separate egg products and shell eggs. In the first stage of the analysis, Dr. Baye created a regression model that controlled for changes in supply and demand factors that affect the quantity of eggs, and used that model to determine the reduction **[**9]** in supply caused by the conspiracy. In the second stage, Dr. Baye used the supply data from the first stage, pricing data, and econometric methods to estimate an inverse demand. Which is to say, Dr. Baye asserts that he eliminated the impact of other supply and demand factors so that he could determine the impact of the various components of the alleged conspiracy. Dr. Baye ran this model on 68 different types of eggs and egg products and found that the Urner Barry price for each type increased as a result of the reduction in the supply of eggs caused by the alleged conspiracy. In doing so, Dr. Baye quantified exactly how much each of the 68 types of shell eggs and egg products was affected by the reduction in the number of eggs. He found that, although the availability of each of the shell eggs and egg products responded differently to the conspiracy, the conspiracy impacted each one in a statistically significant manner.[5]

PROCEDURAL HISTORY

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[5] For example, Dr. Baye calculated that the cage-size restrictions in place from August 2005 through January 2007 increased the price of Liquid Eggs, Whites, Pasteurized, West Coast by 55%, but raised the price of Frozen Yolk Salt 43% Solids by only 20.92%. Dr. Baye Expert Report P 199 (Ex. 20 to Dr. Baye Report).

In 2016, the Court granted summary judgment on the grounds that the DAPs lacked standing to pursue egg product-related claims. *In re Processed Egg Prods. Antitrust Litig., 2016 U.S. Dist. LEXIS 119731, 2016 WL 4670983 (E.D.* **[*505]** *Pa. Sept. 6, 2016)*. The Court concluded that the plaintiffs failed to distinguish between egg products made with Defendant-produced eggs **[**10]** from egg products made with eggs produced by non-conspirators and found that recovery for the latter type of egg products was barred by the prohibition on "umbrella" damages. *2016 U.S. Dist. LEXIS 119731, [WL] at *4*.

On appeal, the Court of Appeals for the Third Circuit concluded that this litigation actually presented a case of first impression, allowing the appellate court to find that the DAPs had "antitrust standing to pursue overcharge damages from the Defendants-Appellees from whom they purchased egg products, regardless of whether those products were made with internal eggs, non-conspirator eggs, or both." *In re Processed Egg Products Antitrust Litig., 881 F.3d 262, 276 (3d Cir. 2018)*. The court came to this conclusion because the purchasers in this case were bringing price-fixing claims against suppliers "from whom they directly purchased products that incorporate a price-fixed component." *Id. at 274* ("The direct relationship between the Purchasers and their Suppliers, and the fact that the Suppliers are alleged price-fixing conspirators and not merely competitors of those conspirators, are key distinctions from the scenario we confronted in *Mid-West Paper [Products Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979)]*.").

The court explicitly limited its holding to the issue of standing and remanded the case for this Court to decide whether the DAPs could "prove **[**11]** 'actual causation' with 'reasonable certainty,' and provide the trier of fact enough to 'make a reasonable estimate of damages.' *Id. at 276* (quoting *Mid-West Paper, 596 F.2d at 584 n.43*).

In light of this ruling, the defendants filed both joint and individual motions for summary judgment.

LEGAL STANDARD

Summary judgment is appropriate only when the record fails to demonstrate a genuine dispute as to material fact that would permit a reasonable jury to find for the nonmoving party. *Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *Inter Vest, Inc, v. Bloomberg, L.P., 340 F.3d 144, 159 (3d Cir. 2003)* ("The movant's burden on a summary judgment motion in an antitrust case is no different than in any other case."). "The moving party may meet its burden on summary judgment by showing that the nonmoving party's evidence is insufficient to carry the burden of persuasion at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The nonmoving party must point to evidence—beyond the pleadings—showing that a genuine dispute as to an issue of material fact exists, necessitating at trial. *Id at 324*. "On summary judgment, the moving party need not disprove the opposing party's claim, but does have the burden to show the absence of any genuine issues of material fact." *Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1366 (3d Cir. 1996)* (citing *Celotex, 477 U.S. at 322-23*).

Summary judgment is not necessarily disfavored in the antitrust context, and the entry of summary judgment in favor of an antitrust defendant **[**12]** may actually be required in order to prevent lengthy and drawn-out litigation, which itself may have a chilling effect on competitive market forces. *Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 73 (3d Cir. 2010)*.

Joint Motion for Summary Judgment

"The primary issue actually before us on the antitrust claims is whether the plaintiffs have proffered sufficient evidence **[*506]** to raise a genuine issue of material fact as to whether the defendants' alleged antitrust violations caused harm to the plaintiffs." *Callahan v. A.E. V., Inc., 182 F.3d 237, 250 (3d Cir. 1999)*. "In other words, a plaintiff must prove a causal connection between the [antitrust violation] and actual damage suffered." *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc., 63 F.3d 1267, 1273 (3d Cir. 1995)*; *see also* *Rossi v. Standard Roofing, Inc., 156 F.3d*

452, 483 (3d Cir.1998) ("To recover damages, an antitrust plaintiff must prove causation, described in our jurisprudence as 'fact of damage or injury.'') (citations omitted).

The basis for the joint summary judgment motion here rests on whether the DAPs have demonstrated that a reduction in the overall supply of eggs *caused* an increase in the price of egg products. The DAPs' theory has always been that there was a conspiracy to reduce the total supply of eggs, which led to an increase in the price of both shell eggs and egg products. The DAPs rely on two main areas to support their claims. First, they rely on documentary evidence that they **[**13]** argue demonstrates that the defendants intended for the conspiracy to impact egg products prices. Second, they rely on Dr. Baye's expert report, which they contend is grounded in sound economic principles and shows hat the alleged conspiracy actually impacted egg products prices.

The defendants dispute that there is evidence that an aggregate reduction in the national flock[6] reduced the supply of liquid egg for the egg products industry. The defendants assert that the DAPs' failure to look at how liquid egg and egg products were specifically affected by the conspiracy means that the DAPs cannot prove causation.[7] The alleged misstep was caused by the fact that Dr. Baye used USDA data that encompasses nationwide egg production. According to the defendants, because "the USDA data that Dr. Baye relies upon include[s] far more than the eggs that go into egg products and far more producers than those who produce eggs destined for egg products, Dr. Baye cannot isolate the effect of the alleged conspiracy on the production of eggs available for processing into egg products [as opposed to those available for distributing shell eggs]." Defs.' Mot. for Summ. J. at 17 (Doc. No. 1812).

The defendants **[**14]** urge the Court not to consider shell eggs and egg products together and to consider a number of factors that make them inherently different. For example, it is undisputed that producers of egg products acquired raw egg from non-defendants (who are not alleged to be co-conspirators and were not UEP certified) and also that egg products producers entered into long-term output contracts, which means those shell eggs were always designated for egg products. At least one major egg products company used long-term, grain-based contracts to ensure a reliable supply of raw egg at prices immune **[*507]** from volatility in the shell egg market. The defendants also contend that Dr. Baye failed to consider increased production in Iowa. During the alleged conspiracy, the flock size in Iowa increased by 88% even though the flock size in the rest of the country only increased by 3%. This growth was allegedly due to long-term contracts between egg products companies and non-UEP certified egg producers. The defendants argue that Iowa's increase would have had a much larger impact on the egg products industry because Iowa is geographically favored for producing liquid egg.

All of this may be true. Indeed, the **[**15]** DAPs admit as much. However, the DAPs have also produced evidence that allows them to argue that an overall reduction in the supply of eggs could have affected egg products prices. There is some documentary evidence to support looking at the overall reduction in the supply of eggs and considering its impact on egg products. Furthermore, Dr. Baye accounted for many of the factors that the defendants argue would have impacted egg products when he calculated the damages as to each of the 68 types of shell eggs and egg products he tested.

I. Documentary Evidence

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[6] For the purposes of this motion only, the defendants do not quarrel with the DAPs' contention that nationwide production of eggs was lower from August 2005 to December 2012, relative to Dr. Baye's benchmark period. Defendants' Mot. for Summ. J. at 14 n.4 (Doc. No. 1812).

[7] This argument is best demonstrated with a hypothetical involving 100 eggs laid. Prior to the conspiracy, 50 of these eggs were used for shell eggs and 50 were used for egg products. After the conspiracy, the number of eggs laid (hypothetically) decreased to 80. The fact that there are only 80 eggs available after the conspiracy does not necessarily mean that 40 were allotted for shell eggs and 40 for egg products. It could be that 30 became shell eggs and 50 were used in egg products, meaning that egg products might not have been affected by the alleged conspiracy at all.

Although it ought to go without saying, the DAPs resist the notion that the Court does have some appreciation for food stuffs to remind the Court that eggs are a necessary prerequisite to egg products. Thus, if there are less overall eggs available, there are inherently less eggs available for egg products.

In the past, demonstrating at least a rudimentary appreciation for recipes, this Court has noted that "it also takes more than eggs to make egg products." *In re Processed Egg Prods. Antitrust Litig., 312 F.R.D. 171, 200 (E.D. Pa. 2015)*. There is, however, some evidence that egg producers considered eggs used for shell eggs and egg products to be somewhat fungible. Statements indicate that industry insiders **[**16]** viewed them together, i.e., as a commodity. *See* Don Bell Presentation on Supply/Demand Challenges, at 2384, DAP Ex. 29 (stating "An egg is an egg is an egg" and "In one way or another, every egg produced impacts prices."); Gene Gregory Deposition Tr. 558:9-12, DAP Ex. 8 (discussing the egg market as "just one pie"). Some producers, such as Rose Acre, have the capacity to sell eggs as either shell eggs or breakers. Producers who have this capacity decide how to sell the eggs based on whether there is a surplus of shell eggs or a change in price for breakers or egg products. *See* DAP Ex. 29, at 2385; Marcus Rust Deposition Tr. 237:3-13, 258: 2-13, DAP Ex. 32; Don Bell December 3, 2004 e mail, DAP Ex. 33.

The defendants also appear to credit what the DAPs characterize as the conspiracy with increasing the price of both shell eggs and egg products. *See* Gene Gregory, An Economic Perspective, DAP Ex. 21. In a 2007 review of egg prices, Gene Gregory of UEP wrote that the industry was benefiting from "record egg prices." Jan. 3, 2008 United Voices, at 619780, DAPs Ex. 42. Mr. Gregory partially attributed those prices to the fact that the "UEP's animal welfare guidelines continued to reduce the number of hens per house." *Id.* He further concluded that **[**17]** "[shell] egg prices likely were the driving force for all forms of eggs." *Id.* In a 2004 earnings call, Michael Foods told investors that "Urner Barry shell egg prices rose by about 35 percent year-over-year in the first-quarter, pushing certain products quite a bit higher as well," and industrial egg product profits were "enhanced by record market-driven price environment as these products are priced off of the Urner **[*508]** Barry markets." Michael Foods Q2 2004 Earnings Call, at 11182-83, DAP Ex. 34.

Defendant Rose Acre likewise partially attributed an increase in egg product prices to increased production costs caused by the animal welfare program. May 30, 2007 Rose Acre Letter, DAP Ex. 37. Rose Acre decision-makers were also allegedly upset before Michael Foods began participating in the UEP program because the company's representatives felt that Michael Foods was reaping the benefits of higher egg product prices without decreasing its own flock size. Marcus Rust April 21, 2006 e-mail, DAP Ex. 40.

The defendants refute the admissibility[8] of most of the documentary evidence. For example, when certain defendants credited the animal welfare program with increased prices, they did so along with **[**18]** a multitude of other reasons, such as ethanol driving up grain prices and better management in response to changes in supply and demand. DAP Ex. 42. The defendants argue that statements like "An egg is an egg is an egg," DAP Ex. 29, or "the egg market is just one pie," DAP Ex. 8, make for pithy phrases but say almost nothing about the production of shell eggs and egg products or how they relate with one another. Furthermore, although it is possible for companies like Rose Acre to "switch hit" by moving eggs from shell eggs to egg products and vice versa, there is no evidence as to how often this happens and to what extent. The Court notes that, although the defendants may be correct that the DAPs are misinterpreting the documentary evidence, this is ultimately an issue for the factfinder, or at least for **[*509]** evaluation when the claim and defenses take their final shape at trial.

"Evidence submitted with a motion for summary judgment must be reducible to admissible evidence at trial." *Agrizap, Inc. v. Woodstream Corp., 450 F. Supp. 2d 562, 567 (E.D. Pa. 2006)* (citing *Williams v. Borough of West*

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[8] The defendants argue that, in addition to being irrelevant, many of the exhibits that the DAPs attached to their response are inadmissible hearsay. For example, the DAPs cite to twelve UEP United Voices newsletters. *See* DAP Exs. 4, 5, 10, 12, 13, 14, 20, 31, 42, 43, 44, & 51. During the DPPs' trial, the Court ruled that these documents contained inadmissible hearsay as to the producer Defendants and could only be admitted for the limited purpose of notice of the statements contained in them and not the truth of the statements themselves. *See* *In re Processed Egg Prods. Antitrust Litig., 08-MD-2002, 2018 U.S. Dist. LEXIS 59633, 2018 WL 1725802, *2-3 (E.D. Pa. Apr. 9, 2018)*.

Chester, 891 F. 2d 458, 465 n.12 (3d Cir. 1989)). The Court notes that "the Federal Rules of Evidence are to be liberally construed in favor of admissibility . . ." United States v. Pelullo, 964 F.2d 193, 204 (3d Cir. 1992). In this case, the Court conditionally **[**19]** admits the evidence for two reasons. First, unlike in the DPPs case, every document cited was authored by a current defendant, making the documents non-hearsay party admissions as to some party at least. Fed. R. Evid. 801(d)(2)(A). The Court notes that, in this regard, limiting instructions may be needed. Second, however, those statements appear, pending further evidence, to be admissible against co-defendants because they are statements of co-conspirators made in the furtherance of the conspiracy. Fed. R. Evid. 801(d)(2)(E).

Co-conspirator statements are admissible under the exemption when the district court finds by a preponderance of the evidence that: "(1) a conspiracy existed; (2) the declarant and the party against whom the statement is offered were members of the conspiracy; (3) the statement was made in the course of the conspiracy; and (4) the statement was made in furtherance of the conspiracy." United States v. Ellis, 156 F.3d 493, 496 (3d Cir. 1998); In re Flat Glass Antitrust Litig., 385 F.3d 350, 375 (3d Cir. 2004). A district court "has 'considerable discretion' to admit the statements conditionally, subject to their later being connected up." In re Domestic Drywall Antitrust Litig., 163 F. Supp. 3d 175, 201 (E.D. Pa. 2016) (quoting United States v. Mobile Materials, Inc., 881 F.2d 866, 869 (10th Cir. 1989)). This Court chooses to exercise such discretion at this juncture, though this is without prejudice for further argument should circumstances warrant.

II. Expert Report

The DAPS rely on their **[**20]** expert, Dr. Baye, to prove that both shell eggs and egg products were affected by the alleged conspiracy.[9] There is no dispute that the types of models Dr. Baye used are considered sound if used properly. PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTIRUST LAW: AN ANALYSIS OF ANTIRUST PRINCIPLES AND THEIR APPLICATION ¶ 399c (3rd and 4th Eds. 2010-2018) (stating that multiple regression analysis has been deemed reliable so long as it is used in a reliable fashion).[10] However, the Court recognizes that regressions do not demonstrate causation in and of themselves. A regression "may suggest that one variable is related to or correlated with another, but this does not translate directly into a causal effect." *Id.* at ¶ 394d. "Causation must be based on some justification rooted in economic theory. Regression alone cannot satisfy the requirements for proving causality. Rather, regression analysis enables us to empirically test a hypothesis based on what economic theory would predict." *Id.*

Dr. Baye analyzed egg products more closely than the DPPs' expert, Dr. Rausser. *See* In re Processed Egg Prods. Antitrust Litig., 312 F.R.D. at 200 (concluding at the class certification consideration stage that the industry analysis of egg products in the **[**21]** DPPs' case lacked rigor). Which is not to say he looked at them with the same depth that he considered shell eggs. He did not. The DAPs for the most part emphasize one paragraph of Dr. Baye's

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[9] The defendants did not challenge Dr. Baye's expert report under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); however, this does not preclude the defendants from arguing that his opinions do not establish a genuine issue of material fact. In *Daubert*, the Supreme Court of the United States explicitly concluded that "conventional devices" such as directed verdict and summary judgment "are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702." 509 U.S. at 596. "Even a theory that might meet certain *Daubert* factors, such as peer review and publication, testing, known or potential error rate, and general acceptance, should not be admitted if it does not apply to the specific facts of the case." Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1056 (8th Cir. 2000) (citing Kumho Tire Co., Ltd. v. Carmichael, 526 U.S., 137, 154, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999); General Elec. Co. v. Joiner, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997)) (internal footnote omitted).

[10] Courts have found a multiple regression analysis to be useful in quantifying the relationship between a dependent variable and independent variables. In re Se. Milk Antitrust Litig., 739 F.3d 262, 285 (6th Cir. 2014) (citing Weisfeld v. Sun Chem. Corp., 84 Fed. Appx. 257, 261 n.3 (3d Cir. 2004)). "This type of model can also 'control for other independent variables so as to isolate and identify the effect of a single independent variable on the dependent variable.'" *Id.* (quoting Weisfeld, 84 Fed. Appx. at 261 n.3).

report that they say adequately addresses the issue of causation. Dr. Baye Expert Report P 194. There is no doubt that the DAPs could have—and perhaps will later find they should have—focused more on the ins and outs of the egg products industry. As much as the DAPs argue that the egg market is all one pie (or, perhaps, quiche), it is not clear that this is true. There are undoubtedly different realities when it comes to making egg products than there are when it comes to producing shell eggs.

With that being said, Dr. Baye looked at how producers decide which eggs remain shell eggs and which become egg products, how egg products are processed, the entire spectrum of egg producers, demand for egg products, and the substitutability of **[*510]** shell eggs and egg products. He found that some producers, like Rose Acre, have the ability to shift eggs between shell eggs and egg products.[11] Dr. Baye also looked at Michael Foods, a major producer of egg products, specifically.

Finally, he also considered the impact **[**22]** of the alleged conspiracy on 68 different types of shell eggs and egg products. In doing so, he allowed, as he necessarily would have to, for the possibility that the conspiracy would not affect every product in the same way, if at all. Dr. Baye asserts that this method eliminated the impact of other supply and demand factors and it measured the precise extent to which the overall egg reduction impacted each egg product at issue. He found that each product responded differently, but that the conspiracy was statistically significant in each.

III. A Reasonable Jury Could Conclude that a Reduction in the Overall Supply of Eggs Caused an Increase in the Price of Egg Products

Based on the documentary evidence and Dr. Baye's report, the Court cannot say that a jury would be unreasonable to find in favor of the DAPs, especially considering that the DAPs must benefit from all reasonable inferences at this stage *See* *In re Se. Milk Antitrust Litig., 739 F.3d at 283-86* (reversing grant of summary judgment and concluding that evidence of a conspiracy and a regression analysis was sufficient evidence to submit to a jury); *Rozema v. Marshfield Clinic, 977 F. Supp. 1362, 1381 (W.D. Wis. 1997)* (denying summary judgment even though the district court was not thoroughly convinced by the expert). The defendants direct the **[**23]** Court to examples of cases in which courts concluded that an expert's analysis was insufficient to prove causation; however, those cases are distinguishable from the facts currently before this Court. *See Stelwagon, 63 F.3d 1267*; *In re eBay Seller Antitrust Litig., 433 Fed. Appx. 504 (9th Cir. 2011)*.

In *Stelwagon*, the Court of Appeals for the Third Circuit reversed a jury verdict awarding treble damages for failure to prove causation. *63 F.3d at 1275*. The case involved a claim under the *Robinson-Patman Act*, which prohibits anticompetitive price discrimination. The court concluded that the plaintiff's expert's opinions were insufficient in and of themselves to support a finding of actual damage. *Id.* The court found that the only other evidence of causation, anecdotal testimony from the plaintiff's employees, should not have been admitted. *Id. at 1274-75*. In particular, the court was troubled that the expert did not consider reasons why the plaintiff may have lost sales other than the price discrimination, such as plaintiffs higher overhead costs. *Id. at 1275*. Furthermore, the plaintiff undisputedly experienced other business complications, such as an embezzlement scheme, during the relevant time period. *Id.* Notably, the court did not agree with the defendant that the district court erred in admitting the **[**24]** expert's testimony at trial, or in failing to strike the testimony in response to a motion by the defendant at the conclusion of the direct examination. *Id.*

In *eBay*, the plaintiffs alleged that eBay charged "supracompetitive" fees for its online auction platform, which resulted in antitrust injury. *In re eBay Seller Antitrust Litig., 07-cv-1882, 2010 U.S. Dist. LEXIS 19480, 2010 WL 760433, at *10 (N.D. Ca. Mar 4, 2010)*. The plaintiffs' expert used eBay's "take rate"—a **[*511]** measure of the fees that eBay collected across all of its transactions—and compared it to what eBay's take rate would have been but for the alleged overcharge in fees, which meant that the expert used the take rate as a proxy for eBay's fees. *2010 U.S. Dist. LEXIS 19480, [WL] at *12-14*. The take rate, however, was determined not only by eBay's fees but also

[11] The Court again notes that it is not entirely clear how much or how often or under what circumstances this happens.

by other factors such as the volume of goods sold on its site, the number of total listings, the number of successful listings, the features that sellers use to present their listings to potential buyers, and eBay's rate schedule. *2010 U.S. Dist. LEXIS 19480, [WL] at *13*. As such, it was undisputed that the expert's model did "not measure fees, or at the very least [did] not measure them alone" and, thus, was insufficient to present to a jury. *2010 U.S. Dist. LEXIS 19480, [WL] at *14*. The Court of Appeals for the Ninth Circuit affirmed the district court's grant of **[**25]** summary judgment because the model did "not connect the allegedly anticompetitive acts with the charging of supracompetitive fees." *433 F. App'x at 506*.

This case is different because Dr. Baye's model accounted for many of the discrepancies the defendants are now raising. Although the defendants contend that many of the eggs used in egg products comes from non-certified producers, Dr. Baye concluded that non-certified producers account for a small share of egg production and that it was unlikely that non-certified producers would have been able to counteract the effects of the alleged conspiracy.[12] The DAPs also argue that, by using the USDA data for total egg production, Dr. Baye inherently included eggs produced in Iowa and those bound for in-line facilities in his calculations. Dr. Baye also controlled for factors such as grain prices and national income. If those factors had impacted the price of egg products, as opposed to the conspiracy, he contends that his model would have shown an impact of zero. According to Dr. Baye, there is a less than 1% chance his model found an effect when there was not one. It remains for the jury to decide which of these competing explanations carry the day.

Furthermore, **[**26]** unlike in *Stelwagon*, the DAPs do not rely entirely on Dr. Baye's report. They also rely on the documentary evidence, which the Court is required at this time to interpret in favor of the DAPs. An expert report, in addition to other evidence, can provide enough to bolster a plaintiff's case in the face of summary judgment. *Callahan, 182 F.3d at 260* (reversing a grant of summary judgment on antitrust claims because the court was satisfied that the expert report, in conjunction with other evidence, "constitutes sufficient evidence of causation"); *Rossi, 156 F.3d at 485-87* (same).

There is no dispute that this Court has been troubled in the past by the relative lack of attention the DAPs have paid to the differences between shell eggs and egg products. *See* *In re Processed Egg Prods. Antitrust Litig., 2016 U.S. Dist. LEXIS 119731, 2016 WL 4670983, at *3*. However, the Court made these observations in the context of whether the DAPs had standing and concluded they did not. At this juncture, the Court is now tasked instead with determining whether the **[*512]** DAPs have presented a genuine dispute of material fact regarding causation. Although it is clear enough that the Court is not thoroughly convinced of the DAPs' case, it need not be. *See* *Rozema, 977 F. Supp. at 1381* (denying summary judgment because the district court could not "say that a jury would be unreasonable to conclude from [the] expert report, combined with findings of a market allocation conspiracy and strong market power, that plaintiffs paid more . . . because of defendants' unlawful conduct").

This case is, undoubtedly, unique. It does not fit neatly into the mold of antitrust cases, leaving this Court to parse through a complicated set of facts and econometric models to determine whether a reasonable jury could rule in the DAPs' favor. "[O]ur jurispudence does not require the summary judgment opponent to match, item for item, each piece of evidence proffered by the movant, but rather he or she must only exceed the 'mere scintilla' standard." *Rossi, 156 F.3d at 466* (citations and some quotations omitted); *see also* *Callahan, 182 F.3d at 253*. Indeed, this uniqueness, in part, makes it an excellent candidate—again—for trial and again the cause for additional development of antirust law outside the mold. The defendants make compelling arguments, but these arguments are better suited for a jury. The defendants can raise these arguments again at trial as "[v]igorous cross-

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[12] The defendants also argue that summary judgment is warranted because the DAPs cannot establish a causal link between the alleged conspiracy and higher Urner Barry prices. Dr. Baye calculated damages based on the Urner Barry price sheets, which reflect market-wide transactions, but the defendants contend that he did not look at how the pricing decisions of at least 15 non-defendants who sold processed egg products impacted Urner Barry. At most, the defendants argue that Dr. Baye's model shows a correlation between a decrease in the overall number of eggs and an increase in egg product prices. Because Dr. Baye concluded that non-certified producers would not have been able to counteract the effects of the alleged conspiracy, this creates a material dispute of fact.

examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert, 509 U.S. at 596*.

INDIVIDUAL DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Rose Acre, Cal-Maine, R.W. Sauder, UEP, and USEM also filed individual motions for summary judgment.[13] They argue that, under the opinion by the Court of Appeals for the Third Circuit, some or all of the DAPs lack standing to make claims against them because those DAPs did not purchase egg products from those defendants. **[**27]** This reading plucks favorable language from the opinion, however, and is incompatible with the well-settled principle of joint and several liability in ***antitrust law***.

In its opinion, the Court of Appeals for the Third Circuit stated, "In sum, we conclude that Plaintiffs-Appellants have antitrust standing to pursue overcharge damages from the Defendants-Appellees from whom they purchased egg products, regardless of whether those egg products were made with internal eggs, non-conspirator eggs, or both." *In re Processed Egg Products Antitrust Litig., 881 F.3d at 276*. The defendants particularly focus on the phrase "from whom they purchased egg products" (and other similar phrasing in the opinion)[14] and argue that each DAP **[*513]** only has standing to bring egg product-related claims against the individual defendants they purchased egg products from directly.[15]

This interpretative reading is not in line with relevant case law. Under ***antitrust law***, a defendant who participated in a conspiracy can be liable for damages even if the plaintiff only purchased from the defendants' co-conspirators and not from the defendant itself. *See* *Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 646, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981)*; *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 448 (3d Cir. 1977)*; *Paper Systems Inc. v. Nippon Paper Indus. Co., Ltd., 281 F.3d 629, 632-34 (7th Cir. 2002)*; *In re Linerboard Antitrust Litig., 203 F.R.D. 197, 208 (E.D. Pa. 2001)*, *aff'd* ***[**28]*** , *205 F.3d 145 (3d Cir. 2002)*. "The fact that a customer has not made purchases from every co-conspirator does not prevent him from suing all for each co-conspirator contributed to the charging of the supracompetitive price paid by the purchaser." *Bogosian, 561 F.2d at 448*. This principle of "joint and several liability simply ensures that the plaintiffs will be able to recover the full amount of damages from some, if not all, participants." *Texas Indus., 451 U.S. at 646*.

In *Nippon Paper*, Judge Easterbrook of the Court of Appeals for the Seventh Circuit addressed a set of facts suitably analogous to the ones at hand. In that case, the plaintiffs alleged that Nippon Paper participated in a conspiracy to reduce the output—and raise prices—of thermal facsimile paper. *Nippon Paper Indus., 281 F.3d at 632*. Although the companies that directly purchased from Nippon Paper opted not to participate in the lawsuit, the court concluded that the district court improperly dismissed Nippon Paper from the case. *Id.* The court reasoned that the plaintiffs, who purchased from co-conspirators, were entitled "to collect damages not just firm-by-firm according to the quantity each sold, but from all conspirators for all sales." *Id.* The Court further explained that, if "Nippon Paper participated in a cartel of thermal fax **[**29]** paper . . . then it is jointly and severally liable for the

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[13] R.W. Sauder's motion (jointly filed with then-defendant Ohio Fresh) is filed at Doc. No. 1808. UEP and USEM filed a notice joining R.W. Sauder's motion. Doc. No. 1810. Rose Acre's motion is filed at Doc. No. 1811. And Cal-Maine's motion is docketed at Doc. No. 1813.

[14] *See e.g.* *In re Processed Egg Products Antitrust Litig., 881 F.3d at 274* ("Crucially, unlike the plaintiff in *Mid-West Paper*, who sued price-fixing suppliers *from whom it made no purchases and with whom it had no direct relationship*, here the Purchasers are pressing claims against price-fixing suppliers from whom they directly purchased products that incorporate a price-fixed component.") (emphasis in original); *id.* ("The direct relationship between the Purchasers and their Suppliers, and the fact that the Suppliers are alleged price-fixing conspirators and not merely competitors of those conspirators, are key distinctions from the scenario we confronted in *Mid-West Paper.*"); *id. at 275* ("Here, the Purchasers are in a direct relationship with the antitrust violators and seek to recover for higher prices set by those violators, and paid by the Purchasers to those very parties.").

[15] In their individual motions, each defendant outlined which DAPs never purchased egg products directly from that defendant. Those relationships are summarized in the Background section of this Memorandum. *See supra* pp. 4-5.

cartel's entire overcharge. That the plaintiffs did not buy from Nippon Paper directly, or at all, does not matter." *Id. at 634*. The only thing that mattered was whether "Nippon Paper's direct customers [held] the exclusive right to damages for its own output," thereby satisfying "the holding and goals of *Illinois Brick [Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)]*" by preventing double recovery. *Id.*

In this case, the defendants ask the Court to ignore relevant case law and interpret the language from the Court of Appeals for the Third Circuit as a "newly articulated test." Ohio Fresh Eggs & R.W. Sauder's Individual Motion for Summary Judgment, p. 3 (Doc. No. 1808). However, the court did not explicitly or implicitly state that it was creating a new test for antitrust standing. Nor did it overrule (or even address) the principle of joint and several liability in antitrust case law. As such, this Court reads the Court of Appeals' opinion for what it says: that the DAPs have antitrust standing to pursue egg products claims.[16]

[*514] Furthermore, like in *Nippon Paper*, this case does not present a situation in which the DAPs may potentially recover twice for their purchases of egg products. **[**30]** The DAPs allege that the defendants conspired to reduce the supply of eggs and thereby increase the price of egg products. The individual DAPs can only recover damages for the egg products they actually purchased and they can do so only once from defendants who are found to have participated in the conspiracy. Those defendants are jointly and severally liable for damages that resulted from the conspiracy. This is true even if an individual defendant did not directly sell egg products to an individual plaintiff.

CONCLUSION

For the foregoing reasons, the Court will deny the outstanding joint and individual motions for summary judgment. An appropriate Order follows.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

UNITED STATES DISTRICT JUDGE

ORDER

AND NOW, this 11th day of June, 2019, upon consideration of Defendants' Joint Motion for Summary Judgment (Doc. No. 1812), the responses and replies thereto (Doc. Nos. 1817, 1824, 1825, and 1826), certain individual Defendants' Motions for Summary Judgment (Doc. Nos. 1808,[1] 1811, and 1813), the responses and replies thereto (Doc. Nos. 1818, 1823, and 1827), and following oral argument on December 19, 2018, it is **ORDERED** that the Motions (Doc. Nos. **[**31]** 1808, 1811, 1812, and 1813) are **DENIED** for the reasons set forth in the accompanying Memorandum.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

UNITED STATES DISTRICT JUDGE

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[16] Under the defendants' interpretation, UEP and USEM could never be held liable for their participation in a conspiracy because those entities do not sell eggs or egg products. It is unreasonable to think that UEP and USEM could have participated in conspiratorial conduct but are protected from contributing to any damages by what would essentially be a loophole.

[1] United Egg Producers, Inc. and United States Egg Marketers, Inc. joined this motion by notice filed at Doc. No. 1810.

Provepharm, Inc. v. Akorn, Inc.

United States District Court for the Eastern District of New York

June 11, 2019, Decided; June 11, 2019, Filed

17-CV-7087(SJF)(AKT)

Reporter
2019 U.S. Dist. LEXIS 98719 *; 2019-1 Trade Cas. (CCH) P80,825; 2019 WL 2443185

PROVEPHARM, INC., Plaintiff, -against- AKORN, INC., Defendant.

Prior History: Provepharm, Inc. v. Akorn, Inc., 2018 U.S. Dist. LEXIS 235692 (E.D.N.Y., Dec. 13, 2018)

Core Terms

methylene blue, counterclaims, patent, monopolization, revised, monograph, quotations, inter alia, alleges, anticompetitive conduct, relevant market, motion to dismiss, disclose, manufacture, technology, antitrust, products, amend, factual allegations, monopoly power, manufacturing process, patent rights, Sherman Act, anticompetitive, counterclaim-defendant, methemoglobinemia, pleadings, probability, intellectual property rights, market power

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For American Regent, Inc., Claus Weisemann, Interested Parties: Adrienne M. Hollander, LEAD ATTORNEY, Arent Fox LLP, New York, NY.

For Akorn, Inc., Counter Claimant: Robert Laurent Joyce, LEAD ATTORNEY, LITTLETON JOYCE UGHETTA PARK & KELLY LLP, Purchase, NY; Taras Gracey, LEAD ATTORNEY, PRO HAC VICE, Polsinelli, Chicago, IL; Eric Jay **[*2]** Goldberg, Littleton Joyce Ughetta Park & Kelly LLP, New York, NY; Hong P. Nguyen, PRO HAC VICE, Polsinelli LLP, Palo Alto, CA; Mark Deming, PRO HAC VICE, Polsinelli PC, Chicago, IL.

Judges: Sandra J. Feuerstein, United States District Judge.

Opinion by: Sandra J. Feuerstein

Opinion

ORDER

FEUERSTEIN, District Judge:

I. Introduction

On December 5, 2017, plaintiff Provepharm, Inc. ("plaintiff" or "Provepharm") commenced this action against defendant Akorn, Inc. ("defendant" or "Akorn"), seeking, *inter alia*, damages and injunctive relief for Akorn's allegedly false advertising of its methylene blue product in violation of *Section 43(a)* of the *Lanham Act*, *15 U.S.C. § 1125(a)*, and *Section 350-e(3) of the New York General Business Law*; unfair competition in violation of *Section 43(a)* of the Lanham Act, *15 U.S.C. § 1125(a)*, and the common law; and deceptive trade practices in violation of *Section 349(h) of the New York General Business Law*.[1] Issue was joined by the service of an answer on behalf of Akorn on or about February 5, 2018. On August 27, 2018, Akorn served an amended answer, *inter alia*, asserting two (2) counterclaims against Provepharm seeking damages and injunctive relief for Provepharm 's alleged monopolization and attempted monopolization of the methylene blue market in the United States in violation of *Section 2* of the *Sherman Act*, *15 U.S.C. § 2*. Pending before **[*3]** the Court, *inter alia*, are Provepharm' s motion to dismiss Akorn's counterclaims in their entirety pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* for failure to state a claim for relief; and Akorn's motion pursuant to *Rule 15(a)(2) of the Federal Rules of Civil Procedure* to amend its counterclaims. For the reasons set forth below, Provepharm's motion to dismiss is denied and Akorn's motion to amend is granted.

II. Background

A. Factual Allegations[2]

This case concerns the drug methylthioninium chloride, also known as methylene blue, (Counterclaim ["Countercl."], ¶ 8; Proposed Amended Counterclaims ["PAC"], ¶ 8), which was originally developed in the nineteenth (19th) century and has been used clinically as both a dye and a medication to treat a variety of conditions, including methemoglobinemia. (Complaint ["Compl."], ¶ 14; Amended Answer ["Am. Ans."], ¶ 14; *see also* Countercl., ¶ 8; PAC, ¶ 8). Methemoglobinemia is a rare and life-threatening disorder in which blood cells produce an abnormal amount of methemoglobin, which is a modified form of hemoglobin. (Compl., ¶ 12; Am. Ans., ¶ 12; *see also* Countercl., ¶ 8; PAC, ¶ 8). Since the hemoglobin in patients with methemoglobinemia cannot effectively release oxygen to body tissues, those tissues may be deprived of an adequate **[*4]** oxygen supply, leading to tissue hypoxia. (Compl., ¶ 13; Am. Ans., ¶ 13). Thus, patients with methemoglobinemia can experience cardiac, pulmonary, and neurological symptoms; and, in severe cases, death. (Compl., ¶ 13; Am. Ans., ¶ 13). Patients with acquired methemoglobinemia can be treated by delivering a solution of methylene blue intravenously, thereby restoring the iron in hemoglobin to its normal oxygen-carrying state. (Compl., ¶ 14; Am. Ans., ¶ 14; *see also* Countercl., ¶ 8; PAC, ¶ 8).

Although the only use for methylene blue that is approved by the United States Food and Drug Administration ("FDA") is for the treatment of methemoglobinemia, "today methylene blue is used by healthcare providers for a multitude of unapproved indications, for example as an antidote for cyanide poisoning, and is often a component in other medications." (Countercl., ¶ 8; PAC, ¶ 8).

On its website, Akorn describes itself as "a niche pharmaceutical company that develops, manufactures and markets generic and branded prescription pharmaceuticals as well as animal and consumer health products[,] . . . [which] specialize[s] in difficult-to-manufacture sterile and no-sterile dosage forms including: ophthalmics, **[*5]** injectables, oral liquids, optics, topicals, inhalants, and nasal sprays." (Compl., ¶ 33; Am. Ans., ¶ 33). Akorn originally began marketing methylene blue in 2009. (Compl., ¶ 34; Am. Ans., ¶ 34).

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[1] This case was originally assigned to the Honorable Arthur D. Spatt, United States District Judge. On October 3, 2018, Judge Spatt entered an order of recusal and the case was reassigned to the undersigned.

[2] The factual allegations in the counterclaims are assumed to be true for purposes of this motion and do not constitute findings of fact by the Court.

Provepharm is a competitor of Akorn in connection with the sale of methylene blue injection products in the United States. (Countercl., ¶ 4; PAC, ¶ 4).

Until 2016, all companies that manufactured and sold methylene blue did so under a "grandfather" status, which exempts pre-existing drugs meeting certain criteria from the requirements: (i) of having an approved New Drug Application ("NDA") under legislation enacted in 1938; and (ii) of proving effectiveness under legislation enacted in 1962. (Counterc ¶¶ 9-11; PAC, ¶¶ 9-11). Akorn sold its methylene blue products in the United States under thi "grandfather" status for decades. (Countercl., ¶¶ 11, 31; PAC, ¶¶ 11, 36).

Provepharm, whose parent companies are based in France, "developed a process to manufacture a purer form of methylene blue" that would comply with the stricter limitations for metal catalyst impurities adopted by European regulatory bodies, and "obtained several patents purportedly covering their manufacturing process for the purer **[*6]** form of methylene blue" (the "Methylene Blue Patents"). (Countercl., ¶ 14; PAC, ¶ 14; *see also* Declaration of Kathy Grant ["Grant Decl."], Ex. 6-8[3]).

In 2011, Provepharm obtained approval from the European Medicines Agency to market its methylene blue product in Europe, (Countercl., ¶ 15; PAC, ¶ 16); and sought to obtain FDA approval of an NDA to market a "drug product in which methylene blue is the active pharmaceutical ingredient ('API')" under *Section 505(b)(2)* of the *Food, Drug, and Cosmetic Act ("FDCA")*. (Countercl., ¶¶ 16-17; PAC, ¶¶ 16-18). Provepharm ultimately obtained FDA approval for its drug product, ProvayBlue® methylene blue injection USP ("ProvayBlue®"), on April 8, 2016. (Compl., ¶ 1; Am. Ans., ¶ 1; Countercl., ¶ 17; PAC, ¶ 18). According to Akorn, "[a]fter Provepharm obtained approval for ProvayBlue®, Akorn and others cannot market methylene blue in the United States unless they file and obtain approval of their own NDA or otherwise received exemptions from such requirements from FDA." (Countercl., ¶ 31; PAC, ¶ 36).

In approving Provepharm's NDA, the FDA also awarded ProvayBlue® Orphan Drug Exclusivity ("ODE")[4] for the treatment of pediatric and adult patients with acquired methemoglobinemia. **[*7]** (Countercl., ¶¶ 19, 21; PAC, ¶¶ 20, 22). ODE runs for a period of seven years, during which the FDA "will not approve any other NDAs for the same API for the sam condition." (Countercl., ¶ 19; PAC, ¶ 20). However, the FDA may "approve other NDAs for t same API if they are directed to other conditions and do not include the orphan condition." (Countercl., ¶ 19; PAC, ¶ 20). Thus, although the FDA "cannot approve any other NDAs for the use of methylene blue to treat pediatric and adult patients with acquired methemoglobinemia until April 8, 2023[,] . . . [it can] approve other NDAs for the use of methylene blue for any other indication. . . ." (Countercl., ¶¶ 21, 32; PAC, ¶¶ 22, 37).

However, according to Akorn, "[w]hile Provepharm was obtaining approval from the FDA for ProvayBlue®, it was also soliciting the United States Pharmacopeia ('USP') to revise the official monograph for the API classified as methylene blue" in order to "foreclose any others from pursuing NDAs for the use of methylene blue for other indications."[5] (Countercl., ¶ 22; PAC, ¶ 23). Specifically, "[o]n or about May 24, 2013, Provepharm requested that

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[3] Since the counterclaims and proposed amended counterclaims specifically refer to United States Patent Nos. 9,227,945, dated January 5, 2016; 8,765,942, dated July 1, 2014; and 8,815,850, dated August 26, 2014, (Countercl., ¶ 14; PAC, ¶ 14), those exhibits are properly considered on this motion, as set forth below.

[4] According to Akorn, "ODE is available to new drug products for which the approved indication is a disease or condition affecting fewer than 200,000 people in the United States, or if greater than 200,000 people, then there is no reasonable expectation that costs of research and development of the drug for the indication can be recovered by sales of the drug in the United States." (Countercl., ¶ 19; PAC, ¶ 20).

[5] According to Akorn, the USP "is a scientific nonprofit organization that sets standards for identity, strength, quality, and purity of medicines, food ingredients, and dietary supplements that are manufactured, distributed and consumed worldwide[,] . . . [which] are enforceable in the United States by the FDA . . . [and] are recognized and required under federal law." (Countercl., ¶ 23; PAC, ¶ 24). "When such medicines comply with the USP-NF [United States Pharmacopeia and National Formulary] standards, the products may be marketed and labelled as USP-compliant, generally by including 'USP' after the product name." (Countercl., ¶ 24; PAC, ¶ 25). According to Akorn, "[t]hat was how [its] methylene products were labeled because they complied at all times with the then-current USP-NF until Provepharm instigated the November 2016 changes." (PAC, ¶ 25).

USP revise the criteria for methylene blue API and methylene blue **[*8]** injection, *i.e.*, a sterile solution of methylene blue in water for injection, to include the pentahydrate form of methylene blue—a different hydrate form of methylene blue that purportedly results from Provepharm's manufacturing process—and to change the standardized assay for other hydrate forms." (Countercl., ¶ 22; PAC, ¶ 23; Grant Decl., Ex. 17[6]).

"As a public standards-setting organization, the USP has an express policy of impartiality and of not favoring one manufacturer over another in setting its standards." (Countercl., ¶ 25; PAC, ¶ 26; Grant Decl., Ex. 4-5[7]). According to Akorn, in order "[t]o ensure impartiality and its policy of not favoring any one manufacturer over another, and 'because USP's standards are intended to be public standards available for the use and benefit of all parties, USP requests that sponsors disclose in their Requests for Revision whether any portion of the methods or procedures submitted is subject to patent or other sponsor-held intellectual property rights.'" (Countercl., ¶ 25; PAC, ¶ 27) (quoting Submissions Guideline at Grant Decl., Ex. 4).

Akorn alleges that Provepharm: (i) "violated clear USP rules and policies when it concealed the fact that [it] **[*9]** owned patents for the manufacturing process necessary to produce methylene blue in the form that [it] urged USP to adopt as [the] standard for methylene blue[,]"[8] (Countercl., ¶ 28; PAC, ¶ 29); (ii) "falsely asserted that the FDA required the inclusion of Provepharm's proposed methods and specifications[,]" (Countercl., ¶ 29; PAC, ¶ 34); and (iii) "failed to inform USP that the proposed methods and specifications 'required' by the FDA were originally proposed by Provepharm[] . . . [and] that in order to meet the 'required,' proposed specifications using the proposed methods, a company would necessarily need to manufacture methylene blue API using manufacturing processes allegedly covered by [Provepharm's Methylene Blue Patents]." (Countercl., ¶ 29; PAC, ¶ 34).

On July 29, 2016, "USP posted revisions for the methylene blue monographs, which required Provepharm's proposed specifications and assay testing method, and later adopted the revised monographs[,]" as a result of which "no other drug manufacturer can file an NDA having methylene blue API without producing the API in accordance with manufacturing processes allegedly covered by [Provepharm's Methylene Blue Patents]." **[*10]** (Countercl., ¶ 30; PAC, ¶ 35; *see also* Countercl., ¶ 32; PAC, ¶ 35). Akorn alleges that "as a result of Provepharm

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[6] Since the counterclaims and proposed amended counterclaims specifically refer to the documents included in plaintiff's Exhibit 17, (Countercl., ¶ 22; PAC, ¶ 23), those documents are properly considered on this motion, as set forth below.

[7] Since the counterclaims and proposed amended counterclaims specifically refer to the "USP Guideline for Submitting Requests for Revision to USP-NF, General Information for All Submissions" ("Submissions Guideline"), and the USP Code of Ethics, (Countercl., ¶ 25; PAC, ¶ 26), those documents are properly considered on this motion, as set forth below.

[8] In its proposed amended counterclaims, Akorn additionally alleges, *inter alia*, (i) that Provepharm's June 30, 2014 submission to USP, which "is a 151-page document in which the following sentence appears: 'Methylene Blue drug substance is manufactured by Provepharm manufacturers using the patented method licensed by the Applicant[,]'" (the "Patented Method Statement"), (PAC, ¶ 30; *see* Grant Decl., Ex. 1 at 2992), did not disclose the existence of the Methylene Blue Patents to USP because (A) "[t]he first of the Methylene Blue Patents did not issue until July 1, 2014," and, thus, did not exist at the time of the June 30, 2014 submission, and (B) "there was no license between Provepharm and any manufacturer of the methylene blue drug substance for the Methylene Blue Patents[,]" and, thus, the Patented Method Statement was false[,]" (PAC, ¶ 31); (ii) that the USP "did not, in fact, appreciate" the Patented Method Statement as a disclosure of the Methylene Blue Patents because (A) the Patented Method Statement "did not identify any specific patents or patent applications[,] . . . did not have enough information for USP to understand the situation with respect to the Methylene Blue Patents[,] . . . [and] was insufficient for USP to understand that the Methylene Blue Patents existed or their relevance to the proposed monograph revision[,]" and (B) "USP did not even notice the Patented Method Statement[,]" (*id.*, ¶ 32); (iii) that "[i]f USP had noticed the Patented Method Statement, and if the Patented Method Statement contained sufficient information for USP to understand the existence of the Methylene Blue Patents and their relevant [sic] to the proposed monograph revision, USP would have taken action to prevent the Methylene Blue Patents from affecting anyone's ability to use or meet a proposed revised monograph," including (A) requiring Provepharm to either abandon the Methylene Blue Patents or license them royalty-free, or, (B) if Provepharm refused, modifying the proposed monograph "so that the Methylene Blue Patents would not affect anyone's ability to use or meet a proposed revised monograph[,]" (*id.*, ¶ 33); and (iv) that "[b]ut for Provepharm's failure to disclose the Methylene Blue Patents to USP, the ability of anyone, including Akorn, to use or meet the proposed revised monograph would not be affected by the Methylene Blue Patents." (*Id.*).

successfully petitioning the USP to revise the monographs for methylene blue and methylene blue injection, Akorn and others cannot submit their own NDAs for approval to market methylene blue without risking being the subject of suits for patent infringement." (Countercl., ¶ 32; PAC, ¶ 37).

According to Akorn, "[t]he net result of Provepharm's two-pronged attack," (Countercl., ¶ 31; PAC, ¶ 36), *i.e.*, obtaining FDA approval of ProvayBlue® with ODE for the treatment of pediatric and adult patients with acquired methemoglobinemia, as well as revision of the USP official monographs for methylene blue, "was the effective monopolization of the market for methylene blue in the United States." (Countercl., ¶ 31; PAC, ¶ 36). Akorn alleges that it "was forced to exit the market for its methylene blue in October of 2016, as they no longer conformed with the revised USP monograph, leaving Provepharm as the sole source of methylene blue in the United States and thus holding a monopoly in the relevant market[,]" (Countercl., ¶ 33; PAC, ¶ 38); and, alternatively, that "Provepharm obtained **[*11]** a dangerous probability of monopolizing the relevant market." (Countercl., ¶ 33; PAC, ¶ 38).

Akorn alleges that as a result of the change instigated to the methylene blue USP by Provepharm, its methylene blue product was removed from the market "earlier than what would have occurred had Provepharm only obtained an approved NDA[,]" (Countercl., ¶ 34; PAC, ¶ 39), because although its "grandfather" status would typically have allowed it to continue to sell its methylene blue products during a six (6)-to twelve (12)-month "transition period" after the FDA approved Provepharm's NDA, it could no longer use "the original [USP] standard to which its grandfathered methylene products conformed" and, thus, "could not manufacture and sell additional units of methylene products." (Countercl., ¶¶ 34-36; PAC, ¶¶ 39-41). According to Akorn, "[i]t was forced to exit the market in October of 2016 and remained so until June 2017, when the FDA permitted [it] to temporarily manufacture methylene blue using the expired USP standard[;]" and Provepharm "achieved actual monopolization in fact" during that approximately eight (8)-month period. (Countercl., ¶ 36; PAC, ¶ 41).

Akorn further alleges that the FDA **[*12]** has temporarily permitted it "to resume manufacturing and selling methylene blue products qualified against the expired original standard, . . . and [it] has re-entered the market, but at a substantially reduced market share that is artificially lower than would have occurred had Provepharm not instigated the change to the USP monographs." (Countercl., ¶¶ 37-38; PAC, ¶¶ 42-43). Akorn further alleges that in the process of its temporary re-entry into the market, it has "exhausted its supply of the expired original standard[,]" (Countercl., ¶ 38; PAC, ¶ 43); and that "[a]s a result of Provepharm instigating the change to the USP monographs, additional quantities of the expired original standard are no longer available" and it "cannot manufacture additional methylene blue products[,]" even if the FDA continues to request it to do so. (Countercl., ¶ 38; PAC, ¶ 43). According to Akorn, once it "exhausts its on-hand supply of methylene blue products, it will once again be forced from the market, and Provepharm will have once again achieved monopolization of the methylene blue market." (Countercl., ¶ 38; PAC, ¶ 43).

B. Procedural History

On December 5, 2017, Provepharm commenced this action **[*13]** against Akorn seeking, *inter alia*, damages and injunctive relief for Akorn's allegedly false advertising of its methylene blue product in violation of *Section 43(a)* of the Lanham Act, *15 U.S.C. § 1125(a)*, and *Section 350-e(3) of the New York General Business Law* (Counts I and V, respectively); unfair competition in violation of *Section 43(a)* of the Lanham Act, *15 U.S.C. § 1125(a)*, and the common law (Counts II and III, respectively); and deceptive trade practices in violation of *Section 349(h) of the New York General Business Law* (Count IV). Issue was joined by the service of an answer on behalf of Akorn on or about February 5, 2018.

Following a pre-motion conference before Judge Spatt on May 29, 2018, the parties filed a joint letter regarding their negotiated discovery schedule, which, *inter alia*, set August 27, 2018 as the "[f]inal date to amend the pleadings." (Docket Entry ["DE"] 32). On August 27, 2018, Akorn served an amended answer, *inter alia*, asserting two (2) counterclaims against Provepharm seeking damages and injunctive relief for Provepharm's alleged monopolization and attempted monopolization of the methylene blue market in the United States in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*. With respect to its first counterclaim for actual monopolization, Akorn alleges, *inter alia*, that Provepharm's anticompetitive **[*14]** conduct excluded it from the methylene blue market in the United States, as a result of which it "was unable to sell methylene blue products for several months, and even on its return to the methylene blue market, has suffered diminished sales of methylene blue products, resulting in substantial damages." (Countercl., ¶¶ 41-42; PAC, ¶¶ 46-47). With respect to its second counterclaim for attempted monopolization, Akorn alleges, *inter alia*, (i) that Provepharm, through "anticompetitive and exclusionary acts," "achieved a dangerous probability of success of monopolizing the relevant market[,] . . . [and] will maintain monopoly over the methylene blue injection USP in the United States[,]" (Countercl., ¶ 47; PAC, ¶ 52); and (ii) that "[a]s a result of being blocked from selling methylene blue, Akorn will suffer antitrust injury."[9] (Countercl., ¶ 47; PAC, ¶ 52).

Provepharm now moves pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* to dismiss Akorn's counterclaims against it in their entirety for failure to state a claim for relief; and Akorn moves pursuant to *Rule 15(a) of the Federal Rules of Civil Procedure* to amend its counterclaims to "include additional allegations based on newly-discovered evidence and testimony[;] . . . provide further factual support for [its] counterclaims[;] **[*15]** . . . [and] rebut the factual arguments that Provepharm made in its motion to dismiss." (Akorn's Memorandum of Law on Motion for Leave to Amend its Counterclaims ["Akorn Mem."] at 5).

III. Discussion

A. Motion to Amend

Initially, the branch of Provepharm's motion seeking dismissal of the counterclaims based upon Akorn's purported failure to comply with *Fed. R. Civ. P. 15(a)(2)* is denied. Where, as here, a defendant files an amended answer that includes a counterclaim without seeking court permission under *Rule 15(a)(2) of the Federal Rules of Civil Procedure*, the plaintiff-counterdefendant may challenge the counterclaim in several ways: "(1) by a *Rule 12(b)(6)* motion if relevant undisputed facts appear on the face of the pleadings or in the record, (2) by a *Rule 56* motion if relevant undisputed facts can be presented by affidavit, or (3) by an answer under *Rule 8(c)* if relevant facts are in dispute." *GEOMC Co., Ltd. v. Calmare Therapeutics Inc., 918 F.3d 92, 101 (2d Cir. 2019)*. "In ruling on a motion to dismiss a new counterclaim, a district court can either assess the new counterclaim's legal sufficiency or exercise the discretion the court would have been entitled to use if the counterclaimant had moved under *Rule 15* to file the new counterclaim." *Id.*

"Leave to amend should be 'freely give[n] ... when justice so requires,' *Fed. R. Civ. P. 15(a)(2)*, but 'should generally be denied in instances **[*16]** of futility, undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, or undue prejudice to the non-moving party[.]'" *United States ex rel. Ladas v. Exelis, Inc., 824 F.3d 16, 28 (2d Cir. 2016)* (alterations in original) (quoting *Burch v. Pioneer Credit Recovery, Inc., 551 F.3d 122, 126 (2d Cir. 2008))*. "A proposed amendment to a complaint is futile when it could not withstand a motion to dismiss." *F5 Capital v. Pappas, 856 F.3d 61, 89 (2d Cir. 2017)*, *cert. denied*, *138 S. Ct. 473, 199 L. Ed. 2d 358 (2017)* (quotations and citation omitted).

Where, as here, a party seeks to amend its pleading while a motion to dismiss is pending, "the Court has a variety of ways in which it may deal with the pending motion to dismiss, from denying the motion as moot to considering the merits of the motion in light of the amended [pleading]." *Kilpakis v. JPMorgan Chase Fin. Co., LLC, 229 F. Supp. 3d 133, 139 (E.D.N.Y. 2017)*. Where, as here, "the proposed amended [pleading] does not seek to add new claims or parties, and the [opposing party] ha[s] had a sufficient opportunity to respond to the new pleading, then, for the purposes of procedural efficiency, the merits of the pending motion to dismiss ought to be considered in light of the proposed amended [pleading]." *Id.* Accordingly, the Court considers the merits of Provepharm's motion to

[9] In its proposed amended counterclaims, Akorn also alleges with respect to its second counterclaim for attempted monopolization that Provepharm "had a specific intent to monopolize the relevant market[,] . . . [and] purposefully acted to wrongfully block anyone else, including specifically Akorn, from selling methylene blue in the United States[,] . . . [because] although FDA granted seven years of exclusivity to Provepharm for the very limited use of treating acquired methemoglobinemia, Provepharm's actions with USP to revise the methylene blue monographs will prevent Akorn and others from filing NDAs for any other indications of use, including for example the numerous 'off label' uses for which Akorn's methylene blue products and Provepharm's ProvayBlue® product are purchased." (PAC, ¶ 51).

dismiss as if it were directed at Akorn's proposed amended counterclaims to determine whether the proposed amendments are futile. **[*17]** [10]

B. Sufficiency of Claims

1. Standard of Review

The standard of review on a motion made pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* is that a party plead sufficient facts "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. The plausibility standard requires "more than a sheer possibility that a defendant has acted unlawfully." *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not 'show[n]'--'that the pleader is entitled to relief.'" *Id. at 679, 129 S. Ct. 1937* (brackets in original) (quoting *Fed. R. Civ. P. 8(a)(2)*). "Determining whether a [pleading] states a plausible claim for relief will[] . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

"A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal, 556 U.S. at 678, 129 S. Ct. 1937* (quoting *Twombly, 550 U.S. at 555, 127 S. Ct. 1955*). "Nor does a [pleading] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting **[*18]** *Twombly, 550 U.S. at 557, 127 S. Ct. 1955*). "Factual allegations must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the [pleading] are true (even if doubtful in fact)." *Twombly, 550 U.S. at 555-56, 127 S. Ct. 1955* (citations omitted).

In deciding a motion pursuant to *Rule 12(b)(6)*, the Court must liberally construe the claims, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the pleader. *See* *Kim v. Kimm, 884 F.3d 98, 102-03 (2d Cir. 2018)*; *Elias v. Rolling Stone LLC, 872 F.3d 97, 104 (2d Cir. 2017)*. However, this tenet "is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal, 556 U.S. at 678, 129 S. Ct. 1937*. "While legal conclusions can provide the framework of a [pleading], they must be supported by factual allegations." *Id. at 679, 129 S. Ct. 1937*. "In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.; see also* *Ruston v. Town Bd. for Town of Skaneateles, 610 F.3d 55, 59 (2d Cir. 2010)*.

Nonetheless, a party is not required to plead "specific evidence or extra facts beyond what is needed to make the claim plausible." *Arista Records, LLC v. Doe 3, 604 F.3d 110, 120-21 (2d Cir. 2010)*; *accord* *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 729-30 (2d Cir. 2013)*. "When there are well-pleaded factual allegations, a court should assume their veracity and then determine **[*19]** whether they plausibly give rise to an entitlement to relief." *Iqbal, 556 U.S. at 679, 129 S. Ct. 1937*.

In deciding a motion pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, the Court must limit itself to the facts alleged in the pleading, which are accepted as true; to any documents attached to the pleading as exhibits or incorporated by reference therein; to matters of which judicial notice may be taken; or to documents upon the terms and effect of which the pleading "relies heavily" and which are, thus, rendered "integral" thereto. *Chambers v. Time Warner, Inc., 282 F.3d 147, 152-53 (2d Cir. 2002)*; *see also* *Nicosia v. Amazon.com, Inc., 834 F.3d 220, 230-31 (2d Cir. 2016)*. "A necessary prerequisite for taking into account materials extraneous to the complaint is that the plaintiff *rely* on the terms and effect of the document in drafting the complaint; mere notice or possession is not enough." *Nicosia, 834 F.3d at 231* (emphasis in original) (quotations and citations omitted); *see also* *Goel v. Bunge, Ltd., 820 F.3d 554, 559 (2d Cir. 2016)* ("Merely mentioning a document in the complaint will not satisfy th[e] [integral to the complaint] standard; indeed, even offering limited quotations from the document is not enough." (quotations

[10] Indeed, with the exception of the allegations pertaining to the Patented Method Selection and Provepharm's purported specific intent, Akorn's proposed amended counterclaims are virtually identical to its original counterclaims.

and citation omitted)). "This generally occurs when the material considered is a contract or other legal document containing obligations upon which the plaintiff's complaint stands or falls, but which for some reason—usually because **[*20]** the document, read in its entirety, would undermine the legitimacy of the plaintiff's claim—was not attached to the complaint." *Nicosia, 834 F.3d at 231*(quotations and citation omitted); *accord* *Goel, 820 F.3d at 559*. Moreover, "even if a document is 'integral' to the complaint, it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document[,] . . . [and] that there exist no material disputed issues of fact regarding the relevance of the document." *Faulkner v. Beer, 463 F.3d 130, 134 (2d Cir. 2006)* (citations omitted); *accord* *Nicosia, 834 F.3d at 231*.

Other than Provepharm's patents, (Grant Decl., Ex. 6-8); the USP Code of Ethics and Submissions Guideline, (*id.*, Ex. 4 & 5); Provepharm's submission to the USP dated June 30, 2014, including the Patented Method Statement, (*id.*, Ex. 1); and the documents submitted as Exhibit 17 to the declaration of Kathy Grant, all of which are specifically incorporated by reference in the proposed amended counterclaims, (*see* PAC, ¶¶ 14, 23, 26 and 30-33), the other extrinsic evidence submitted by Provepharm is not properly considered on this motion to dismiss pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* because, *inter alia*, (i) none of it is attached to, or incorporated by reference in, the pleadings, nor does it contain matters on which judicial notice may **[*21]** properly be taken; and (ii) the counterclaims do not rely heavily upon the terms and effect of any of those documents such that they may properly be deemed as integral thereto, nor is it clear from the record that the documents are indisputably authentic or accurate. *See* *Chambers, 282 F.3d at 152-53*. Accordingly, pursuant to *Rule 12(d) of the Federal Rules of Civil Procedure*, the Court excludes all such extrinsic evidence, and the arguments based thereupon, from its consideration of this motion, and considers only the factual allegations in the complaint to which there is no dispute; the factual allegations in the counterclaims, which are assumed to be true for purposes of this motion only; and the seven (7) aforementioned exhibits that are incorporated by reference in the proposed amended counterclaims.

2. *Section 2* of the Sherman Act

"*Section 2* of the Sherman Act makes it an offense to 'monopolize, or attempt to monopolize ... any part of the trade or commerce among the several States.'" *New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 651 (2d Cir. 2015)* (quoting *15 U.S.C. § 2*). As explained by the Supreme Court,

> "The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against **[*22]** conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest. . . . Thus, this Court and other courts have been careful to avoid constructions of *§ 2* which might chill competition, rather than foster it."

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993) (citations omitted). Accordingly, the conduct of a single firm, governed by *§ 2* of the Sherman Act, is "unlawful only when it actually monopolizes or dangerously threatens to do so." *Id. at 459, 113 S. Ct. 884*.

However, "there is no heightened pleading standard in antitrust cases[,]" *Wacker v. JP Morgan Chase & Co, 678 F. App'x 27, 29 (2d Cir. Feb. 1, 2017)* (summary order) (quoting *Concord Assocs., L.P. v. Entm't Props. Trust, 817 F.3d 46, 52 (2d Cir. 2016))*; and on a motion to dismiss pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, the pleader "need only 'raise a reasonable expectation that discovery will reveal evidence of illegality.'" *Id.* (quoting *Mayor & City Council of Baltimore, Md. v. Citigroup Inc., 709 F.3d 129, 135 (2d Cir. 2013))*.

"To establish monopolization in violation of *§ 2*, a plaintiff must prove not only that the defendant possessed monopoly power in the relevant market, but that it willfully acquired or maintained that power 'as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *Actavis, 787 F.3d at 651* (quoting *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004))*; *accord* *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 495 (2d Cir. 2004)*. In order to "demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged **[*23]** in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, 506 U.S. at 456, 113 S. Ct. 884*. Thus, unlike actual monopolization, attempted monopolization "requires a finding of specific intent."[11] *Actavis, 787 F.3d at 651*; *see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)* (holding that an attempted monopolization claim requires proof of "a 'specific intent' to accomplish the forbidden objective," *i.e.*, "an intent which goes beyond the mere intent to do the act[,]" whereas on a claim for actual monopolization, "evidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive' . . . or 'predatory.' (quotations and citations omitted)); *Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 101 (2d Cir. 1998)* ("Although the completed offense of monopolization requires only a general intent, a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt." (quotations and citation omitted)).

The latter element of an attempted monopolization claim, *i.e.*, a dangerous probability of actual monopolization, generally requires: (i) a definition of the relevant product and geographic market and examination of the defendant's market power, *Spectrum Sports, 506 U.S. at 455, 459, 113 S. Ct. 884*, *i.e.*, "the defendant's **[*24]** ability to lessen or destroy competition in that market[,]" *id. at 456, 113 S. Ct. 884*; and (ii) a showing of "more than intent alone." *Id. at 457-58, 113 S. Ct. 884*. Thus, "proof of unfair or predatory conduct alone is [not] sufficient to make out the offense of attempted monopolization." *Id. at 457, 113 S. Ct. 884*. A defendant "may not be liable for attempted monopolization under *§ 2* of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize." *Id. at 459, 113 S. Ct. 884*.

a. Monopoly Power

"Monopoly power is 'the power to control prices or exclude competition[,]'" *Geneva, 386 F.3d at 500* (quoting *United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956))*, which "can be proven directly through evidence of control over prices or the exclusion of competition, or . . . inferred from a firm's large percentage share of the relevant market." *Id.*; *see also PepsiCo., Inc. v. Coca-Cola Co., 315 F.3d 101, 108 (2d Cir. 2002)* ("The pertinent inquiry in a monopolization claim . . . is whether the defendant has engaged in improper conduct that has or is likely to have the effect of controlling prices or excluding competition, thus creating or maintaining market power. In the absence of [such] direct measurements of a defendant's ability to control prices or exclude competition, however, market power necessarily must be determined by reference to the area of effective competition—which, **[*25]** in turn, is determined by reference to a specific, defined product market. . . . Once a relevant market is determined, the defendant's share in that market can be used as a proxy for market power." (quotations and citations omitted)). "Once the relevant market is determined, [courts] consider a variety of factors in addition to the defendant's market share, including the strength of competition, barriers to entry, and the probable development of the market, . . . in order to determine whether there is a dangerous probability that, left unchecked, the defendant will attain monopoly power, *i.e.*, the ability (1) to price substantially above the competitive level and (2) to persist in doing so for a significant period without erosion by new entry or expansion." *AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216, 226-27 (2d Cir. 1999)* (quotations and citation omitted); *see also Tops Mkts., 142 F.3d at 100* ("In considering the likelihood of achieving monopoly power, we . . . consider[] the defendant's relevant market share in light of other market characteristics, including barriers to entry[,]" as well as strength of the competition, the probable development of the industry, the nature of the anticompetitive conduct and the elasticity of consumer demand). "[A] lesser degree of market **[*26]** power may establish an attempted monopolization claim than that necessary to establish a completed [or actual] monopolization claim." *Tops Mkts., 142 F.3d at 100*.

However, "[t]o safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*." *Verizon, 540 U.S. at 407, 124 S. Ct. 872* (emphasis in original); *see also Actavis, 787 F.3d at 652* ("Product innovation generally benefits consumers and inflicts harm on competitors, so courts look for evidence of exclusionary or anticompetitive effects in order to

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[11] Since Provepharm does not challenge the sufficiency of the specific intent element in its motion to dismiss, it is not addressed herein.

distinguish between conduct that defeats a competitor because of efficiency and consumer satisfaction and conduct that impedes competition through means other than competition on the merits." (quotations and citations omitted)). "Anticompetitive conduct is conduct without a legitimate business purpose that makes sense only because it eliminates competition." *In re Adderall XR Antitrust Litig., 754 F.3d 128, 133 (2d Cir. 2014)* (quotations, alterations and citation omitted). "Conduct may be characterized as exclusionary if it does not further competition on the merits or does so in an unnecessarily restrictive way." *Merced Irrigation Dist. v. Barclays Bank PLC, 165 F. Supp. 3d 122, 142 (S.D.N.Y. 2016)* (quotations and citation omitted); *see also* *Aspen Skiing, 472 U.S. at 605 n. 32, 105 S. Ct. 2847* ("'[E]xclusionary' comprehends at the most behavior that not only (1) tends to impair **[*27]** the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." (quotations and citation omitted)). In order to prove that the alleged monopolist 'willfully acquired or maintained its power, thereby causing unreasonable exclusionary or anticompetitive effects[,]'" *Wacker, 678 F. App'x at 29* (quoting *Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 188 (2d Cir. 1992))*, the claimant must "plead antitrust injury, *i.e.*, an 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Wacker, 678 F. App'x at 29* (quoting *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990))*; *see also* *IQ Dental Supply, Inc. v. Henry Schein, Inc., 924 F.3d 57, 62 (2d Cir. May 10, 2019)* ("A plaintiff raising an antitrust claim must demonstrate antitrust injury to ensure that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place." (quotations, alterations and citation omitted)).

i. Anticompetitive Conduct

In this Circuit, the bar for showing that a party has engaged in unlawful anticompetitive conduct "is a low one." *IQ Dental, 924 F.3d at 63*. Although "product improvement alone is [not] anticompetitive[,]" *Actavis, 787 F.3d at 653-54*, when such conduct is combined "with some other conduct, the overall effect of which is to coerce consumers rather than persuade them on the merits, . . . and to impede **[*28]** competition, . . . [the] actions are anticompetitive under the Sherman Act." *Id. at 654* (citations omitted).

There is no dispute that the relevant market in this case is the methylene blue market in the United States. The counterclaims and proposed amended counterclaims allege sufficient facts from which it may reasonably be inferred, *inter alia*, (i) that Provepharm possesses monopoly power, *i.e.*, the power to exclude competition, in the relevant market, or at least did so for the approximately eight (8)-month period from when the USP revised the monographs in accordance with Provepharm's request until the FDA requested that Akorn temporarily re-enter the market to manufacture and sell methylene blue products qualified against the expired original standard;[12] and (ii) that Provepharm "willfully sought to maintain or attempted to maintain that monopoly in violation of *§ 2*[,]" *Actavis, 787 F.3d at 652*, by, *inter alia*, combining its alleged improvement of its methylene blue product, for which it sought and obtained FDA approval, with its allegedly anticompetitive conduct, *i.e.*, its solicitation of the USP to revise the official monograph for methylene blue to include the pentahydrate form, while failing to disclose its patent **[*29]** rights on the manufacturing process allegedly necessary to produce that hydrate form of methylene blue, and to change the standardized assay for other hydrate forms, in order to significantly heighten barriers to entry and substantially foreclose competition in the methylene blue market in the United States. *See generally* *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308, 314 (3d Cir. 2007)*[13] ("[C]onduct that undermines the procompetitive

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[12] Provepharm's assertion that "[t]he FDA's approval of ProvayBlue® led the USP to update and revise the monograph for methylene blue to mirror the FDA's approved standards for this injectable drug[,]" (Plaintiff's Reply Memorandum of Law in Further Support of its Motion to Dismiss ["Plf. Reply"] at 2), appears to be contradicted by the documents incorporated by reference in the counterclaims that are attached as exhibit 17 to the declaration of Kathy Grant. Those documents indicate, in relevant part, (i) that Provepharm commenced the process of seeking revision of the methylene blue monograph on or before May 24, 2013, *i.e.*, approximately three (3) years before it obtained FDA approval of its NDA, because the existing monograph was "old," did not "take into account the recent knowledge on the [different] hydrate forms of the Methylene Blue," and "describe[d] the Methylene Blue as trihydrate only[;]" (ii) that since Provepharm's API "contains mainly the pentahydrate form, which is the most stable form[,] . . . it doesn't strictly conform to the USP monograph;" and (iii) that Provepharm's objective in seeking revision of the monograph was "to have a product compliant with USP" and, thus, it was "look[ing] for the most efficient process to update the monograph in the meantime of the review of [its] NDA." (Grant Decl., Ex. 17 at 628).

benefits of private standard setting may, at least in some circumstances, be deemed anticompetitive under ***antitrust law***. . . . We hold that (1) in a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise . . . [to a standard-determining organization ('SDO')], (3) coupled with [the] SDO's reliance on that [misrepresentation] when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct. . . . Deception in a consensus-driven private standard-setting environment harms the competitive process by obscuring the costs of including proprietary technology in a standard and increasing the likelihood that patent rights will confer monopoly power on the patent holder. . . ." (quotations and citations **[*30]** omitted)); *e.g.* *Amphastar Pharms., Inc. v. Momenta Pharm., Inc., 297 F. Supp. 3d 222, 230 (D. Mass. 2018)* ("Intentional misrepresentations designed to deceive a standard-setting organization can constitute an antitrust violation. . . . By incorporating patented technology into a standard, the patent-holder obtains market power because adoption of the standard eliminates alternatives to the patented technology.")[14]

It may also reasonably be inferred from the factual allegations in Akorn's counterclaims and proposed amended counterclaims, including, *inter alia*, Provepharm's substantial share in the relevant market following the USP's revision of the methylene blue monograph, even following Akorn's limited re-entry into the market at the request of the FDA; the weakness of its competition; and the barriers to entry or re-entry into the market imposed by the revisions to the USP monograph, combined with the OED restrictions, that there is a dangerous probability that Provepharm will attain monopoly power in the methylene blue market in the United States sufficient to state a plausible claim for attempted monopolization under *Section 2* of the Sherman Act. Contrary to Provepharm's contention, the vague and ambiguous Patented Method Statement buried within its approximately **[*31]** one hundred fifty-one (151)-page submission to USP, dated June 30, 2014, does not conclusively establish that it "actively disclosed" its patent rights to the USP during the revision process, so as to directly contradict Akorn's claim of anticompetitive conduct or render it implausible. (Plaintiff's Memorandum of Law in Support of Motion to Dismiss Counterclaims ["Plf. Mem."] at 14). At best, the Patented Method Statement may affect the weight and credibility of Akorn's counterclaims, but the factual allegations both in the original counterclaims, and as amplified by the proposed amended counterclaims, which are presumed true for purposes of this motion, are nonetheless sufficient "to raise a right to relief above the speculative level." *Twombly, 550 U.S. 544, 127 S. Ct. at 1959*; *see generally* *Hogan v. Fischer, 738 F.3d 509, 514 (2d Cir. 2013)* ("In ruling on a motion pursuant to *Fed. R. Civ. P. 12(b)(6)*, the duty of a court is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.") "The issue is not whether a [claimant] will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Walker v. Schult, 717 F.3d 119, 124 (2d Cir. 2013)*.

The case *Rambus Inc. v. F.T.C., 522 F.3d 456, 380 U.S. App. D.C. 431 (D.C. Cir. 2008)*, cited by Provepharm, is inapposite as, *inter alia*, it did not involve a motion **[*32]** to dismiss at the pleadings stage. Indeed, the court specifically distinguished the *Broadcom* case from the circumstances of that case on the basis that *Broadcom* "simply reversed a grant of dismissal" and, thus, its ruling "that deceit lured the SSO [standard-setting organization] away from non-proprietary technology" could not help the Federal Trade Commission ("FTC") in *Rambus* because the FTC was unable to find, after "lengthy proceedings," that the alleged monopolist's behavior caused the SSO's choice.[15] *Id. at 466*. In other words, *Rambus* involved a failure of proof, not a failure of pleading.

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[13] The plaintiff in *Broadcom* alleged that the defendant monopolized a market by "by falsely promising to license its patents according to the fair, reasonable, and non-discriminatory ('FRAND') terms set by the European Telecommunications Standards Institute ('ETSI') and its standards-defining organizations ('SDO') counterparts in the United States, but then reneging on those promises after it succeeded in having its technology included in the standard." *501 F.3d at 306*.

[14] In *Amphastar*, the plaintiff alleged that the defendants "wrongfully acquir[ed] monopoly power by deceiving the USP into adopting a standard which they later claimed was covered by defendants' patents." *Id., 297 F. Supp. 3d at 227*.

[15] *Rambus* alternatively held that to the extent that *Broadcom*'s ruling "may have rested on a supposition that there is a cognizable violation of the Sherman Act when a lawful monopolist's deceit has the effect of raising prices (without an effect on

The cases Provepharm cites that were decided at the pleadings stage, CriMar Sys., Inc. v. Cisco Sys., Inc., 72 F. Supp. 3d 1012 (N.D. Cal. 2014); Apple Inc. v. Samsung Elecs. Co., Ltd., No. 11-cv-1846, 2011 U.S. Dist. LEXIS 120416, 2011 WL 4948567 (N.D. Cal. Oct. 18, 2011); and Townshend v. Rockwell Int'l Corp., No. C99-0400SBA, 2000 U.S. Dist. LEXIS 5070, 2000 WL 433505 (N.D. Cal. Mar. 28, 2000), are distinguishable. *Apple* involved the development of technical industry standards in the wireless communications industry and, specifically, the SSOs development of a UMTS standard, designed to support increased speeds and bandwidth capacity on mobile devices, which ultimately incorporated the defendants' patented technology that the defendants had failed to disclose to the SSOs. Id., 2011 U.S. Dist. LEXIS 120416, 2011 WL 4948567, * 1-2. There is no indication **[*33]** in that case that there was a pre-existing UMTS standard that had already been adopted by the SSOs which the defendants merely sought to revise. The district court, relying upon Rambus, 522 F.3d 456, 380 U.S. App. D.C. 431, held that a pleader alleging anticompetitive conduct based on a theory of failure to disclose intellectual property rights ("IPR") to an SSO during a standard-setting process, "must allege that there was an alternative technology that the SSO was considering during the standard setting process and that the SSO would have adopted an alternative standard had it known of the patent holder's intellectual property rights." Apple, 2011 U.S. Dist. LEXIS 120416, 2011 WL 4948567, at *5. The court further held that, without more, such as "factual allegations that there were other technologies considered by the SSO at the time of standard setting," Apple's conclusory allegations that "[h]ad Samsung properly disclosed the existence of its IPR, the relevant SSO would have selected a viable alternative technology or would have decided not to incorporate that proposal into the standard[,]" were insufficient to state a plausible claim for monopolization under Section 2 of the Sherman Act. 2011 U.S. Dist. LEXIS 120416, [WL] at * 6.

Similarly, the anticompetitive conduct alleged in *Townshend* involved, *inter alia*, the counterclaim-defendants' **[*34]** conduct during the standards-setting process before the International Telecommunications Union ("ITU"). Specifically, the counterclaims alleged, *inter alia*, that the counterclaim-defendants lobbied the ITU to adopt an industry standard for the operation of 56K PCM modem chipset products incorporating their patented technology (the "V.90 standard") without disclosing that they had filed a trade secret action in state court against the counterclaim-plaintiff, or that they intended to file a patent infringement suit against the counterclaim-plaintiff. Id., 2000 U.S. Dist. LEXIS 5070, 2000 WL 433505, at * 1-2, 11. Like *Apple*, there is no indication in *Townshend* that there was a pre-existing V.90 standard that had already been adopted by the SSO which the defendants merely sought to revise or amend. Moreover, the district court in *Townshend* merely distinguished the case upon which the counterclaim-plaintiff relied, *i.e.*, an FTC case finding anticompetitive conduct based upon a firm's lobbying for an industry standard incorporating its patented technology without disclosing its patent rights to the SSO during the process, from the case before it on the basis that, unlike the FTC case, the counterclaim-defendants' patents issued only after the ITU **[*35]** had adopted the V.90 standard; the counterclaim-defendants had informed the ITU about their pending patent applications covering the 56K chipset modem technology; and the counterclaims did not assert that the ITU "could have adopted a V.90 standard which did not encompass [their] technology," whereas in the FTC case, "the standards-setting body was choosing among options, and there was a possibility that they could have adopted a standard which did not incorporate [the firm's] patents." 2000 U.S. Dist. LEXIS 5070, [WL] at * 11. In contrast to *Apple* and *Townshend*, this case involves the revision to an existing official monograph in the USP-NF that was initiated by Provepharm, not the development of a new standard or monograph; and there is no indication that the USP would have revised the existing monograph for methylene blue but for Provepharm's request therefor. In other words, assuming the truth of the factual allegations in the counterclaims and proposed amended counterclaims, the USP had already adopted an official standard for methylene blue in the USP-NF which Provepharm sought to revise, purportedly without disclosing its patent rights on the manufacturing processes allegedly necessary to comply with the revised **[*36]** monograph it requested. Drawing all reasonable inferences in favor of Akorn as required on this motion, since there was an existing official monograph for methylene blue in the USP-NF, it may reasonably be inferred that had Provepharm disclosed its patent rights to USP, USP would not have revised the methylene blue monograph at all, much less as requested by Provepharm. Thus, even assuming, *arguendo*, that a party asserting a claim under Section 2 of the Sherman Act based upon a failure to disclose intellectual property rights to an SSO must plead that an alternative standard or technology which did not

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competitive structure), it conflicts with *NYNEX* [Corp. v. Discon, Inc., 525 U.S. 128, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)]." at 466. However, that holding is not relevant to this case.

incorporate the defendant's intellectual property rights was available in order to withstand dismissal at the pleadings stage, Akorn's counterclaims plausibly state such a claim.[16]

Although *ChriMar* similarly involved amendments to an existing industry standard, that case is nonetheless also distinguishable from this case. In that case, the counterclaims alleged, *inter alia*, that the counterclaim-defendant, as a participant in the standards-setting process, was required, but failed, to disclose to the SSO, *i.e.*, the Institute of Electrical and Electronics Engineers ("IEEE"), **[*37]** its belief that its patent was essential to the proposed amendments to the existing industry standard for Power over Ethernet-enabled products. *ChriMar, 72 F. Supp.3d at 1015-1016*. There is no indication in that case as to who sponsored the amendments ultimately adopted by the IEEE; only that the counterclaim-defendant was a participant in the standards-setting process and, as such, had a duty to disclose any patents it "believed to be infringed by the practice of the proposed standard" pursuant to the IEEE's "patent disclosure policy." *Id., at 1015*. In addition, there is no indication in that case as to the counterclaim-defendant's market share in the relevant market. Accordingly, the district court found, in relevant part, that the counterclaims failed "to sufficiently allege market power," *i.e.*, that the counterclaim-defendant had acquired sufficient monopoly power, because they did not "clearly allege that the IEEE would have adopted an alternative standard had it known about" the counterclaim-defendant's patent or position with respect to its patent. *72 F. Supp. 3d at 1019*.

Unlike *ChriMar*, the counterclaims in this case contain sufficient factual allegations from which it may reasonably be inferred that Provepharm acquired sufficient monopoly power **[*38]** in the relevant market based upon, *inter alia*, (i) its solicitation of the USP to revise the pre-existing official monograph to include a different hydrate form of methylene blue that purportedly results from Provepharm's patented manufacturing process, without disclosing its patent rights to the USP, plausibly suggesting that the USP would not have revised the existing monograph for methylene blue as requested by Provepharm had Provepharm disclosed its patent rights; (ii) the barriers to entry or re-entry into the relevant market as a result of USP's adoption of the revised monograph requested by Provepharm; and (iii) Provepharm's substantial market share in the relevant market following USP's adoption of the revised monograph it requested. *See, e.g. Actividentity Corp. v. Intercede Grp. PLC, No. C 08-4577, 2009 U.S. Dist. LEXIS 132206, 2009 WL 8674284, at * 4 (N.D. Cal. Sept. 11, 2009)* (finding that allegations that the alleged monopolist had approximately ninety percent (90%) of the relevant market and failed to disclose its intellectual property rights to the SSO before the standards it adopted had "garnered significant market acceptance;" that the SSO "would have changed the recently-adopted standard but for [the alleged monopolist's] failure to disclose"; and that as a result of the alleged monopolist's failure **[*39]** to disclose, it "obtained a monopoly market share as the market became 'locked in' to the standard," were sufficient to state a monopolization claim under *Section 2* of the Sherman Act). Indeed, the USP Submissions Guideline reveals the importance of intellectual property rights in the standards-setting process, (*see* Grant Decl. 4 at 1-2, 4), and, contrary to Provepharm's contention, can be read to apply to patents on manufacturing processes, as well as on testing and assaying methods and procedures.[17] Accordingly,

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[16] The Court is not necessarily persuaded that this is a proper pleading standard, as opposed to an evidentiary standard. *Apple* relies on *Rambus* to hold that the pleader "must allege that there was an alternative technology that the SSO was considering during the standard setting process and that the SSO would have adopted an alternative standard had it known of the patent holder's intellectual property rights." *Apple, 2011 U.S. Dist. LEXIS 120416, 2011 WL 4948567, at *5*. However, as set forth above, *Rambus* involved a failure of proof, not a failure of pleading. Moreover, *Townshend* did not set forth a pleading standard at all with respect to claims alleging anticompetitive conduct based upon alleged misconduct before an SSO; it merely distinguished two (2) cases based upon their facts. However, since Akorn's counterclaims allege sufficient facts suggesting the possibility that USP would not have revised the existing official monograph for methylene blue as requested by Provepharm had Provepharm disclosed its patent rights during the revision process, it is unnecessary to decide this issue.

[17] The Submissions Guideline provides, in pertinent part, that "because USP's standards are intended to be public standards available for the use and benefit of all parties, USP requests that sponsors disclose in their Requests for Revision whether *any portion* of the methods or procedures submitted is subject to patent or other sponsor-held intellectual property rights. In cases where patented methods, procedures or materials required for compendial tests and assays (such as RS or photomicrographs) are proposed, USP may seek assistance from the sponsor in in obtaining clearance or license for use by any persons seeking to use or apply a USP public standard incorporating such method, procedure or material, and may consider other approaches

the counterclaims and proposed amended counterclaims contain sufficient factual allegations to state a plausible claim that Provepharm engaged in anticompetitive conduct by soliciting the USP to revise the official monograph for methylene blue without disclosing its patent rights with respect to the manufacturing process necessary to produce the methylene blue in the hydrate form incorporated in the revised standard; and that USP would not have revised its official monograph for methylene blue but for Provepharm's alleged conduct.

ii. Antitrust Injury

The Second Circuit has "established a three-part test for determining whether the plaintiff has alleged an antitrust injury: **[*40]** (1) the court must identify the practice complained of and the reasons such a practice is or might be anticompetitive, . . . (2) the court must identify the actual injury the plaintiff alleges [] which requires [it] to look to the ways in which the plaintiff claims it is in a worse position as a consequence of the defendant's conduct, . . . and (3) the court compares the anticompetitive effect of the specific practice at issue to the actual injury the plaintiff alleges. . . ." *IQ Dental, 924 F.3d at 62-63* (quotations, alterations and citations omitted).

Akorn has sufficiently alleged that Provepharm's anticompetitive conduct, *i.e.*, its alleged misrepresentations to the USP during the standards-revision process, affected the methylene blue market in the United States, and that Akorn's sales of its methylene blue product suffered as a result, sufficient to state a plausible claim of actual antitrust injury.[18] *See, e.g. IQ Dental, 924 F.3d at 63-64* (finding that allegations that the defendants' anticompetitive conduct affected the market, and that the plaintiff's sales suffered as a result, "is the type of injury the antitrust laws were designed to prevent" because the plaintiff "is entitled to conduct its business in a market that is not infected **[*41]** with an anticompetitive distortion.") Moreover, assuming the truth of Akorn's allegations, *inter alia*,

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including the solicitation of other Requests for Revision that use alternative methods or procedures. USP reserves the right to indicate in a resulting monograph or general chapter whether methods or procedures are subject to such intellectual property rights." For purposes of this motion, all reasonable inferences must be construed in favor of the non-moving party, and it may reasonably be inferred from that entire provision that sponsors, such as Provepharm, are required to disclose their patents on "any portion of the methods or procedures submitted," including manufacturing processes, to the USP in their Requests for Revision.

[18] In asserting that the counterclaims fails to state a plausible claim of antitrust injury, and is barred by the *Noerr-Pennington* doctrine, Provepharm focuses upon its "right to obtain NDA approval for ProvayBlue®, and with it Orphan Drug Exclusivity[,]" (Plf. Mem. at 18), seemingly ignoring that the anticompetitive conduct alleged is Provepharm's purported deception in sponsoring the revised methylene blue standard before the USP without disclosing its patent applications directed to the revised standard, which, in combination with the FDA approval of its NDA, operated to reduce consumer choice, significantly heighten barriers to entry, and substantially foreclose competition in the methylene blue market in the United States. Provepharm's petitioning of the USP, a private standards-setting organization, for a revised methylene blue standard "generally does not trigger *Noerr-Pennington* protection." *Amphastar Pharms. Inc. v. Momenta Pharms., Inc., 850 F.3d 52, 56 (1st Cir. 2017)* (citing *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988))*; *see also Hospital Auth. of. Metro. Gov't of Nashville v. Momenta Pharm., Inc., No. 3:15-1100, 2016 U.S. Dist. LEXIS 136004, 2016 WL 5724306, at * 15-16 (M.D. Tenn. Sept. 29, 2016)*, *report and recommendation adopted in relevant part and rejected on other grounds*, *244 F. Supp. 3d 705, 715-16 (M.D. Tenn. Mar. 21, 2017)* (finding that since the crux of the plaintiff's antitrust claim was the defendants' alleged misconduct before the USP, a private standards-setting organization, the *Noerr-Pennington* doctrine was inapplicable).

Provepharm also apparently ignores the fact that the FDA's award of ODE to ProvayBlue® is for the treatment of pediatric and adult patients with acquired methemoglobinemia only; it allegedly does not prevent Akorn and others from submitting their own NDA for approval to market products having methylene blue API for any other indication or use, or from manufacturing and selling any such product under an approved NDA. Assuming the truth of the allegations in the counterclaims, it is Provepharm's alleged anticompetitive conduct, not the limited ODE protection, which restricts Akorn and other drug manufacturers from manufacturing and selling products with methylene blue API in the United States under their own NDA for any other use than that covered by the ODE, because the manufacturing process purportedly necessary to produce methylene blue in the form adopted by the USP in the revised monograph is allegedly covered by Provepharm's patents. Moreover, since the counterclaims plausibly allege that Akorn and other drug manufacturers would be subject to suits for patent infringement for their marketing of methylene blue, not merely the submission of their own NDAs for FDA approval, the safe harbor provision of the *Patent Act*, *35 U.S.C. § 271(e)(1)*, is not applicable.

that Provepharm's alleged anticompetitive conduct effectively prevents or delays any other drug manufacturer's entry or re-entry into the market because they cannot seek an NDA to market any product having methylene blue API in accordance with USP's revised monograph without producing the API in accordance with Provepharm's patented manufacturing processes and, thus, without infringing upon Provepharm's patent rights, such conduct "does not simply harm a competitor or two, but threatens to reduce competition in the [methylene blue] market, . . . [and] is precisely the type that the antitrust laws were designed to protect against."[19] *Actavis, 787 F.3d at 661* (quotations and citation omitted); *see, e.g. U.S. ex rel. Krahling v. Merck & Co., Inc., 44 F. Supp. 3d 581, 599 (E.D. Pa. 2014)* ("Plaintiffs have successfully pled a claim for a *§ 2* violation. Taking the facts in the light most favorable to Plaintiffs, Defendant's fraudulent misrepresentations about Defendant's own product, coupled with the unique facts of this case (e.g., the 100% monopoly of the market and the arguable statutory and contractual duties to disclose information) create the basis for an antitrust claim that Defendant willfully **[*42]** maintained monopoly power through exclusionary tactics. Plaintiffs have argued sufficient facts to sustain a claim for proximate causation, detailing the significant barriers that other companies would face to enter the Mumps vaccine market.")

"An antitrust plaintiff must show that a defendant's anticompetitive act was a 'material' and 'but-for' cause of plaintiff's injury, although not necessarily the sole cause." *Actos, 848 F.3d at 97*. "Further, 'a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury.'" *Id. at 97-98* (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n. 9, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*); *see also In re Publ'n Paper Antitrust Litig., 690 F.3d 51, 66 (2d Cir. 2012)* ("[A]n antitrust defendant's unlawful conduct need not be the *sole* cause of the plaintiffs' alleged injuries; to prove a 'causal connection' between the defendant's unlawful conduct and the plaintiff's injury, the plaintiff need only demonstrate that the defendant's conduct was a substantial or materially contributing factor in producing that injury. (quotations, alterations and citation omitted)). **[*43]** "[C]ausation questions are peculiarly within the competence of the factfinder and should be left for the jury." *Amphastar, 297 F. Supp. 3d at 228* (quotations and citations omitted); *see also Taylor Publ'g Co. v. Jostens, Inc., 216 F.3d 465, 485 (5th Cir. 2000)* "[T]he question of causation is generally a factual question for the jury. . . ."); *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. 14-md-02503, 2018 U.S. Dist. LEXIS 11921, 2018 WL 563144, at *13 (D. Mass. Jan. 25, 2018)* ("[C]ausation is generally a question best left for the jury to decide."); *In re Flonase Antitrust Litig., 798 F. Supp. 2d 619, 627 (E.D. Pa. 2011)* ("The presence of the requisite causation is normally a question of fact for a jury[.]" (quotations, alterations and citation omitted)).

Akorn's allegations that Provepharm's purportedly deceptive conduct during the standards-setting process before the USP led to the revision of the official methylene blue monograph and the subsequent exclusion of Akorn from the relevant market, at least for the period from October 2016 until June 2017, and from when Akorn's remaining product sells out; and that Akorn cannot seek an NDA to market any product having methylene blue API in accordance with USP's revised standards without producing the API in accordance with Provepharm's patented manufacturing processes and, thus, without infringing upon Provepharm's patent rights, are sufficient to state a plausible **[*44]** claim that Provepharm's conduct before the USP was a material cause of the antitrust injury. *See, e.g. Amphastar, 297 F. Supp. 3d at 228* (finding that the plaintiff's allegations that the defendant's deceptive

[19] Provepharm's contentions regarding the merits of Akorn's patent allegations are improper on a motion to dismiss at the pleadings stage. Since *Rule 8(a)(2) of the Federal Rules of Civil Procedure* only requires a pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Akorn's counterclaims need not provide further "analysis," "explanation" or "more of a factual basis;" nor conclusive or "self-evident" proof of any fact. (Plf. Mem. at 23). While Provepharm contends that its patents protect only "one method for purifying methylene blue, [and that] it is not self-evident that this is the only method[,]" (Plf. Mem. at 23) (emphasis omitted), "there remain fact-intensive questions about the feasibility, availability and even existence of [any] alternative[] [methods]." *Amphastar, 297 F. Supp. 3d at 229*. "The existence of alternatives is a factual question inappropriate for resolution on a motion to dismiss." *Id.*; *see, e.g. In re Actos End-Payor Antitrust Litig., 848 F.3d 89, 101 (2d Cir. 2017)* (rejecting the defendant's argument that the plaintiff's causation theory was implausible because it failed "to rule out a litany of alternative possible causes of [the plaintiff's] delayed market entry," because "[w]hile it [was] possible that one or more of th[o]se factors may turn out to be barriers to plaintiff's causation theory at later stages of the litigation, they do not mandate dismissing the complaint [at the pleadings stage]. . . . Dismissal at this early stage on the basis of speculation about possible and not inherently more plausible alternative causes would be premature.")

conduct in front of the USP led to the approval of the [patented standard] and the subsequent exclusion of [the plaintiff] from the marketplace[;] [and that] [t]he adoption of the [patented standard] by the USP made the FDA's approval of the sale of enoxaparin by [the plaintiff] conditional on its use of an infringing procedure[,] . . . adequately pled that the defendants' conduct at the USP was a material cause of the antitrust injury.") Accordingly, Akorn's proposed amended counterclaims are not futile and Provepharm's motion to dismiss pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* ism thus, denied in its entirety. The Second Circuit has "referred to the prejudice to the opposing party resulting from a proposed amendment as among the most important reasons to deny leave to amend." *AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A., 626 F.3d 699, 725 (2d Cir. 2010)* (quotations and citation omitted); *see also* *Pasternack v. Shrader, 863 F.3d 162, 174 (2d Cir. 2017)* ("The rule in this Circuit has been to allow a party to amend its pleadings in the absence of a showing by the nonmovant of prejudice or bad faith." (quotations and citation omitted)). "Amendment may be prejudicial when, **[*45]** among other things, it would require the opponent to expend significant additional resources to conduct discovery and prepare for trial[;] . . . significantly delay the resolution of the dispute[,]" *AEP Energy, 626 F.3d at 725-26* (quotations and citation omitted); *accord* *City of New York v. Group Health Inc., 649 F.3d 151, 158 (2d Cir. 2011)*, or "prevent the plaintiff from bringing a timely action in another jurisdiction." *Pasternack, 863 F.3d at 174*. "[M]ere delay, [] absent a showing of bad faith or undue prejudice, does not provide a basis for a district court to deny the right to amend[;] . . . [n]or can complaints of the time, effort and money [] expended in litigating the matter, without more, constitute prejudice sufficient to warrant denial of leave to amend." *Id.* (quotations, alterations and citations omitted).

C. Prejudice

Since the proposed amendments merely assert additional facts in support of Akorn's original counterclaims; do not require additional fact discovery; and will not significantly delay the resolution of this action, Provepharm will not be prejudiced by them. Indeed, although Provepharm indicates that fact discovery is now closed and that amendments in response to a dispositive motion are disfavored, it does not indicate that it needs any additional fact discovery as a result of the amendments; **[*46]** a "second motion to dismiss" will not be required since the Court has considered Provepharm's motion to dismiss as if it was directed to the proposed amended counterclaims; and neither party has yet moved for summary judgment.[20] Accordingly, Akorn's motion to amend its counterclaims is granted and the proposed amended counterclaims are accepted for filing *nunc pro tunc*.

IV. Conclusion

For the reasons set forth above, Provepharm's motion to dismiss Akorn's counterclaims against it pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* is denied in its entirety; Akorn's motion to amend its counterclaims pursuant to *Rule 15(a)(2) of the Federal Rules of Civil Procedure* is granted; and Akorn's proposed amended counterclaims are accepted for filing *nunc pro* tunc.

SO ORDERED.

/s/

Sandra J. Feuerstein

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[20] Even assuming, *arguendo*, that Akorn must establish "good cause" pursuant to *Rule 16(b)(4) of the Federal Rules of Civil Procedure* to amend its counterclaims after the deadline set forth in the parties' joint letter to the Court setting forth their negotiated discovery schedule, (DE 32), Akorn satisfied that standard by, *inter alia*, asserting its counterclaims by the deadline set forth in the parties' negotiated discovery schedule based upon the evidence before it at that time and then diligently seeking relevant discovery and moving to amend its counterclaims within a reasonable time after receiving the discovery sought. *See generally* *Holmes v. Grubman, 568 F.3d 329, 335 (2d Cir. 2009)* ("Whether good cause exists [under *Fed. R. Civ. P. 16(b)*] turns on the diligence of the moving party." (quotations and citation omitted)). Moreover, as set forth above, Provepharm will not suffer any significant prejudice as a result of the proposed amendment. **[*47]** *See generally* *Kassner v. 2nd Ave. Delicatessen Inc., 496 F.3d 229, 244 (2d Cir. 2007)* (holding that although "the primary consideration" for purposes of *Fed. R. Civ. P. 16(b)* "is whether the moving party can demonstrate diligence[,]" the district court may also "consider other relevant factors including . . . whether allowing the amendment of the pleading . . . will prejudice defendants.")

United States District Judge

Dated: June 11, 2019

Central Islip, New York

[Cent. Valley Med. Grp., Inc. v. Indep. Physician Assocs. Med. Grp., Inc.](#)

United States District Court for the Eastern District of California

June 14, 2019, Decided; June 14, 2019, Filed

1:19-cv-00404-LJO-SKO

Reporter

2019 U.S. Dist. LEXIS 100265 *; 2019-1 Trade Cas. (CCH) P80,820; 2019 WL 2491328

CENTRAL VALLEY MEDICAL GROUP, INC., Plaintiffs, v. INDEPENDENT PHYSICIAN ASSOCIATES MEDICAL GROUP, INC., dba ALLCARE IPA, DOES 1 through 10, inclusive, Defendants.

Subsequent History: Remanded by, Request denied by, Costs and fees proceeding at, Injunction denied by, As moot *Cent. Valley Med. Grp., Inc. v. Indep. Physician Assocs. Med. Grp., Inc., 2019 U.S. Dist. LEXIS 124388 (E.D. Cal., July 25, 2019)*

Core Terms

federal question, policies, unfair, federal law, anti trust law, cause of action, unfair competition, tethered, state law, business practice, federal issue, violates, alleges, supplemental jurisdiction, federal jurisdiction, antitrust, pleaded, prong, independent state, federal claim, predicate, threatens, disputed, offends

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For Independent Physician Associates Medical Group, Inc. Doing business as Allcare, IPA, Defendant: James Maxwell Cooper, LEAD ATTORNEY, Kessenick Gamma & Free LLP, San Francisco, CA.

Judges: Lawrence J. O'Neill, UNITED STATES CHIEF DISTRICT JUDGE.

Opinion by: Lawrence J. O'Neill

Opinion

MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTION TO REMAND. (ECF NO. 6)

I. INTRODUCTION

This case concerns claims brought by Central Valley Medical Group, Inc. ("CVMG") against Independent Physician Associates Medical Group, Inc., dba AllCare ("AllCare") and Does 1 through 10. This case was originally filed in Stanislaus County Superior Court on March 19, 2019. ECF No. 1, Ex. A. On March 27, 2019, Defendant AllCare filed a notice of removal to this court. ECF No. 1. On April 5, 2019, Plaintiff CVMG filed a motion to remand, followed by an opposition from Defendant AllCare on April 22, 2019 and a reply from Plaintiff CVMG on April 29, 2019. ECF Nos. 6, 8, 9. For the following reasons, Plaintiff's motion **[*2]** to remand is **DENIED without prejudice**.

II. BACKGROUND

Plaintiff alleges that CVMG and AllCare are both corporations doing business in Stanislaus County. ECF No. 1, Ex. A at 1-2. Both CVMG and AllCare are each alleged to be an Independent Physician Association ("IPA"). *Id.* IPAs establish a network of independent physicians and then connect that network to health plans to provide services to members of those health plans. *Id.* The health plans compensate the IPA on a per member per month basis dependent on how many of the health plan's members choose to sign to that IPA. *Id.* The health plan member's choice of IPA is based most often on whether that plan member's physician is in that IPA. *Id.* The CVMG and AllCare networks are alleged to overlap and contain many of the same physicians. *Id.* at 2.

CVMG alleges that on or about February 2019, AllCare informed physicians in its network that certain bonuses were only available if the physician did not also contract with CVMG, and that this caused at least one physician to terminate their contract with CVMG. *Id.* at 3. On March 19, 2019 CVMG filed a Complaint with the Stanislaus County Superior Court. ECF No. 1, Ex. A. The first cause of action alleged interference **[*3]** with contract. ECF No. 1, Ex. A at 3-4. The second cause of action alleged unfair business practices in violation of *California Business and Professional Code § 17200*, specifically by offending the policies of three federal antitrust laws. ECF No. 1, Ex. A at 4-5.

On March 27, 2019, AllCare removed to this court, arguing that the second cause of action presented a federal question and the Court had supplemental jurisdiction over the first cause of action. ECF No. 1. CVMG moved to remand on April 5, 2019, arguing that there is no substantial federal question presented in the second cause of action and Court therefore does not have jurisdiction to hear the case. ECF No. 7. AllCare opposed the motion on April 22, 2019. ECF No. 8. CVMG filed its reply on April 29, 2019. ECF No. 9. Pursuant to *Local Rule 230(g)*, the Court determined that this matter was suitable for decision on the papers and took it under submission on April 29, 2019. ECF No. 10.

III. LEGAL STANDARD

A defendant may remove a civil case from state court to federal court if the action presents either a federal question or the action's parties are citizens of different states and the amount in controversy is over $75,000. *28 U.S.C. §§ 1331*, *1441*. Subject-matter jurisdiction (in the form of either federal question **[*4]** or diversity jurisdiction) may be challenged at any time prior to final judgment. *Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 571, 124 S. Ct. 1920, 158 L. Ed. 2d 866 (2004)*.

The artful pleading doctrine prevents a plaintiff from circumventing federal jurisdiction by embedding federal issues within state law causes of action. *See Franchise Tax Bd. of State of Cal. v. Const. Laborers Vacation Trust for So. Cal., 463 U.S. 1, 14, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)* ("Even though state law creates appellant's causes of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties."); *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 312, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005)* ("[F]ederal question jurisdiction will lie over state-law claims that implicate significant federal issues."). The Ninth Circuit has elaborated that

> the artful pleading doctrine allows federal courts to retain jurisdiction over state law claims that implicate a substantial federal question. A state law claim falls within this . . . category when: (1) "a substantial, disputed question of federal law is a necessary element of . . . the well-pleaded state claim," . . . or the claim is an "inherently federal claim" articulated in state-law terms, . . . or (2) "the right to relief depends on the resolution of a substantial, disputed federal question . **[*5]** . . ." A careful reading of artful pleading cases shows that no specific recipe exists for a court to alchemize a state claim into a federal claim—a court must look at a complex group of factors in any particular case to decide whether a state claim actually "arises" under federal law.

Lippitt v. Raymond James Fin. Servs., Inc., 340 F.3d 1033, 1042-43 (9th Cir. 2003), *as amended* (Sept. 22, 2003) (internal citations and quotation marks omitted); *see also* Gunn v. Minton, 568 U.S. 251, 258, 133 S. Ct. 1059, 185 L. Ed. 2d 72 (2013) (substantial federal question jurisdiction will lie "if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress."); Grable, 545 U.S. at 312 (substantial federal question doctrine "captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law").

"Courts have fashioned a number of proxies to determine whether a state claim depends on the resolution of a federal question to such an extent as to trigger subject matter jurisdiction." Lippitt, 340 F.3d at 1045. In evaluating whether jurisdiction exists, a court must determine if the federal question goes to the gravamen of a plaintiff's claims, or, in other words, "[i]s **[*6]** the federal question 'basic' and 'necessary' as opposed to 'collateral' and 'merely possible'? Is the federal question 'pivotal' as opposed to merely 'incidental'? Is the federal question 'direct and essential' as opposed to 'attenuated?'" *Id.* Nevertheless, "the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." Lippitt, 340 F.3d at 1040.

When a court has original federal jurisdiction over one of a plaintiff's claims, the court may exercise supplemental jurisdiction over claims that share a "common nucleus of operative facts" with the federal claim. *Shell Offshore, Inc. v. Greenpeace, Inc., 709 F.3d 1281, 1288 (9th Cir. 2013)*. "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c).

IV. DISCUSSION

A. Federal Question Jurisdiction.

The core dispute between the parties is whether a substantial federal issue is necessarily raised by Plaintiff's California Unfair Competition Law claim. *See* Gunn, 568 U.S. at 258; Lippitt, 340 F.3d at 1041-43.

The California Unfair Competition Law ("UCL") provides a cause of action against three different types of wrongful business practices: 1) "Unlawful" business practices; 2) "Unfair" business practices; and 3) "Fraudulent" business practices. *See* Cal. Bus. & Prof. Code § 17200; Hadley v. Kellogg Sales Co., 243 F. Supp. 3d 1074, 1089 (N.D. Cal. 2017). The **[*7]** California Supreme Court has defined an "unfair" business practice as "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999). When pleading under the "unfair" prong of the UCL and alleging a violation of the policy or spirit of a state or federal ***antitrust law***, the policy must be "tethered to specific constitutional, statutory or regulatory provisions." Rheumatology Diagnostics Lab., Inc v. Aetna, Inc., No. 12-cv-05847-WHO, 2015 U.S. Dist. LEXIS 49740, 2015 WL 1744330, at *24 (N.D. Cal. Apr. 15, 2015) (quoting Bardin v. Daimlerchrysler Corp., 136 Cal. App. 4th 1255, 1271, 39 Cal. Rptr. 3d 634 (2006)); *see also* Cel-Tech, 20 Cal. 4th at 186-87 ("we must require that any finding of unfairness to competitors under section 17200 be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.").

The main reference in Plaintiff's complaint to any policy tethered to an ***antitrust law*** is alleged as follows:

> In taking the actions alleged herein, Defendant has unfairly competed with CVMG. Defendant's conduct, as alleged, offends the policies of free competition and free trade and commerce set forth in, inter alia, the federal Sherman Act, Clayton Act, Federal Trade **[*8]** Commission Act, 15 USC §12 et seq; 15 USC §§45 et seq.

ECF No. 1, Ex. A ¶ 23. Plaintiff also pleads allegations regarding AllCare's prior violations of the Federal Trade Commission Act. *Id.* ¶ 26. Thus, Plaintiff's sole theory of UCL unfair competition liability is that AllCare's conduct violates policies tethered to federal antitrust laws. Plaintiff does not explicitly plead in its complaint, much less argue in its opposition, that AllCare's alleged conduct violates policies tethered to California-specific constitutional, statutory, or regulatory provisions. *Compare* ECF No. 1, Ex. A at ¶ 23 *with* *AT&T Mobility v. AU Optronics Corp., 707 F.3d 1106, 1110 (9th Cir. 2013)* ("The Cartwright Act enumerates a relatively broad array of anticompetitive and conspiratorial conduct that constitutes a 'trust.' *Cal. Bus. & Prof. Code § 16720*. The Act declares that 'every trust is unlawful, against public policy and void,' *id.* *§16726* . . . ."). The anticompetitive policies Plaintiff pleads that Defendant violated are only "tethered to specific" federal statutes. Indeed, if the Court were to disregard all references Plaintiff makes to federal ***antitrust law*** and policies, Plaintiff's UCL claim would fail because it was not predicated on any policies tethered to any law. **[*9]** *In re: National Football Leagues Sunday Ticket Antitrust Litigation, No. ML 15-02668-BRO, 2016 U.S. Dist. LEXIS 41639, 2016 WL 1192642, at *4 (C.D. Cal. Mar. 28, 2016)* ("If the Court were to disregard the allegations regarding Defendants' alleged 'monopoly position' and 'supra-competitive prices,' no alternative and independent unconscionability theory would remain."). Plaintiff's unfair competition cause of action will require a Court to interpret and apply federal antitrust statutes, case law, and policies in order to determine whether AllCare's conduct constitutes unfair competition under the UCL. Thus, the federal question is "direct and essential" to Plaintiff's unfair competition claim. *See* *Sacks v. Dietrich, 663 F.3d 1065, 1068 (9th Cir. 2011)*; *California ex rel. Lockyer v. Dynegy, Inc., 375 F.3d 831, 839 (9th Cir. July 6, 2004)*; *In re: National Football Leagues, 2016 U.S. Dist. LEXIS 41639, 2016 WL 1192642, at *5*; *Cordon v. Wachovia Mortg., a Div. of Wells Fargo Bank, N.A., 776 F. Supp. 2d 1029, 1036 (N.D. Cal. 2011)*. Plaintiff is the "master of [its] complaint," *see* *Teutscher v. Woodson, 835 F.3d 936, 956-7 (9th Cir. 2016)* (internal quotation marks omitted), and the Court cannot rewrite Plaintiff's complaint to include a state law theory now that Plaintiff desires remand. Therefore, Plaintiff's artfully pleaded unfair competition cause of action "necessarily" raises a substantial, disputed federal question, and federal question jurisdiction exists over this claim. *See* *Gunn, 568 U.S. at 258*; *Grable, 545 U.S. at 312*; *Lippitt, 340 F.3d at 1041-42*.

Plaintiff's remaining arguments in favor of remand do not change the result.

First, Plaintiff argues his complaint simply pleads federal statutes embodying policies that "mirror" California policies. *See* ECF No. 6 at 3. This is incorrect **[*10]** because, as discussed above, the complaint, as pleaded, raises a substantial, disputed federal question as its sole basis for the unfair competition claim. In contrast, a plaintiff may be able to defeat federal jurisdiction if an "alternative and independent" violation of state antitrust policies is offered as a basis for an unfair competition claim, even if a federal basis is also offered. *See* *Rains v. Criterion Systems, Inc., 80 F.3d 339, 346 (9th Cir. 1996)* ("When a claim can be supported by alternative and independent theories—one of which is a state law theory and one of which is a federal law theory—federal question jurisdiction does not attach because federal law is not a necessary element of the claim."). Consequently, numerous courts have found that, when a plaintiff's UCL claim could be established by reference to a state law predicate alone, there was no federal question and remand was appropriate. *See Gershfeld v. Champion Aerospace LLC.*, No. SACV 13-1318-JVS (JEMx), 2013 WL 12123685, at *2 (C.D. Cal. Oct. 8, 2013) (ordering remand where "Plaintiff may succeed on his UCL failure-to-disclose claim with or without proving a violation of federal law.); *Peoplebrowsr, Inc. v. Twitter, Inc., No. C-12-6120-EMC, 2013 U.S. Dist. LEXIS 31786, 2013 WL 843032, at *4 (N.D. Cal. Mar. 6, 2013)* ("Thus, a violation of the unfair prong of the UCL does not necessarily require establishing a **[*11]** violation of the Sherman Act. . . . As Twitter has not demonstrated that PeopleBrowsr's unfair acts UCL claim arises under federal law, remand is appropriate."); *Caldwell v. N. Pac. Mortg. Corp., No. C10-05306-THE, 2011 U.S. Dist. LEXIS 39698, 2011 WL 1303629, at *3 (N.D. Cal. Apr. 4, 2011)* ("Thus because Plaintiffs' UCL claim is supported by state-law theories of liability, the claim is not necessarily federal in character, and the Caldwells' right to relief does not depend on the resolution of a disputed federal question."); *Briggs v. First Nat. Lending Servs., No. C 10-00267-RS, 2010 U.S. Dist. LEXIS 35639, 2010 WL 962955, at *3 (N.D. Cal. Dec. 9, 2010)* ("Here, since the complaint's UCL claim is supported by numerous theories of recovery under California law, the alleged violation of TILA is not considered a necessary element under *Rains.");* *California Pinnacle Sec. CA. LP, 746 F. Supp. 2d 1129, 1131 (N.D. Cal. 2010)* ("Because plaintiff is able to show defendant acted unlawfully based on these state law provisions and without any references to federal law, remand is appropriate."); *Hendricks v. Dynegy Power Mktg., Inc., 160 F. Supp. 2d 1155, 1165 (S.D. Cal. 2001)* ("As a result, Plaintiffs can state a violation under *§ 17200* in two ways, independent of the Federal Power Act: either by alleging a violation of the Cartwright Act as the predicate offense, or by alleging that the anti-competitive activity was unfair or deceptive even if not unlawful."); Castro v. Providian Nat'l Bank, No. C-00-4256-VRW, 2000 U.S. Dist. LEXIS 19062, 2000 WL 1929366, at *3 (N.D. Cal. Dec. 29, 2000) (ordering remand because "plaintiffs have both pled and **[*12]** intend to prove that the unlawful prong of section 17200 is supported by violations of state law as well.").

And, when there is no independent state ground underlying a UCL claim, courts have ruled a federal question exists. *See* Nat'l Credit Reporting Ass'n, Inc. v. Experian Info. Solutions, Inc., No. C04-01661-WHA, 2004 U.S. Dist. LEXIS 17303, 2004 WL 1888769, at *3 (N.D. Cal. July 21, 2004) ("As the master of its complaint, plaintiff could have avoided any issue of federal question and, instead, could have simply borrowed state antitrust laws. But it did not. Rather, plaintiff's claim for unlawful business practices necessarily rests on questions of federal ***antitrust law***."); In re: National Football Leagues, 2016 U.S. Dist. LEXIS 41639, 2016 WL 1192642, at *5 (ruling federal jurisdiction proper because "Plaintiff's UCL and common law claims necessarily raise federal issues."); California ex rel. Lockyer, 375 F.3d at 841 n.6 ("While California insists that the district court was obliged to remand if at least one independent state law theory of relief existed, . . . we do not discern any such claim.").

Plaintiff here does not allege two independent policy bases, one state and one federal, but insists on only explicitly pleading and arguing violations of federal antitrust policy. Plaintiff makes no effort to state what exact California policies are being "mirrored." Plaintiff's bare argument that such a policy **[*13]** exists—without even citing California statutes or case law or otherwise attempting to demonstrate that this policy exists—is insufficient to justify remand. The closest Plaintiff comes to identifying a state antitrust policy is in arguing that "the policies underlying the UCL and federal law are the same." ECF No. 6-1 at 4. But referencing the UCL alone is insufficient as well as circular, given *Cel-Tech* held that the UCL requires pleading policies "tethered" to specific predicate antitrust laws beyond the UCL. Cel-Tech, 20 Cal. 4th at 186-87. And regardless, Plaintiff's complaint does not attempt to plead that Defendants' conduct offends the state policies underlying the UCL. *See* ECF 1, Ex. A ¶ 23 ("Defendant's conduct, as alleged, offends the policies of free competition and free trade and commerce set forth in, inter alia, the federal Sherman Act, Clayton Act, Federal Trade Commission Act, 15 USC §12 et seq; 15 USC §§45 et seq."). Therefore, Plaintiff has not pleaded an independent state antitrust policy tethered to specific state laws such that Plaintiff's unfair competition claim must be remanded.

Second, Plaintiff argues that because it alleges an "unfair" competition claim, as opposed to "unlawful," remand is appropriate because the Court will **[*14]** not have to determine whether a violation of federal law occurred. This misses the point and mischaracterizes Defendants' argument. The test for whether a federal issue is "necessarily raised" is not whether a violation of federal law has been alleged or must be proven. If a federal question is "basic," "necessary," "pivotal," "direct," or "essential," then federal jurisdiction is proper. Lippitt, 340 F.3d at 1045. Thus, a substantial federal question is raised not only when the plaintiff alleges a violation of federal law, but also when the plaintiff alleges conduct that offends policy based on federal law. *See* In re: National Football Leagues, 2016 U.S. Dist. LEXIS 41639, 2016 WL 1192642, at *5 ("Although the Court agrees that 'a violation of the unfair prong of the UCL does *not* necessarily require establishing a violation of the Sherman Act,' . . . Plaintiff's UCL cause of action relies on Defendants' alleged 'abuse of its monopoly position' and charging 'supra-competitive prices,' . . . .").

Third, Plaintiff argues *Cel-Tech* held that the "unfair" prong of the UCL requires pleading policies that are tethered to federal antitrust laws, and thus its complaint merely follows the *Cel-Tech* requirements. *See* ECF No. 9 at 4. This is incorrect. *Cel-Tech* does acknowledge the relevance of section 5 of the **[*15]** Federal Trade Commission Act and its jurisprudence to its decision and future determinations of whether conduct is unfair, given the "similarity of language and obvious identity of purpose" of section 5 and § 17200. *See* Cel-Tech, 20 Cal. 4th at 185-86; *see also* id. at 186 n.11 ("Our notice of federal law under section 5 means only that federal cases interpreting the prohibition against 'unfair methods of competition' may assist us in determining whether a particular challenged act or practice is unfair under the test we adopt. We do not deem the federal cases controlling or determinative, merely persuasive."). But *Cel-Tech*'s plain language refers to violation of the policies of "an ***antitrust law***," not any specific ***antitrust law***. *See* Cel-Tech, 20 Cal. 4th at 187 ("the word 'unfair' in that section means conduct that threatens an incipient violation of *an* ***antitrust law***, or violates the policy or spirit of *one of those laws* because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.") (emphasis added). Antitrust policies tethered to state laws are an acceptable predicate for a UCL "unfair" pleading. *See, e.g.,* Greencycle Paint, Inc. v. Paintcare, Inc., 250 F.Supp.3d 438, 451 (N.D. Cal. Apr. 11, 2017) ("Because the

Court has found Plaintiff properly alleges a Cartwright Act violation, it finds Plaintiff **[*16]** has also sufficiently stated a UCL claim under the unlawful *and unfair* prongs.") (emphasis added); *see also* *RLH Indus., Inc. v. SBC Commc'ns, Inc., 133 Cal. App. 4th 1277, 1286, 35 Cal. Rptr. 3d 469 (2005)* (describing a *§ 17200* "unfair" claim based on threatening "an incipient violation" of the Cartwright Act). *Cel-Tech* does not require pleading violation of the policies underlying federal antitrust laws. The numerous cases, some of which are cited above, where plaintiffs obtained remand by pleading separate and independent state law violations shows Plaintiff is incorrect that a finding of federal question jurisdiction here would make "every unfair practices claim a federal claim." ECF No. 9 at 5.

Finally, Plaintiff submits an amended complaint, arguing that by adding two new causes of action for violation of California law, it shows that its "single reference to federal policies . . . does not raise a 'substantial' question of federal law." *See* ECF No. 9 at 4-5. The test for federal question jurisdiction here does not depend on whether there are more state causes of action as compared to actions raising a federal question. Even if the Court were to accept the amended complaint (which at this time it does not), there would still be a necessary federal question embedded in the UCL claim. **[*17]**

Therefore, Plaintiff's UCL claim necessarily raises a substantial federal question, over which this Court has jurisdiction. Remand is not proper. Nevertheless, because it appears Plaintiff could amend the complaint to allege an independent state law basis for its UCL claim, which may compel remand, the Court will deny Plaintiff's motion without prejudice.

B. Supplemental Jurisdiction

Supplemental jurisdiction is a doctrine of discretion, not of right. *See* *City of Chicago v. Int'l College of Surgeons, 522 U.S. 156, 172, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997)*; *United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*. Supplemental jurisdiction over state-law claims exists when a federal claim is sufficiently substantial to confer federal jurisdiction, and there is "a common nucleus of operative fact between the state and federal claims." *Brady v. Brown, 51 F.3d 810, 816 (9th Cir. 1995)* (quoting *Gilder v. PGA Tour, Inc., 936 F.2d 417, 421 (9th Cir. 1991))*; *see also* *28 U.S.C. § 1367*. The parties do not appear to dispute that all causes of action in this case are based on the common nucleus of AllCare's conduct in contracting with independent physicians. *See* ECF No. 1, Ex. A ¶¶ 14, 21. Therefore, the Court finds that supplemental jurisdiction over Plaintiff's remaining claim is appropriate in this case so long as no independent state law basis for the unfair competition claim is alleged.

C. Temporary Restraining Order

Plaintiff requests in its reply that if remand is denied, **[*18]** the Court set a hearing date for a temporary restraining order. *See* ECF No. 9 at 5. The Court has not received any formal application from CVMG for a temporary restraining order, and Plaintiff's informal request in its reply does not comply with the Federal Rules of Civil Procedure or this Court's local rules. *See* *Fed. R. Civ. Proc. 65*; *Local Rule 231*. The Court will not consider Plaintiff's request at this time. Plaintiff may renew its request in compliance with the federal and local rules if it so desires.

V. CONCLUSION AND ORDER

For the reasons stated above, Plaintiff's motion to remand is **DENIED without prejudice**. Plaintiffs shall have twenty (20) days from electronic service of this Order to file an amended complaint and renew their motion to remand if they desire. Additionally, in light of the law discussed above, the Court would entertain remand by stipulation. Finally, the pending motion to dismiss will be held in abeyance until the filing of an amended pleading, or until the expiration of the amendment period, whichever is sooner.

IT IS SO ORDERED.

Dated: **June 14, 2019**

/s/ Lawrence J. O'Neill

UNITED STATES CHIEF DISTRICT JUDGE

In re German Auto. Mfrs. Antitrust Litig.

United States District Court for the Northern District of California

June 17, 2019, Decided; June 17, 2019, Filed

MDL No. 2796 CRB (JSC)

Reporter

392 F. Supp. 3d 1059 *; 2019 U.S. Dist. LEXIS 101014 **; 2019-1 Trade Cas. (CCH) P80,814; 2019 WL 2509771

IN RE: GERMAN AUTOMOTIVE MANUFACTURERS ANTITRUST LITIGATION. This Order Relates To: Dkt. Nos. 321, 339, 340, 341, 345, 377

Subsequent History: Dismissed by, Without prejudice *In re German Auto. Mfrs. Antitrust Litig., 2020 U.S. Dist. LEXIS 57625 (N.D. Cal., Mar. 31, 2020)*

Motion denied by *In re German Auto. Mfrs. Antitrust Litig., 335 F.R.D. 407, 2020 U.S. Dist. LEXIS 100800, 2020 WL 3060748 (N.D. Cal., June 6, 2020)*

Motion granted by, Dismissed by *In re German Auto. Mfrs. Antitrust Litig., 2020 U.S. Dist. LEXIS 198870 (N.D. Cal., Oct. 23, 2020)*

Prior History: *In re German Auto. Mfrs. Antitrust Litig., 278 F. Supp. 3d 1373, 2017 U.S. Dist. LEXIS 164943 (J.P.M.L., Oct. 4, 2017)*

Core Terms

antitrust, Defendants', tanks, personal jurisdiction, complaints, allegations, innovation, manufacturer, steel, purchases, prices, consumers, emissions, convertibles, suppliers, motion to dismiss, Sherman Act, anticompetitive, markets, cartel, forum state, conspiracy, exchanges, costs, working group, investigating, savings, exercise of jurisdiction, collaboration, competitors

Judges: [1]** CHARLES R. BREYER, United States District Judge.

Opinion by: CHARLES R. BREYER

Opinion

[*1061] ORDER RE: DEFENDANTS' MOTIONS TO DISMISS

Consumers and auto dealers have filed two related consolidated class actions against the five leading German car manufacturers—Audi AG, BMW AG, Daimler AG, Porsche AG, and Volkswagen AG ("VW AG")—and their American subsidiaries. Plaintiffs allege that since the mid-1990s, Defendants have colluded to restrain trade in ways that constitute per se violations of the Sherman Act and that violate various state laws. Defendants have moved to dismiss the claims. Finding the allegations currently insufficient to state a claim, the Court GRANTS Defendants' joint motion to dismiss, with leave to amend. The Court DENIES the German Defendants' separate motions to dismiss for lack of personal jurisdiction.

[*1062] I. BACKGROUND[1]

As alleged, U.S. consumers and auto dealers have been overpaying for Audi, BMW, Mercedes, Porsche, and Volkswagen cars for over twenty years. They have paid premiums for "German engineering," a phrase that is synonymous with innovation and exceptional performance, but they have received something less.

Plaintiffs claim that in the mid-1990s, Defendants started intentionally slowing **[**2]** down the pace of innovation. (IPP ¶¶ 123, 139, 183; DPP ¶¶ 2, 76.) Doing so resulted in their cars having "fewer features and reduced performance." (IPP ¶ 5.) Defendants took this approach, Plaintiffs maintain, in order to "reduce production costs" and "avoid[] price and technology wars." (DPP ¶¶ 76, 81; *see also* IPP ¶ 92.) All the while they continued to charge premiums for cutting edge technology and engineering. (IPP ¶¶ 6, 92; DPP ¶¶ 68-69, 76.)

At least 200 employees are alleged to have participated in the agreement to reduce innovation, meeting for decades in dozens of working groups and at trade association events. (IPP ¶¶ 123, 129, 196; DPP ¶¶ 77-79.) Since 2011 alone, at least 1,000 meetings in furtherance of the agreement have purportedly taken place. (IPP ¶ 123; DPP ¶ 77.)

All sorts of vehicle components are claimed to have been covered by the agreement (e.g, brake controls, chassis, electronics, gas and diesel engines, clutches, transmissions, exhaust systems, and drivetrains (IPP ¶¶ 123, 131; DPP ¶ 86)), although only two examples are explained in any detail in the complaints.

Soft-top convertibles. Minutes from a meeting in Bad Kissingen, Germany document that Defendants **[**3]** discussed the cost, safety, weight, and technical risks of soft-top convertibles and then collectively agreed that their soft-top convertible roofs should only be allowed to open and close at vehicle speeds below 50 kilometers (or 31 miles) per hour. (IPP ¶ 138.) In memorializing this agreement, Defendants allegedly noted that there should be "[n]o arms race when it comes to speeds for [soft-top convertibles]." (*Id.* (alterations in complaint).)

AdBlue tanks. As explained in the complaints, AdBlue is a substance that is used to breakdown emissions from diesel engines into less harmful compounds. (IPP ¶ 145; DPP ¶ 102.) It became popular in the early 2000s when Defendants started marketing their diesel cars as fuel-efficient alternatives to electric and hybrid cars. (IPP ¶¶ 144-45.) With the use of AdBlue burgeoning, Defendants reportedly determined that they could save up to €80 per car by agreeing on a standard tank size. (IPP ¶ 150.) They first agreed, in or around 2006, to only use AdBlue tanks that were between 17 and 23 liters. (IPP ¶¶ 149, 151.) Several years later they shifted to smaller, 8-liter tanks after their marketing departments touted the cost savings of smaller tanks **[**4]** and the benefits of having more space in the cars for passengers, cargo, and equipment. (IPP ¶¶ 148, 152.) Eight-liter tanks were then ditched in favor of 16-liter tanks after Defendants learned in 2010 that new U.S. regulations would soon require tanks to contain enough AdBlue to last for 10,000 miles before needing to be refilled. (IPP ¶¶ 153-55.) Even the 16-liter tanks were not large enough to meet U.S. standards, according to the IPP complaint. (IPP ¶ 153.) But Plaintiffs maintain that Defendants agreed to use 16-liter tanks despite knowing this. **[*1063]** Documents purportedly reflect that VW AG encouraged the others to stick with the 16-liter tanks despite regulatory concerns (IPP ¶ 159) and Audi AG cautioned against a potential "arms race with regard to tank sizes," which "we should continue to avoid at all costs" (IPP ¶ 160).

The European investigation. The above allegations, like most others in the complaints, are based largely on articles that were published in the German news magazine *Der Spiegel*. In the summer of 2017, *Der Spiegel* reported that the European Commission's competition department ("ECC") and Germany's Federal Cartel Office were investigating "allegations of an antitrust **[**5]** cartel among the Defendants." (IPP ¶¶ 119-20.) As Plaintiffs note, ECC investigations only proceed when there are "reasonable indications of a likely infringement" of competition laws. (IPP ¶ 112 (quoting Antitrust Manual of Procedures, EUROPA.EU, 102-109 (March 2012), *Opening of Proceedings, Conditions for Opening of Proceedings*).)

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[1] Citations to "IPP ¶" and "DPP ¶" are respectively to the indirect purchaser plaintiffs' and the direct purchaser plaintiffs' complaints. (Dkt. Nos. 241, 244.) The IPPs are U.S. consumers; the DPPs are U.S. auto dealers.

VW AG and Daimler AG reportedly submitted proffers to the ECC as part of the agency's leniency program. (IPP ¶¶ 113-14, 121; DPP ¶¶ 111-12.) In VW AG's proffer, it admitted (1) that "Daimler, BMW, Volkswagen, Audi and Porsche made agreements 'for many years, at least since the 1990s, up to today' about the development of their vehicles, costs, suppliers and markets;" (2) that Defendants "discussed vehicle development, brakes, petrol and diesel engines, clutches and transmissions as well as exhaust treatment systems;" (3) that there had been an "exchange of internal, competitively sensitive technical data;" (4) that Defendants had jointly established "technical standards" and agreed to use "only certain technical solutions" in new cars; and (5) that "behavior in violation of cartel law" may have occurred. (IPP ¶ 124.)

Plaintiffs assert that by seeking leniency **[**6]** from the ECC, VW AG and Daimler AG effectively "admitted the existence of a secret cartel." (IPP ¶ 118; *see also id.* ¶ 115 ("Leniency is not available for lesser anti-competitive infringements, nor is it available to a company that claims it did not participate in a cartel." (citing *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*, OFFICIAL JOURNAL OF THE EUROPEAN UNION (Aug. 12, 2006), Introduction ¶ 1)).) In October 2017, following VW AG's and Daimler AG's proffers and in connection with the ECC's investigation, the ECC conducted "dawn raids" in Germany at several of Defendants' headquarters, including the headquarters of BMW AG, Daimler AG, and VW AG. (IPP ¶ 120; *see also* DPP ¶ 114.)

The investigation is narrowed. In September 2018, after Plaintiffs had filed their complaints in this action, the ECC announced in a press release that the scope of its investigation was changing.[2] The ECC explained in the press release that its investigation had not unearthed a vehicle-wide conspiracy to restrain technological development, but that it would be opening an in-depth investigation into one issue: whether Defendants "colluded, in breach of EU antitrust rules, **[**7]** to avoid competition on the development and roll-out of technology to clean the emissions of petrol and diesel passenger cars." (Dkt. No. 377-3 at 2 (emphasis omitted).) The ECC announced **[*1064]** that specifically it would be examining whether Defendants colluded to limit the development and roll-out (i) of "selective catalytic reduction ('SCR') systems to reduce harmful nitrogen oxides emissions from passenger cars with diesel engines," and (ii) of "Otto particulate filters ('OPF') to reduce harmful particulate matter emissions from passenger cars with petrol engines." (*Id.* (emphasis omitted).)

In its press release, the ECC emphasized that its formal investigation would concern "solely the emissions control systems" just identified. (*Id.*) Referring to Defendants as the "circle of five," the Commission explained that although Defendants had also exchanged other technical information and had cooperated on other areas of vehicle development, there was no reason to believe that those exchanges were unlawful:

> [In addition to emissions control systems,] [n]umerous other technical topics were discussed, including common quality requirements for car parts, common quality testing procedures **[**8]** or exchanges concerning their own car models that were already on the market. The "circle of five" also had discussions on the maximum speed at which the roofs of convertible cars can open or close, and at which the cruise control will work. Cooperation also extended to the area of crash tests and crash test dummies where the car companies pooled technical expertise and development efforts to improve testing procedures for car safety.
> At this stage the Commission does not have sufficient indications that these discussions between the "circle of five" constituted anti-competitive conduct that would merit further investigation. EU antitrust rules leave room for technical cooperation aimed at improving product quality. The Commission's indepth investigation in this case concerns specific cooperation that is suspected to have aimed at limiting the technical development or preventing the roll-out of technical devices.

(*Id.*)

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[2] Defendants filed a copy of that press release (*see* Dkt. No. 377-3) and the Court takes judicial notice of its contents as information that is from a source "whose accuracy cannot reasonably be questioned." *Fed. R. Evid. 201(b)(2)*. The Court will not consider Defendants' supplemental briefing on the press release (*see* Dkt. No. 377), as Defendants did not seek the Court's leave before filing the brief, as required. *See Civil L.R. 7-3(d)*.

Other agreements. Plaintiffs allege that Defendants reached other anticompetitive agreements in addition to their agreement to reduce innovation.

. *Price fixing*. Plaintiffs claim that Defendants agreed to "artificially fix, raise, stabilize, and control prices" for their **[**9]** cars in the United States. (*E.g.*, IPP ¶ 261.) No specifics on this agreement are offered.

. *Agreements on suppliers*. Defendants allegedly agreed to use the same suppliers for certain vehicle components. Three concrete examples are offered in the complaints. In or around 2006, Defendants agreed that, if possible, AdBlue tanks should be produced by only two manufactures. (IPP ¶ 156.) In 2011, one of Defendant's managers explained to a working group that Defendants needed to select the same supplier for diesel-motor sensors. (IPP ¶ 142.) And in 2013, one of Defendants' working groups reviewed and criticized the performance of a shared supplier of suspension equipment. (IPP ¶ 141.)

. *Agreement on steel purchases*. Starting in the 1990s, Plaintiffs contend that Defendants and German steel manufacturers began using a shared pricing formula for steel purchases. (IPP ¶ 169.) The formula set a fixed long-term price for raw steel and a variable price, based on a selected price index, for scrap steel, precious metals and alloys—three materials that are combined with raw steel to build cars. (IPP ¶¶ 166, 169; DPP **[*1065]** ¶ 91.) The formula helped bridge a divide between Defendants and the steel manufacturers: **[**10]** Defendants wanted long-term contracts with fixed, predictable costs to effectively set car model prices, while steel manufacturers wanted short-term contracts that could be adjusted to account for fluctuations in the markets for these materials. (IPP ¶¶ 167-68; DPP ¶ 90.) Defendants apparently stopped using the variable index in 2015, after European officials began investigating anticompetitive conduct in the German steel industry. (IPP ¶ 175.) But soon after that decision, Plaintiffs submit that Defendants started communicating about setting up a replacement index. (IPP ¶¶ 175-76.)

. *Agreement to fund scientific studies*. As alleged, Defendants sponsored now-debunked scientific studies that were aimed at promoting their diesel vehicles. (IPP ¶ 178.) Plaintiffs claim that the studies were flawed because they purported to show that new German-made diesel cars had low emissions, but at least some of those cars used emissions cheating software and were not in fact clean or safe for human health. (IPP ¶¶ 178-82.)

Both the IPPs and DPPs assert that through the conduct described above Defendants have violated *§ 1 of the Sherman Act*. The IPPs also assert that Defendants have violated various state **[**11]** antitrust, unfair competition, consumer protection, and unfair trade practices laws, and have triggered certain state unjust enrichment and disgorgement statutes. The IPPs and DPPs seek to bring class actions respectively on behalf of all persons and U.S.-based car dealers that, since the mid-1990s, bought or leased in the United States one or more new passenger cars manufactured or sold by Defendants. (IPP ¶¶ 4, 10, 245; DPP ¶ 129.)

After the complaints were filed, Defendants filed a joint motion to dismiss for failure to state a claim. *See* *Fed. R. Civ. P. 12(b)(6)*; (Dkt. No. 321). The German Defendants (Audi AG, BMW AG, Daimler AG, Porsche AG, and VW AG) also filed individual motions to dismiss for lack of personal jurisdiction. *See* *Fed. R. Civ. P. 12(b)(2)*; (Dkt. Nos. 339, 340, 341, 345).

II. LEGAL STANDARDS

At the pleading stage, plaintiffs in civil proceedings must make "a prima facie showing" of personal jurisdictional over the defendants. *CollegeSource, Inc. v. AcademyOne, Inc., 653 F.3d 1066, 1073 (9th Cir. 2011)* (quoting *Brayton Purcell LLP v. Recordon & Recordon, 606 F.3d 1124, 1127 (9th Cir. 2010))*. They cannot rely on "bare allegations" in doing so, but "uncontroverted allegations in the complaint must be taken as true." *Id.* (citation omitted). If a prima facie case is made, the burden shifts to the defendants to "present a compelling case" for why the exercise of jurisdiction **[**12]** would be unreasonable. *Id. at 1079* (quoting *Burger King v. Rudzewicz, 471 U.S. 462, 477-78, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985))*.

The complaints must also include factual allegations that, if true, would plausibly support a claim for relief. *See* *Ashcroft v. Iqbal, 556 U.S. 662, 677-80, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*; *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554-57, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In the antitrust context, the Ninth Circuit has explained that the facts that count in this assessment are "evidentiary facts." *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008)*. Evidentiary facts are those that can answer the questions "who, did what, to whom (or **[*1066]** with whom), where, and when." *In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1194, n.6 (9th Cir. 2015)* (quoting *Kendall, 518 F.3d at 1047*).

Unlike evidentiary facts, legal conclusions and conclusory facts will not be accepted as true. *See* *Iqbal, 556 U.S. at 678* ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). When the nonconclusory facts are accepted, they "must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011)*.

III. PERSONAL JURISDICTION

The Court first considers the German Defendants' motions to dismiss for lack of personal jurisdiction. Audi AG, BMW AG, Daimler AG, Porsche AG, and VW AG are German corporations. They also allegedly made the agreements at issue in Germany. Because they are foreign companies and the challenged conduct occurred abroad, **[**13]** they argue that this Court lacks personal jurisdiction over them.

In a federal antitrust case, a district court may not enter a binding judgment against a defendant that has insufficient contacts with the United States. *See* *Int'l Shoe Co. v. Washington, 326 U.S. 310, 319, 66 S. Ct. 154, 90 L. Ed. 95 (1945)* (general standard); *Action Embroidery Corp. v. Atl. Embroidery, Inc., 368 F.3d 1174, 1180 (9th Cir. 2004)* (applied in antitrust context). Where, as here, the defendants are not "at home in the forum," *Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011)*, personal jurisdiction will be appropriate only if they "purposefully direct[ed] [their] activities" at the forum or "purposefully avail[ed] [themselves] of the privilege of conducting activities in the forum," *Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004)*.

During the relevant period, the German Defendants purposefully directed their activities at the United States. Through subsidiaries that they established in the United States, they annually sold hundreds of thousands of cars to auto dealers and consumers in this country. (DPP ¶¶ 16-18, 20-22, 25-26, 28-32, 34-36.) They designed their cars to meet federal and state motor vehicle regulations. (DPP ¶ 126; IPP ¶¶ 153-55 (alleging that Defendants chose to use larger AdBlue tanks in their U.S.-bound cars than in their Europe-bound cars because of U.S. emission standards).) Their executives publicly noted that the U.S. market was one of the "most **[**14]** important," a "core region," a "strategic pillar," a "very high priority," and a "second home." (Opp'n, Dkt. No. 362 at 22, 26, 29-30, 32, 34 (quoting annual reports, press releases, and statements at annual meetings.)[3] Indeed, they allegedly made billions of dollars selling their cars in the United States. (DPP ¶ 55.)

The German Defendants, in short, targeted the United States as a market for their cars; and because the claims at issue are tied to the cars that they indirectly sold in the United States, personal jurisdiction over them is appropriate. Two well-known Supreme Court decisions support this conclusion.

In *World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)*, the Court held that an **[*1067]** Oklahoma court could not exercise personal jurisdiction "over a nonresident automobile retailer and its wholesale distributor in a products-liability action, when the defendants' only connection with Oklahoma [was] the fact that an automobile sold in New York to New York residents became involved in an

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[3] The Court may consider evidence presented outside the pleadings in assessing personal jurisdiction. *See* *Dole Food Co. v. Watts, 303 F.3d 1104, 1108 (9th Cir. 2002)*.

accident in Oklahoma." *Id. at 287*. In reaching that holding, the Court took care to distinguish the facts before it from a scenario that would have given rise to personal jurisdiction over the nonresident defendants:

> [I]f the sale of a product of a manufacturer **[**15]** or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.

Id. at 297.

Relying in part on *World-Wide Volkswagen*, a plurality of the Court in *Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987)*, concluded that a Japanese valve manufacturer's "mere awareness" that its valves would reach the forum State "in the stream of commerce" after it sold the valves to a Taiwanese tire manufacturer was insufficient to support that the valve manufacturer "purposefully avail[ed] itself of the privilege of conducting activities within the forum State." *Id. at 105, 109, 112-13* (O'Connor, J.). But the plurality explained that certain "[a]dditional conduct," if present, could have established the "substantial connection between the defendant and the forum State necessary for a finding of minimum contacts":

> Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State [and support personal jurisdiction.] [F]or example, **[**16]** designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.

Id. at 112 (citation omitted).

The facts that were absent in *World-Wide Volkswagen* and *Asahi*, but which the Supreme Court noted could support personal jurisdiction over a foreign defendant, are sufficiently alleged here. During the over 20 year conspiracy that is claimed, Plaintiffs submit that more than 20 million of the German defendants' cars were sold in the United States (DPP ¶ 54)—far from "simply an isolated occurrence." *World-Wide Volkswagen, 444 U.S. at 297*. And those 20 million cars didn't simply arrive in the United States through "the stream of commerce." *Asahi, 480 U.S. at 112*. The German defendants "establish[ed] channels for . . . marketing [their] product[s] . . . in the [United States]" (*see* IPP ¶¶ 53-66; DPP ¶¶ 40-43), and they "design[ed] [their] product[s] for the market in the [United States]" (*see* IPP ¶¶ 153-55; DPP ¶ 126). *Asahi, 480 U.S. at 112*.[4]

[*1068] It is an "unexceptional proposition" that when a foreign manufacturer "seek[s] to serve a given . . . market," the manufacturer may **[**17]** be subject to the jurisdiction of courts within that market even "without entering the forum." *J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 882, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011)* (plurality). Given the German Defendants' efforts to target the U.S. market (and the success they had), this Court "has the power to subject [them] to judgment concerning that conduct." *Id. at 884*; *see also* *Schwarzenegger, 374 F.3d at 802* (explaining that personal jurisdiction exists when a foreign defendant directs his activities at the forum, the claim arises from that forum-directed conduct, and the exercise of jurisdiction is otherwise reasonable).

Plaintiffs have made a prima facie showing of personal jurisdiction. The burden accordingly shifts to the German Defendants to "present a compelling case" for why the exercise of jurisdiction would be unreasonable. *CollegeSource, 653 F.3d at 1079* (quoting *Burger King, 471 U.S. at 477*); *see also* *Asahi, 480 U.S. at 113-15*. They have not met this burden.

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[4] In *Williams v. Yamaha Motor Co., 851 F.3d 1015 (9th Cir. 2017)*, a case on which the German Defendants rely, there were no allegations that the Japanese defendant, Yamaha Motor Co. Ltd., had designed the defective boat motors at issue for sale in the forum state of California. The Ninth Circuit's conclusion that personal jurisdiction was lacking over the foreign defendant there, even though its U.S. subsidiary sold the motors in California, *id. at 1022-25*, is thus not controlling.

Defendants first assert that the European Union and Germany have sovereign interests in adjudicating this matter, as it involves German companies, German witnesses, and conduct in Germany. They argue that the exercise of jurisdiction here would conflict with those sovereign interests. A conflict with "the sovereignty of the defendant's state" is a factor that courts consider in determining whether the exercise of personal **[**18]** jurisdiction is reasonable. *CollegeSource, 653 F.3d at 1079* (*Dole Food, 303 F.3d at 1114*). But Defendants have not persuaded the Court that such a conflict exists. While Germany and the European Union are investigating Defendants' actions, Plaintiffs bring their cases for violations of U.S. antitrust laws based on conduct that is tied to the United States. This Court will not interfere with the sovereign interests of Germany and the European Union by considering whether Defendants violated U.S. law and harmed U.S. consumers.

The German Defendants next note that hundreds of their employees are alleged to have been involved in the agreements in question and most (if not all) of those employees are located in Germany. If litigation in this forum continues, the German Defendants argue that the burdens will be significant, as witnesses and attorneys will need to shuttle back and forth between the United States and Europe. Inconveniences of the type asserted "will not overcome clear justifications for the exercise of jurisdiction" unless they are "so great as to constitute a deprivation of due process." *Hirsch v. Blue Cross, Blue Shield of Kansas City, 800 F.2d 1474, 1481 (9th Cir. 1986)*. At this stage, the Court cannot conclude that the identified inconveniences are of this magnitude. If Plaintiffs' cases move forward and the travel **[**19]** and expense burdens that are forecasted crystalize, the German Defendants may renew their inconvenience argument at a later date. *See IMAPizza, LLC v. At Pizza Ltd., 334 F. Supp. 3d 95, 116 n.5 (D.D.C. 2018)* (noting that "jurisdictional issues, like merits issues, are adjudicated in stages" and considering a *Rule 12(b)(6)* motion after determining that the plaintiffs made out a prima facie showing of personal jurisdiction).

Plaintiffs have made a prima facie showing of personal jurisdiction and the German Defendants have not presented a **[*1069]** compelling case for why the exercise of jurisdiction would be unreasonable. The Court thus concludes that it has personal jurisdiction over the German Defendants for Plaintiffs' Sherman Act claims. Under the doctrine of pendent personal jurisdiction, the Court also exercises jurisdiction over the German Defendants for Plaintiffs' state law claims, which are based on the same operative facts as their Sherman Act claims. *See CollegeSource, 653 F.3d at 1076* (citing *Action Embroidery, 368 F.3d at 1180-81*). The German Defendants' motions to dismiss for lack of personal jurisdiction are DENIED.

IV. SHERMAN ACT CLAIMS

Section 1 of the Sherman Act forbids competitors from entering into agreements that unreasonably restrain trade. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. Multiple anticompetitive agreements are claimed here, although the principal focus is on an **[**20]** agreement by Defendants to reduce innovation.

If Defendants agreed to what is alleged—"a *de facto* whole car conspiracy" to reduce innovation (Opp'n Dkt. No. 360 at 20)—that agreement plausibly would have violated *§ 1*. Plaintiffs maintain that the innovation-reducing agreement resulted in Defendants' cars having "fewer features and reduced performance." (IPP ¶ 5.) An agreement "to make a product of inferior quality . . . count[s] as [an] output reduction," Philip E. Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* ¶ 1901d (3rd & 4th Eds., 2018 Cum. Supp. 2010-2017), and agreements to restrict output are per se illegal under *§ 1*, *see Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100, 104 S. Ct. 2948, 82 L. Ed. 2d 70 & n.21 (1984)*.

The question is whether the well-pled allegations plausibly support the output reducing agreement that is claimed. After considering that question next, the Court will later address the other agreements that are described in the complaints.

A. Agreement to Reduce Innovation

The complaints identify two instances in which Defendants reached consensus on vehicle specifications. As alleged, they agreed not to manufacture convertibles with roofs that opened when the cars were traveling above a particular speed, and **[**21]** they agreed to use the same sized AdBlue tanks in their diesel-engine cars.

Neither of these is a compelling example of an agreement "to make a product of inferior quality." Areeda & Hovenkamp ¶ 1901d. The complaints do not suggest that consumers even want convertibles with roofs that open at speeds above 31 miles per hour, the chosen limit; and common sense suggests that there are safety reasons for why consumers would *not* want that feature. It's also not clear if the selected 16-liter AdBlue tanks were inferior to larger tanks. Larger tanks would have needed to be refilled less often, but they also would have taken up more space in the cars, as Defendants recognized. (IPP ¶¶ 148, 152.)

Even assuming, though, that the convertible and AdBlue tank agreements reduced innovation and resulted in inferior cars, those two examples are not enough to support a "*de facto* whole car conspiracy" to reduce innovation. The two examples relate to niche vehicle features that are only found in a small subset of Defendants' cars. Only two of 37 named IPPs allege that they purchased a convertible (IPP ¶¶ 34, 44), and only one alleges that he **[*1070]** purchased a diesel-engine car (*id.* ¶ 26). To maintain lawsuits **[**22]** against Defendants on behalf of almost everyone in the United States who has purchased one of their cars (of any model type) over the past 20 years, more is needed.

To support the broader agreement that they allege, Plaintiffs rely heavily on VW AG's admissions to European antitrust authorities. To review, Plaintiffs allege that VW AG admitted to the ECC that:

1. "Daimler, BMW, Volkswagen, Audi and Porsche made agreements 'for many years, at least since the 1990s, up to today' about the development of their vehicles, costs, suppliers and markets;" that

2. Defendants "discussed vehicle development, brakes, petrol and diesel engines, clutches and transmissions as well as exhaust treatment systems;" that

3. there had been an "exchange of internal, competitively sensitive technical data;" that

a4. Defendants jointly established "technical standards" and agreed to use "only certain technical solutions" in new vehicles; and that

5. "behavior in violation of cartel law" may have occurred.

(IPP ¶ 124.)

These admissions may seem significant at first glance, but it is hard to make much of them when they are examined more closely. The first admission is vague. That Defendants made agreements for many **[**23]** years "about the development of their vehicles, costs, suppliers and markets" says little about the scope of those agreements, and says nothing about the alleged agreement to reduce innovation.

The second admission is similar. VW AG admitted that Defendants "discussed vehicle development," but there is no indication of what those discussions entailed. More detail is needed because a discussion among competing auto manufacturers about brakes, or about any of the other identified car parts, need not be anticompetitive. *See* *Princo Corp. v. Int'l Trade Comm'n, 616 F.3d 1318, 1335 (Fed. Cir. 2010)* (explaining that collaboration among competitors can "reduce costs, facilitate innovation, eliminate duplication of efforts and assets, and share risks that no individual member would be willing to undertake alone"); FTC & Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* 1 (2000) (noting that "to compete in modern markets, competitors sometimes need to collaborate," and that collaboration may "not only [be] benign but procompetitive").

The third, fourth, and fifth admissions do a bit more for Plaintiffs. An "exchange of internal, competitively sensitive technical data" among Defendants may have been anticompetitive and, as VW AG appears to **[**24]** have acknowledged, may have violated European cartel law. Defendants' agreement to use "'only certain technical solutions' in new vehicles" also sounds similar to an agreement to reduce innovation. Yet even these allegations lack important specificity.

For one thing, European and American antitrust laws are not uniform, so Defendants' possible violation of European cartel law does not necessarily mean that they violated the *Sherman Act*. *See* D. Daniel Sokol, *Troubled Waters*

Between U.S. and European Antitrust, *115 Mich. L. Rev. 955, 970 (2017)* (explaining that "European case law and enforcement on information sharing [among competitors] is more aggressive than the United States").

Even more importantly, an agreement to only use certain technical solutions is not the same as an agreement to reduce **[*1071]** product quality. The former may be equivalent to "standard setting," which "serves many useful ends, such as protecting consumers from inferior goods, increasing compatibility among products that must be interchangeable with the products of other manufacturers, or focusing customer comparison on essential rather than nonessential differences." Areeda & Hovenkamp ¶ 2136a. For these reasons, "most instances of standard setting **[**25]** . . . are lawful." *Id.* It is not appropriate to infer that Defendants reached a per se illegal agreement to reduce product quality, which is what Plaintiffs allege, simply because they agreed to exchange "competitively sensitive technical data" and to use "only certain technical solutions."

Also of significance, VW AG's admissions do not identify the specific types of competitively sensitive technical data that Defendants exchanged, or the technical solutions to which Defendants agreed. Maybe those exchanges and technical solutions touched on many different areas of vehicle development, as Plaintiffs allege. But it is also possible that the exchanges were more limited in scope. Indeed, perhaps the exchanges and technical solutions related only to the speed at which soft-top convertibles open and the size of AdBlue tanks, the two examples that Plaintiffs have identified in their complaints.

VW AG's admissions to European antitrust authorities, in short, are too general and too vague to plausibly support the broad agreement to reduce innovation that Plaintiffs allege.

Other allegations require even more speculation. For example, putting aside VW AG's admissions, Plaintiffs argue it is significant **[**26]** that the ECC is investigating Defendants' coordinated activities. But courts in this district have explained that government antitrust investigations ordinarily carry "no weight in pleading an antitrust conspiracy," for it is "unknown whether the investigation[s] will result in indictments or nothing at all." *In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007)*; *see also* *In re Capacitors Antitrust Litig., 106 F. Supp. 3d 1051, 1064 (N.D. Cal. 2015)*.

The ECC investigation at issue proves why this skepticism is well founded. Since Plaintiffs filed their complaints, the scope of that investigation has narrowed significantly. The ECC was initially investigating whether Defendants had unlawfully colluded on numerous areas of vehicle development. But having determined from its initial investigation that Defendants' collaboration was mostly akin to standard setting, the ECC is now only looking into whether Defendants colluded on the development of certain emissions technologies. (*See* Dkt. No. 377-3 at 2.) That targeted investigation into one area of vehicle development does little to support a "whole car conspiracy" to reduce innovation.

Some allegations in the complaints do support the expansive agreement to reduce innovation that is claimed, but these allegations are not well pled. For example, Plaintiffs allege that **[**27]** the innovation-reducing agreement covered "almost all areas of automotive development." (DPP ¶ 86 (emphasis omitted); *accord* IPP ¶ 131.) Absent are evidentiary facts supporting this allegation. It is a conclusory factual statement and will not be accepted as true. *See* *Iqbal, 556 U.S. at 678-79*.

Allegations about how Defendants used working groups and trade associations to further their "whole car conspiracy" also lack sufficient detail. Although the IPPs spend more than a dozen pages of their complaint discussing these working groups and trade associations, they almost never identify what was agreed to in these meetings and instead only vaguely refer to **[*1072]** "clandestine agreements to limit technological innovation." (IPP ¶ 129.) More facts are needed to plausibly support that Defendants used working groups and trade associations to reach the broad anticompetitive agreement that is alleged. *See* *In re Musical Instruments, 798 F.3d at 1196* ("[M]ere participation in trade-organization meetings where information is exchanged and strategies are advocated does not suggest an illegal agreement.").

As the Supreme Court noted in *Twombly*, antitrust discovery can be "sprawling, costly, and hugely time-consuming," and can "push cost-conscious defendants to settle even **[**28]** anemic cases." *550 U.S. at 559* & n.6.

These concerns are at play here. Plaintiffs propose two class actions that would include almost every purchaser and dealer of German cars in the United States over the past 20 years. Discovery would require Defendants to search through decades of information; and because Plaintiffs allege that Defendants' agreement covered most (if not all) areas of vehicle development, discovery would reach into almost every nook and cranny at five giant automakers.

With the potential for such a massive and expensive factual investigation, the Court "retain[s] the power to insist upon some specificity in pleading." *Id. at 558* (citation omitted). Before Plaintiffs are allowed to pursue such a broad antitrust claim, they must do more than point to a European antitrust investigation (the scope of which is now much narrower than Plaintiffs' claims), two examples of agreements by Defendants to use certain technical standards, and Defendants participation in working groups and trade associations. Even when viewed together, these allegations do not plausibly support that Defendants reached a "*de facto* whole car conspiracy" to reduce innovation.[5]

B. The Other Agreements

While the principal focus **[**29]** of the complaints is on the asserted agreement to restrain innovation, Plaintiffs also allege that Defendants violated *§ 1* by (i) fixing prices, (ii) agreeing to only use certain part suppliers, (iii) using a shared pricing formula for steel purchases, and (iv) jointly funding now-debunked scientific studies that were aimed at promoting their diesel cars. The allegations do not support these claims.

No factual allegations support price fixing. Plaintiffs simply state in the Claims for Relief sections of their complaints that Defendants "agree[d] to fix, increase, maintain and/or stabilize prices of German Automobiles sold in the United States." (DPP ¶ 153; *see also* IPP ¶ 261 (Defendants "entered into a continuing agreement . . . to artificially fix, raise, stabilize, and control prices for new German Passenger Vehicles in the United States"). These are conclusory statements and will not be accepted as true. *See* *Iqbal, 556 U.S. at 678*.

For the other three agreements, even if they were reached it is unclear how Plaintiffs were injured by them. If, as is alleged, the five leading German car makers agreed to coordinate their purchases of car parts and steel, the prices they paid for those inputs would presumably **[**30]** have **[*1073]** dropped. *See, e.g.*, Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, *86 Iowa L. Rev. 1137, 1178 (2001)* ("If, for example, many buyers in the relevant market participate in a purchasing joint venture, the venture is more likely to give those buyers the clout to lower their purchasing costs."); Areeda & Hovenkamp ¶ 2135b (explaining that the most common purpose of "joint purchasing arrangements" is "to obtain lower prices on more favorable terms"). Lower input prices would likely have benefited car purchasers, not harmed them. *See* John B. Kirkwood, *Powerful Buyers and Merger Enforcement*, *92 B.U. L. Rev. 1485, 1505 n.75 (2012)* (noting that "[l]ower input prices generally yield lower prices and greater output of end products" (quoting Jonathan M. Jacobson & Gary J. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 Antitrust Bull. 1, 4 (1991))).

Plaintiffs claim that they were harmed because any savings from the car-part and steel supplier agreements were not passed on to them. (*See, e.g.*, DPP ¶ 87 (alleging that with respect to the steel-purchasing agreement, "Defendants pocketed the cost savings and did not pass along a single cent to the Dealer Plaintiffs").) That result would have been odd, as "[a] firm will normally pass on some portion **[**31]** of its cost-per-unit savings to consumers even if it is a profit-maximizing monopolist." *Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1145 n.11 (9th Cir. 2003)*. But in any event, Plaintiffs do not explain why Defendants were required to pass on their cost savings. If Defendants had collectively agreed that none of them would share cost savings with consumers,

[5] As the Court reads the complaints, Plaintiffs do not offer the soft-top convertible and AdBlue tank allegations in support of separate, component-level Sherman Act claims. They instead offer those allegations to support the broader "whole car conspiracy" to reduce innovation that is claimed. The Court, then, will not separately consider whether the soft-top convertible and AdBlue tank agreements would plausibly violate the Sherman Act on their own.

then perhaps that agreement would have unreasonably restrained trade and harmed consumers. But the complaints do not include any factual allegations supporting such an agreement.

As for Defendants funding of now-debunked studies on diesel emissions, Plaintiffs do not explain how they were injured or how trade was restrained by this conduct. They do not allege that these scientific studies affected the price of their cars or that they relied on these studies in purchasing their cars; nor do they dispute that the principal study discussed in the IPP complaint was never published. (*See* Joint Mot., Dkt. No. 321 at 41 n. 17.)

To support a Sherman Act claim, a private plaintiff must "allege some credible injury caused by the [challenged] conduct." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California, 190 F.3d 1051, 1056 (9th Cir. 1999)*. The nonconclusory, evidentiary facts in the complaints do not support a credible injury to Plaintiffs resulting from Defendants' agreements regarding part suppliers, **[**32]** steel purchases, and scientific studies.

* * *

The well-pled allegations do not plausibly support any of the anticompetitive agreements that are alleged. The Court accordingly GRANTS Defendants' joint motion to dismiss Plaintiffs' Sherman Act claims. Having reached that conclusion, the Court need not consider other arguments for dismissal of the Sherman Act claims that Defendants have raised.

V. STATE LAW CLAIMS

In addition to their Sherman Act claims, the IPPs also assert that Defendants violated various state laws. The factual bases and theories of injury for these claims are the same as those for the Sherman Act claims. Like the Sherman Act claims, then, the state law claims are not well pled. Having reached that conclusion, the Court will not consider additional claim-specific arguments that Defendants have made for dismissal of the state law claims. Their **[*1074]** joint motion to dismiss the state law claims is GRANTED.

VI. CONCLUSION

Plaintiffs have not stated a claim for relief. It is not a certainty, however, that they cannot allege facts sufficient to address the identified deficiencies. The Court thus grants them leave to amend their complaints. To the extent that they choose to do so, **[**33]** they must file their amended complaints within **45 days** of this Order.

IT IS SO ORDERED.

Dated: June 17, 2019

/s/ Charles R. Breyer

CHARLES R. BREYER

United States District Judge

Omnimax Int'l, Inc. v. Anlin Indus.

United States District Court for the District of Colorado

June 17, 2019, Decided; June 17, 2019, Filed

Case No. 18-cv-01830-DDD-MEH

Reporter

2019 U.S. Dist. LEXIS 102011 *; 2019-1 Trade Cas. (CCH) P80,819; 2019 WL 2516121

OMNIMAX INTERNATIONAL, INC., Plaintiff-Counterclaim Defendant, v. ANLIN INDUSTRIES, INC., JOHN APPLEGATE, MARIE CLARK, PATRICIA MOLINE, Defendants-Counterclaim Plaintiffs.

Core Terms

antitrust, damages, counterclaims, allegations, covenants, abuse of process, intimidation, market power, ulterior, consumers, customers, courts, motive, motion to dismiss, anti trust law, employees, benefits, inferred, Pricing, bonuses, dealers, secrets

Counsel: **[*1]** For Omnimax International, Inc., a Delaware corporation formerly known as Euramax International, Inc., doing business as Amerimax Windows, Plaintiff: Ashley Warren Jordaan, Sonia Nicole Anderson, Christopher Larry Ottele, Husch Blackwell LLP-Denver, Denver, CO; Randall S. Thompson, Husch Blackwell LLP-St.Louis, St. Louis, MO.

For Anlin Industries, Inc., a California corporation doing business as Anlin Window Systems, John Applegate, an individual, Marie Clark, an individual, Patricia J. Moline, an individual, Defendants: Lance Henry, Matthew M. Wolf, Patrick D. Vellone, Allen Vellone Wolf Helfrich & Factor P.C., Denver, CO.

For Anlin Industries, Inc., a California corporation, John Applegate, an individual, Marie Clark, an individual, Patricia J. Moline, an individual, Counter Claimants: Lance Henry, Matthew M. Wolf, Patrick D. Vellone, Allen Vellone Wolf Helfrich & Factor P.C., Denver, CO.

For Omnimax International, Inc., a Delaware corporation, Counter Defendant: Ashley Warren Jordaan, Sonia Nicole Anderson, Christopher Larry Ottele, Husch Blackwell LLP-Denver, Denver, CO; Randall S. Thompson, Husch Blackwell LLP-St.Louis, St. Louis, MO.

Judges: Daniel D. Domenico, United States District Judge. **[*2]**

Opinion by: Daniel D. Domenico

Opinion

ORDER

Plaintiff—a manufacturer and distributor of metal and vinyl products, including replacement windows and doors—brought this case against three of its former sales representatives and the competitor that hired them, seeking damages and injunctive relief for alleged breach of contract, misappropriation of trade secrets, defamation, and related harms. Defendants filed four counterclaims (Doc. 41), three of which Plaintiff moves to dismiss for failure to state claims under *Federal Rule of Civil Procedure 12(b)(6)*. (Motion, Doc. 44.) For the reasons that follow, the Court **GRANTS** the Motion.

I. BACKGROUND

Plaintiff Amerimax[1] and Defendant Anlin are window vendors that sell to dealers. (Countercl. ¶ 1, Doc. 41.) This case centers on certain customer lists and confidential information that Amerimax alleges it owns but that its former employees misappropriated as they departed Amerimax to work for Anlin. (*See generally* Am. Compl., Doc. 38.) The facts as described below are drawn from the allegations in the counterclaim, which the Court must treat as true when considering a motion to dismiss. *Wilson v. Montano, 715 F.3d 847, 850 n.1 (10th Cir. 2013)* (citing *Brown v. Montoya, 662 F.3d 1152, 1162 (10th Cir. 2011))*.

Amerimax publishes a price book for its products, which is widely available and routinely received by dealers. (Countercl. **[*3]** ¶ 3.) However, Amerimax typically charges dealers less than the price published in the book—at a discount that varies per dealer based on a "Base Factor" and "Options Factor"—pursuant to an industry standard practice. (*Id.*) Dealers are not required to keep their individualized pricing confidential and regularly disclose such information in negotiations with competitors of Amerimax. (*Id.* ¶ 4.) Amerimax maintains a spreadsheet of the Base Factors for all its customers, which it calls the "Master Pricing List." (*Id.* ¶ 5.)

In October 2003, Amerimax hired Defendant Marie Clark, who worked as a sales representative for the company with territory in Colorado, Wyoming, and Nebraska. (*Id.* ¶ 21.) In July 2006, Amerimax hired Defendant John Applegate, who worked as a sales representative with territory in Colorado, New Mexico, and Texas. (*Id.* ¶ 6.) Neither had any supervisory responsibilities. (*Id.* ¶¶ 8, 23.) In May 2016, Amerimax sent Applegate and Clark an e-mail with the subject "Restrictive Covenant Agreement," stating that "effective immediately . . . [e]mployees who are eligible for any bonus or incentive must sign the agreement on an annual basis. Employees who fail to do so will not be **[*4]** paid any bonus or incentive payment." Amerimax sent a follow-up e-mail a few days later stating that "[i]n order for Q1 SIP bonuses to be processed and paid — these [agreements] need to be turned in today." (*Id.* ¶¶ 11, 26 ("Agreements").) Both Applegate and Clark were eligible for bonuses and signed the documents, but currently insist that none of the information to which they had access during their time with the company was ever identified as confidential or secret. (*Id.* ¶¶ 13, 27.)

Citing ineffective servicing of customers, compensation and benefits issues, unrealistic sales targets, and (in the case of Clark) offensive offhand remarks, Clark and Applegate eventually provided two weeks' notice and resigned effective May and June 2018, respectively. (*Id.* ¶¶ 16, 18, 27, 30.) Shortly after their departures, both went to work for Anlin. (*Id.* ¶¶ 17, 31.) On June 25, 2018, Anlin mailed an announcement to many window contractors, including Amerimax customers, advertising Clark's new affiliation with Anlin. (*Id.* ¶ 32.) On July 2, 2018, Anlin did the same regarding Applegate. (*Id.* ¶18.) Both employees maintain that they did not take the Master Pricing List, memorize it, or use the information **[*5]** contained therein with respect their employment with Anlin. (*Id.* ¶¶ 17, 31.) Neither directly solicited any Amerimax customers or made any disparaging comments concerning their former employer. (*Id.* ¶¶ 19-20, 33-34.)

In September 2009, Amerimax hired Defendant Patricia Moline as a customer service representative to handle incoming orders and inquiries. (*Id.* ¶ 35.) She does not recall ever being presented with or signing a "Restrictive Covenant Agreement." (*Id.* ¶ 38.) Citing stagnant compensation and decreasing benefits, she left Amerimax in June 2018. (*Id.* ¶¶ 39, 42.) Like Applegate and Clark, she maintains that none of the information to which she was privy at Amerimax was described as secret or confidential, she did not take or use the Master Pricing List, and she has never made any disparaging remarks about her former employer. (*Id.* ¶¶ 39, 43.)

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[1] Plaintiff OmniMax International, Inc., formerly known as Euramax International, Inc., has an operating and manufacturing division called "Amerimax," which is at issue in this dispute. For ease of reference in the present Order, the Court will refer to Amerimax in place of either OmniMax or Euramax.

Amerimax brought this action for damages and injunctive relief against Defendants, alleging breaches of non-compete and non-solicitation covenants and related obligations, as well as violations of the *Colorado Uniform Trade Secrets Act*. Defendants asserted four counterclaims against Amerimax. Count One pursues a declaration under *Colo. Rev. Stat. § 8-2-113(1)-(2)* that none **[*6]** of the Agreements are enforceable against Applegate, Clark, or Moline. Count Two seeks damages pursuant to the same statute to compensate Applegate and Clark for the alleged threats and intimidation Amerimax employed in causing them to sign the Agreements. Count Three asserts unlawful restraint of trade in violation of *Colo. Rev. Stat. § 6-4-104*. Count Four claims that Amerimax's filing and prosecution of this case is an abuse of process. The instant Motion seeks dismissal of the latter three of these claims.

II. ANALYSIS

The legal sufficiency of a pleading is a question of law. *Dubbs v. Head Start, Inc., 336 F.3d 1194, 1201 (10th Cir. 2003)*. As noted above, at this stage all allegations of material fact in support of the counterclaims must be accepted as true. *Wilson v. Montano, 715 F.3d at 850 n.1*. Still, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. Plausibility means that the pleader set forth facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "[L]abels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Twombly, 550 U.S. at 545*.

A. Count [*7] Two: Claim for Damages Under *Colo. Rev. Stat. § 8-2-113(1)*

Defendants' second claim is for damages they allege were caused by Amerimax's use of "threats and/or intimidation to cause Applegate and Clark to sign" the Agreements. (Countercl. ¶ 54, Doc. 41.) This, they argue, violates Colorado law and entitles them to sue for damages. The statute in question, dubbed "Unlawful to intimidate worker--agreement not to compete," declares it "unlawful to use force, threats, or other means of intimidation to prevent any person from engaging in any lawful occupation at any place he sees fit." *Colo Rev. Stat. § 8-2-113(1)*. It goes on to declare that except for certain contracts, including those for the protection of trade secrets or regarding management personnel and executive staff, "any covenant not to compete . . . shall be void." *Id. § 8-2-113(2)*. Applegate and Clark allege that they were damaged by Amerimax's "use[of] threats and/or intimidation . . . . Specifically, Amerimax threatened Applegate and Clark in emails that unless they signed [a] Restrictive Covenant Agreement, they would not receive bonuses to which they were already entitled." (Countercl. ¶¶ 54-55.) Amerimax responds that even if one assumes its behavior violated the statute, the state legislature **[*8]** did not intend this provision to create a private right of action for damages.

In a diversity case like this one, federal courts seek to ascertain and apply state law and must defer to the decisions of the controlling state's highest court. *Kokins v. Teleflex, Inc., 621 F.3d 1290, 1295 (10th Cir. 2010)*. Unfortunately, no party has pointed to any Colorado decision with direct guidance on the question whether a party may seek damages for a statutorily improper threat under *Section 113*. And the statute itself provides no express authorization for a such a claim. So, the Court must divine whether such authorization should be inferred. In matters of statutory interpretation, Colorado's Supreme Court has declared that a court's "fundamental task must be to discern and effectuate the legislature's intent. When, as here, a claimant alleges that a statute, ordinance, or regulation implicitly creates a private right of action, the critical question is whether the legislature intended such a result." *City of Arvada ex rel. Arvada Police Dep't v. Denver Health & Hosp. Auth., 403 P.3d 609, 614, 2017 CO 97 (Colo. 2017)*. This Court is not convinced of the practicality of that intent-based approach to statutory interpretation,[2] but if "no controlling state decision exists, the federal court must attempt to predict what the state's highest court would do." *TMJ Implants, Inc. v. Aetna, Inc., 498 F.3d 1175, 1180 (10th Cir. 2007)* (internal quotations and citations **[*9]** omitted).

Fortunately, Colorado's Supreme Court has given us more concrete guidance in how it interprets statutory text structure when it comes to allegations of implied rights of action. As an initial matter, "if the legislature includes a remedy in the statute at issue, [Colorado courts] will conclude it did not intend for the courts to create others." *City of Arvada, 403 P.3d at 614-15* (quoting *Allstate Ins. Co. v. Parfrey, 830 P.2d 905, 910-11 (Colo. 1992))*. But if the statute "is totally silent on the matter of remedy," then the court "must determine whether a private civil remedy reasonably may be implied." This turns on three factors:

(1) "whether the plaintiff is within the class of persons intended to be benefitted by the legislative enactment";
(2) "whether the legislature intended to create, albeit implicitly, a private right of action"; and
(3) "whether an implied civil remedy would be consistent with the purposes of the legislative scheme."

Id. The statute must satisfy all of these for a court to "conclude the legislature clearly expressed its intent to create a cause of action conferring standing on the claimant." *Id.* Discussing these considerations, *Parfrey* suggests that inferring a right of action may be **[*10]** appropriate when doing so would incentivize compliance and failing to do so would leave the statutorily-intended beneficiary without recourse. *See* *Parfrey, 830 P.2d at 911*; *City of Arvada, 403 P.3d at 615*.

Applying this framework, the Court holds that *Section 113* does not clearly afford the Defendants, under the circumstances presented here, a cause of action for damages. It is worth emphasizing that the Court is not deciding whether there are ever *any* potential circumstances in which a damages action for violation of *Section 113* might succeed. But the alleged intimidation here relates entirely to threatening to withhold bonuses if Clark and Applegate did not sign the Agreements. (*See* Countercl. ¶¶ 45, 54-55.) The question before the Court is therefore limited to whether Colorado law provides a right to sue for damages based on such allegations where the employees entered covenants, continued their employment, and received all benefits they were due.

As Amerimax argues, the law at issue is not silent on the matter of remedy. Illegal non-competition covenants are void. *Colo Rev. Stat. § 8-2-113(2)*. Defendants respond by pointing out that not all covenants are illegal, and that the remedy does not cover all prohibited conduct, for example where a facially acceptable covenant (e.g., one purporting **[*11]** to protect trade secrets) is procured by prohibited conduct (e.g., via intimidation). This is so, but it does not alter the fact that in this case, at least, any alleged damage flows from being induced to enter the Agreements. The bonuses in question were ultimately paid, and the threats and intimidation did not, as far as the counterclaim asserts, lead to any damage other than that allegedly caused by the Agreements themselves.

Moreover, the remedy here of avoiding the covenants incentivizes compliance and is consistent with existing state law. This claim is essentially one alleging that the Agreements were signed under duress, and such harms are well-guarded against by Colorado's general principles of contract law. And those principles provide the same remedies: voidability and rescission. *Vail/Arrowhead, Inc. v. Dist. Court for the Fifth Judicial Dist., Eagle Cty., 954 P.2d 608, 612 (Colo. 1998)* ("A contract is voidable on the grounds of duress if a party's manifestation of assent is induced by an improper threat that leaves no reasonable alternative.") (citing *Restatement (Second) of Contracts § 176* (1981)). Absent any authority indicating otherwise, the Court cannot say that the Colorado legislature intended to upend these common, privately accessible equitable principles by tacitly authorizing statutory damages in circumstances **[*12]** where the law has dependably afforded only equitable remedies.

Finally, the language of *Section 113(1)*—"[t]hat it shall be unlawful to use force, threats, or other means of intimidation to prevent any person from engaging in any lawful occupation"—has been in place for a century, where it once appeared alongside codes prohibiting (and providing criminal penalties for) blacklisting, picketing, and publishing notices of boycott. *See* Colo. Rev. Stat. Ch. XV Sec. 400 (1908) ("Blacklisting and Boycotting"). As

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[2] *See, e.g.*, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 61, 68 (1994) ("Intent is elusive for a natural person, fictive for a collective body.").

historically, there are today criminal penalties in place to discipline (and therefore deter) violations of the provision in questions. *Colo. Rev. Stat. § 8-2-115* ("Any person, firm, or corporation violating any provisions of *sections 8-2-112 to 8-2-115* is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than ten dollars nor more than two hundred fifty dollars, or by imprisonment in the county jail for not more than sixty days, or by both such fine and imprisonment."). Colorado law, therefore has implemented effective deterrents and remedies in place to enforce the state's longstanding prohibition, but it imbues the state—and not private parties—with armament in non-equitable remedies.

Although the considerations **[*13]** laid out by *Parfrey* involve some overlap, the gravity of available legislative materials, existing criminal penalties, and available equitable remedies—taken together—do not permit the Court to infer that Colorado's "legislature clearly expressed its intent to create a cause of action" for damages under *Section 113* in these circumstances. Defendants' second counterclaim therefore must be dismissed.

B. Claim Three: Antitrust Claim Under *Colo. Rev. Stat. § 6-4-104*

Under the *Colorado Antitrust Act of 1992* ("Act"), "[e]very contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce is illegal." *Colo. Rev. Stat. § 6-4-104*. At this motion to dismiss stage, the debate is whether Defendants' allegations concerning the Agreements adequately invoke the Act.

As the parties agree, stating a claim under the Act is analogous to one brought under the federal *Sherman Act* and involves three elements: (1) the defendant entered into an agreement constituting a contract, combination in the form of a trust or otherwise, or conspiracy; (2) that constitutes an unreasonable restraint on trade; and (3) the plaintiff suffered an antitrust injury. *JTS Choice Enterprises, Inc. v. E.I. DuPont De Nemours & Co., No. 11-CV-03143-WJM-KMT, 2014 U.S. Dist. LEXIS 24332, 2014 WL 793525, at *4-*5 (D. Colo. Feb. 26, 2014)* **[*14]** ; *Arapahoe Surgery Ctr., LLC v. Cigna Healthcare, Inc., 80 F. Supp. 3d 1257, 1262 (D. Colo. 2015)* ("The Colorado Antitrust Act is the state law analogue to the Sherman Act. . . . [T]he courts shall use as a guide interpretations given by the federal courts to comparable federal antitrust laws." (internal citations omitted)).

Assuming for present purposes that Anlin has alleged that the Agreements restrain trade, the Motion focuses on the third element—whether the pleadings sufficiently state an antitrust injury. "An antitrust injury is defined as an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc., 131 F.3d 874, 882 (10th Cir. 1997)*. The thrust of this analysis is whether a particular practice is "anticompetitive," using that term with special antitrust meaning reflecting the regulations' "basic objectives, the protection of a competitive process that brings to consumers the benefits of lower prices, better products, and more efficient production methods. . . . In this lexicon, a practice ultimately judged anticompetitive is one which harms competition, not a particular competitor." *SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 963 (10th Cir. 1994)* (internal citations omitted); *see also* *Brunswick Corp. v. Pueblo Bowl—O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (holding antitrust laws were enacted to protect competition, not competitors).

For **[*15]** many courts, the "crucial first step," "screen," or "filter" dispositive of whether an accused's practices harm competition within the meaning of the antitrust statutes is whether that firm possesses "market power." *SCFC, 36 F.3d at 963*. As the Tenth Circuit explained in *SCFC*, "market power is the ability to raise price by restricting output. '[I]n economic terms [it] is the ability to raise price without a total loss of sales.' Without market power, consumers shop around to find a rival offering a better deal." *Id. at 965* (quoting 2 P. Areeda & D. Turner, ***Antitrust Law*** ¶ 501, at 322 (1978)). The Circuit continued by quoting from one of the foremost antitrust authorities in the United States: "if we accept the notion that the point of antitrust is promoting consumer welfare, then it is clear why the concept of market power plays such a prominent role in antitrust analysis. If the structure of the market is such that there is little potential for consumers to be harmed, we need not be especially concerned with how firms behave." *Id.* (quoting George A. Hay, *Market Power in Antitrust*, 60 Antitrust L.J. 807, 808 (1992)).

Here, Anlin has failed to plausibly allege any comprehensible antitrust injury. Its threadbare, singular allegation—that the Agreements **[*16]** have anticompetitive effects because they tend to limit the entry of new companies into the Colorado market—is assumptive, conclusory, not colored by any facts permitting that inference, and ignores wholesale the fundamental principles of consumer protection the antitrust laws were enacted maintain. For example, the threshold market power query begins with the determination of the relevant market and involves evaluating the geographic reach of the businesses at issue and the type, price, and interchangeability of the products they sell. *Id. at 966*. Aside from a short conclusion that Anlin itself has suffered injury because of the Agreements with three employees, the counterclaims fail to even hypothetically plead facts to inform the Court of the relevant market, the market power of any party, or how the use of the Agreements causes that or any other antitrust injury, such as a negative impact on consumers. In all, Anlin has failed to nudge its allegations of an antitrust injury across the line from conceivable to plausible, *Twombly, 550 U.S. at 570*, and its third counterclaim accordingly fails.

C. Claim Four: Abuse of Process

The final claim at issue is for abuse of process. In Colorado, abuse of process requires proof **[*17]** of (1) an ulterior purpose in the use of judicial proceedings; (2) willful actions by a defendant in the use of process that are not proper in the regular conduct of a proceeding; and (3) damages. *Hewitt v. Rice, 154 P.3d 408, 414 (Colo. 2007)*. "An improper use of the legal process occurs when a particular procedural tool is used in an attempt to accomplish a result which that tool, when properly used, could not provide." *Gustafson v. Am. Family Mut. Ins. Co., 901 F. Supp. 2d 1289, 1305 (D. Colo. 2012)*. "If the action is confined to its regular and legitimate function in relation to the cause of action stated in the complaint there is no abuse, even if the plaintiff had an ulterior motive in bringing the action or if he knowingly brought suit upon an unfounded claim." *James H. Moore & Assocs. Realty, Inc. v. Arrowhead at Vail, 892 P.2d 367, 373 (Colo. App. 1994)*. And "while the ulterior motive may be inferred from the wrongful use of the process, the wrongful use may not be inferred from the motive." *Id.; see also Restatement (Second) of Torts § 682 comment b* (1977) ("[T]here is no action for abuse of process when the process is used for the purpose for which it is intended, [although] there is an incidental motive of spite or an ulterior purpose.").

Here, the allegations purporting to state a claim for abuse of process are severely limited. According to the counterclaims, Amerimax had an ulterior purpose in filing this action, which was an attempt **[*18]** to enforce knowingly void non-compete agreements and deter Anlin's right to legitimate competition in Colorado. Even were the Court to assume the truth of that accusation, Defendants have failed to plausibly allege any legal impropriety, and an "ulterior or even nefarious motive, alone, isn't enough to constitute an abuse of process." *Parks v. Edward Dale Parrish LLC, 2019 COA 19, 2019 WL 470515, at *3 (Colo. App. 2019)*. Defendants have not sought to test the assertion that Amerimax's claims lack factual or legal support through a motion to dismiss, but even if they did so successfully, "filing a complaint not justified in fact or law alone is not enough to amount to an abuse of process." *GN Netcom, Inc. v. Callpod, Inc., No. 11-CV-03271-RBJ, 2012 U.S. Dist. LEXIS 132001, 2012 WL 4086530, at *2 (D. Colo. Sept. 17, 2012)* (reviewing Colorado authority). Even if there is an alleged "ulterior motive," there are no allegations showing this action and its procedural tools have been used for anything other than their regular, legitimate judicial functions. Anlin's fourth counterclaim thus does not allege a prima facie case for abuse of process, and accordingly fails.

III. CONCLUSION

For the foregoing reasons, counterclaims Two, Three, and Four are **DISMISSED** without prejudice. Defendants may proceed on their claim for declaratory relief.

Dated: June 17, 2019. **[*19]**

BY THE COURT:

/s/ Daniel D. Domenico

Daniel D. Domenico

United States District Judge

Diva Limousine, Ltd. v. Uber Techs., Inc.

United States District Court for the Northern District of California

June 20, 2019, Decided; June 20, 2019, Filed

Case No. 18-cv-05546-EMC

Reporter

392 F. Supp. 3d 1074 *; 2019 U.S. Dist. LEXIS 103621 **; 2019 WL 2548459

DIVA LIMOUSINE, LTD., Plaintiff, v. UBER TECHNOLOGIES, INC., et al., Defendants.

Prior History: Diva Limousine, Ltd. v. Uber Techs., Inc., 2019 U.S. Dist. LEXIS 4274 (N.D. Cal., Jan. 9, 2019)

Core Terms

rates, drivers, allegations, affiliates, public utility, unfair, misclassification, out-of-state, competitors, exemption, one-way, prices, rides, motion to dismiss, prong, employees, anti trust law, causation, diversity, partial summary judgment, class member, violates, asserts, causal, merits, limousine, practices, courts, costs, subject matter jurisdiction

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For Uber Technologies, Inc., Rasier, LLC, Rasier-CA, LLC, Uber USA, LLC, UATC, LLC, Defendants: Brian C. Rocca, LEAD ATTORNEY, Sujal Shah, Kent Michael Roger, Morgan, Lewis & Bockius LLP, San Francisco, CA; Minna L Naranjo, Morgan Lewis and Bockius, San Francisco, CA.

For Keller Lenkner LLC, Warren Postman, Defendants: Thomas Kayes, Keller Lenkner LLC, Chicago, IL.

For Lyft, Inc., 3rd party defendant: R. James Slaughter, LEAD ATTORNEY, Keker, Van Nest & Peters LLP, San Francisco, CA.

Judges: EDWARD M. CHEN, United States District Judge.

Opinion by: EDWARD M. CHEN

Opinion

[*1080] ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS, AND DENYING WITHOUT PREJUDICE PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Docket Nos. 33, 113

Plaintiff Diva Limousine ("Diva"), a licensed provider of livery services in California, brings this **[**2]** putative class action on behalf of providers of pre-arranged ground transportation services against Uber Technologies and its subsidiaries ("Uber"). Diva alleges that Uber secures unlawful cost savings by misclassifying its drivers as independent contractors instead of employees. In doing so, Uber takes business and market share from competitors like Diva who operate their businesses in compliance with the law. Diva also alleges that Uber, armed with cash from investors, prices its services below cost in order to drive out competitors. Diva asserts that Uber's actions violate the *California Unfair Competition Law* ("UCL") and the *California Unfair Practices Act* ("UPA").

Pending before the Court are Uber's motion to dismiss Diva's First Amended Complaint and Diva's motion for partial summary judgment on the issue of driver misclassification. *See* Docket Nos. 33, 113. For the reasons discussed below, Uber's motion to dismiss is **GRANTED in part** and **DENIED in part**, and Diva's motion for partial summary judgment is **DENIED without prejudice**.

I. BACKGROUND

A. Factual Background

The First Amended Complaint alleges the following. Diva is a licensed provider of limousine and chauffeur-driven ground **[**3]** transportation services in California. Docket. No. 106 ("FAC") ¶ 39. Diva maintains affiliate relationships with limousine companies outside of California. *Id.* ¶ 44. These out-of-state affiliates refer clients who are looking to book rides in California to Diva and receive a fee or commission for the referral. *Id.*

Uber is a company that "provides prearranged transportation services for compensation **[*1081]** using an online-enabled application or platform." *Id.* ¶ 4. According to Diva, two aspects of Uber's business unlawfully undermine competition and cause harm to Diva. First, "Uber willfully misclassifies its California drivers as independent contractors" in violation of the California Labor Code. *Id.* ¶ 90. Diva alleges that Uber drivers should properly be classified as employees under California law because the drivers are integral to Uber's business and Uber "controls the precise manner in which the driver delivers Uber's service." *Id.* ¶¶ 69, 106 (emphasis removed). By misclassifying its drivers, Uber avoids paying minimum and overtime wages and providing benefits to its drivers as employees, saving it "a massive amount of money" and allowing it to lower prices, taking market share from competitors **[**4]** like Diva. *Id.* ¶¶ 90, 112, 125.

Second, Uber prices its rides "at a level that is far below the total average costs attributable to those rides with the purpose of injuring competition." *Id.* ¶ 129. Because Uber charges less for rides than the costs of providing the rides, it has "consistently lost massive amounts of money." *Id.* ¶ 131. Uber is able to continue operating at a loss because of substantial influxes of cash provided by investors. *Id.* ¶ 147. "The only rational purpose for Uber subsidizing rides as it has done and continues to do is to drive enough competitors out of business to be able to raise prices down the road." *Id.* ¶ 146.

As a result of these practices, since Uber began operating in Los Angeles, Diva has lost corporate and retail client business, and has been compelled by Uber's lower prices not to raise its own rates in line with expenses. *Id.* ¶¶ 41-42. It has also received fewer referrals from its out-of-state affiliates. *Id.* ¶ 43. Diva asserts two causes of action: a claim under the UCL, premised on Uber's alleged misclassification of its drivers, *id.* ¶ 127, and a claim under the UPA, premised on Uber's alleged loss-leader pricing, *id.* ¶¶ 162-63. Diva seeks injunctive **[**5]** relief under the UCL and damages and injunctive relief under the UPA. *Id.* ¶¶ 50, 60.

Diva seeks to certify two classes of Plaintiffs. The UCL class includes "[a]ll business entities that earned revenue through the provision of pre-arranged limousine or chauffeur-driven ground transportation services for non-shared rides in California from September 10, 2014 to the present." *Id.* ¶ 47. The UPA class is defined identically, with the exception that the class period runs from September 10, 2015 to the present. *Id.* ¶ 57.

B. Procedural Background

Diva filed its class action complaint on September 10, 2018. Docket No. 1. It then filed a motion for partial summary judgment on a "single issue": whether Uber drivers are properly classified as independent contractors or employees under the California Supreme Court's recent ruling in *Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903, 232 Cal. Rptr. 3d 1, 416 P.3d 1 (Cal. 2018)*. Docket No. 33 ("PSJ Mot."). Uber requested that the pending PSJ motion "be held in abeyance subject to a further scheduling order" or "denied without prejudice as premature under the one-way intervention rule." Docket No. 48. The Court ordered briefing on the one-way intervention issue. Docket No. 98.

Uber moved to dismiss Diva's original complaint in January 2019. Docket **[**6]** No. 100. Diva responded by filing the FAC. Docket No. 106. Uber then moved to dismiss the FAC under *Federal Rule of Civil Procedure 12(b)(1)* and *12(b)(6)*. Docket No. 113 ("Mot."). The motion to dismiss and the one-way intervention question on the PSJ motion are currently before the Court.

[*1082] II. LEGAL STANDARDS

Under *Federal Rule of Civil Procedure 12(b)(1)*, a party may move to dismiss for lack of subject matter jurisdiction. When subject matter jurisdiction is challenged, "the party seeking to invoke the court's jurisdiction bears the burden of establishing that jurisdiction exists." *Scott v. Breeland, 792 F.2d 925, 927 (9th Cir. 1986)*. A *Rule 12(b)(1)* motion will be granted if the complaint, considered in its entirety, fails on its face to allege facts sufficient to establish subject matter jurisdiction. *See* *Savage v. Glendale Union High Sch., 343 F.3d 1036, 1039 (9th Cir. 2003)*.

Under *Federal Rule of Civil Procedure 12(b)(6)*, a party may move to dismiss a complaint for failure to state a claim. To overcome a *Rule 12(b)(6)* motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has **[**7]** acted unlawfully." *Id.* (internal quotation marks omitted).

On a *Rule 12(b)(6)* motion, the Court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)*. The Court need not, however, "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Fayer v. Vaughn, 649 F.3d 1061, 1064 (9th Cir. 2011)* (per curiam) (internal quotation marks omitted). Thus, "a Plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555* (citing *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)*).

III. UBER'S MOTION TO DISMISS

A. Subject Matter Jurisdiction

Diva asserts that this Court has subject matter jurisdiction over the claims in this case under the *Class Action Fairness Act* ("CAFA"), *28 U.S.C. § 1332(d)*. FAC ¶ 26. CAFA "vests the district court with 'original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which' the parties satisfy, among other requirements, minimal diversity." *Abrego Abrego v. The Dow Chem. Co., 443 F.3d 676, 680 (9th Cir. 2006)* (quoting *28 U.S.C. § 1332(d)*). Minimal diversity exists where "any member of a class of plaintiffs **[**8]** is a citizen of a State different from any defendant." *28 U.S.C. § 1332(d)(2)(A)*.

The FAC alleges that Uber is incorporated in Delaware and headquartered in San Francisco. FAC ¶¶ 17-21. For diversity purposes, then, Defendants are citizens of Delaware and California. *See* *28 U.S.C. § 1332(c)(1)* ("[A] corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business . . . ."). Each of the two putative classes in this action are a combination of "limousine and chauffeur-driven ground transportation services *within* California" **[*1083]** and "business entities *outside of* California" that have affiliate relationships with instate Plaintiffs. FAC ¶¶

48 (UCL class), 58 (UPA class) (emphases added). The in-state Plaintiffs are not diverse from Uber; they have California citizenship in common. Thus, the CAFA minimal diversity requirement is only met if at least one out-of-state affiliate within each putative class is a citizen of a state other than Delaware or California.

Diva alleges that these affiliates are, indeed, "not citizens of California." *Id.* ¶ 27. The FAC recites a statistic that 84 percent of the approximately 17,300 **[**9]** limousine and chauffeur-driven ground transportation companies in the United States have their principal place of business in states other than California, and that "the overwhelming majority of these companies . . . are also incorporated in states other than California." *Id.* ¶ 28. As a result, Diva submits that it can be "reasonably estimated" that there are out-of-state affiliates in each putative class that are not citizens of California. *Id.* ¶ 29. These allegations are insufficient to establish minimal diversity. "Absent unusual circumstances, a party seeking to invoke diversity jurisdiction should be able to allege affirmatively the actual citizenship of the relevant parties." *Kanter v. Warner-Lambert Co., 265 F.3d 853, 857 (9th Cir. 2001)* (citation omitted). The FAC does not identify any specific out-of-state affiliates or their states of citizenship. Nor does the FAC expressly allege that the out-of-state affiliates are not citizens of Delaware.

Diva attempts to remedy its pleading deficiency by supplying supplemental facts relevant to jurisdiction with its opposition brief. A declaration from Diva's Chairman, Bijan Zoughi, identifies at least thirteen limousine companies with which Diva has had affiliate relationships within the last four **[**10]** years; none of the affiliates is based in California or Delaware. *See* Docket No. 114-2 ¶¶ 5-7. In addition, public records show that each of the thirteen affiliates is incorporated in and has its principal place of business in a state other than California or Delaware.[1] *See* Docket No. 114-4, Exhs. A—N. These facts, if considered, would establish minimal diversity because they demonstrate that multiple members of the putative classes are citizens of states different from Uber. Uber does not dispute this; its reply merely urges the Court to order Diva to amend its complaint to properly allege these facts instead of allowing Diva to establish them in via extrinsic submissions. *See* Docket No. 117 at 3.

The Ninth Circuit has articulated the general framework for determining when a court may consider extrinsic evidence to resolve a jurisdictional challenge:

> A *Rule 12(b)(1)* jurisdictional attack may be facial or factual. In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations **[*1084]** that, by themselves, would otherwise invoke federal **[**11]** jurisdiction. . . . In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment.

Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004) (citations omitted). Under this framework, a plaintiff would ordinarily be permitted to submit evidence beyond what it alleged in its complaint when the defendant mounts a factual attack on jurisdiction. *See id.* Here, however, Uber is arguing that the allegations in the FAC are insufficient, even if taken as true, to establish minimal diversity—a facial attack. "[C]ourts do not consider evidence outside the pleadings when deciding a facial attack." *United Poultry Concerns v. Chabad of Irvine, No. SACV1601810ABGJSX, 2017 U.S. Dist. LEXIS 170193, 2017 WL 3000019, at *1 (C.D. Cal. Jan. 20, 2017)*; *MVP Asset Management (USA) LLC v. Vestbirk, No. 2:10-cv-02483-GEB-CMK, 2011 U.S. Dist. LEXIS 44822, 2011 WL 1457424, *1 (E.D. Cal. Apr. 14, 2011)* (same).

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[1] Diva requests judicial notice of these public records. The Court can properly take judicial notice of these documents because they are public records provided by government agencies and their authenticity is not disputed. *See* *Fed. R. Evid. 201* (allowing a court to take judicial notice of a fact "not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); *Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998-99 (9th Cir. 2010)* ("It is appropriate to take judicial notice of this information, as it was made publicly available by government entities . . . , and neither party disputes the authenticity of the web sites or the accuracy of the information displayed therein."). The Court, however, cannot take judicial notice of the facts in the Zoughi declaration.

Because the FAC on its face does not allege sufficient facts to establish subject matter jurisdiction, Uber's *Rule 12(b)(1)* motion to dismiss is **GRANTED**. Diva may amend its complaint within 30 days of the date of this Order to incorporate the new facts establishing minimal diversity. Notwithstanding the dismissal on jurisdictional grounds, the parties agreed at the hearing that the Court must still address Uber's **[**12]** arguments for dismissing Diva's claims on the merits, since resolution of those arguments informs the potential futility and scope of any amendment. The Court therefore proceeds to determine the viability of Diva's UPA and UCL claims.

B. UPA Claim

The UPA makes it "unlawful for any person engaged in business within this state to sell any article or product at less than the cost thereof to such vender, or to give away any article or product for the purpose of injuring competitors or destroying competition." *Cal. Bus. & Prof. Code § 17043*. Diva alleges that Uber's practice of offering rides as a loss leader[2] with the intent of driving competitors out of the market violates the UPA. FAC ¶¶ 162-63. Uber argues that Diva's UPA claim fails as a matter of law because a statutory provision exempts Uber from UPA liability. The UPA expressly exempts two categories of services, articles, or products from its coverage:

> Nothing in this chapter applies:
>
> (1) To any service, article or product for which rates are established under the jurisdiction of the Public Utilities Commission of this State and sold or furnished by any public utility corporation, or installation and repair services rendered in connection with any services, articles **[**13]** or products.
> (2) To any service, article or product sold or furnished by a publicly owned public utility and upon which the rates would have been established under the jurisdiction of the Public Utilities Commission of this State if such service, article or product had been sold or furnished by a public utility corporation, or installation and repair services rendered in connection with any services, articles or products.

Cal. Bus. & Prof. Code § 17024.

Uber believes it falls within the first exemption. Diva disagrees. Their dispute **[*1085]** centers on the meaning of the phrase "for which rates are established under the jurisdiction of the Public Utilities Commission."[3] To Uber, this phrase indicates that "it does not matter *who* sets the rates, as long as the rates are established *under the jurisdiction* of the CPUC." Mot. at 11 (emphases in original). Diva, on the other hand, interprets the phrase as applying only to rates *actually established by* the CPUC; it is not enough that the CPUC has the authority to set rates but has not exercised it. Opp. at 8 ("The narrowly-defined exemption . . . . only exempts rates that have been established by the CPUC."). This distinction is critical because while "the parties do not dispute that the **[**14]** CPUC has authority to regulate Uber," Diva alleges that "the CPUC has never used that authority to set Uber's rates." *Id.* at 14; *see* FAC ¶¶ 83-88 (allegations regarding the CPUC's jurisdiction over Uber).

The plain language of the statute and the case law interpreting *§ 17024* support Uber's position.

1. Statutory Text and Related Provisions

"[I]n all cases of statutory interpretation, we begin with the language of the governing statute." *Beal Bank, SSB v. Arter & Hadden, LLP, 42 Cal. 4th 503, 507, 66 Cal. Rptr. 3d 52, 167 P.3d 666 (2007)*; *see* *Satterfield v. Simon &*

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[2] The UPA defines "[l]oss leader" as "any article or product sold at less than cost . . . [w]here the effect is to divert trade from or otherwise injure competitors." *Cal. Bus. & Prof. Code § 17030(c)*.

[3] The parties are in accord that Uber is a "public utility corporation" within the meaning of *§ 17024(1)*. "'Public utility' includes every common carrier . . . where the service is performed for, or the commodity is delivered to, the public or any portion thereof." *Cal. Pub. Util. Code § 216(a)*. A "common carrier," in turn, "means every person and corporation providing transportation for compensation to or for the public or any portion thereof." *Id.* *§ 211*. "Whenever any common carrier . . . performs a service for, or delivers a commodity to, the public or any portion thereof for which any compensation or payment whatsoever is received, that common carrier . . . is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of [the *California Public Utilities Act*]." *Id.* *§ 216(b)*.

Schuster, Inc., 569 F.3d 946, 951 (9th Cir. 2009). By its terms, the exemption in § 17024(1) covers "any service, article or product for which rates are established under the jurisdiction of the Public Utilities Commission." Notably, the statute does not say "rates *established by* the Public Utilities Commission." This undercuts Diva's assertion that a public utility only qualifies for the exemption if its rates are actually established by the CPUC. Rather, the lack of specificity as to who must set the rates suggests that the legislature did not intend to limit the exemption to public utilities whose rates are actually set by the CPUC. *Cf.* Dean v. United States, 556 U.S. 568, 572, 129 S. Ct. 1849, 173 L. Ed. 2d 785 (2009) ("The passive voice focuses on an event that occurs without respect to a specific actor . . . .").

Diva counters that "[w]ith respect to establishing rates, this provision refers **[**15]** to no actor other than the CPUC," so it must be the CPUC that is setting the rates. Opp. at 12-13. Diva cites Coso Energy Developers v. Cty. of Inyo, 122 Cal. App. 4th 1512, 19 Cal. Rptr. 3d 669 (2004), in which the court held that one clause in a statute written in the passive voice is not ambiguous where the statute "includes no language suggesting an actor other than the State of California." Id. at 1525. But the statute in Coso differs from the statute at issue here in one critical respect—it identified the actor in the active voice in the clause immediately preceding the passive clause. In full, the statute provided:

> The State of California hereby cedes to the United States of America exclusive **[*1086]** jurisdiction over such piece or parcel of land as may have been or may be hereafter ceded or conveyed to the United States, during the time the United States shall be or remain the owner thereof, for all purposes except the administration of the criminal laws of this State and the service of civil process therein.

Id. at 1523. The appellant in *Coso* insisted that the second clause, "land as may have been or may be hereafter ceded or conveyed to the United States," means that "California cedes exclusive jurisdiction over 'all land ceded to the United States *without limitation as to time or identity of the ceding party* ***[**16]*** .'" *Id.* (emphasis in original). The court disagreed because the first clause, "[t]he State of California hereby cedes," clearly specifies that "the subject of the sentence and lone actor" is the State of California and dispels any ambiguity that might otherwise have been created by the passive voice in the second clause. Id. at 1525 ("It is reasonable to infer that the undisclosed actor in the second clause is the same actor specified in the first; the lack of disclosure in the second instance can be attributed to the desire to avoid redundancy."). In marked contrast, § 17024(1) nowhere identifies a rate-setting actor. It is therefore not amenable to the narrow reading Diva advocates.

The applicability of § 17024(1) does not turn on whether the CPUC has actually set rates. As Uber points out, the California Public Utilities Code expressly provides that it is within the CPUC's discretion to regulate public utilities within its jurisdiction, including by setting rates, but that the CPUC is not required to do so in all instances. *See* Cal. Pub. Util. Code § 701 ("The commission may supervise and regulate every public utility in the State and may do all things . . . necessary and convenient in the exercise of such power and jurisdiction."); *id.* ***[**17]*** § 728.5(a) ("The commission may establish rates or charges for the transportation of passengers and freight by railroads and other transportation companies . . . ."). Similarly, the California Constitution provides that the CPUC "*may* fix rates for all public utilities subject to its jurisdiction[.]" Cal. Const. Art. XII, § 6 (emphasis added); *see also id.*, Art. XII, § 4 (CPUC "may fix rates and establish rules for the transportation of passengers"). This context lends credence to the notion that the rates established by a public utility which are merely subject to the CPUC's jurisdiction are "rates are established under the jurisdiction of" CPUC irrespective of whether the CPUC actually exercises its rate setting authority.[4]

The broader interpretation of § 17024 is supported by the fact that the statutory scheme allows the CPUC to consider anticompetitive concerns when regulating public utility corporations like Uber. As alleged, Uber is a "charter-party carrier of passengers" under the Public Utilities Code. *See* FAC ¶ 4; Cal. Pub. Util. Code § 5360 ("'[C]harter-party carrier of passengers' means every person engaged in the transportation of persons by motor

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[4] To be sure, the statute is not without ambiguity. Section 17024 does not, for instance, refer to rates "subject to regulation by" CPUC—language which would have made the broader reach of the exemption clear.

vehicle for compensation, whether in common or contract carriage, over any public highway in this state."). **[**18]** The CPUC is given broad authority to "supervise and regulate every charter-party carrier of passengers in the State and may do all things, whether specifically designated in this part, or in addition thereto, which are necessary and convenient in the exercise of **[*1087]** such power and jurisdiction." *Cal. Pub. Util. Code § 5381*. In particular, charter-party carriers are required to obtain "a certificate [of] public convenience and necessity" from the CPUC to operate. *Id. § 5371*. In granting a certificate of public convenience and necessity, the CPUC "may attach to the permit or certificate such terms and conditions as, in its judgment, are required in the public interest." *Id. § 5375*. Although the Public Utilities Code does not expressly require the CPUC to weigh anticompetitive concerns, courts have observed that "the PUC undoubtedly does 'take antitrust considerations into account in determining whether a [transaction] will advance the public interest.'"[5] *McCaw Per. Commc'ns, Inc. v. Pac. Telesis Grp., 645 F. Supp. 1166, 1171 (N.D. Cal. 1986)* (alteration in original) (quoting *N. California Power Agency v. Pub. Util. Com., 5 Cal. 3d 370, 377, 96 Cal. Rptr. 18, 486 P.2d 1218 (1971))*. That the CPUC retains authority to address anticompetitive behavior in regulating charter-party carriers suggests that the legislature intended to leave to the CPUC the field of regulating and monitoring prices of utilities under its jurisdiction. **[**19]**

Diva's statutory arguments to the contrary are not persuasive. First, Diva purports to rely on the plain text of the statute:

> A plain reading of *Section 17024(1)* shows that the exemption only applies to a service, such as an Uber ride, "*for which rates are established*" by the CPUC. By reading these critical words out of the statute, Uber invites the Court to violate fundamental canons of statutory interpretation.

Opp. at 11 (emphasis in original). But it is Diva who reads critical words out of the statute, ignoring the operative phrase "under the jurisdiction of" from *§ 17024(1)* and replacing it with "by the CPUC." *See Abbott Labs. v. Franchise Tax Bd., 175 Cal. App. 4th 1346, 1359, 96 Cal. Rptr. 3d 864 (2009)* ("Deleting the language . . . from [the statute] rewrites the statute to give the statute a purpose quite different than the one enacted by the legislature.").

Second, Diva argues that "Uber's interpretation of *Section 17024(1)* cannot be harmonized with *Section 17024(2)*." Opp. at 11. Whereas *§ 17024(1)* exempts privately owned public utilities from the UPA's proscriptions, *§ 17024(2)* exempts publicly owned public utilities for which rate-setting authority belongs to municipalities rather than the CPUC. *See Cty. of Inyo v. Pub. Utilities Com., 26 Cal. 3d 154, 165-66, 161 Cal. Rptr. 172, 604 P.2d 566 (1980)*. Diva asserts that because the two categories of exemptions are analogous, if Uber is correct that *§ 17024(1)* applies to privately owned public utilities whose rates *could* **[**20]** be set by the CPUC, then *§ 17024(2)* would have been written to apply to publicly owned public utilities whose rates "*could have been* established **[*1088]** under the jurisdiction of" the CPUC if they had been privately owned. Opp. at 11-12. Instead, *§ 17024(2)* applies to publicly owned public utilities whose "rates *would have been* established under the jurisdiction of the Public Utilities Commission of this State if such service, article or product had been sold or furnished by a public utility corporation." *Cal. Bus. & Prof. Code § 17024(2)* (emphasis added).

Diva reads too much into the statute. The "would have been" language in *§ 17024(2)* has a much simpler and logical purpose, as one court explained recently:

> The fact that the private companies are, and the publicly owned entities are not, under the jurisdiction of the PUC, explains the difference in wording in the two subsections: the "would have been" counter factual (or subjunctive) phrase is used in *subsection (2)* because the PUC doesn't normally have jurisdiction over the

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[5] Uber has also cited examples of the CPUC considering risks of anticompetitive behavior in regulating rates for other common carriers. For instance, in 1990 the CPUC adopted a flexible rate program for the trucking industry whereby "common carriers [were] allowed rate freedom within a zone of reasonableness." *Regulation of Gen. Freight Transp. by Truck, 35 C.P.U.C. 2d 307, 307 (Feb. 7, 1990)*. In those proceedings, the CPUC made clear that "[t]he principal reason for regulation of utility rates in general is to prevent monopoly pricing due to restriction of supply." *Id. at 334*. The decision to implement a flexible rate-setting mechanism was "based upon a finding that workable competition exists" within the industry, and the CPUC pledged to "continuously monitor the degree of competition and quality of service" under the new scheme. *Id. at 334, 353*.

> public entities. It is fair, however, to otherwise view the two subsections as creating the same immunity under essentially the same circumstances, thus placing the private utility corporations on equal footing with publicly owned utilities.

Actions v. Uber Techs., No. CJC-17-004925, 2018 Cal. Super. LEXIS 1913, at *6 (Cal. Super. Mar. 2, 2018), *appeal docketed*, No. A154694 (First App. Dist., Div. One).

Third, Diva points to California Public Utilities Code § 2106 as evidence that the legislature did not intent to "broadly immunize public utilities" from liability via § 17024. Opp. at 14. Section 2106 authorizes a private right of action against public utilities. Even by Diva's description, however, § 2106 only "enshrine[s] a general rule that [public utilities] are liable for violations of the law." **[**21]** Opp. at 14. As such, it does not override an express statutory exemption, like § 17024, created by the legislature.

2. Case Law

No higher court in California has definitively construed § 17024(1), but the Court of Appeal in Hladek v. City of Merced, 69 Cal. App. 3d 585, 138 Cal. Rptr. 194 (1977) provided an analysis of § 17024(2) that also illuminates the scope of § 17024(1). In *Hladek*, a privately owned "dial-a-bus, dial-a-ride" service sued the City of Merced under the UPA for starting a competing transportation service that allegedly operated at a loss. Id. at 588. The City's service was a publicly owned public utility, raising the question whether was exempt from UPA liability under § 17024(2). In resolving the question, the court held that "the pivotal issue is whether the Public Utilities Commission *would have* the jurisdiction to establish the rates for such service if it had been sold or furnished by a privately owned public utility." Id. at 590 (emphasis added).

As Uber points out, and the Superior Court in *Actions v. Uber Technologies* observed, *Hladek* supports Uber's interpretation of § 17024(1) because "*Hladek* considered only whether the PUC would have had jurisdiction; it did not consider whether the PUC did in fact, or would, *exercise* its jurisdiction." 2018 Cal. Super. LEXIS 1913, at *6 (emphasis in original). The Superior Court in *Actions* accordingly concluded **[**22]** that "[w]hen [*Hladek*'s] analysis is applied to § 17024(1), then the immunity kicks in to the extent[] the PUC 'does have the jurisdiction to establish the rates for such service.'" Id. at *6-7.

Notably, Judge White of this Court has also cited *Hladek* in dismissing with prejudice UPA claims brought in two cases against Uber. In *Desoto Cab Company, Inc. v. Uber Techs., Inc.*, No. 16-cv-06385, Docket No. 64 at 17 (N.D. Cal. Sept. 24, 2018), Judge White noted, "California courts have determined that the **[*1089]** section 17024(1) exception . . . applies where the CPUC has the jurisdiction to establish a utility's rates," and therefore "applies if Uber is a public utility."); *see also A White and Yellow Cab, Inc. v. Uber Techs., Inc.*, No. 15-cv-05163, Docket No. 114 at 12 (same).

The courts that have addressed the issue have so concluded that the CPUC is not required to actually establish rates in order for § 17024(1) to apply. This Court agrees.

3. The Filed Rate Doctrine

Diva makes one final argument for construing the § 17024(1) exemption narrowly by analogizing § 17024 to the federal filed rate doctrine. Opp. at 10. The filed rate doctrine is "a judicial creation" that "bar[s] challenges under state law and federal antitrust laws to rates set by federal agencies." E. & J. Gallo Winery v. Encana Corp., 503 F.3d 1027, 1033 (9th Cir. 2007) (citation **[**23]** omitted). There is no state-law equivalent of the filed rate doctrine in California. *See* Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 992-93 (9th Cir. 2000) (citing Cellular Plus, Inc., v. Superior Court, 14 Cal. App. 4th 1224, 18 Cal. Rptr. 2d 308 (1993)). Diva asserts that the California Legislature intended for § 17024 to function as an analogous exemption to UPA liability for public utilities whose rates are actually set by the CPUC: "in the face of private litigation contesting public utilities rates, the Legislature needed to create a narrow safe-haven for rates approved by state regulators akin to the filed-rate doctrine. Section 17024 accomplishes this exact purpose." Opp. at 10. But Diva cites no authority—legislative history or otherwise—for this claim. Moreover, the same argument was made and rejected in *Actions v. Uber Technologies*. The Superior

Court in *Actions* pointed out that "[t]he filed rate doctrine is judge made," and "doesn't affect the patent right of the legislature to step in and independently limit the reach of its own laws." *Actions v. Uber Techs., 2018 Cal. Super. LEXIS 1913, at *8*. There is simply no support for Diva's claim that *§ 17024* must be construed as narrowly as the filed rate doctrine.

4. Conclusion

The plain language of *§ 17024(1)* indicates that the exemption should be construed to apply to all public utilities over which the CPUC has rate-setting authority. Accordingly, Diva's UPA claim is **DISMISSED with [**24] prejudice**.

C. UCL Claim

The UCL proscribes business practices that are (1) unlawful, (2) unfair, or (3) fraudulent. *Cal. Bus. & Prof. Code § 17200*. Each prong of the UCL provides a separate and distinct basis of liability. Here, Diva alleges that Uber's deliberate decision to misclassify its drivers as independent contractors to save costs is both "unfair" and "unlawful" under the UCL. FAC ¶ 127. The "unfair" prong creates a cause of action for a business practice that is unfair even if it is not proscribed by some other law. *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1143, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*. The "unlawful" prong prohibits "anything that can properly be called a business practice and that at the same time is forbidden by law." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)* (internal quotation marks omitted).

Uber contends that Diva's claim under the "unfair" prong fails because Uber's alleged conduct does not violate antitrust laws, and that the claim under the "unlawful" prong fails because causation is not sufficiently alleged.

[*1090] 1. "Unfair" Prong

The California Supreme Court has held that "a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice" must allege "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because **[**25]** its effects are comparable to or the same as a violation of the law, or otherwise **[*1091]** significantly threatens or harms competition." *Cel-Tech, 20 Cal. 4th at 186-87*. "[A]ny finding of unfairness to competitors under *section 17200* [must] be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Id.* The parties agree that Diva is a direct competitor to Uber, and thus must meet the pleading standard articulated in *Cel-Tech. See* Opp. at 19. Uber contends that the allegations in the FAC reveal that Uber's misclassification of drivers results in *more* competition and lower prices for consumers, which means that no antitrust laws were violated even if Diva lost business. Mot. at 18.

Uber is correct that "the antitrust laws' prohibitions focus on protecting the competitive process and not on the success or failure of individual competitors." *Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 902 (9th Cir. 2008)*. Thus, "the antitrust laws do not punish economic behavior that benefits consumers and will not cause long-run injury to the competitive process," even if individual competitors may suffer. *Id. at 903*. But of course, economic behavior does not passes muster simply because it might result in lower prices. Courts must "distinguish robust competition from conduct with long-term **[**26]** anticompetitive effects" and ward "against conduct which unfairly tends to destroy competition itself." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458-59, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. Predatory pricing can harm competition in the long run.

Diva claims that Uber's conduct crossed the line from robust competition to unfair anti-competition. In particular, the FAC alleges that Uber's misclassification of drivers "violates the policy or spirit of the antitrust laws and threatens an incipient violation of ***antitrust law***, including but not limited to monopolization and/or attempted monopolization under *Section 2 of the Sherman Antitrust Act*." FAC ¶ 126. However, this conclusory allegation is not accompanied by specific facts that would support a Sherman Act claim. In order to state a claim for monopolization under *Section 2 of the Sherman Act*, a plaintiff must prove: (1) possession of monopoly power in the relevant market; (2) willful acquisition or maintenance of that power; and (3) causal antitrust injury. *SmileCare Dental Grp. v. Delta Dental Plan of California, Inc., 88 F.3d 780, 783 (9th Cir. 1996)* (citation omitted). And to state a claim for attempted monopolization, the plaintiff must show: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct to accomplish the monopolization; (3) dangerous probability of success; and (4) **[**27]** causal antitrust injury. *Id.* The FAC, as currently pleaded, does not speak to many of these elements, so Diva's "unfair" prong claim cannot be sustained by its bare allegations of Sherman Act violations.

However, *Cel-Tech* taught that it is not just conduct that threatens a violation of an actual ***antitrust law*** that supports a UCL unfairness claim. Equally actionable is conduct that "violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise **[*1091]** significantly threatens or harms competition." *Cel-Tech, 20 Cal. 4th at 186-87*. Here, Diva has alleged that Uber's misclassification of drivers allows it to shirk its legal obligations under the California Labor Code and Wage Orders issued by the California Industrial Welfare Commission to provide adequate pay and benefits to its drivers. *See* FAC ¶¶ 112-14, 123. The California Supreme Court recently condemned precisely this kind of misclassification practice as a form of unfair competition:

> [T]he risk that workers who should be treated as employees may be improperly misclassified as independent contractors is significant in light of the potentially substantial economic incentives that a business may **[**28]** have in mischaracterizing some workers as independent contractors. Such incentives include *the unfair competitive advantage the business may obtain over competitors that properly classify similar workers as employees* and that thereby assume the fiscal and other responsibilities and burdens that an employer owes to its employees.

Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903, 913, 232 Cal. Rptr. 3d 1, 416 P.3d 1 (2018) (emphasis added). *Dynamex* thus indicates that worker misclassification can violate the policy or spirit of antitrust laws because it significantly threatens or harms competition. Uber attempts to discount the significance of *Dynamex* by insisting that it "cannot be read to overrule *Cel-Tech*'s limitation of competitor suits under the UCL to incipient violations of the antitrust laws." Docket No. 117 at 12 n.9. This misses the point because, as explained above, *Cel-Tech* also allows competitor suits predicated on conduct that violates the policy or spirit of antitrust laws by significantly threatening or harming competition. *Dynamex* affirms that worker misclassification may constitute an example of such conduct.

Further, there is no question that the prohibition on worker misclassification is "tethered to some legislatively declared policy." *Cel-Tech, 20 Cal. 4th at 186-87*. The California Labor **[**29]** Code expressly declares that "[i]t is the policy of this state to vigorously enforce minimum labor standards in order . . . to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards." *Cal. Labor Code § 90.5(a)*. Standards codified in the Labor Code concern, among other things, potential harm to competition. *See* *Dynamex, 4 Cal. 5th at 952* ("California's *industry-wide* wage orders are also clearly intended for the benefit of those law-abiding businesses that comply with the obligations imposed by the wage orders, ensuring that such responsible companies are not hurt by unfair competition from competitor businesses that utilize substandard employment practices.") (emphasis in original).

Accordingly, Diva's "unfair" prong claim meets the requirements of *Cel-Tech*. Uber's motion to dismiss the UCL unfairness claim is **DENIED** to the extent the claim is based on violations of California labor laws. The motion is **GRANTED** to the extent the unfairness claim is based on Sherman Act violations. Diva may amend its complaint with specific facts that would support its claim that Uber's misclassification of drivers violates the *Sherman Act*. **[**30]**

2. "Unlawful" Prong

Uber next contends that Diva lacks standing to bring a claim under the "unlawful" prong of the UCL. To establish Article III standing, a plaintiff must demonstrate: (1) injury-in-fact in the form of "concrete and particularized" and "actual **[*1092]** or imminent" harm to a legally protected interest; (2) a causal connection between the injury and the conduct complained of; and (3) a likelihood that a favorable decision would redress the injury-in-fact. *Barnum Timber Co. v. U.S. E.P.A., 633 F.3d 894, 897 (9th Cir. 2011)* (quoting *Lujan v. Defenders of Wildlife, 504 U.S. 555,* 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)). Uber maintains that Diva has failed to establish the causation element.

a. Standing as to All Plaintiffs

Uber argues that Diva has not shown that Uber's driver misclassification is the cause of its unfair cost advantage over its competitors because Diva also alleges that investor subsidies allow Uber to price its rides below cost. Mot. at 19-20. Thus, Uber reasons, Diva would have suffered the same harm even if Uber had complied fully with labor laws and paid its drivers as employees. *See* Daro v. Superior Court, 151 Cal. App. 4th 1079, 1099, 61 Cal. Rptr. 3d 716 (2007) (holding that, to establish standing under the UCL, "there must be a causal connection between the harm suffered and the unlawful business activity," and that the "causal connection is broken when a complaining party would **[**31]** suffer the same harm whether or not a defendant complied with the law").

The argument is meritless for several reasons. First, the dismissal of Diva's UPA claim resolves this issue. As Diva explains, the FAC pleads alternative theories of liability under the UPA and UCL. Opp. at 21-22. The UPA cause of action incorporates only the allegations that pertain to Uber's investor-funded loss-leader pricing, whereas the UCL cause of action incorporates only the allegations that pertain to Uber's driver misclassification. Now that the UPA cause of action has been dismissed, the sole remaining source of Uber's cost advantage is its alleged misclassification practices. Causation is thus simplified.

Second, even if Diva's harm is caused by both Uber's driver misclassification and predatory pricing subsidized by investor financing, Diva has still established standing by asserting that the misclassification is a substantial cause of the harm. Opp. at 22-23. It does not appear that the UCL requires the unlawful conduct be the sole factor in causing harm in order to support UCL standing and thus a contributing cause may satisfy standing. Admittedly, the courts have not definitively decided this question. *See* Law Offices of Mathew Higbee v. Expungement Assistance Servs., 214 Cal. App. 4th 544, 562, 153 Cal. Rptr. 3d 865 (2013) ("[C]ourts have not yet defined **[**32]** the contours of the causation element under the 'unlawful' prong of the UCL.") (citing Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 326 n.9, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)). However, the language of the UCL evinces no "sole factor" requirement. The statute authorizes any "person who has suffered injury in fact and has lost money or property as a result of the unfair competition" to bring suit under the UCL. Cal. Bus. & Prof. Code § 17204.

Notably, the California Court of Appeal has suggested in dicta that a "substantial factor" standard of causation would suffice for UCL standing. In Troyk v. Farmers Grp., Inc., 171 Cal. App. 4th 1305, 90 Cal. Rptr. 3d 589 (2009), the court stated that it "discern[ed] no legislative intent from [§ 17024]'s language that would require a standard of causation more stringent than the 'a substantial factor' standard that applies to negligence actions . . . for a plaintiff to have UCL standing." Id. at 1350 n.33. As *Troyk* set forth, "a substantial **[*1093]** factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm." *Id.* (citation and alteration omitted). It is well-established that the "substantial factor" standard of causation applies to claims under the "fraudulent" prong of the UCL. *See* In re Tobacco II Cases, 46 Cal. 4th at 326. It is noteworthy that the substantial factor **[**33]** test for causation applies in many contexts. *See, e.g., Nat'l Ass'n of African Am.-Owned Media v. Charter Commc'ns, Inc., 915 F.3d 617, 623 (9th Cir. 2019)* (disparate treatment claims under Title VII); Nuveen Mun. High Income Opportunity Fund v. City of Alameda, Cal., 730 F.3d 1111, 1119 (9th Cir. 2013) (securities fraud actions under Section 10(b) of the Securities and Exchange Act); BladeRoom Grp. Ltd. v. Emerson Elec. Co., 331 F. Supp. 3d 977, 987 (N.D. Cal. 2018) (breach of contract and tort actions).

Assuming the "substantial factor" standard for causation applies here—and Uber has not contended that it does not—Diva's allegations are sufficient to establish that Uber's misclassification practices alone have been a substantial factor in causing Diva's economic harm. The FAC alleges that Diva must pay its drivers at least minimum wage ($13 per hour or more in major cities) because they are employees. FAC ¶ 69. Diva must also bear the cost of overtime wages, work breaks, unemployment insurance, workers' compensation insurance premiums, social security tax, and Medicare tax. *Id.* ¶¶ 70-74. Uber, by misclassifying its drivers as independent contractors, avoids these obligations. *Id.* ¶ 114. Diva estimates that "Uber avoids an average of $9.07 an hour in business expenses and employee benefits that it would have to pay if it properly classified drivers as employees. As a result, Uber pays costs for the average driver that are equivalent to what an employer would bear if they **[**34]** (illegally) paid their W-2 employees $7.48 per hour," *i.e.*, approximately half of the minimum wage. *Id.* ¶ 118. Given that "Uber pays over 75 percent of gross bookings to drivers," it can reasonably inferred that by paying its drivers effectively half the hourly wage that would be required if they were treated as employees, Uber is able to significantly undercut its competitors on price. Thus, Uber's driver misclassification as alleged is a "substantial factor" in causing Diva's harm, and not merely a "remote or trivial factor." *Troyk, 171 Cal. App. 4th at 1350 n.33*.

The three cases cited by Uber do not suggest otherwise. In *Overton v. Uber Techs., Inc., 333 F. Supp. 3d 927 (N.D. Cal. 2018)*, this Court found that the plaintiffs did not establish a causal link between Uber's failure to register as a motor carrier under federal law and its gaining of an unfair competitive advantage over plaintiffs. *Id. at 946-47*. Causation was "highly speculative" in *Overton* because the plaintiffs did not show "what Uber's increased costs would be if it registered, how those increased costs would be born as between Uber and its drivers, [and] how much, if at all, Uber's pricing of rides will be affected." *Id.* Here, in contrast, Diva has detailed the per-driver cost savings Uber attains through misclassification. In **[**35]** *Haynish v. Bank of Am., N.A., 284 F. Supp. 3d 1037 (N.D. Cal. 2018)*, the plaintiffs did not establish that the defendant's unlawful conduct caused the foreclosure of their home because the foreclosure was independently triggered by the plaintiffs' default on their home loan. *Id. at 1052*. Diva's allegations support the inference that Uber could not have undercut market prices to the same degree without misclassifying its drivers to skirt significant costs. **[*1094]** Finally, unlike Diva, the plaintiff in *Rooney v. Sierra Pac. Windows, No. 10-CV-00905-LHK, 2011 U.S. Dist. LEXIS 117294, 2011 WL 5034675 (N.D. Cal. Oct. 11, 2011)* "failed to allege *any* causal connection" between the defendant's alleged violations of law and the plaintiff's injury. *2011 U.S. Dist. LEXIS 117294, [WL] at *11* (emphasis in original).

Diva has adequately alleged a causal link between Uber's misclassification practices and Diva's UCL injury.

b. Standing as to Out-of-State Plaintiffs

Uber next argues that there is a causation problem specific to the out-of-state affiliates, because the alleged harm to those affiliates arises from Uber's extraterritorial conduct. It is well-established that the UCL does not apply extraterritorially. *Sullivan v. Oracle Corp., 51 Cal. 4th 1191, 1207, 127 Cal. Rptr. 3d 185, 254 P.3d 237 (2011)*. Thus, the UCL does not reach "claims of non-California residents injured by conduct occurring beyond California's borders." *Norwest Mortgage, Inc. v. Superior Court, 72 Cal. App. 4th 214, 222, 85 Cal. Rptr. 2d 18 (1999)*. It does, however, apply where the "relevant conduct occur[s] **[**36]** in California." *Sullivan, 51 Cal. 4th at 1208*. Uber asserts that the out-of-state affiliates cannot be losing business because of Uber's practices in California; rather, "the only plausible, non-speculative reason is due to competition from Uber . . . *in those other states*." Mot. at 22 (emphasis in original).

Uber's argument appears to be grounded in a misunderstanding about how the affiliate system allegedly works. Uber repeatedly focuses on the fact that the out-of-state affiliates are booking rides for out-of-state clients. *See id.*; Docket No. 117 at 15. However, the FAC states that when out-of-state clients want to book rides in California, they do so through out-of-state affiliates who refer the clients to companies (like Diva) in California who provide the rides in California. FAC ¶¶ 44-45. The California company and the out-of-state affiliate split the revenue for the ride. *Id.* ¶ 45. Thus, when Uber undercuts its competitors' prices *in California*, fewer clients book rides with California limousine companies through out-of-state affiliates. *Id.* Uber's pricing practices outside of California do not affect clients' booking decision for rides in California under this model. In short, there is a direct causal **[**37]** link between Uber's alleged misconduct in California and the out-of-state affiliates' loss of revenue. That meets the requirement for standing under for the UCL to apply. *See Sullivan, 51 Cal. 4th at 1208*.

Accordingly, Uber's motion to dismiss Diva's claim under the unlawful prong of the UCL is **DENIED**.

D. Jurisdiction under CAFA

Uber finally argues that if the Court dismisses the claims of the out-of-state affiliates, it should dismiss the entire action under CAFA's home-state controversy exception. Mot. at 22-23. The home-state controversy exception to CAFA jurisdiction provides that a "district court shall decline to exercise jurisdiction" if "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." *28 U.S.C. § 1332(d)(4)(B)*. Here, the only putative class members that are not citizens of California are the out-of-state affiliates. *See* FAC ¶ 29. Uber therefore contends that if the out-of-states affiliates are removed from the suit for lack of standing, all of the remaining class members would be California citizens and CAFA jurisdiction would be destroyed. However, as explained above, there is no basis to dismiss **[**38]** the claims of the out-of-state affiliates, which comprise "approximately **[*1095]** half of the members of each of the putative classes." *Id.* Uber's home-state controversy argument accordingly fails.

IV. DIVA'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Uber contends that it would be premature to litigate Diva's PSJ motion at this stage because its motion to dismiss presents threshold jurisdictional issues and because the one-way intervention rule prevents adjudication of merits issues prior to class certification. Docket No. 99 at 1. As discussed above, the threshold issues Uber raises (minimal diversity and standing) are not fatal to Diva's case. Therefore, the Court addresses whether the one-way intervention rule bars consideration of the PSJ motion.

The one-way intervention rule exists to "protect defendants from unfair 'one-way intervention,' where the members of a class not yet certified can wait for the court's ruling on summary judgment and either opt in to a favorable ruling or avoid being bound by an unfavorable one." *Villa v. San Francisco Forty-Niners, Ltd., 104 F. Supp. 3d 1017, 1021 (N.D. Cal. 2015)* (citing *American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 547, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974))*. "The doctrine is 'one-way' because a plaintiff would not be bound by a decision that favors the defendant but could decide to benefit from a decision favoring the class." **[**39]** *Id.* Courts have applied this rule to "deny putative lead plaintiffs' pre-certification motions for summary judgment because" those motions, "if unsuccessful, would not prevent putative class members from filing their own suits with hope for a more favorable ruling.'" *Magadia v. Wal-Mart Assocs., Inc., 319 F. Supp. 3d 1180, 1186 (N.D. Cal. 2018)* (citing cases).

As an initial matter, Diva asserts that one-way intervention only becomes a problem when a plaintiff seeks a final judgment on the merits prior to class certification, and the rule is therefore not implicated by a partial summary judgment motion like Diva's. Docket No. 103. This contention is meritless. The one-way intervention rule applies in the context of merits *rulings*, not just final merits *judgments. See, e.g., Gooch, 672 F.3d at 432* ("The rule against one-way intervention prevents potential plaintiffs from awaiting merits rulings in a class action before deciding whether to intervene in that class action."). This makes sense, given that the underlying rationale of the rule is to "protect defendants from unfair 'one-way intervention,' where the members of a class not yet certified can wait for the court's ruling on summary judgment and either opt in to a favorable ruling or avoid being bound by an unfavorable one." *Villa, 104 F. Supp. 3d at 1021*. A **[**40]** merits ruling, even if not a final judgment, can still affect putative class members' decisions whether or not to opt in. Accordingly, courts have applied the one-way intervention rule to motions for partial summary judgment. *See, e.g., id.* In particular, one court has rejected the precise argument Diva makes here:

> Plaintiffs assert that because they seek only partial summary judgment and not a final judgment on the merits, which could have a *res judicata* effect on class members, the problem of "one-way intervention" is not implicated. However, the Court does not find Plaintiffs' proposed limitation to be appropriate when—as is the case here—a motion for partial summary judgment would reach the merits of the case. Although Plaintiffs are correct that in the abstract, class members may always judge whether to opt-out or not based on how well the litigation is going so far, here, allowing absent plaintiffs to make that determination after the Court adjudicates issues **[*1096]** of liability in the underlying case would unfairly prejudice Defendants.

*Gomez v. Rossi Concrete Inc., No. 08CV1442 BTM CAB, 2011 U.S. Dist. LEXIS 15852, 2011 WL 666888, at *1 (S.D. Cal. Feb. 17, 2011)* (internal citations, quotation marks, and alterations omitted).

Diva's second argument has more merit. It **[**41]** contends that the one-way intervention rule does not apply here because the misclassification question raised in its PSJ motion pertains to its UCL class claim, which seeks only injunctive relief as a *Rule 23(b)(2)* class. *See* FAC ¶ 50; Docket No. 103 at 2. In contrast to *Rule 23(b)(3)* classes, which permit class members to out-out of an unfavorable decision and require "the best notice that is practicable" to class members, *Rule 23(b)(2)* class members may not opt out and are only entitled to "appropriate notice" directed in the court's discretion. *Fed. R. Civ. P. 23(c)(2)(A)-(B)*. Therefore, some courts have declined to "apply[] the prohibition on one-way intervention to *Rule 23(b)(2)* class certifications, in which class members may not opt out and therefore make no decision about whether to intervene." *Gooch v. Life Inv'rs Ins. Co. of Am., 672 F.3d 402, 433 (6th Cir. 2012)*; *see* *Paxton v. Union Nat. Bank, 688 F.2d 552, 558-59 (8th Cir. 1982)*; *Williams v. Lane, 129 F.R.D. 636, 642 (N.D. Ill. 1990)*.

Nevertheless, the Court concludes that it would be inappropriate to address the PSJ motion at this stage of the litigation. While there is less concern that putative class members can engage in one-way intervention in the context of a *Rule 23(b)(2)* class, asymmetrical risks remain because the named plaintiffs can still hedge their bets by opting not to seek class certification if they receive an unfavorable pre-certification merits ruling. The Court therefore exercises **[**42]** its case management authority to **DENY without prejudice** Diva's PSJ motion. *See* *Ahanchian v. Xenon Pictures, Inc., 624 F.3d 1253, 1254-55 (9th Cir. 2010)*. The Court would be amenable to hearing Diva's class certification and PSJ motions on the same schedule.

V. CONCLUSION

Uber's motion to dismiss is **GRANTED in part** and **DENIED in part**. Specifically, (1) Diva's complaint is dismissed under *Rule 12(b)(1)* for lack of subject matter jurisdiction, with leave for Diva to amend within 30 days of the date of this Order to cure the jurisdictional defects; (2) Diva's UPA claim is dismissed with prejudice; and (3) Diva's claim under the "unfair" prong of the UCL unfairness claim is dismissed to the extent it is predicated on Sherman Act violations, with leave for Diva to amend within 30 days. Diva's motion for partial summary judgment is **DENIED without prejudice**.

This order disposes of Docket Nos. 33 and 113.

IT IS SO ORDERED.

Dated: June 20, 2019

/s/ Edward M. Chen

EDWARD M. CHEN

United States District Judge

LexisNexis

In re Ry. Indus. Emple. No-Poach Antitrust Litig.

United States District Court for the Western District of Pennsylvania

June 20, 2019, Decided; June 20, 2019, Filed

Master Docket: Misc. No. 18-798; MDL No. 2850

Reporter
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IN RE: RAILWAY INDUSTRY EMPLOYEE NO-POACH ANTITRUST LITIGATION. This Document Relates to: All Actions

Subsequent History: Motion granted by, Costs and fees proceeding at *In re Ry. Indus. Emple. No-Poach Antitrust Litig., 2020 U.S. Dist. LEXIS 249903 (W.D. Pa., Aug. 26, 2020)*

Settled by, Class certification granted by, Judgment entered by *In re Ry. Indus. Emple. No-Poach Antitrust Litig., 2020 U.S. Dist. LEXIS 249904 (W.D. Pa., Aug. 26, 2020)*

Core Terms

employees, conspiracy, allegations, class action, defendants', antitrust, consolidated, factual allegations, predominance, plaintiffs', overarching, court of appeals, hire, suppression, proposed class, bilateral agreement, faculty, subsidiary, class member, horizontal, motion to dismiss, rule of reason, class-wide, discovery, class certification, no-poach, brokers, non-faculty, soliciting, salaries

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Judges: Joy Flowers Conti, Senior United States District Judge.

Opinion by: Joy Flowers Conti

Opinion

[*471] CONTI, Senior District Judge

I. Introduction

In this multi-district antitrust putative class action, plaintiffs[1] allege defendants,[2] their employers, violated the *Sherman Act*, *15 U.S.C. § 1*, by entering into unlawful "nopoach" agreements pursuant to which defendants agreed to not hire or solicit each other's employees. Defendants, who are railway equipment suppliers and their subsidiaries, filed a joint motion to (a) dismiss the consolidated class action complaint under *Federal Rule of Civil Procedure 12(b)(6)*, and *(b)* strike the class action allegations under *Federal Rule of Civil Procedure 12(f)* (ECF No. 124). Plaintiffs oppose the motion. (ECF No. 152.)

The parties dispute whether the rule of reason or per se violation analysis should be applied to defendants' alleged "no-poach" agreements and whether the factual allegations in the consolidated complaint are sufficient to show

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[1] Plaintiffs Stephen Baldassano ("Baldassano"), John Brand ("Brand"), David Escalera ("Escalera"), Brian Lara ("Lara"), and Patricia Lonergan ("Lonergan") in this opinion will be collectively be referred to as "plaintiffs."

[2] Defendants Westinghouse Air Brake Technologies Corporation ("Wabtec"), Wabtec Railway Electronics, Inc., Ricon Corporation ("Ricon"), Railroad Controls, L.P., Xorail Inc., Faiveley Transport, S.A. ("Faiveley"), Faiveley Transport North America Inc. ("Faiveley N.A."), Knorr-Bremse AG ("Knorr"), Knorr Brake Company LLC ("Knorr Brake"), New York Air Brake LLC ("NY Air Brake"), and Bendix Commercial Vehicle Systems LLC ("Bendix") in this opinion will be collectively referred to as "defendants."

plausibly that beginning at least in in 2009 all defendants were engaged in a conspiracy in violation of the antitrust laws. The parties also dispute whether the allegations in the consolidated class action complaint **[**12]** are sufficient to show that it is possible for plaintiffs to satisfy their burden at the class certification stage with respect to the *Federal Rule of Civil Procedure 23* requirements of typicality and predominance.

For the reasons set forth in this opinion, the motion to dismiss will be granted in part and denied in part. The court agrees with plaintiffs that the no-poach agreements as plead in the consolidated complaint, i.e., plead as market allocation agreements that were not ancillary to any other agreements with proper business purposes, may be considered per se violations of *§ 1*. Thus, plaintiffs were not required to set forth factual allegations sufficient to show plausibly the relevant market in which the antitrust impact occurred. The motion to dismiss will be denied without prejudice with respect to this issue.

The court, however, agrees with defendants that plaintiffs failed to set forth factual allegations to show plausibly that all defendants were engaged in an overarching "no-poach" conspiracy from 2009. At best, plaintiffs plead three bilateral conspiracies, which plausibly culminated in an overarching conspiracy among all defendants beginning at the earliest in 2014 when Wabtec and Faiveley N.A. entered **[**13]** into the third bilateral no-poach agreement. Plaintiffs did not set forth factual allegations sufficient plausibly to show that Ricon or Bendix were participants in the overarching conspiracy or any of the bilateral conspiracies. The motion to dismiss will, therefore, be granted without prejudice with respect to plaintiffs' allegations that beginning in at least 2009 all defendants were engaged in a "no-poach" conspiracy in violation of the antitrust laws **[*472]** and with respect to all allegations against Ricon and Bendix.

With respect to defendants' motion to strike class allegations, plaintiffs in the consolidated class action complaint did not allege sufficient facts to make a prima facie showing that the predominance requirement of *Rule 23* is satisfied or that discovery is likely to produce substantiation of plaintiffs' allegations with respect to predominance. Plaintiffs in the consolidated class action complaint allege that defendants conspired to restrict the hiring and soliciting of **all** their employees. Plaintiffs, however, did not set forth factual allegations sufficient to make a prima facie showing that defendants' agreements caused **all** employees of defendants harm (antitrust impact) that **[**14]** can be proven on a class-wide basis or that discovery will likely substantiate plaintiffs' conclusory allegations that the common issues in this case will predominate over the individual questions raised by plaintiffs' proposed class of **all** employees. Even if plaintiffs satisfied their burden at this stage with respect to the *Rule 23* requirement of predominance, their class definition is overbroad and lacks precision. The motion to strike class allegations will, therefore, be granted without prejudice to plaintiffs filing a motion for leave to file an amended consolidated class action complaint.

II. Procedural History

On October 12, 2018, plaintiffs filed a one-count consolidated class action complaint against defendants. (ECF No. 88.) On November 27, 2018, all defendants filed a joint motion to dismiss for failure to state a claim and to strike class action allegations and a brief in support of the motion. (ECF Nos. 124, 129.) On January 11, 2019, plaintiffs filed a response in opposition to the motion to dismiss. (ECF No. 152.) On January 25, 2019, the United States Department of Justice ("DOJ" or the "government") filed a "Notice of Intent to File a Statement of Interest." (ECF No. 155.) **[**15]** On February 8, 2019, the government filed its statement of interest. (ECF No. 158.) On February 13, 2019, defendants file a reply brief in support of their motion. (ECF No. 165.) On February 22, 2019, plaintiffs filed a notice of supplemental authority. (ECF No. 172.)

On February 25, 2019, the court held a hearing on the joint motion to dismiss and strike class action allegations. (Hearing Transcript ("H.T.") 2/25/2019 (ECF No. 176).) The government with leave of court participated in the hearing. (Id.; ECF Nos. 168, 171.) The court heard from the parties and the government, ordered the transcript at the joint cost of the parties, and took the matter under advisement.

On June 3, 2019, plaintiffs filed a second notice of supplemental authority. (ECF No. 189.) On June 5, 2019, defendants filed a response to plaintiffs' notice of supplemental authority. (ECF No. 190.)

III. Factual Allegations in the Consolidated Class Action Complaint which are Accepted as True for the Purpose of Resolving the Motion to Dismiss

A. General Allegations

The named plaintiffs are former employees of defendants. (ECF No. 88 ¶ 1.) Plaintiffs allege that defendants were "among the world's dominant rail equipment suppliers" **[**16]** and members of a conspiracy "to restrain competition and reduce compensation for railway industry employees." (Id.) Wabtec, Knorr, and their respective co-defendant subsidiaries "are the largest suppliers of rail equipment used in freight and passenger rail applications." (Id. ¶ 2.)

[*473] B. Plaintiffs

Baldassano was employed by defendant Knorr Brake from approximately March 1998 to December 2012, and from approximately January 2017 to October 2017. (ECF No. 88 ¶ 12.) Baldassano performed his duties as a Project Manager and Manager of Systems and Sales for Knorr Brake in Maryland. (Id.)

Brand was employed by defendant NY Air Brake, a wholly-owned subsidiary of Knorr, as a Senior Manager of Systems and Software Engineering from approximately May 2013 to August 2016. (Id. ¶¶ 13, 26.) Brand performed his duties as a NY Air Brake employee in Texas. (Id.)

Escalera was employed by Wabtec as a Field Service Technician from approximately July 2011 to January 2015, in California. (Id. ¶ 14.)

Lara was employed by Wabtec as a Machinist from approximately November 2011 to January 2017. (ECF No. 88 ¶ 15.) Lara performed his duties as a Wabtec employee in Pennsylvania. (Id.)

Longergan was employed by Wabtec **[**17]** as a Positive Train Control Manager from approximately October 2013 to April 2015. (Id. ¶ 16.) Lonergan performed her duties as a Wabtec employee in Colorado. (Id.)

C. The Wabtec Defendants

Wabtec has more than 100 subsidiaries and more than 18,000 employees. It is the world's largest provider of rail equipment and services with global sales of $3.9 billion in 2017. (ECF No. 88 ¶ 17.) Wabtec Passenger Transit is a business unit of Wabtec that develops, manufactures, and sells rail equipment and services for passenger rail applications. (Id.) Wabtec Global Services is a business unit of Wabtec that offers maintenance, repair, and support services. (Id.)

Wabtec Railway Electronics, Inc. is a wholly-owned subsidiary of Wabtec that designs, develops, manufactures, and repairs electronic products used to improve railroad operations and safety. (ECF No. 88 ¶ 18.)

Ricon is a wholly-owned subsidiary of Wabtec that designs and manufactures wheelchair lifts and ramps for commercial, paratransit, transit, motorcoach, and passenger rail vehicles. (Id. ¶ 19.)

Railroad Controls, L.P. is a wholly-owned subsidiary of Wabtec and one of the largest railroad signal construction companies in the United States. **[**18]** (Id. ¶ 20.)

Xorail Inc. is a wholly-owned subsidiary of Wabtec and provides railroad signal engineering and design services. (Id. ¶ 21.)

On November 30, 2016, Faiveley was acquired as a wholly-owned subsidiary of Wabtec. (ECF No. 88 ¶ 22.) Before the acquisition, Faiveley was the world's third-largest rail equipment supplier behind Wabtec and Knorr. (Id.)

Faiveley had employees in twenty-four countries, including at six locations in the United States. (Id.) It developed, manufactured, and sold passenger and freight rail equipment to customers in Europe, Asia, and North America, including the United States, with revenues of approximately €1.2 billion in 2016. (Id.)

Faiveley N.A. was a wholly-owned subsidiary of Faiveley prior to Faiveley's acquisition by Wabtec. (ECF No. 88 ¶ 23.) Prior to Wabtec's acquisition of Faiveley, Faiveley conducted business in the United States primarily through Faiveley N.A. (Id.) Faiveley N.A. is now a wholly-owned subsidiary of Wabtec. (Id.)

D. The Knorr Defendants

Knorr is a privately-owned German company and the world's second largest provider of rail and commercial vehicle equipment. (ECF No. 88 ¶ 24.) In 2017, Knorr had annual revenues of approximately **[*474]** $7.7 **[**19]** billion. (Id.) Knorr has several wholly-owned subsidiaries in the United States. (Id.)

Knorr Brake is a wholly-owned subsidiary of Knorr and manufactures train control, braking, and door equipment used on passenger rail vehicles. (ECF No. 88 ¶ 25.)

NY Air Brake is a wholly-owned subsidiary of Knorr and manufactures railway air brakes and other rail equipment used on freight trains. (Id. ¶ 26.)

Bendix is a wholly-owned subsidiary of Knorr and develops and supplies active safety technologies, air brake charging and control systems, and components for commercial vehicles. (ECF No. 88 ¶ 27.) Bendix served as a recruiter for Knorr. (Id.)

E. Competition for Employees Among Rail Equipment Suppliers

Wabtec and Knorr, top rivals in the development, manufacture, and sale of equipment used in freight and passenger rail applications, are some of the largest employers[3] in the rail industry. (ECF No. 88 ¶¶ 29-30.) They compete with each other to hire and retain employees throughout the United States, i.e., lateral hiring is a key form of competition between Wabtec and Knorr. (Id. ¶¶ 2, 35.) There is high demand for and limited supply of skilled employees who have rail industry experience. (Id. ¶ 31.) **[**20]** Critical jobs in the rail industry can remain vacant for months while firms try to recruit and hire individuals with the requisite skills, training, and experience for a job opening. (Id.) Employees within the rail industry are key sources of potential talent to fill these openings. (Id.)

Defendants employ a variety of recruiting techniques, including using internal and external recruiters and staffing agencies to identify, solicit, recruit, and otherwise help hire employees. (ECF No. 88 ¶ 32.) Defendants also receive direct applications from individuals interested in employment opportunities. (Id.) Directly soliciting employees from other rail industry employers is a particularly efficient and effective method of competing for qualified employees. (Id. ¶ 33.) Soliciting involves communicating directly—whether by phone, e-mail, social or electronic networking, or in person—with another firm's employee who has not otherwise applied for a job opening. (Id.) Direct solicitation can be performed by individuals of the company seeking to fill the position or by outside recruiters retained to identify potential employees on the company's behalf. (Id.) Firms in the rail industry rely **[**21]** on direct solicitation of employees of other rail companies because those individuals have the specialized skills necessary and may be unresponsive to other methods of recruiting. (ECF No. 88 ¶ 33.)

In a properly functioning and lawfully competitive labor market, rail industry employers compete with one another to attract highly-skilled talent for their employment needs. (Id. ¶ 34.) The competition benefits employees because it

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[3] For example, by the end of 2017, Wabtec and its subsidiaries employed approximately 18,000 full-time employees worldwide. (ECF No. 88 ¶ 30.) In 2016, Wabtec added approximately 5,700 employees through the acquisition of Faiveley. (Id.) By the end of 2017, Knorr and its subsidiaries employed approximately 27,700 employees worldwide, including approximately 5,000 employees in the Americas. (Id.)

increases the available job opportunities and improves an employee's ability to negotiate for a better salary and other terms of employment. (Id.) By soliciting and hiring employees from other rail industry employers, a company is able to take advantage of the efforts its rival has expended in identifying and training the employees, while simultaneously inflicting a cost on **[*475]** the rival by removing an employee on whom the rival may depend. (ECF No. 88 ¶ 35.) By contrast, hiring employees directly out of a training program comes with none of those benefits, and the hiring institution must invest significant resources in identifying, assessing, and training new employees. (Id.)

Plaintiffs allege that the competition between employers, e.g., Wabtec and Knorr and their **[**22]** subsidiaries, for employees provides significant benefits to the employees. Plaintiffs explain:

> Competition for workers via lateral hiring has a significant impact on compensation in a variety of ways. First, when employers become aware of attractive outside opportunities for their employees, the threat of losing employees to competitors encourages employers to preemptively increase compensation to increase morale, productivity, and retention. If employers do not react to competition, their employees may seek positions that offer more generous compensation and benefits elsewhere, be receptive to recruiting by a rival employer, and/or reduce their productivity and morale. Once an employee has received an offer from a rival, retaining the employee may require a disruptive increase in compensation for one individual, if retention is possible at all, and cascading (and unplanned) pressures on compensation of other employees where internal equity and fair pay analysis would demand similar raises. Employers therefore have an incentive to preempt lateral departures by paying all employees well enough that they are unlikely to seek or pursue outside opportunities. Preemptive retention measures **[**23]** thus lead to increased compensation for all employees.
> ...
> The availability of desirable positions at competing employers also forces employers to reactively increase compensation to retain employees who are likely to join a competitor. This can occur both when a particular employee or group of employees becomes interested in switching employers and the current employer responds by offering a compensation increase to retain them, or when an employer responds to overall attrition rates among its employees by increasing compensation levels. In the former case, even a targeted increase designed to retain specific employees may put upward pressure on the entire compensation structure.
> ...
>
> Because many rail industry workers are highly specialized and integrated into teams tied to specific functions, some workers who move to positions at different companies may bring with them others from their teams. Just as competition forces employers to preemptively or reactively raise compensation to retain employees who might otherwise seek employment elsewhere, it also encourages increased compensation for related workers. Thus, increased movement of one category of employee not only increases the compensation **[**24]** for those employees, but also for the categories of employees who are likely to also seek parallel lateral positions, with similar higher compensation and benefits.
> ...
>
> The positive compensation effects of hiring employees from competitors are not limited to the particular individuals who are solicited or who seek new employment. Instead, the effects of hiring from competitors (and the effects of eliminating lateral hiring, pursuant to agreement) **[*476]** commonly impact all employees of the participating companies.

(ECF No. 88 ¶¶ 39-36.)

F. Defendants' No-Poach Agreements[4]

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[4] The descriptions of the agreements and their import are taken from the consolidated class action complaint. The court expresses no opinion about the merits of those allegations.

Beginning at least in 2009, Wabtec and Knorr allegedly entered into a no-poach agreement (ECF No. 88 ¶ 43.) No later than 2011, Knorr and Faiveley (prior to Faiveley's acquisition by Wabtec) allegedly entered into a no-poach agreement. (Id. ¶ 49.) Finally, no later than January 2014, Wabtec and Faiveley N.A. (prior to Faiveley's acquisition in 2016 by Wabtec) allegedly entered into a no-poach agreement. (Id. ¶ 53.) The agreements were executed and enforced by the companies' senior executives and included the companies' subsidiaries in the United States. (Id. ¶ 41.) According to plaintiffs, the companies agreed to refrain from **[**25]** soliciting or hiring each other's employees without the consent of the current employer in order to: (a) fix compensation of plaintiffs at artificially low levels; and (b) substantially eliminate competition among defendants for rail industry employees. (Id. ¶¶ 3, 77.) According to plaintiffs, the agreements are per se violations of ***antitrust law***. (Id. ¶ 79.)

The agreements spanned several years and were monitored and enforced by executives of defendants. (ECF No. 88 ¶ 3.) The agreements substantially affected interstate commerce for employee services by causing: competition to be reduced for employees; suppressed employee compensation below competitive levels; employees to be denied access to better job opportunities; employee mobility to be restricted; and employees to be deprived of information they could use to negotiate for better terms of employment. (Id. ¶¶ 5-6, 58.) Plaintiffs allege that defendants concealed[5] their conspiracy and anti-competitive conduct. (ECF No. 88 ¶¶ 59-64.) On April 3, 2018, however, the conspiracy was publicly revealed with an announced action and proposed stipulated judgment by the DOJ. (Id. ¶ 7.)

G. Class Allegations

The proposed class is defined as follows:

> All natural persons employed by, or hired through staffing agencies or vendors to work for, Defendants or their wholly owned subsidiaries, in the United States, at any time from the start of the conspiracy (no later than 2009) to the present. Excluded from the class are senior executives and personnel in the human resources, recruiting, and legal departments of the Defendants, and employees hired outside of the United States to **[**27]** work outside of the United States.

(ECF No. 88 ¶ 65.)

Plaintiffs allege:

> **[*477]** - there are "thousands of Class members;"
> - the class is ascertainable from defendants' records;

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[5] Plaintiffs allege:

> Knowledge of the agreements was closely held by senior executives **[**26]** and recruiters of the Defendant companies who relied on direct and non-public communications with one another to manage and enforce the no-poach agreements, including in-person discussions and private email communications.
>
> ...
>
> Defendants devised internal procedures by which implicated applicants could be discreetly flagged. Once flagged, the company President decided whether to seek permission from the rival company to hire the individual. The applicant was not told, much less consulted, about this process.
>
> ...
>
> Knorr's policies stated that it was committed to fair competition.
>
> ...
>
> Wabtec's policies provided that it was committed to respecting its employees and the fair and equitable treatment of employees.

(ECF No. 88 ¶¶ 60-63.)

- their claims are typical of the claims of the proposed class;
- they will fairly and adequately represent the interests of the proposed class and have no conflict with the interests of the proposed class;
- the counsel has experience in antitrust, employment, and class action litigation; and
- class action is superior to any other form for resolving this litigation.

(ECF No. 88 ¶¶ 66-70, 74.)

Plaintiffs identify the following questions of law and fact that are common to the members of the proposed class and predominate over any questions affecting only individual members of the proposed class:

- whether Defendants agreed not to solicit or hire each other's employees;
- whether such agreements were per se violations of the Sherman Act;
- whether Defendants fraudulently concealed their misconduct;
- whether and the extent to which Defendants' conduct suppressed compensation below competitive levels for railway employees;
- whether Plaintiffs and the Proposed Class suffered antitrust injury as a result of Defendants' agreements;
- **[**28]** the type and measure of damages suffered by Plaintiffs and the Proposed Class; and
- the nature and scope of injunctive relief necessary to restore a competitive market.

(ECF No. 88 ¶ 71.)

H. Damages

Plaintiffs in the consolidated class action complaint seek the following relief:

- threefold the damages determined to have been sustained by them as a result of the conduct of defendants;
- the costs of suit, including reasonable attorneys' fees and expenses, prejudgment interest, and post-judgment interest;
- injunctive relief, declaring the no-hire agreement among Defendants unlawful and enjoining defendants from enforcing the agreement or entering into similar agreements going forward; and
- all other relief to which plaintiffs and the class may be entitled at law or in equity.

(ECF No. 88 at 20-21 ¶¶ A-F.)

IV. Discussion

A. Motion to Dismiss

1. Standard of Review

A motion to dismiss filed pursuant to *Federal Rule of Civil Procedure 12(b)(6)* tests the legal sufficiency of the complaint. *Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993)*. In deciding a motion to dismiss, the court is not opining on whether the plaintiff will be likely to prevail on the merits; rather, when considering a motion to dismiss, the court accepts as true all well-pled factual allegations in the complaint and **[**29]** views them in a light most favorable to the plaintiff. *U.S. Express Lines Ltd. v. Higgins, 281 F.3d 383, 388 (3d Cir. 2002)*. While a complaint does not need detailed factual allegations to survive a *Rule 12(b)(6)* motion to dismiss, a complaint must provide more than labels and conclusions. *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A "formulaic recitation of the elements of a cause of action will not do." Id. (citing *Papasan v. Allain, 478 U.S. 265, 286,* ***[*478]*** *106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986))*. "Factual allegations must be enough to raise a right to relief above the speculative level" and "sufficient to state a claim for relief that is plausible on its face." Id. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 556*).

> The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.. . . Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

(Id.) (quoting *Twombly, 550 U.S. at 556*) (internal citations omitted).

The Court of Appeals for the Third Circuit has instructed that "a court reviewing the sufficiency of a complaint must take three steps." *Connelly v. Lane Constr. Corp., 809 F.3d 780, 787 (3d Cir. 2016)*. **[**30]** The court of appeals explained:

> First, it must "tak[e] note of the elements [the] plaintiff must plead to state a claim." *Iqbal, 556 U.S. at 675*. Second, it should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." *Id. at 679*. See also *Burtch v. Milberg Factors, Inc., 662 F.3d 212, 224 (3d Cir.2011)* ("Mere restatements of the elements of a claim are not entitled to the assumption of truth."(citation and editorial marks omitted)). Finally, "[w]hen there are well-pleaded factual allegations, [the] court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal, 556 U.S. at 679*.

Id. "Determining whether a complaint states a plausible claim for relief will...be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal, 556 U.S. at 679* (citing *Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007))*. A plaintiff must set forth "sufficient factual allegations to raise a reasonable expectation that discovery will reveal evidence" of the elements of the claim for relief. *Connelly, 809 F.3d at 789*; *Trzaska v. L'Oreal USA, Inc., 865 F.3d 155, 162 (3d Cir. 2017)*.

2. Plausibility of claim for a per se violation of *§ 1* of the Sherman Act

"To establish an actionable antitrust violation, a plaintiff must show concerted action by the defendants, that this concerted action resulted in a restraint on trade, **[**31]** and that this restraint was unreasonable." *In re* ***[*479]*** *Processed Egg Prods. Antitrust Litig., 206 F. Supp. 3d 1033, 1043 (E.D. Pa. 2016)* (citing *15 U.S.C. § 1*; *Santana Prods. v. Bobrick Washroom Equip., Inc., 401 F.3d 123, 131 (3d Cir. 2005))*. "'To sufficiently plead an unreasonable restraint, a plaintiff must include allegations showing that the restraint will fail under one of three rules of analysis: the rule of reason, per se, or quick look.'" *Aya Healthcare Servs. v. AMN Healthcare, Inc., Civ. Action No. 17-205, 2018 U.S. Dist. LEXIS 102582, 2018 WL 3032552, at *8 (S.D. Cal. June 19, 2018)* (quoting *United States v. eBay, Inc., 968 F. Supp. 2d 1030, 1037 (N.D. Cal. 2013))*.

a. Rule of Reason

"The 'rule of reason' standard is more than a default rule that the courts will apply when evaluating the lawfulness of a challenged business practice." *In re Processed Egg, 206 F.Supp.3d at 1044* (citing *Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 8, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979))*. In a rule of reason case, the plaintiff must prove:

> "(1) that the defendants contracted, combined or conspired among each other; (2) **that the combination or conspiracy produced adverse, anti-competitive effects within the relevant product and geographic markets**; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of that conspiracy."

Rossi v. Standard Roofing, Inc., 156 F.3d 452, 464-65 (3d Cir. 1998) (quoting *Tunis Bros. Co., Inc. v. Ford Motor Co., 763 F.2d 1482, 1489 (3d Cir. 1985))* (emphasis added). Thus, to state plausibly a rule of reason claim under the antitrust laws, the plaintiff must plausibly plead, among other things, a definition of the relevant market. *Int'l Constr. Prod. LLC v. Caterpillar Inc., No. CV 15-108-RGA, 2016 U.S. Dist. LEXIS 111174, 2016 WL 4445232, at *4*

(D. Del. Aug. 22, 2016); *MBR Const. Servs., Inc. v. City of Reading, No. 11-CV-07218, 2012 U.S. Dist. LEXIS 140355, 2012 WL 4478384, at *8 n.37 (E.D. Pa. Sept. 28, 2012)*.

b. Per Se

"[C]ertain agreements **[**32]** or practices are so 'plainly anticompetitive' and so often lack any redeeming virtue that they are conclusively presumed anticompetitive per se, without need for further examination." *In re Processed Egg, 206 F.Supp.3d at 1044* (quoting *Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 8, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979))*. The Third Circuit Court of Appeals has explained:

> A restraint among competitors—called "horizontal," as opposed to "vertical" restraints on market participants at different points in a product's supply chain—is more rigorously scrutinized for an antitrust violation because it could more easily facilitate competitive harms, such as the exclusion of rivals, price fixing, or the consolidation of market power. See Areeda & Hovenkamp, Fundamentals, supra, § 14.11[A].
>
> In particular, "when a firm exercises monopsony power pursuant to a conspiracy, its conduct is subject to more rigorous scrutiny ...." *West Penn, 627 F.3d at 103*. "[U]nlike independent action, concerted activity inherently is fraught with anticompetitive risk insofar as it deprives the marketplace of independent centers of decisionmaking that competition assumes and demands." Id. (internal quotation marks omitted).
>
> Indeed, some horizontal restraints, including price fixing and market division, are considered anticompetitive by their very nature. *NYNEX Corp., 525 U.S. at 133-34, 119 S.Ct. 493* (citing *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 60 S.Ct. 811, 84 L.Ed. 1129* (horizontal price-fixing), and *Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49-50, 111 S.Ct. 401, 112 L.Ed.2d 349 (1990)* (per curiam) (horizontal **[**33]** market division)). These are treated as per se *Sherman Act Section 1* violations. Id.

Lifewatch Servs. Inc. v. Highmark Inc., 902 F.3d 323, 335-36 (3d Cir. 2018). The per se violation condemnation of an antitrust claim lightens a plaintiff's litigation burden. *In re Processed Egg, 206 F.Supp.3d at 1051*. "[T]he significance of a *per se* analysis is that the Court presumes the anticompetitive and unlawful character of the agreement which must otherwise be proven under the rule of reason." *Id. at 1052*. If, however, "the plaintiff chooses to so limit his claims, and the Court holds on summary judgment that per se treatment of the restraint is improper, he risks the **[*480]** possibility that his claim may be dismissed." *Id. at 1051*.

c. Quick Look

A horizontal restraint may "facilitate the creation of new products, improve efficiencies, or lead to lower consumer costs[,]" and, thus, may not be "clearly harmful to competition." *Lifewatch, 902 F.3d at 336*. Id. Under those circumstances, the horizontal restraint is not per se unreasonable and would be "analyzed under some form...of a 'rule of reason' burden-shifting framework, which seeks to determine whether the restraint's harmful effects are outweighed by any procompetitive justifications and, if so, whether there are less restrictive alternatives." *Id.* A *complete* rule of reason analysis in those circumstances is not always **[**34]** warranted; rather, a "quick look" analysis may be conducted. The Third Circuit Court of Appeals has explained:

> A quick look "presum[es] competitive harm without detailed market analysis" because "the anticompetitive effects on markets and consumers are obvious." *Deutscher Tennis Bund, 610 F.3d at 832*. It is inappropriate if "'the contours of the market' ... are not 'sufficiently well-known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition ....'" Id. (quoting *Worldwide Basketball & Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n., 388 F.3d 955, 961 (6th Cir. 2004))*.

Lifewatch, 902 F.3d at 336 n.8. In other words, a quick look analysis falls between the rule of reason and per se condemnation. eBay, *968 F.Supp.2d at 1037*.

d. Application of Per Se Analysis

Here, defendants argue that plaintiffs' claim should be dismissed because the claim is subject to a rule of reason analysis and plaintiffs did not allege the relevant market in the consolidated class action complaint. (ECF No. 124-1 at 9.) Plaintiffs respond that they adequately alleged a per se violation of the antitrust laws, and, therefore, they are not required to plead a relevant market. (ECF No. 152 at 13-19.) At this stage of the proceedings, plaintiffs have the better view on this issue.

One treatise has recognized that a growing number **[**35]** of courts are using a two-step analysis to determine whether an alleged antitrust violation is per se unreasonable and explained:

> [T]he court first asks whether the challenged conduct truly involves a "horizontal" restraint between actual or potential competitors allocating markets or customers, reducing output, or otherwise restricting competition between them, and, if so, whether the restraint is devoid of plausible procompetitive justification (i.e., is "naked") or is instead plausibly ancillary and necessary to some larger, procompetitive integrative activity.
> If the answer to the first question is "no," then the restraint is assessed under the rule of reason as a vertical nonprice restraint. If the answer to the first question is "yes," and the restraint is naked (either because no justification is put forth, or because the one presented is simply not credible), then the per se rule is applied.
>
> If, however, it appears plausible that the restraint is ancillary and necessary to achieve some larger procompetitive activity or other legally protected objective, such that the restraint cannot be said to be manifestly anticompetitive, then the more flexible rule of reason (or at least the **[**36]** quick look) is applied.

[*481] William Homes & Melissa Mangiaracina, ***Antitrust Law*** Handbook § 2:13 (2018-2019 ed.) (footnotes omitted).

In this case, based upon the allegations in the consolidated class action complaint, the answer to the first question, i.e., whether the challenged conduct truly involves a "horizontal" restraint between actual or potential competitors allocating markets or customers, reducing output, or otherwise restricting competition between them, would be "yes." The Supreme Court of the United States has explained: "One of the classic examples of a per se violation of *§ 1* is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition." *United States v. Topco Assocs., Inc., 405 U.S. 596, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*. "***Antitrust law*** does not treat employment markets differently from other markets." *eBay, 968 F.Supp.2d at 1039*. Indeed, one treatise has explained: "An agreement among employers that they will not compete against each other for the services of a particular employee or prospective employee is, in fact, a service division agreement, analogous to a product division agreement." XII Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 2013b at 148 (3d ed. 2012).

Here, plaintiffs allege that Wabtec, **[**37]** Knorr, and Faiveley N.A. along with their subsidiaries were the largest railroad industry suppliers, i.e., they were at the same level of the market, and they agreed to not hire each other's employees, i.e., they entered into an agreement to allocate their employees to minimize competition for the employees. Thus, plaintiffs plausibly alleged that defendants' agreements constituted horizontal restraints of competition with respect to defendants' employees.

Plaintiffs also plausibly alleged that defendants' horizontal product division agreements are "naked agreements." A naked agreement is an agreement "among competitors with no plausible efficiency justifications." 1 John J. Miles, Health Care & ***Antitrust Law*** § 3:2 (2018). Plaintiffs in the consolidated class action complaint do not allege any basis upon which the court could reasonably infer that the agreements had any procompetitive results or were somehow ancillary to a proper business dealing or purpose. Under those circumstances, plaintiffs plausibly alleged that the "no-poach" agreements described in the consolidated class action complaint were horizontal service division agreements, which, like product division agreements would be, **[**38]** are per se unlawful under the antitrust laws. Plaintiffs, therefore, are not required to plead the requirements of a rule of reason analysis, e.g., relevant market.

The court's decision that the agreements alleged by plaintiff are plausibly per se violations of the antitrust laws is supported by the case law and the position of the DOJ, which was articulated by the government at the hearing on the motion to dismiss. Other courts[6] that have considered **[*482]** similar "no-poach" agreements have held that the agreements may be per se violative of the antitrust laws. For example, in *United States v. Kemp & Assocs., Crim. Action No. 16-403, 2019 U.S. Dist. LEXIS 28231, 2019 WL 763796 (D. Utah Feb. 21, 2019)*, the defendant was charged in a criminal indictment with criminal conspiracy in violation of *§ 1* for entering into a horizontal customer allocation agreement. The district court held that the agreement in issue should be subject to a rule of reason analysis and dismissed the indictment as barred by the statute of limitations. The government appealed. The Court of Appeals for the Tenth Circuit held that: (1) the indictment was not barred by the statute of limitations; and (2) it did not have interlocutory appellate jurisdiction to review the district's court's decision to apply the rule of reason analysis to the charge **[**39]** in the indictment and mandamus was not warranted with respect to that issue. *United States v. Kemp & Assocs., Inc., 907 F.3d 1264, 1272, 1276 (10th Cir. 2018)*. The court of appeals, however, cautioned the district court:

> To be sure, were the merits of the rule of reason order before us we might very well reach a different conclusion than did the district court. After all, "an agreement to allocate or divide customers between competitors within the same horizontal market, constitutes a per se violation of *§ 1 of the Sherman Act*," *Suntar Roofing, Inc., 897 F.2d at 473 (10th Cir. 1990)*, and Defendants' efforts to distinguish their agreement from a traditional customer allocation agreement are mostly unpersuasive. Despite Defendants' arguments otherwise, it is immaterial whether a customer allocation agreement applies to new or existing customers, *Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 49-50, 111 S.Ct. 401, 112 L.Ed.2d 349 (1990)*, and there is no rule that allocation agreements are only subject to the per se rule if customers are divided geographically, see *United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1088 (5th Cir. 1978)*. Nor does it matter that the alleged agreement **[*483]** would only affect a small number of potential customers, cf. *United States v. Reicher, 983 F.2d 168, 170 (10th Cir. 1992)* (holding that a conspiracy to rig a single bid, and therefore affect only a single

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[6] Plaintiffs in the notice of supplemental authority cite *Conrad v. Jimmy John's Franchise, LLC, Case No. 3:18-cv-00133-NJR-RJD, 2019 U.S. Dist. LEXIS 94411 (S.D. Ill. May 21, 2019)* (ECF No. 189-1), **[**40]** and *Blanton v. Domino's Pizza Franchising LLC, Case No. 2:18-cv-13207-VARDRG, 2019 U.S. Dist. LEXIS 87737 (E.D. Mich. May 24, 2019)* (ECF No. 198-2). Plaintiffs attached the Conrad and Blanton decisions to their notice of supplemental authority. The court will, therefore, use this case's ECF docket citation when discussing each of those decisions.

In Conrad, the plaintiff sued the defendants under the Sherman Act for their alleged "practice of including no-poach clauses in its franchise contracts." (ECF No. 189-1 at 2.) The defendants filed a motion to dismiss, which was denied with respect to the plaintiff's Sherman Act claim. (Id. at 3.) The judge presiding over the case at the time held that plaintiff stated a plausible Sherman Act claim and the court could not decide at the pleading stage of the litigation which analysis would apply to the case, i.e., the rule of reason, the per se approach, or the quick look analysis. (Id. at 3-4.) The judge then retired and the case was reassigned. The defendants filed another motion to dismiss that was "extremely similar to the one that the prior judge already adjudicated." (Id. at 2.) The newly assigned judge applied the law of the case doctrine and denied the defendant's motion to dismiss the complaint. (Id. at 6.)

In Blanton, the plaintiff alleged that the defendants "violated the Sherman Antitrust Act by orchestrating an employee no-hire agreement among their nationwide network of franchisees." (ECF No. 189-2 at 2.) The defendant filed a motion to dismiss and argued that the plaintiff failed to state a *§ 1* claim under the rule of reason. The court disagreed; it held that plaintiff stated a plausible *§ 1* claim and that the plaintiff's failure to apply the rule of reason was not fatal to his claim. The court explained that "[m]ore factual development...[was] necessary[,]" and at that stage the plaintiff set forth factual allegations sufficient to show plausibly he was entitled to relief under *§ 1*. (Id. at 10.)

Defendants argue that the court should disregard plaintiffs' notice of supplemental authority because the courts in the foregoing decisions did not hold that horizontal no-poach agreements are always subject to the per se rule. (ECF No. 190 at 1.) The court finds *Conrad* and *Blanton* persuasive to the extent the courts in those decisions held that the plaintiffs set forth factual allegations sufficient from which the court could plausibly infer that the per se rule would apply, and, therefore, the plaintiffs were not required to plead a rule of reason analysis in their complaints. The court agrees with defendants that the courts in those decisions did not hold that all horizontal no-poach agreements will be per se violative of the antitrust laws.

> customer, is subject to per se analysis), and any lack of judicial familiarity with the Heir Location Services industry is largely irrelevant, *Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 346, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982)*.

Id. at 1277.

After the case was remanded, the government filed a motion for reconsideration of the district court's decision to dismiss the indictment because of the rule of reason analysis. *Kemp, 2019 U.S. Dist. LEXIS 28231, 2019 WL 763796, at *1*. The court granted the motion for reconsideration and held that the per se approach was applicable in the case. The court explained that the agreement in issue was a horizontal customer allocation agreement, which is subject to the per se approach, and it could not discern any basis upon which to find the per se approach inapplicable to the case. *2019 U.S. Dist. LEXIS 28231, [WL] at *2-3*.

In *Aya Healthcare Servs. v. AMN Healthcare, Inc., Civ. Action No. 17-205-MMA, 2018 U.S. Dist. LEXIS 102582, 2018 WL 3032552 (S.D. Cal. June 19, 2018)*, the plaintiffs sued the defendants under *§ 1*. The plaintiffs and the defendants sold medical-traveler services to hospitals, i.e., they provided nurses to understaffed hospitals around the United States. The defendants were the dominate providers of the nurses in the country and employed other providers as subcontractors. The plaintiffs sued defendants because the defendants required the subcontractor-providers "to accept unilateral no-poaching agreements[,]" which forbade the defendants' rivals, i.e., the subcontractor **[**41]** providers, from initiating job offers or otherwise soliciting the nurses employed by defendants. *2019 U.S. Dist. LEXIS 28231, [WL] at *2*. The defendants filed a motion to dismiss arguing, among other things, that the plaintiffs failed to state a claim under *§ 1* under all three rules of analysis, i.e., per se, quick look, and rule of reason.

The court found that the agreements alleged were horizontal market allocation agreements, which typically constitute a per se violation of *§ 1*. *2019 U.S. Dist. LEXIS 28231, [WL] at *12*. The court determined that the plaintiffs plausibly alleged that the agreements were not reasonably ancillary to the subcontractor agreements because, among other reasons, the agreements lasted beyond the subcontractor relationship had ended and the defendants were not subject to the same restrictions. Under those circumstances, the plaintiffs' allegations were sufficient to allege a type of restraint subject to per se treatment. The motion to dismiss was denied on that basis with respect to that issue. *2019 U.S. Dist. LEXIS 28231, [WL] at *12-13*.

In *United States v. eBay, Inc., 968 F.Supp.2d 1030 (N.D. Cal. 2013)*, the government asserted a *§ 1* claim against eBay, Inc. ("eBay") and alleged that eBay entered into an agreement with Intuit, Inc. ("Intuit"), "which restricted eBay and Inuit's ability to recruit or hire candidates from one **[**42]** another." *Id. at 1032*. eBay filed a motion to dismiss and argued, among other things, that the government "failed to state an unreasonable restraint of trade because it fails to include any allegations sufficient to state a rule of reason claim." *Id. at 1037*. The government admitted that it did not include in the complaint any allegations with respect to the rule of reason, but argued that it was not required to do so because it only intended to pursue claims under the per se and quick look rules. Id.

The court recognized that the government set forth factual allegations sufficient to show plausibly that eBay and Intuit entered into a horizontal market allocation **[*484]** agreement. *Id. at 1039*. The court explained that a horizontal "market allocation agreement or any other restraint traditionally subject to per se treatment will only be found to be per se illegal if it 'facially appears to be one that would almost always tend to restrict competition and decrease output[.]'" *eBay, 968 F.Supp.2d at 1039* (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 100, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984))*. Under those circumstances, the court was charged with considering "factual evidence relating to the agreement's formation and character" to determine "whether the alleged no-solicitation/no hire agreement...[was] ancillary to a procompetitive **[**43]** business purpose." Id. At the pleading stage of the litigation, however, the court could not "determine with certainty the nature of the restraint, and by extension, the level of analysis to apply." *Id. at 1040*. In other words, "taking the allegations in the Complaint as true, the court...[could not] determine as a matter of law that per se treatment...[would] be inappropriate." Id. The court denied the motion to dismiss with respect to that issue on that basis. Id.

Defendant relied on decisions[7] which do not warrant the application of the rule of reason in this case. In *Eichorn v. AT & T Corp., 248 F.3d 131, 143 (3d Cir. 2001)*, the court of appeals held that the district court properly applied the rule of reason to analyze the "no-hire agreement" at issue in the case because the "no-hire agreement" was a covenant not to compete, i.e., a legitimate *ancillary* restraint on trade executed upon the legitimate transfer of ownership of a business. Here, at this stage of the proceedings, the court cannot discern that the alleged "no-poach" agreements would be legitimate ancillary restraints on trade executed with some other proper business purpose.

In *Weisfeld v. Sun Chemical Corp., 210 F.R.D. 136, 143 (D.N.J. 2002)*, the court relied upon Eichorn to conclude that the rule of reason applied to a *§ 1* claim based upon **[**44]** the three largest manufacturers in the ink printing industry conspiring not to hire each other's employees for a period of four years. On appeal, the Third Circuit Court of Appeals in dicta explained that Eichorn was distinguishable from the facts of Weisfeld:

> As we have recognized, the "Supreme Court has been cautious in extending the per se approach to claims that fall outside certain previously enumerated categories of liability." *Eichorn, 248 F.3d at 143* (citations omitted). In Eichorn, we held that the no hire agreement at issue did not constitute a per se violation and, in fact, did not constitute an unreasonable restraint of trade at all. *Id. at 144, 145-146*. But the facts in Eichorn are different than those here. In Eichorn, AT & T adopted a policy not to allow employees of Paradyne Corp., an AT & T affiliate, to transfer to other divisions of AT & T. The purpose of the policy was to make Paradyne more attractive to potential buyers. Shortly thereafter, Paradyne was sold, and AT & T entered into a post-closing agreement in which it agreed not to hire, solicit or rehire any Paradyne employee or consultant whose compensation exceeded $50,000 for a period of 245 days (8 months). *Id. at 136-37*. In this case, however, Weisfeld alleges **[**45]** that the three largest manufacturers in **[*485]** the ink printing industry conspired not to hire each others' employees for a period of four years.

Weisfeld v. Sun Chem. Corp., 84 F. App'x 257, 260 n.2 (3d Cir. 2004). The court of appeals, however, did not directly decide the issue. In any event, defendants' citations to Eichorn and Weisfeld do not persuade the court to conclude that the rule of reason would apply to this case; rather, the dictum in *Weisfeld* supports plaintiffs' argument that a conspiracy to not hire or solicit employees between employers who compete with one another may be a per se violation of *§ 1 of the Sherman Act*.

The court's decision in this respect is supported by the government's explanation in its statement of interest and at the hearing on the motion to dismiss. It explained that the federal agencies charged with enforcing the antitrust laws consider naked no-poach agreements per se violations of the Sherman Act and the DOJ will proceed criminally against those who enter into those kinds of agreements. (ECF No. 158 at 9, 11, 13 (citing Federal Trade

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[7] Defendant cites the following decisions from courts outside the Third Circuit in support of its argument that the rule of reason should be applied to the alleged horizontal restraints in this case. Those decisions, however, are easily distinguishable from this case. See *Deslandes v. McDonald's USA, LLC, Civ. Action No. 17-4857, 2018 U.S. Dist. LEXIS 105260, 2018 WL 3105955, at *7 (N.D. Ill. June 25, 2018)* (holding "the restraint alleged in plaintiff's complaint cannot be deemed unlawful per se...[b]ecause the restraint alleged in plaintiff's complaint is ancillary to an agreement with a procompetitive effect"); *In re High-Tech Employee Antitrust Litig., 856 F.Supp.2d 1103 n.9 (N.D. Cal. 2012)* (acknowledging that the "horizontal agreements between competitors in restraint of trade" were "either *per se* unlawful...or...prima facie anticompetitive under the rule of reason analysis" but not deciding the issue because the plaintiffs plead their claim under the rule of reason); *Bogan v. Hodgkins, 166 F.3d 509, 515 (2d Cir. 1999)* (holding the agreement in issue did not trigger per se treatment because "while the Agreement may constrain General Agents to some degree, it does not allocate the market for agents to any meaningful extent"); *Phillips v. Vandygriff, 711 F.2d 1217 (5th Cir. 1983)* (holding the agreement in issue was not subject to per se analysis because it was "at least potentially reasonably ancillary" to a proper business purpose); *UARCO Inc. v. Lam, 18 F.Supp.2d 1116 (D. Haw. 1998)* (analyzing an "unclean hands" defense in deciding a motion for preliminary injunction and holding that companies' agreements to not hire each other's employees must be analyzed under the rule of reason without recognizing that no-hire agreements are horizontal market allocation agreements which receive per se treatment under the antitrust laws); *Coleman v. Gen. Elec. Co., 643 F. Supp. 1229 (E.D. Tenn. 1986)* (holding the per se analysis did not apply to the agreement in issue because "there was no stifling of competition for the services of these employees" and the impact of the agreement on the employment market was nothing more than "incidental").

Commission, Department of Justice Antitrust Division, Antitrust Guidance for Human Resource Professionals, at 3 (Oct. 2016)).

The motion to dismiss will, therefore, be denied without prejudice with respect to this issue. Defendants may raise this issue if warranted **[**46]** in a motion for summary judgment.

3. Plausibility of Claim for Antitrust Conspiracy

Section 1 of the Sherman Act provides, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1. "To state a *Section 1* claim, then, a plaintiff must allege (1) an agreement (2) to restrain trade unreasonably." *Lifewatch, 902 F.3d at 331* (quoting *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 315 (3d Cir. 2010))*. "A private plaintiff suing under the *Clayton Act* must also allege antitrust standing, including that its 'injury [is] of the type the antitrust laws were intended to prevent and ... flows from that which makes defendants' acts unlawful.'" *Lifewatch, 902 F.3d at 331* (quoting *In re Ins. Brokerage Antitrust Litig., 618 F.3d at 331 n.9*).

[*486] The prohibition in *§ 1* on "every contract, combination..., or conspiracy" that unreasonably restrains trade is a prohibition on an "agreement" that unreasonably restrains trade. *Lifewatch, 902 F.3d at 332-33*. "An agreement may be shown by either direct or circumstantial evidence." *Id. at 333* (citing *W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 99 (3d Cir. 2010))*. "'Unilateral activity by a defendant, no matter the motivation, cannot give rise to a [S]ection 1 violation.'" *Id. at 332-33* (quoting *InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 159 (3d Cir. 2003))*. To show plausibly the defendants made an "agreement," "a plaintiff must plead 'some form of concerted action ..., in other words, **[**47]** a unity of purpose or a common design and understanding or a meeting of minds or a conscious commitment to a common scheme ....'" Id. (quoting *Ins. Brokerage, 618 F.3d at 315*)). The Third Circuit Court of Appeals has explained:

> For circumstantial evidence of an agreement, then, a plaintiff must allege both parallel conduct and something "more," which we have sometimes called a "plus factor." *Ins. Brokerage, 618 F.3d at 321*. This "more" could include evidence (1) "that the defendant had a motive to enter into a ... conspiracy," (2) "that the defendant acted contrary to its interests," or (3) "implying a traditional conspiracy." *Id. at 321-22* (quoting *In re Flat Glass Antitrust Litig., 385 F.3d 350, 360 (3d Cir. 2004))*.

Lifewatch, 902 F.3d at 333.

The Supreme Court of the United States has explained:

> In applying these general standards to a *§ 1* claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

Twombly, 550 U.S. at 556.

Defendants in their joint motion to dismiss the consolidated class action complaint argue plaintiffs did not set forth factual allegations **[**48]** to show plausibly the "three distinct bilateral agreements are part of a single, overarching conspiracy among the Defendants." (ECF No. 124-1 at 14.) Plaintiffs respond that "[t]he Complaint never refers to a 'single' or 'overarching conspiracy[;]'" rather, plaintiffs plausibly alleged that "each Defendant participated in bilateral combinations to restrain competition in the market for employees." (ECF No. 152 at 19-20.) According to plaintiffs, each member of the proposed class was harmed by each bilateral agreement because each bilateral agreement "disrupted the normal bargaining and price-setting mechanisms that apply in the labor market...[which] suppress[ed] compensation levels generally." (Id. at 20.) Plaintiffs also argue that "it is certainly plausible that Defendants acted in concert with knowledge of, and in reliance on, the other express agreements to further the purposes of the [overarching] conspiracy." (Id. at 21.)

Here, plaintiffs allege that the defendants entered into three bilateral agreements:

> (1) beginning no later than **2009 and lasting at least until 2016, Wabtec's** and **Knorr's** senior executives entered into an express no-poach agreement and then actively managed it with each other **[**49]** through direct communications;
>
> (2) beginning no later than **2011 and lasting until at least 2015**, senior executives at **Knorr** and **Faiveley [*487] N.A.** reached an express no-poach agreement that included a commitment to contact one another before pursuing an employee of the other company and actively managed the agreement through direct communications; and
>
> (3) beginning no later than **2014 and lasting at least until the companies merged in 2016**, senior executives at **Wabtec** and **Faiveley N.A.** entered into a no-poach agreement in which the companies agreed not to hire each other's employees without approval from the other company and actively managed and enforced the agreement through direct communications.

The foregoing allegations plausibly show that there existed three bilateral agreements to restrain competition for employees in the railway equipment supplier industry. Issues remain, however, about: (1) whether plaintiffs set forth factual allegations to show plausibly that Wabtec, Knorr, and Faiveley N.A. were members of an overarching conspiracy; and (2) if so, when the overarching conspiracy began.

Plaintiffs plausibly alleged that by **2014** Wabtec, Knorr, and Faiveley N.A. were engaged in three **[**50]** separate bilateral conspiracies. Plaintiffs, however, did not set forth factual allegations from which the court could conclude it is plausible that Wabtec in 2009 up until 2014 knew about Knorr and Faiveley N.A.'s agreement, Knorr knew about Wabtec and Faiveley N.A.'s agreement, or Faiveley N.A. knew about Wabtec and Knorr's agreement. Plaintiffs, however, may prove the existence of an overarching conspiracy via circumstantial evidence. Plaintiffs' allegations are sufficient to support a reasonable inference that at least by 2014 when all three competitors had entered into no-poach agreements they were engaged in conduct that would limit competition for the employees of each company, i.e., it is plausible they each entered into an overarching agreement to refrain from competing for employees with their top rivals.

Plaintiffs also plausibly alleged "something more" from which a reasonable inference can be drawn that by 2014, Wabtec, Knorr, and Faiveley N.A. were members of an overarching conspiracy to refrain from competing against each other with respect to employees. First, plaintiffs assert that Wabtec, Knorr, and Faiveley N.A. each had a motive to enter into an overarching agreement. **[**51]** Plaintiffs allege:

- Wabtec, Knorr, and Faiveley N.A. were the three largest rail equipment suppliers and some of the largest employers in the rail industry;
- there is a high demand for and limited supply of skilled employees who have rail industry experience;
- directly soliciting employees from other rail industry employers is a particularly efficient and effective method of competing for qualified employees;
- in a properly functioning and lawfully competitive labor market, rail industry employers compete with one another to attract highly-skilled talent for their employment needs; and
- the competition benefits employees because it increases the available job opportunities and improves an employee's ability to negotiate for a better salary and other terms of employment.

Based upon the foregoing allegations, it is plausible to infer that by 2014, Wabtec, Knorr, and Faiveley N.A. each had a motive to join an *overarching conspiracy* because: (1) they were each other's biggest competitors for skilled employees; and (2) they each entered into bilateral agreements **[*488]** *with* their two largest competitors. An overarching agreement among all three of the largest rail equipment suppliers would place **[**52]** Wabtec, Knorr, and Faiveley N.A. on equal footing with respect to competition for employees from their largest competitors. In any event, the 2016 acquisition of Faiveley by Wabtec resulted in Faiveley N.A. becoming part of the bilateral conspiracy between Wabtec and Knorr.

Plaintiffs set forth factual allegations sufficient to show plausibly that the entry into the bilateral agreements was contrary to the competitive interests of Wabtec, Knorr, and Faiveley N.A.: "By soliciting and hiring employees from other rail industry employers, a company is able to take advantage of the efforts its rival has expended in identifying and training the employees, while simultaneously inflicting a cost on the rival by removing an employee on whom the rival may depend." (ECF No. 88 ¶ 35.) By entering into the bilateral agreements, Wabtec, Knorr, and Faiveley N.A. forfeited the advantages gained from soliciting and hiring their competitors' employees. A reasonable inference is that they would enter into such agreements in exchange for promises that their top competitors would not solicit or hire each other's employees. Thus, the top rivals would be on equal footing in the competition for employees.

[53]** Plaintiffs set forth sufficient factual allegations to show plausibly that there were similarities between the three bilateral agreements from which a reasonable inference may be drawn that the three bilateral agreements evolved into to an overarching agreement when Wabtec and Faiveley N.A. (no later than 2014) entered into the third bilateral agreement described in the consolidated class action complaint. Plaintiff alleges:

- the three bilateral agreements were entered into within a six-year time period and by the time Wabtec and Faiveley N.A. entered into their agreement in 2014, the other two bilateral agreements between Wabtec & Knorr and Knorr & Faiveley N.A. were effective and being enforced;
- the three bilateral agreements were executed and enforced by the companies' senior executives;
- the parties to each of the bilateral agreements agreed to not poach each other's employees and to not hire each other's employees prior to receiving approval from the other party to the agreement; and
- the executives of Wabtec, Knorr, and Faiveley N.A. managed and enforced the bilateral agreements via direct communication with each other.

Based upon the foregoing, plaintiffs set forth factual allegations **[**54]** to show plausibly four conspiracies to restrain competition for employees in the railway equipment supplier industry: (1) beginning no later than 2009, Wabtec and Knorr; (2) beginning no later than 2011, Knorr and Faiveley N.A.; (3) beginning no later than 2014, Wabtec and Faiveley N.A.; and (4) beginning at the earliest 2014, the overarching conspiracy among Wabtec, Knorr, and Faiveley.

Plaintiffs and defendants cite to three decisions in support of their positions with respect to whether the allegations in the consolidated complaint are sufficient to plausibly show an overarching conspiracy among Wabtec, Knorr, and Faiveley: *In re Insurance Brokerage Antitrust Litigation, 618 F.3d 300 (3d Cir. 2010)*; *In re High-Tech Employee Antitrust Litigation, 856 F. Supp. 2d 1103 (N.D. Cal. 2012)*; and *In re Iowa Ready-Mix Concrete Antitrust Litigation, 768 F.Supp.2d 961, 972 (N.D. Iowa 2011)*.

[*489] Defendants argue that this case "is like In re Insurance Brokerage Antitrust Litig.,, in which the Third Circuit Held that alleged parallel kickback conspiracies among defendants, although not necessarily 'praiseworthy—or even lawful,' did not plausibly suggest a 'global conspiracy' among the defendants." (ECF No. 124-1 at 15.) In Insurance Brokerage, the plaintiffs, who were "purchasers of commercial and employee benefit insurance," sued the defendants, who were "insurers and insurance brokers that deal[t] in those lines of insurance." *Insurance Brokerage, 618 F.3d at 308*. The plaintiffs **[**55]** sued the defendants alleging the defendants "entered into unlawful, deceptive schemes to allocate purchasers among particular groups of defendant insurers." Id. The plaintiffs explained: "conspiring brokers funneled unwitting clients to their co-conspirator insurers, which were insulated from competition; in return, the insurers awarded the brokers contingent commission payments—concealed from the insurance purchasers and surreptitiously priced into insurance premiums—based on the volume of premium dollars steered their way." Id. The agreements between brokers and insurers at issue in Insurance Brokerage were vertical agreements. Id. The plaintiffs also alleged that a "global conspiracy" existed among the brokers to conceal the existence of the alleged conspiracy and commission agreements. *Id. at 313*. The plaintiffs labeled the global conspiracy as a "horizontal restraint." *Id. at 348*.

The defendants filed a motion to dismiss arguing, among other things, that the plaintiffs failed to set forth factual allegations sufficient to show plausibly a global, horizontal conspiracy existed among the brokers or among the insurers. The plaintiffs in response explained that in a normal market, a broker would explain **[**56]** to customers that another broker's rates are too high. Because of the conspiracy, however, a broker could not explain to a potential client that another broker's rates were too high without exposing himself or herself and his or her participation in the conspiracy and commission agreements. The plaintiffs in support of the global conspiracy theory pointed to parallel conduct by the brokers and insurers, i.e., "the similar nature of each broker-centered conspiracy, as well as the allegedly similar confidentiality agreements the brokers inserted into the vertical contracts with each of their partner insurers." *Id. at 350-51*.

The district court granted the motion to dismiss with respect to the global conspiracy and held that the "complaints' factual allegations fail[ed] to plausibly imply horizontal non-disclosure agreements among the defendant brokers or the defendant insurers." *Insurance Brokerage, 618 F.3d at 348*. The district court explained: "While Plaintiffs present facts to support the possibility of inadequate disclosures by the brokers to the insureds, the Complaints are bereft of allegations to demonstrate that this was more than brokers adopting sub-par disclosure methods to protect their own, lucrative agreements." *Id. at 351*.

The court **[**57]** of appeals relied upon Twombly to affirm the decision of the district court. The court of appeals explained:

> Twombly makes clear that a claim of conspiracy predicated on parallel conduct should be dismissed if "common economic experience," or the facts alleged in the complaint itself, show that independent self-interest is an "obvious alternative explanation" for defendants' common behavior. For our present purposes, we find this guidance sufficient.

Insurance Brokerage, 618 F.3d at 325. The court found that although the plaintiffs alleged parallel conduct, i.e., the brokers used industry-standard disclosure language in their agreements with customers **[*490]** and did not disclose their participation in the vertical agreements with insurers to their customers, the brokers' independent self-interest provided an obvious alternative explanation for their failure to disclose the vertical agreements to customers. The court of appeals explained: "Reaping 'enormous profits' from their own furtive use of contingent commission agreements, the brokers had no desire to upset the apple cart." *Id. at 349*.

The court of appeals found that the plaintiffs did not otherwise set forth factual allegations, i.e., "plus factors," to "plausibly imply a horizontal **[**58]** agreement among the brokers." *Id. at 349-50*. For example, the brokers' use of industry standard disclosure practices was not a "plus factor" from which a horizontal conspiracy could be reasonably inferred. Id. The court of appeals explained:

> Plaintiffs' attack on the pervasive use of contingent commissions to exploit insurance brokers' power over their clients—and the use of similar techniques to disguise this activity—may allege a "pernicious industry practice," but they do not plausibly imply an industry-wide conspiracy.

Id. at 350.

Insurance Brokerage is distinguishable from this case. First, plaintiffs allege members of three horizontal bilateral agreements to not poach each other's employees were members of one overarching horizontal agreement to not poach each other's employees, i.e., the members and subject-matter of the agreements were the same. In Insurance Brokerage, however, the plaintiffs argued that *vertical* agreements between brokers and insurers were evidence of *horizontal* agreements between brokers and between insurers to not disclose the contents of the vertical agreements. In other words, the parties to the horizontal agreements were different than the parties to the vertical agreements and **[**59]** the subject-matters of the agreements were related but not the same.

Second, the plaintiffs in Insurance Brokerage heavily relied upon the industry-standard disclosure language to show that the brokers were engaged in horizontal agreements to not disclose their vertical agreements with insurers. The court of appeals rejected that argument because although the reliance on the industry-standard language may be evidence of a "pernicious industry practice," it did not show that the brokers were engaged in a horizontal agreement to violate the antitrust laws. *Id. at 351*. Here, however, there is no evidence that the alleged agreements by Wabtec, Knorr, and Faiveley to not poach each other's employees were industry practice. As discussed above, plaintiffs set forth factual allegations that constitute "plus factors" and circumstantially support that by at least 2014, Wabtec, Knorr, and Faiveley were members of an overarching conspiracy to not poach each other's employees.

The parties also cite to *In re High-Tech Employee Antirust Litigation, 856 F.Supp.2d 1103 (N.D. Cal. 2012)*. In High-Tech, the plaintiff-employees alleged the defendant-companies, who were all high-tech companies with a principal place of business in Silicon Valley, conspired to fix and suppress employee compensation **[**60]** to restrict employee mobility. *Id. at 1108*. The plaintiffs alleged that the conspiracy consisted of six bilateral agreements among the defendants to not poach each other's employees. *Id. at 1110-11*. The plaintiffs also alleged that all defendants were members of an "overarching conspiracy." *Id. at 1115*. The defendants argued that the plaintiffs failed to set forth factual allegations sufficient to show plausibly there was an overarching conspiracy among all defendants. Id.

[*491] The district court determined the factual allegations in the complaint plausibly showed the defendants were a part of the overarching conspiracy because the plaintiffs "alleged facts beyond mere parallel conduct[,]" which "tend...to exclude the possibility of independent action." *Id. at 1117*. The court explained the plaintiffs alleged: (1) the six bilateral agreements were negotiated by senior executives; (2) "at all relevant times, at least one of three [senior] executives 'had significant influence over at least one party to each of the six bilateral agreements[;]" (3) the six bilateral agreements, which were reached in secrecy over a span of two years, were identical; and (4) one of the senior executives (Steve Jobs) "exerted significant influence over companies **[**61]** involved in four of the bilateral" agreements. *Id. at 1116-17*. The court concluded: "The fact that all six identical bilateral agreements were reached in secrecy among seven Defendants in a span of two years suggests that these agreements resulted from collusion, and not from coincidence." *Id. at 1120*.

The factual allegations in support of an overarching conspiracy in this case are not as strong as the factual allegations in *High-Tech*; indeed, plaintiffs in this case do not allege that a) Wabtec, Knorr, or Faiveley N.A. shared senior executives or board members b) senior executives or board members had influence over another party to the bilateral agreements, c) the agreements were reached within a span of two years (here it was approximately 5 years), or d) the agreements were identical. Plaintiffs do allege, however, that beginning in 2014, the three largest railroad equipment suppliers were all engaged with each other in bilateral agreements to not poach each other's employees. The agreements, like the agreement in High-Tech, were company-wide in the United States and included the same essential terms. Wabtec, Knorr, and Faiveley N.A. would have been motivated to enter into an overarching agreement to ensure **[**62]** that the other two companies also agreed to not poach each other's employees and obtain any advantage in the marketplace. Under those circumstances, there is a reasonable expectation that discovery will reveal evidence that at least beginning in 2014 (when Wabtec and Faiveley N.A. entered into their no poach agreement) there was an overarching conspiracy among Wabtec, Knorr, and Faiveley N.A. to not poach each other's employees. Like the plaintiffs in *High-Tech*, plaintiffs in this case set forth factual allegations sufficient to show parallel conduct and something "more" to show defendants were acting pursuant to an overarching conspiracy.

Defendants also cite to *In re Iowa Ready-Mix Concrete Antitrust Litigation, 768 F.Supp.2d 961, 972 (N.D. Iowa 2011)*, in support of their argument that plaintiffs failed to set forth factual allegations sufficient to show plausibly Wabtec, Knorr, and Faiveley N.A. were members of an overarching conspiracy. In Ready-Mix, the plaintiffs, purchasers of ready-mix concrete, sued the defendants, producers and sellers of ready-mix concrete and certain of their officers, directors, owners, and employees, "alleging an antitrust conspiracy to suppress and eliminate competition by fixing the price of ready-mix concrete in the 'Iowa region.'" *Id. at 963*. According **[**63]** to the plaintiffs, "the defendants and their co-conspirators conspired to set and reached agreements to set agreed-upon prices, to set agreed-upon price increases, and to submit non-competitive and rigged bids for ready-mix concrete sold in the Northern District of Iowa and elsewhere." *Id. at 965-66*. The defendants filed a motion to dismiss in which they argued that "the plaintiffs...alleged no facts to support a direct agreement among any of the defendants other than the three separate and **[*492]** discrete agreements admitted in the individual defendant's plea agreements to criminal antitrust charges[.]" *Id. at 971*. More specifically, the defendants argued: "defendants contend that the allegations of an industry-wide conspiracy in the entire (and undefined) 'Iowa region' over a four-plus year period are inconsistent with the discrete agreements admitted in the plea agreements and, thus, must be disregarded." *Id. at 972*.

The court agreed with the defendants and held that the plaintiffs included in the complaint only conclusory allegations about the defendants allegedly entering into an industry-wide conspiracy in the Iowa region. *Id. at 974*. The court explained:

> Here, as the defendants contend, the Amended Consolidated Complaint does **[**64]** not even allege parallel conduct, but skips straight to conclusory allegations of an agreement among the defendants. See Amended Consolidated Complaint at ¶¶ 42-51. Such "a naked assertion of conspiracy in a *§ 1* complaint ... gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'" *Bell Atlantic, 550 U.S. at 557, 127 S.Ct. 1955* (citing *DM Research, Inc. v. College of Am. Pathologists, 170 F.3d 53, 56 (1st Cir.1999)*, as stating, "[T]erms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient in conjunction with a more specific allegation-for example, identifying a written agreement or even a basis for inferring a tacit agreement, ... but a court is not required to accept such terms as a sufficient basis for a complaint"). There is no "further factual enhancement" in the Amended Consolidated Complaint to push the allegations of an antitrust conspiracy across the line between possible and plausible. Indeed, allegations that, for the purpose of forming and effectuating their combination and conspiracy, the defendants and their co-conspirators "did those things which they combined and conspired to do, including, among other things, discussing, forming and **[**65]** implementing agreements to raise and maintain at artificially high levels the prices for Ready-Mix Concrete," Amended Consolidated Complaint at ¶ 44, is, as the defendants contend, merely a tautology, not an allegation of additional facts. Even the plaintiffs' allegations that, throughout the class period, the defendants and their co-conspirators conspired to set and reached agreements to set agreed-upon prices, to set agreed-upon price increases, and to submit non-competitive and rigged bids for ready-mix concrete sold in the Northern District of Iowa and elsewhere, id. at ¶¶ 51-52, are merely conclusory allegations of an agreement, not allegations of facts from which an agreement can reasonably be inferred. Similarly, allegations that the defendants concealed their agreement through secret meetings, id. at 56-57, are merely conclusory allegations providing no factual enhancement.
>
> The defendants are correct that the only facts about the nature and operation of the alleged conspiracy to be gleaned from the Amended Consolidated Complaint are the facts in the plea agreements of the individual defendants. Even then, it is only by recourse to the plea agreements referenced in the Amended Consolidated **[**66]** Complaint that one can learn any factual details of antitrust conspiracies, and then only as to certain bilateral agreements.
>
> On the other hand, the plaintiffs are correct that the Packaged Ice decision on which the defendants rely held that civil antitrust litigation cannot be "circumscribed **[*493]** or defined by the boundaries of the criminal investigation or plea agreements" of some of the alleged participants in the civil antitrust conspiracy. *723 F.Supp.2d at 1011-12*. That decision also held that "taken as part of the larger picture, and considering the parallel internal investigations that have resulted in the suspension of key executives, these guilty pleas [of certain alleged participants in the civil conspiracy] do enhance the expectation that discovery might lead to evidence of a nationwide illegal agreement among these same actors, one of whom is under active government investigation and admittedly does not sell product in southeastern Michigan." *Id. at 1011*. What is missing in this case, however, is the "larger picture" from which inferences of a wider conspiracy can be drawn from guilty pleas to separate bilateral conspiracies.

Id.

The court: (1) rejected the application of a "hub and spoke" conspiracy to the case **[**67]** because the plaintiffs did not allege a vertical conspiracy, which is a requirement of a "hub and spoke" conspiracy; (2) recognized the plaintiffs did not set forth any "allegation of facts supporting the existence of an overall plan to fix prices or that each defendant had knowledge that others were involved in the conspiracy[;]" and (3) found the allegations about the geographical area of the conspiracy, i.e., an undefined "Iowa region," implausible because "[a]s alleged, ready-mix concrete must be produced and delivered within a limited geographical area, such that it is not clear how all of the defendants could compete within an entire undefined 'Iowa region[.]'" *Id. at 975-76*.

Defendants rely upon Ready-Mix and argue that like the plaintiffs in Ready-Mix, the "[p]laintiffs [in this case] do not offer any factual allegations that would connect the separate bilateral agreements." (ECF No. 124-1 at 15.) Plaintiffs' allegations in this case, however, rise above the conclusory and implausible allegations set forth by the plaintiffs in Ready-Mix. As discussed above, by 2014, the three largest railroad equipment suppliers had all entered into bilateral agreements to not poach each other's employees. **[**68]** Those agreements were reached and managed by the senior executives of the three largest railroad equipment suppliers and the agreements applied company-wide throughout the United States. Under those circumstances, there is a reasonable expectation that discovery will reveal evidence that beginning no later than 2014, Wabtec, Knorr, and Faiveley N.A. were members of an overarching conspiracy to restrain competition for employees.

Based upon the foregoing, plaintiffs set forth factual allegations sufficient to show plausibly that: (1) Wabtec, Knorr, and Faiveley N.A. entered into three bilateral no-poach agreements to not poach each other's employees; and (2) beginning in at least 2014, the three bilateral no-poach agreements were part of an overarching conspiracy among Wabtec, Knorr, and Faiveley N.A. to not poach each other's employees. Defendants' motion to dismiss will be denied on that basis.

4. Ricon and Bendix will be dismissed without prejudice from the consolidated class action complaint.

Defendants argue that the complaint filed by the DOJ in the underlying criminal action did not name Bendix or Ricon as defendants and the factual allegations with respect to Bendix (a subsidiary **[**69]** of Knorr) and Ricon (a subsidiary of Wabtec) "are particularly sparse[.]" (ECF No. 124-1 at 16.) With respect to Ricon, defendants argue that "[t]he single reference to Ricon in the Complaint comes in the paragraph in which Plaintiffs describe Ricon as **[*494]** a defendant." (Id. at 17.) "Plaintiffs make no allegation that Ricon's products are principally for the 'railway industry.'" (Id.) Plaintiffs "do not oppose Defendants' request to dismiss the claims against Ricon." (ECF No. 152 at 24 n.7.) Plaintiffs request the court dismiss the claims against Ricon without prejudice "to Plaintiffs' ability to request leave to amend in the future." (Id.) The motion to dismiss will be granted without prejudice with respect to Ricon, and Ricon will be dismissed without prejudice as a defendant.

With respect to Bendix, defendants explain that plaintiffs "allege a no-poach conspiracy restraining competition for 'railway industry employees[,]" but Bendix is a manufacturer of braking systems for trucks, i.e., tractor trailers and similar commercial vehicles, and not rail cars. (ECF No. 124-1 at 16.) In other words, plaintiffs do not allege that Bendix had any railway employees, who are in issue in this case. (Id. at 17.) Plaintiffs **[**70]** in the consolidated class action complaint set forth the following allegations against Bendix:

> Defendant Bendix Commercial Vehicle Systems LLC ("Bendix") is a Delaware corporation with its headquarters in Elyria, Ohio. Bendix develops and supplies active safety technologies, air brake charging and control systems, and components for commercial vehicles. Bendix is a wholly-owned subsidiary of Knorr-Bremse. Bendix served as a recruiter for Knorr Brake for certain employment needs.
>
> ...
>
> In furtherance of their agreement, Wabtec and Knorr informed their outside recruiters not to solicit employees from the other company. For example, Knorr Brake used Bendix, a Knorr subsidiary and Knorr Brake sister company, as a recruiter for certain employment needs. Knorr Brake directed the Bendix recruiters to refrain from soliciting employees from Wabtec.

(ECF No. 88 ¶¶ 27, 45).

To state a *§ 1* claim against Bendix, plaintiffs must set forth factual allegations sufficient to plausibly show that Bendix had "unity of purpose or a common design and understanding or a meeting of minds or a conscious commitment to a common scheme" with Wabtec to divide the market in the employee rail equipment supplier industry. **[**71]** *Insurance Brokerage, 618 F.3d at 315*. Plaintiffs, however, are not required to show that Bendix "knew of or participated in every transaction in furtherance of or related to the alleged conspiracy." *In re Magnesium Oxide Antitrust Litig., No. CIV. 10-5943 DRD, 2011 U.S. Dist. LEXIS 121373, 2011 WL 5008090, at *17 (D.N.J. Oct. 20, 2011)* (citing decisions). Allegations that Bendix *knew* about the conspiracy—without more—are insufficient to show plausibly that Bendix was a member of an alleged conspiracy in this case. Id. Plaintiffs must set forth factual allegations to show plausibly: (1) Bendix had knowledge of the agreement between Wabtec and Knorr; and (2) Bendix intended to join the agreement. *Id.* (citing *In re Vitamins Antitrust Litig., 320 F.Supp.2d 1, 15 (D.D.C. 2004))*. "'[A] party progresses form mere knowledge of an endeavor to intent to join it when there is 'informed and interested cooperation, stimulation, instigation. And there is also a stake in the venture which, even if it may not be essential, is not irrelevant to the question of conspiracy.'" Id. (quoting *Direct Sales Co. v. United States, 319 U.S. 703, 713, 63 S. Ct. 1265, 87 L. Ed. 1674 (1943))*.

Here, plaintiffs allege Bendix, a wholly-owned subsidiary of Knorr, acted as Knorr's recruiter for "certain employment needs" and that Knorr directed Bendix to refrain from soliciting employees from Wabtec. (ECF No. 88 ¶¶ 27, 45.) **[*495]** Those allegations, **[**72]** however, are not sufficient to raise a reasonable expectation that discovery will reveal evidence that Bendix knew Knorr agreed with Wabtec to restrict competition for employees and that Bendix intended to join the agreement. Plaintiffs' allegations against Bendix amount to no more than allegations that Bendix aided and abetted Knorr in violating the antitrust laws. The Sherman Act, however, does not establish liability for a wholly-owned subsidiary who aids and abets its parent-corporation in violating the antitrust laws; rather, "to state a valid antitrust claim against...[a wholly-owned subsidiary], the...[plaintiff] must assert conduct by [the wholly-owned subsidiary] that is directly forbidden by the Sherman Act." *MCI Telecommunications Corp. v. Graphnet, Inc., 881 F. Supp. 126, 130 (D.N.J. 1995)*. In other words, "aiding and abetting is not an independent theory of civil liability under the Sherman Act." *Top Rank, Inc. v. Haymon, No. CV154961JFWMRWX, 2015 U.S. Dist. LEXIS 164676, 2015 WL 9948936, at *16 (C.D. Cal. Oct. 16, 2015)* (citing *MCI Telecommunications, 881 F.Supp. at 129*). The motion to dismiss with respect to Bendix will, therefore, be granted, and Bendix will be dismissed without prejudice[8] as a defendant.

B. Motion to Strike Class Allegations

1. Applicable Law

Here, defendants argue the class allegations should be stricken from the consolidated class action complaint under **[**73]** *Federal Rule of Civil Procedure 12(f)*. (ECF No. 129 at 7.) Defendants also acknowledge that *Federal Rule of Civil Procedure 23(c)(1)(A)* and *(d)(1)(D)* provides "statutory authority for Defendants' pleading-stage motion to strike." (ECF No. 129 at 19.) Courts have reached different conclusions about whether *Rule 12(f)*, *Rule 23*, or both[9] *Rule 12(f)* and *Rule 23* provide a court the authority to strike class allegations from the complaint. For the reasons explained below, defendants' motion to strike class allegations will be considered and analyzed under *Rule 23(d)(1)(D)*.

a. *Rule 12(f)*

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[8] In the alternative to plaintiffs' argument that the allegations against Bendix are sufficient, they request leave to amend the consolidated class action complaint to set forth additional factual allegations against Bendix. (ECF No. 152 at 26 n.9.) To the extent plaintiffs want to amend their consolidated class action complaint, they should do so in accordance with *Federal Rule of Civil Procedure 15*.

[9] For example, in *Luppe v. Cheswick Generating Station, Civ. Action No. 12-929, 2015 U.S. Dist. LEXIS 9791, 2015 WL 401443, at *2 (W.D. Pa. Jan. 28, 2015)*, the court explained that *Rule 12(f)* and *Rule 23(c)(1)(A)* "together, provide authority for the Court to strike the class allegations from Plaintiffs' Complaint, if appropriate, even before Plaintiffs move for class certification."

Rule 12(f) provides, in pertinent part, that "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). The moving party bears the burden to show allegations should be stricken from a pleading. Staro Asset Mgmt., LLC v. Soose, No. CIV.A. 02-886, 2005 U.S. Dist. LEXIS 32320, 2005 WL 2179781, at *3 (W.D. Pa. Aug. 17, 2005). "'The purpose of a motion to strike is to clean up the pleadings, streamline litigation, and avoid unnecessary forays into immaterial matters.'" Landau v. Lamas, Civ. Action No. 15-1327, 2018 U.S. Dist. LEXIS 106052, 2018 WL 3126396, at *2 (M.D. Pa. June 26, 2018) (quoting McInerney v. Moyer Lumber and Hardware, Inc., 244 F.Supp.2d 393, 402 (E.D. Pa. 2002). "While courts possess considerable discretion in weighing Rule 12(f) motions, such motions are not favored and **[*496]** will generally be denied unless the material bears no possible relation to the matter at issue and may result in prejudice to the moving party." Miller v. Group Voyagers, Inc., 912 F.Supp. 164, 168 (E.D. Pa. 1996). "Motions to strike factual allegations will be denied **[**74]** when, although the averments state no independently actionable claim, they 'are so connected with the subject matter of the suit that it might be deemed to present a question of law or fact that the court ought to hear.'" In re Westinghouse Sec. Litig., No. CIV. A. 91-354, 1998 U.S. Dist. LEXIS 3033, 1998 WL 119554, at *2 (W.D. Pa. Mar. 12, 1998) (quoting River Rd. Dev. Corp. v. Carlson Corp.-Ne., No. CIV. A. 89-7037, 1990 U.S. Dist. LEXIS 6201, 1990 WL 69085, at *1 (E.D. Pa. May 23, 1990)).

It is unlikely that a defendant can show the class allegations constitute "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter[,]"[10] Fed. R. Civ. P. 12(f), that should be stricken from the complaint. See Timothy A. Daniels, Challenging Class Certification at the Pleading Stage: What Rule Should Govern and What Standard Should Apply?, 56 S. Tex. L. Rev. 241, 264 (2014) ("A complaint seeking class certification certainly does not raise an 'insufficient defense,' nor does it typically contain 'redundant,' 'impertinent,' or 'scandalous' matters."). It is recognized, however, that "[a]n order granting a motion to strike class allegations is tantamount to a denial of class certification after a motion to certify.'" Smith v. Merial Ltd., No. 10-cv-439, 2012 U.S. Dist. LEXIS 78220, 2012 WL 2020361, at *6 (D.N.J. June 5, 2012) (quoting 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 3:4 (15th ed. 2018)); Richardson v. Verde Energy USA, Inc., 354 F.Supp.3d 639, 654 (E.D. Pa. 2018) ("[A] motion to strike is 'for all **[**75]** practical purposes, identical to an opposition to a motion for class certification.") (quoting Korman v. The Walking Co., 503 F.Supp.2d 755, 762-63 (E.D. Pa. 2007)); Scott v. Family Dollar Stores, Inc., 733 F.3d 105, 110 n.2 (4th Cir. 2013) ("[W]e have jurisdiction to review the district court's grant of Family Dollar's motion to dismiss or strike the class allegations because the district court's ruling is the functional equivalent of denying a motion to certify the case as a class action.") (citing In re Bemis Co., Inc., 279 F.3d 419, 421 (7th Cir. 2002) (holding the rejection of a position in an answer with respect to whether class treatment was suitable in a case was the "functional equivalent" of denying a motion for class certification)). Thus, a court's consideration of a motion to strike class allegations should not be analyzed under Rule 12(f) under which the movant the burden of proof; rather, a court should consider a motion to strike class allegations under the pertinent provisions of Rule 23, which governs class certification.

b. *Rule 23*

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[10] One court in this district defined the relevant terms of Rule 12(f) as follows:

> "Redundant"—The statement of facts which are wholly foreign to the issue intended to be denied or the needless repetition of material averments.
>
> "Immaterial"—having no essential or important relationship to the averment intended to be denied. A statement of unnecessary particulars in connection with, and as descriptive of, what is material.
>
> "Impertinent"—A statement **[**76]** of matters applied to facts which do not belong to the matter in question, and which is not necessary to the matter in question.
>
> "Scandalous"—Unnecessary matter or facts criminatory of a party referred to in the pleading.

Burke v. Mesta Mach. Co., 5 F.R.D. 134, 138 (W.D.Pa.1946) (cited by DirecTV, Inc. v. Weikel, No. CIV. 03-5300 (JBS), 2005 U.S. Dist. LEXIS 9902, 2005 WL 1243378, at *2 (D.N.J. May 25, 2005)).

Rule 23(c)(1)(A) provides that "[a]t an early practicable time...the court must determine by order whether to certify the **[*497]** action as a class action[,]" Fed. R. Civ. P. 23(c)(1)(A), and Rule 23(d)(1)(D) provides that "the court may issue orders that...require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly[,]" Fed. R. Civ. P. 23(d)(1)(D). The Supreme Court of the United States has recognized that "[s]ometimes the issues are plain enough from the pleadings to determine whether" class certification is appropriate in a given case. Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982). The Third Circuit Court of Appeals has acknowledged that in a "rare few" cases "the complaint itself demonstrates that the requirements for maintaining a class action cannot be met" and a court may strike class allegations contained in a complaint. Landsman & Funk PC v. Skinder-Strauss Assocs., 640 F.3d 72, 93 n.30 (3d Cir. 2011) (citing Rios v. State Farm Fire & Cas. Co., 469 F. Supp. 2d 727, 740 (S.D. Iowa 2007)). In Landsman, the court noted, however, that in all other cases (the majority of cases) "[t]o determine if the requirements of Rule 23 have been satisfied, a district court must conduct a 'rigorous **[**77]** analysis.'" Landsman, 640 F.3d at 93 (quoting In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 309 (3d Cir. 2008)). The court of appeals explained:

> In [conducting a rigorous analysis], a "court may 'delve beyond the pleadings to determine whether the requirements for class certification are satisfied.'" In re Hydrogen Peroxide, 552 F.3d at 316 (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 167 (3d Cir.2001)). . . . In most cases, some level of discovery is essential to such an evaluation. In Weiss v. Regal Collections, 385 F.3d 337 (3d Cir.2004), we emphasized the importance of discovery as part of the class certification process. "It seems appropriate," we said, "that the class action process should be able to 'play out' according to the directives of Rule 23 and should permit due deliberation by the parties and the court on the class certification issues." Weiss, 385 F.3d at 347-48 (footnote omitted). Accordingly, "[a]llowing time for limited discovery supporting certification motions may . . . be necessary for sound judicial administration." Id. at 347 n. 17. These concerns were the basis for setting down a "rigorous analysis" requirement in Hydrogen Peroxide, where we recognized that changes in Rule 23 reflected the need "for a thorough evaluation of the Rule 23 factors." In re Hydrogen Peroxide, 552 F.3d at 318.

Landsman, 640 F.3d at 93.

With respect to certification of a class, the proponent of the class bears the burden of proof to show by a preponderance of the evidence that the four requirements of Rule 23(a) are satisfied and that the class fits **[**78]** in one of the three categories listed in Rule 23(b)(1)-(3). In re Hydrogen Peroxide, 552 F.3d at 309 n.6. Here, the parties dispute which party has the burden of proof with respect to defendants' motion to strike class allegations. According to plaintiffs, defendants must "satisfy the very heavy burden of establishing that class certification is a 'clear impossibility.'" (ECF No. 152 at 8 (quoting Dieter v. Aldi, Inc., No. 18-cv-846, 2018 U.S. Dist. LEXIS 201119, 2018 WL 6191586, at *6 (W.D. Pa. Nov. 28, 2018).) According to defendants, however, "[o]n a motion to strike, the burden remains with the plaintiff to show that they can meet the Rule 23 requirements." (H.T. 2/25/2019 (ECF No. 176) at 17.) Defendants' motion to strike the class allegations is based upon only the allegations contained in the consolidated class action complaint, i.e., neither party offered any evidence in support of their positions. Thus, the court's **[*498]** consideration of defendants' argument that class certification is impossible as a matter of law is constrained by the applicable law and the allegations in the consolidated class action complaint.

Courts have recognized that with respect to whether class allegations should be stricken "'the plaintiff bears the burden of advancing a prima facie showing that the class action requirements of Fed. R. Civ. P. 23 are satisfied or **[**79]** that discovery is likely to produce substantiation of the class allegations.'" Trunzo v. CitiMortgage, Civ. Action No. 11-1124, 2018 U.S. Dist. LEXIS 19625, 2018 WL 741422, at * 4 (W.D. Pa. Feb. 7, 2018) (quoting Mantolete v. Bolger, 767 F.2d 1416, 1424 (9th Cir. 1985)); Noye v. Yale Assocs., No. 1:15-CV-2253, 2017 U.S. Dist. LEXIS 101295, 2017 WL 2813293, at *3 (M.D. Pa. June 29, 2017); Swank v. Wal-Mart Stores, Inc., No. 2:13-CV-01185, 2015 U.S. Dist. LEXIS 41789, 2015 WL 1508403, at *2 (W.D. Pa. Mar. 31, 2015); Bell v. Cheswick Generating Station, Genon Power Midwest, L.P., Civ. Action No. 12-929, 2015 U.S. Dist. LEXIS 9791, 2015 WL 401443, at *3 (W.D. Pa. Jan. 28, 2015) ("accelerating the class certification question does not alter the traditional Rule 23 burdens...."). "Absent such a showing, a trial court's refusal to allow class discovery is not an abuse of discretion." Trunzo, 2018 U.S. Dist. LEXIS 19625, 2018 WL 741422, at *4 (citing Mantolete, 767 F.2d at 1424). Stated another way, "courts grant motions to strike under Rule 23(d)(1)(D) before class discovery only in 'the rare few [cases] where the complaint itself demonstrates that the requirements for maintaining a class action cannot be met[.]'" Id. (quoting Goode v. LexisNexis Risk & Info. Analytics Grp., Inc., 284 F.R.D. 238, 246 (E.D.Pa. 2012)). Thus, plaintiffs have the burden to allege sufficient facts in the consolidated class action complaint to make a prima facie showing that the requirements of Rule 23 are satisfied or that at least discovery is likely to produce substantiation of the class allegations.

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" Comcast Corp. v. Behrend, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013). In order to become certified, a class must satisfy the four requirements of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. **[**80]** Fed. R. Civ. P. 23(a). In addition to satisfying the four requirements set forth in Rule 23(a), the class must fit within one of the three types of class actions set forth in Rule 23(b). Mielo v. Steak 'n Shake Operations, Inc., 897 F.3d 467, 482 (3d Cir. 2018). Plaintiffs' consolidated class action complaint pleads the class claims pursuant to Rule 23(a), 23(b)(2) and 23(b)(3). (ECF No. 88 ¶ 65). Defendants argue that the consolidated class action complaint shows that plaintiffs will not be able to satisfy the Rule 23(a)(3) requirement of typicality and the Rule 23(b) requirement of predominance and they challenge plaintiffs' class definition as overbroad. Each of the arguments will be addressed below.

2. *Rule 23(a)(3)* Typicality Analysis

Typicality[11] is designed to "'screen out class actions in which the **[*499]** legal or factual position of the representatives is markedly different from that of other members of the class even though common issues of law or fact are present.'" Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 598 (3d Cir. 2012) (quoting 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS, A. BENJAMIN SPENCER & ADAM N. STEINMAN, FEDERAL PRACTICE & PROCEDURE § 1764 (3d ed. 2005)). "The criterion acts as a bar to class certification only when 'the legal theories of the named representatives potentially conflict with those of the absentees.'" Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 183 (3d Cir. 2001), as amended (Oct. 16, 2001) (quoting Georgine v. Amchem Products, Inc., 83 F.3d 610, 631 (3d Cir. 1996)). Typicality "ensur[es] **[**81]** that the class representatives are sufficiently similar to the rest of the class—in terms of their legal claims, factual circumstances, and stake in the litigation--so that certifying those individuals to represent the class will be fair to the rest of the proposed class." In re Schering Plough Corp. ERISA Litig., 589 F.3d 585, 597 (3d Cir. 2009).

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[11] One treatise has recognized that "[t]he typicality inquiry assumes an added dimension of complexity when multiple parties are named as defendants." 1 WILLIAM B. RUBENSTEIN, ALBA CONTE, HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 3:48 (5th ed. 2012). "The question is whether a plaintiff who has been affected by the conduct of one of the defendants may name all those who engaged in the challenged conduct as the defendants—and thereby represent a class of all those affected by any single defendant—even though the named plaintiff has had no contact with some of those defendants." Id. The Third Circuit Court of Appeals has explained that "where no nominal plaintiff has standing on any issue against one of multiple defendants, a suit for damages may not be maintained as a class action against that defendant." Haas v. Pittsburgh Nat'l Bank, 526 F.2d 1083 (3d Cir. 1975). The court of appeals acknowledged two exceptions to that general rule:

> (1) situations in which the injuries are the result of "a conspiracy or concerted schemes between the defendants at whose hands the class suffered injury," or (2) instances in which all defendants are juridically related and a single disposition of the entire dispute would be expeditious.

Id. at 1095 n.15 (quoting La Mar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973)).

Here, plaintiffs, who are employees of Knorr, Wabtec, and certain of their respective wholly-owned subsidiaries, seek to represent a class of employees of Knorr, Wabtec, and certain of their respective wholly-owned subsidiaries. Plaintiffs set forth factual allegations to show plausibly that their injuries are the result of conspiracies entered into by Knorr, Wabtec, and Faiveley N.A. Thus, the first Haas exception to the general rule that a plaintiff cannot assert claims on behalf of a class against a defendant with whom the plaintiff has had no contact is applicable to this case.

There exists a "low threshold for satisfying" the requirement of typicality. *Newton, 259 F.3d at 183*. The factual and legal bases of each class members' claim may differ. Id. "If the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences." *Id. at 183-84* (citing *Barnes v. Am. Tobacco Co., 161 F.3d 127, 141 (3d Cir. 1998))*. "[E]ven relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories." *Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 58 (3d Cir. 1994)*. "If a plaintiff's claim arises from the same event, practice **[**82]** or course of conduct that gives rise to the claims of the class members, factual differences will not render that claim atypical if it is based on the same legal theory as the claims of the class." *Marcus, 687 F.3d at 598* (citing *Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 923 (3d Cir.1992))*.

"Where an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice." *Baby Neal, 43 F.3d at 58*. The Third Circuit Court of Appeals has explained:

> Our jurisprudence "assures that a claim framed as a violative practice can **[*500]** support a class action embracing a variety of injuries so long as those injuries can all be linked to the practice." *Baby Neal, 43 F.3d at 63* (discussing *Falcon, 457 U.S. 147, 102 S.Ct. 2364, 72 L. Ed. 2d 740*). As a result, we have concluded that the requirement "does not mandate that all putative class members share identical claims," *Barnes, 161 F.3d at 141*, because "'even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories' or where the claim arises from the same practice or course of conduct." *Prudential, 148 F.3d at 311* (quoting *Baby Neal, 43 F.3d at 58*); *Hoxworth II, 980 F.2d at 923*.

Newton, 259 F.3d at 184.

To determine whether a named plaintiff's claims are typical of the claims of the proposed class members, courts focus on **[**83]** three concerns:

> (1) The claims of the class representative must be generally the same as those of the class in terms of both (a) the legal theory advanced and (b) the factual circumstances underlying that theory; (2) the class representative must not be subject to a defense that is both inapplicable to many members of the class and likely to become a major focus of the litigation; and (3) the interests and incentives of the representative must be sufficiently aligned with those of the class.

In re Schering Plough, 589 F.3d at 599.

The parties' arguments with respect to typicality raise only the first issue[12] whether the claims of the named plaintiffs are generally the same in legal theory and fact. Defendants conceded that the "underlying legal theory of Plaintiffs' claims may apply class-wide." (ECF No. 124-1 at 23.) Defendants argue, however, that the factual underpinnings of the claims, e.g., terms of employment, would be individually-negotiated or employee-specific with respect to an employee who has special skills in the industry as opposed to an employee without skills specific to the industry. (Id.) Plaintiffs' claims and the claims of the proposed class are all based upon Knorr, Wabtec, and Faiveley N.A. agreeing to **[**84]** restrain competition for all levels of employees, which allegedly caused the suppression of their employees' compensation and deprived the employees of free and fair competition in the market for their services (ECF No. 88 ¶ 78.) A fair reading of the consolidated class action complaint is that the agreements by Knorr, Wabtec, and Faiveley N.A. applied to all defendants' employees, whether highly skilled in the railway equipment supply industry or without skills specific to that industry.

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[12] All defenses that might be raised appear to be applicable to many members of the class. Defendants do not argue that the interests or incentives of the representative plaintiffs are not sufficiently aligned with those of the class. Plaintiffs and proposed members of the class were all employees of defendants or their wholly-owned subsidiaries. restrain competition for *all* their employees, which resulted in the suppression of compensation for all members of the proposed class. The legal **[*501]** theory for plaintiffs and the proposed classes and the factual basis for those claims are generally the same. The factual differences about each plaintiff cited by defendant do not defeat a finding of typicality at this stage of the case. See Id.

The Third Circuit Court of Appeals has explained: "If a plaintiff's claim arises from the same event, practice or course of conduct that gives rise...to the claims of the class members, factual differences will not render that claim atypical if it is based on the same legal theory as the claims of the class." *Marcus, 687 F.3d at 598*. Plaintiffs allege that defendant's antitrust violation was the same for all members of the proposed classes, i.e., defendants entered into three bilateral agreements and one overarching conspiracy to

In Marcus, the defendants argued the plaintiff's claims were not typical of the class because the plaintiff purchased only one kind of product that was at issue in the case and the proposed **[**85]** class included purchasers of a variety of different products. *Marcus, 687 F.3d at 599*. The court rejected the defendants' argument and explained: "When a class includes purchasers of a variety of different products, a named plaintiff that purchases only one type of product satisfies the typicality requirement if the alleged misrepresentations or omissions apply uniformly across the different product types." Id. The named plaintiff's allegations about the defendants' conduct in the case with respect to the products in issue was the same for all products purchased by the members of the proposed class. Id. The court of appeals affirmed the district court's conclusion that typicality was satisfied on that basis. Id.

Defendants cite *Semenko v. Wendy's International, Inc., Civ. Action No. 12-0836, 2013 U.S. Dist. LEXIS 52582, 2013 WL 1568407 (W.D. Pa. Apr. 12, 2013)*, in support of their argument that typicality is not satisfied in this case. *Semenko*, however, is distinguishable from this case. In Semenko, the plaintiff sued her former employer, Wendy's, for, among other things, failing to accommodate her under the *American with Disabilities Act*, *42 U.S.C. § 12101, et seq.* (the "ADA"). The plaintiff also sought to represent a class of individuals. The court found that the plaintiff's claims were not typical of the class because "the facts and evidence needed to prove the **[**86]** claims of each member of the proposed class...[would] be unique to each claimant." *Id. at *9*. For example, a determination whether each member of the proposed class was entitled to recovery under the ADA would be a "highly individualized inquiry" and proof of the plaintiff's claims would "not prove the claims of other class members." Id. The court explained: "'If proof of the representatives' claims could not necessarily prove all of the proposed class members' claims, the representatives are not typical of the proposed members' claims.'" Id. (quoting *Liberty Lincoln Mercury v. Ford Mktg. Corp., 149 F.R.D. 65, 77 (D.N.J. 1996))*.

The district court in Semenko, however, read too narrowly the Court of Appeals for the Third Circuit's jurisprudence with respect to typicality. The court of appeals has instructed that "[t]he typicality requirement is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of absentees." *Georgine, 83 F.3d at 631*. The correct inquiry is "whether the named plaintiffs have incentives that align with those of absent class members so that the absentees' interests will be fairly represented." Id. Typicality does not require that "all putative class members share identical claims." *Barnes v. Am. Tobacco Co., 161 F.3d 127, 141 (3d Cir. 1998)*. Factual differences, **[**87]** even "'relatively pronounced'" factual differences, between the named plaintiff's claims and the claims of the putative class are acceptable so long as "'there is a strong similarity of legal theories.'" Id. (quoting *Baby Neal, 43 F.3d at 58*). The Third Circuit Court of Appeals in its assessment of typicality does not require proof of the named plaintiffs' claims to prove the claims of the putative class. In this case, the factual differences between the named plaintiffs and the members of the putative class may be "relatively pronounced" but defendants do not argue that those factual differences create a conflict between the interests of the named plaintiffs and the interests of **[*502]** the putative class members. The factual differences, therefore, do not render the named plaintiffs' claims atypical of the claims of the proposed class members.

Plaintiffs in the consolidated class action complaint rely upon the same factual allegations to show the named plaintiffs *and* the proposed class were injured by defendants' three bilateral agreements and one overarching agreement, which are per se violative of *§ 1* of the Sherman Act. Here, based upon the factual allegations in the consolidated class action complaint, plaintiffs' **[**88]** claims arise "from the same event, practice or course of conduct that gives rise to the claims of the class members[.]" *Marcus, 687 F.3d at 598*. The factual differences emphasized by defendants, e.g., employees highly skilled in the railway equipment supply industry versus employees without skills specific to that industry, do "not render...[plaintiffs' claims] atypical" because the claims are "based on the same legal theory as the claims of the class[,]" i.e., a violation of *§ 1* of the Sherman Act. Id. In Semenko, however, Wendy's conduct in failing to provide reasonable accommodations would necessarily be different with respect to each member of the class because of the individualized inquiry required with respect to a person's disability and his or her need for accommodation. The court, therefore, is not persuaded by defendants' citation to Semenko because the individualized inquiries in an ADA claim are not present in this case.

Defendants also cite to dictum from *Todd v. Exxon Corp., 275 F.3d 191 (2d. Cir. 2001)*, in support of their argument that plaintiffs cannot satisfy the typicality requirement of *Rule 23*. In Todd, a former employee of Exxon on behalf of herself and a proposed class sued Exxon and thirteen other "major companies in the integrated oil and **[**89]** petrochemical industry" alleging that they "violated *§ 1* of the Sherman Act by regularly sharing detailed information regarding compensation paid to nonunion managerial, professional, and technical...employees and using this information in setting the salaries of these employees at artificially low levels." *Id. at 195*. The members of the plaintiff's proposed class included, among others, accountants, lawyers, and chemical engineers. *Id. at 201*. The defendants filed a motion to dismiss under *Rule 12(b)(6)*. The district court granted the motion and the plaintiff appealed. *Id. at 198*.

The court of appeals recognized that the plaintiff did not assert a claim alleging "an actual agreement among defendants to fix salaries[,]" which would be a per se violation of the antitrust laws; rather, the plaintiff set forth a claim alleging the defendants unlawfully exchanged information, which is subject to the rule of reason analysis. *Id. at 199*. The court explained that the "basic framework for the rule of reason" for an information-exchange claim under *§ 1* was as follows: "'A number of factors including most prominently the structure of the industry involved and the nature of the information exchanged are generally considered in divining the procompetitive **[**90]** or anticompetitive effects of this type of interseller communication.'" *Todd, 275 F.3d at 199* (quoting *United States v. United States Gypsum, Co., 438 U.S. 422, 441 n.16, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978))*. The court of appeals explained that under Gypsum, an important factor to consider in a "data exchange" case was the market power of the defendants, which may include defining the relevant market and showing the defendants' percentage share of that market. Id. The district court found that the plaintiff did not plead a plausible market because she did not show that the products at issue, i.e., the employees, were "reasonably interchangeable or that there...[was] a **[*503]** cross-elasticity of demand for potential substitutes." *Id. at 201*.

The court of appeals disagreed with the district court because the relevant inquiry in a case involving a buyer-side conspiracy is the market power of the buyers, i.e., the defendant companies in Todd, and not the interchangeability of the sellers' products, i.e., the plaintiff-employees in *Todd. Id. at 201-02* (agreeing with the plaintiff that "the proper focus is...the commonality and interchangeability of the buyers, not the commonality or interchangeability of the sellers."). The court of appeals explained:

> The question is not the interchangeability of, for example, lawyers with engineers. At issue is **[**91]** the interchangeability of, from the perspective of an...employee, of a job opportunity in the oil industry with, for example, one in the pharmaceutical industry.

Todd, 275 F.3d at 202. On that basis and for other reasons explained in the opinion that are not relevant to this case, the court of appeals found that the plaintiff set forth factual allegations sufficient to plead a plausible product market. *Id. at 206*.

In a footnote the Todd court explained that the district court's conclusions about the interchangeability of the prospective jobs may have implications in whether the plaintiff could satisfy her burden under *Rule 23* to show typicality and predominance. The court of appeals commented:

> The observation by the district court and defendants about the large differences among the various MPT jobs is better understood not as speaking to interchangeability, but as indicating that not all MPT employees are affected by the conspiracy in the same way—thus creating potential difficulties with class certification. While interchangeability of the different types of employees is not an element of market definition in an oligopsony, the different types of employees will differ in how they must prove the interchangeability among **[**92]** employers. For example, as the district court and defendants point out, oil industry employers may not be interchangeable with pharmaceutical industry employers from the standpoint of a petroleum geologist, but the two may be more interchangeable from the standpoint of a labor lawyer. More importantly, the means of proof

> may be quite different; at trial the geologists must present evidence of the relative job prospects for geologists outside the oil industry, while the lawyers must explore the legal job market. That this large class might have difficulty meeting the predominance and typicality requirements for Rule 23 certification, however, does not indicate that plaintiff fails to state a claim upon which relief can be granted.

Todd, 275 F.3d at 202 n.5. First, the foregoing passage is dictum. Second, the court noted that the named plaintiffs "might have difficulty meeting the...typicality" requirement but did not foreclose the possibility that the named plaintiffs could establish that their claims were typical of the putative class members' claims. Id. Third, the foregoing passage is consistent with the law set forth by this court in this opinion. As explained above, the existence of factual differences between **[**93]** the claims of the named plaintiff and the claims of the members of the putative class is relevant to the court's assessment of typicality. If the claims of the named plaintiffs and the claims of the putative class are based upon the same course of conduct by the defendant, however, the factual differences between the named plaintiffs' claims and the claims of the putative class members might not render the named plaintiff's claims atypical unless the factual differences **[*504]** create a conflict of interest between the named plaintiff and members of the putative class. The footnote from Todd cited above, therefore, is not inconsistent with this court's understanding of the typicality requirement under Rule 23.

At this stage, plaintiffs allege that defendants violated § 1 of the Sherman Act when they entered into three bilateral agreements and one overarching agreement to not poach each other's employees, which included all employees of the defendants and their wholly-owned subsidiaries. Plaintiffs allege that those agreements impacted the compensation of ***all employees*** of defendants and their wholly-owned subsidiaries. There may be factual differences among the various kinds of employees in the putative **[**94]** class, but, at this stage, the court cannot conclude that those differences create a conflict of interest between the named plaintiffs and the members of the putative class that render the claims of the named plaintiffs atypical compared to the claims of the putative class. 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1764 (3d ed. 2005) ("In general, the requirement [of typicality] may be satisfied even though varying fact patterns support the claims or defenses of individual class members...or there is a disparity in the damages claimed by the representative parties and the other class members.") (citing, e.g., In re Orthopedic Bone Screw Prod. Liab. Litig., 176 F.R.D. 158, 175 (E.D. Pa. 1997) ("[T]he fact that individual class members may recover varying amounts from the settlement fund does not defeat typicality.")).

Based upon the foregoing, the court is satisfied that the factual allegations in the consolidated class action complaint show that it is likely that discovery will reveal evidence that the claims of the named plaintiffs are typical of the claims of the putative class.

3. *Rule 23(b)* Predominance Requirement

"The predominance inquiry tests whether the proposed class is sufficiently cohesive to warrant adjudication by representation." **[**95]** In re Cmty. Bank of N. Virginia, 418 F.3d 277, 308-09 (3d Cir. 2005). One court has explained:

> "Issues common to the class must predominate over individual issues." Hydrogen Peroxide, 552 F.3d at 311. "Individual questions need not be absent.... [Rule 23(b)(3)] requires only that those questions not predominate over the common questions affecting the class as a whole." Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 815 (7th Cir.2012). "Because the nature of the evidence that will suffice to resolve a question determines whether the question is common or individual, a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case." Hydrogen Peroxide, 552 F.3d at 311 (internal quotation marks and citation omitted). "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." Id. (citing Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 172 (3d Cir.2001)).

In re Flonase Antitrust Litig., 284 F.R.D. 207, 219 (E.D. Pa. 2012). "An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'" Tyson Foods, Inc. v. Bouaphakeo, 136 S.Ct. 1036, **[*505]** 1045, 194 L. Ed. 2d 124 (2016) (quoting 2 WILLIAM B. RUBENSTEIN, ALBA CONTE, HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 4:50 (5th ed. **[**96]** 2012)).

"The analysis of whether questions of law or fact common to class members predominate begins with the elements of the underlying cause of action." In re Lithium Ion Batteries Antitrust Litig., No. 13-MD-2420 YGR, 2017 U.S. Dist. LEXIS 57340, 2017 WL 1391491, at *8 (N.D. Cal. Apr. 12, 2017) (citing Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011)). "The three relevant elements of an antitrust claim that must be capable of common proof for the class to be certified under Rule 23(b)(3) are: (1) violation of antitrust laws, (2) antitrust impact, and (3) measurable damages." In re: Domestic Drywall Antitrust Litig., 322 F.R.D. 188, 201 (E.D. Pa. 2017) (citing Hydrogen Peroxide, 552 F.3d at 311-12). As discussed above, plaintiffs set forth factual allegations sufficient to show plausibly that the defendants engaged in three bilateral agreements and an overarching conspiracy to not poach each other's employees, which means there could be an antitrust violation which might be common to all members of a properly defined class who were employees of defendants or their wholly-owned subsidiaries. The issue whether there was a violation of the antitrust laws could be, therefore, common to the class.

With respect to the second element, i.e., antitrust impact, one court explained:

> Antitrust impact refers to injury—that is, each plaintiff must show that it suffered injury as a result of the defendants' unlawful behavior. Id. (citing Bogosian v. Gulf Oil Corp., 561 F.2d 434, 454 (3d Cir. 1977)). Though plaintiffs **[**97]** need not prove the element of antitrust impact at the class certification stage, they must "demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members." Id.

Domestic Drywall, 322 F.R.D. at 201. Antitrust impact refers to the "fact of damage...as opposed to the extent of damage." In re Flonase Antitrust Litig., 284 F.R.D. 207, 220 (E.D. Pa. 2012). The Third Circuit Court of Appeals has explained: "In antitrust cases, impact often is critically important for the purpose of evaluating Rule 23(b)(3)'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof." Hydrogen Peroxide, 552 F.3d at 311. "[F]or cases involving antitrust violations, common issues do not predominate unless the issue of impact is also susceptible to class-wide proof." In re High-Tech Employee Antitrust Litig., 289 F.R.D. 555, 566 (N.D. Cal. 2013) ("High-Tech I") (collecting decisions).

Here, defendants argue that plaintiffs will not be able to satisfy their burden to show predominance with respect to antitrust impact because the "expansive class definition will require the Court to consider each employee's contract, salary history, professional qualifications, geographic location and willingness to relocate, and fungibility within labor markets, when determining proof of both antitrust **[**98]** injury and damages." (ECF No. 124-1 at 26.) Plaintiffs argue in opposition that defendants failed to satisfy their burden to show that it is a "'clear impossibility'...that predominance requirements can be met in the instant case." (ECF No. 152 at 30 (quoting Dieter, 2018 U.S. Dist. LEXIS 201119, 2018 WL 6191586, at *6.)

As discussed above, however, plaintiffs in the first instance have the "'burden of advancing a prima facie showing that the class action requirements of Fed. R. Civ. P. 23 are satisfied or that discovery is likely to produce substantiation of the class allegations.'" Trunzo, 2018 U.S. Dist. LEXIS 19625, 2018 WL **[*506]** 741422, at *4 (quoting Mantolete, 767 F.2d at 1424). Plaintiffs point out that in the consolidated class action complaint they alleged that defendants' agreements applied to all employees regardless of title, position, or status and that each agreement harmed each plaintiff regardless of his or her employer because every agreement "'disrupted the normal bargaining and price-setting mechanisms that apply in the labor market,' causing 'suppressed compensation levels generally.'" (ECF No. 152 at 20, 27.) Plaintiffs' allegations in this respect are mostly conclusory but may show plausibly that all defendants' employees were subject at some point in time to the overarching conspiracy and the bilateral agreements entered into **[**99]** by Wabtec, Knorr, and Faiveley N.A., and that employees may have been harmed by those agreements. Plaintiffs, however, do not set forth sufficient factual allegations to advance a prima facie showing that antitrust impact is capable of proof on a class-wide basis for a class comprised of all employees or that at the least discovery is likely to produce evidence to substantiate plaintiffs' conclusory allegations with respect to predominance.

The Third Circuit Court of Appeals has rejected "the notion that antitrust injury in an employee boycott or no hire context can never be proven by common evidence." *Weisfeld v. Sun Chem. Corp., 84 F. App'x 257, 263 (3d Cir. 2004)*. The court of appeals recognized that evidence showing that compensation of the class members was correlated over time may be evidence to show that antitrust injury in a wage suppression case may be proven on a classwide basis. *Id. at 264*. Other courts in wage suppression or no-hire cases have certified classes and found antitrust impact could be proven on a class-wide basis when there is evidence that the class members' wages were correlated and the defendant-employers emphasized internal or external equality, which ensured "individuals performing similar jobs are compensated on a similar level." **[**100]** *Nitsch v. Dreamworks Animation SKG, Inc., 315 F.R.D. 270, 293 (N.D. Cal. 2016)*; *Seaman v. Duke Univ., No. 1:15-CV-462, 2018 U.S. Dist. LEXIS 16136, 2018 WL 671239, at *8 (M.D.N.C. Feb. 1, 2018)*; *In re: High-Tech Employee Antitrust Litigation, 985 F.Supp.2d 1167 (N.D. Cal. 2013)* ("High-Tech II"). Plaintiffs in this case, however, failed to set forth any factual allegations about defendants' compensation structures to make prima facie showing that antitrust impact is capable of proof on a class-wide basis for all employees or that at least it is likely that discovery will reveal evidence that antitrust impact is capable of proof on a class-wide basis for all employees.

In Nitsch, former employees of animation and visual effects studios on their own behalf and on behalf of a proposed class sued the studios alleging they conspired to fix and suppress employee compensation and to restrict employee mobility under *§ 1* of the Sherman Act. *Nitsch, 315 F.R.D. at 274*. The named plaintiffs were "artists and engineers who were previously employed by four of the name Defendants." *Id. at 275*. The plaintiffs defined the proposed class as follows:

> All animation and visual effects employees employed by defendants in the United States who held any of the jobs listed in Ashenfelter Report Appendix C during the following time periods: Pixar (2001-2010), Lucasfilm Ltd., LLC (2001-2010), DreamWorks Animation SKG, Inc. (2003-2010), The Walt Disney Company (2004-2010), Sony Pictures **[**101]** Animation, Inc. and Sony Pictures Imageworks, Inc. (2004-2010), Blue Sky Studios, Inc. (2005-2010) and Two Pic MC LLC f/k/a ImageMovers Digital LLC (2007-2010). Excluded from the Class are senior executives, members of the board of directors, and persons employed **[*507]** to perform office operations or administrative tasks.

Id. at 281. The plaintiffs filed a motion for class certification. *Id. at 274*. The court addressed, among other things, whether common questions would dominate with respect to antitrust impact, i.e., "whether Plaintiffs have presented a sufficiently reliable theory to demonstrate that common evidence can be used to demonstrate impact." *Id. at 292*. The court—after a review of the "extensive documentary evidence, economic theory, data, and expert statistical modeling"—found the plaintiffs satisfied their burden to prove predominance. Id.

The court provided the following summary with respect to the plaintiffs' evidence of class-wide antitrust impact:

> First, Plaintiffs present evidence that Defendants' anti-solicitation agreements and collusion over compensation policies would have had the effect of directly suppressing compensation for some class members. Second, Plaintiffs present evidence that because of **[**102]** the ways in which Defendants determined compensation for employees generally, including the use of formal compensation structures that are not inherently collusive, the collusive suppression of compensation for certain class members would have spread throughout the class and suppressed compensation to anti competitive levels classwide.

Nitsch, 315 F.R.D. at 292. The plaintiffs alleged that the defendant-employers' agreement to stop cold-calling each other's employees and collusion with respect to compensation suppressed the compensation of class members. The plaintiffs in support of those allegations presented documentary and expert evidence to show that:

- "cold-calling" was a "recruitment tool that Defendants viewed as likely to yield the most valuable recruits" and caused the dissemination of information about salaries and benefits of one defendant-employer to the employees' of another defendant-employer;
- the defendant-employers' agreement to stop cold-calling each other's employees restricted the dissemination of the information with respect to salaries and benefits; and
- the defendant-employers colluded to suppress compensation by exchanging compensation information.

Id. at 292-93. The plaintiffs also presented evidence **[**103]** to the court to show that the compensation suppression "spread throughout the class" because the defendant-employers had "compensation structures that prioritized 'internal' and 'external' equity." *Id. at 293*. The compensation structures "organize[d] employees by job titles whose compensation ranges were evaluated by reference to all other job titles within each company." Id. Thus, the "upward pressure" placed on the salaries of the employees who received the cold-calls would impact all other salaries of each defendant. *Nitsch, 315 F.R.D. at 293*. Because the defendant-employees shared compensation information, the suppression of one employee's salary would impact the salaries of employees in a similar position and employed by all defendants. Id.

The court in Nitsch explained:

> Plaintiffs argue that Defendants' alleged antitrust violations would have directly suppressed compensation for some class members. Then, as a result of Defendants' emphasis on internal equity, compensation suppression would have spread beyond the employees directly affected by the antitrust violations to impact all class members within each Defendant. At the same time, Defendants' goal of maintaining external equity **[*508]** would have spread the effects **[**104]** of compensation suppression between Defendants. This is the same approach to showing classwide antitrust impact approved by this Court in High-Tech. See *High-Tech, 985 F.Supp.2d at 1206* (describing the approach to demonstrating classwide antitrust impact by showing direct impact to some class members combined with evidence of internal and external equity).

Nitsch, 315 F.R.D. at 293. The court held that based upon the foregoing, the plaintiffs satisfied their burden to show that the common questions predominated over individualized questions with respect to the issue of antitrust impact. *Id. at 303-04*.

In High-Tech, the plaintiffs sued their employers who were seven high-tech companies. *High-Tech II, 985 F.Supp.2d at 1171*. The plaintiffs alleged that the defendants "conspired to suppress, and actually did suppress, employee compensation to artificially low levels by agreeing not to solicit each other's employees" in violation of *§ 1* of the Sherman Act. Id. The plaintiffs had filed a motion to certify a class, which the court in a previous decision (High-Tech I) denied because the plaintiffs did not satisfy their burden to show that common issues predominated over individualized issues with respect to antitrust impact. *High-Tech I, 289 F.R.D. at 583*. The court in High-Tech I held, however, that common issues predominated **[**105]** over individualized issues with respect to the antitrust violation and damages. Id. The plaintiffs in their first motion to certify the class proposed a class definition that covered all the defendants' employees and a second class definition that covered only technical employees. Id. The plaintiffs' evidence heavily focused on the proposed class of all employees. Id.

The plaintiffs in High-Tech I offered an expert to opine about whether antitrust impact could be proven on a class-wide basis. The district court held that the plaintiffs' expert's theories showed that common proof could be used to show that the defendants' "anti-solicitation agreements suppressed compensation broadly[,]" i.e., across the class. *High-Tech I, 289 F.R.D. at 570*. The court explained the expert's theories as follows:

> Essentially, Dr. Leamer opines that, by virtue of the interplay between information economics and considerations of internal equity, cold-calls would have transmitted information to, and put competitive pressure on, [Redacted]. See Reply at 16; see also Leamer Rep. ¶ 104. Dr. Leamer further hypothesizes that, by virtue of entering into the anti-solicitation agreements, firms are able to be more relaxed in maintaining competitive **[**106]** compensation packages because such agreements: (1) "suppress competition directly;" (2) "reduce the risk of employees becoming aware of pay practices elsewhere;" and (3) "otherwise eliminate competition for 'passive' employees." Leamer Rep. ¶ 106.

Id. at 569 (redactions in original). "A key component" of the plaintiffs' expert's opinion was that the wage structure of the defendants was rigid, i.e., "compensation for employees with entirely different titles would necessarily move together through time such that a detrimental impact to an employee with one job title would necessarily result in an impact to other employees in entirely different jobs (i.e., that any impact would ripple across the entire salary structure)." *Id. at 577-78*. The court explained that while the plaintiffs' expert's *theory* showed that antitrust impact was susceptible to common proof, that "theory" is not sufficient to satisfy the predominance requirements of *Rule 23*. The court had to consider the "reliable evidence" upon which the plaintiffs' expert relied to **[*509]** arrive at his theory. *Id. at 570* ("Plaintiff must provide 'properly analyzed, reliable *evidence*' that a common method of proof exists to prove impact on a class-wide basis'") (quoting *In re Graphics Processing Units Antitrust Litig., 253 F.R.D. 478 (N.D. Cal. 2008))*.

The court **[**107]** determined that the evidence available to the plaintiffs at the time they filed the motion for class certification did not support the plaintiffs' expert's theory that antitrust impact could be proven on a class-wide basis, and, therefore, common issues with respect to the impact of antitrust violation on all employees or all technical employees would predominate under *Rule 23*. For example, the evidence did not show that the wage structures of the defendants were sufficiently rigid so that an impact on the wages of one member of the class would "ripple across the entire salary structure." *Id. at 577-78* ("Thus, these charts shed little light on whether compensation for more disparate title (*e.g.*, a custodian at an Intel office in Texas and an engineer at an Intel office in California) moved together over time."). The court did find, however, that the plaintiffs' expert's opinion that damages could be proven on a class-wide basis was supported by reliable evidence. *Id. at 582*. The court explained:

> The Court is generally persuaded that the Conduct Regression is capable of: (1) showing that, while the anti-solicitation agreements were in effect, Defendants' total expenditures on compensation were less than they should **[**108]** have been, and (2) providing an estimate of the net amount by which Defendants were under-compensating their employees (class-wide damages).
>
> ...
>
> [T]he Conduct Regression does provide a method of estimating the aggregate undercompensation to Defendants' employees on a year-by year and defendant-by-defendant basis.

High-Tech I, 289 F.R.D. at 579, 582. The court concluded that the plaintiffs' expert's method of calculating damages was consistent with the plaintiffs' theory of liability, and the plaintiffs established a plausible method for providing an estimate of damages for the all-employee proposed class and the technical proposed class. *Id. at 582*. The court held that under those circumstances, plaintiffs satisfied their burden to show predominance with respect to damages. *Id. at 582-83*.

The court, however, explained that it would deny the motion for certification because it had "concerns": (1) about "whether the evidence will be able to show that Defendants maintained such rigid compensation structures that a suppression of wages to some employees would have affected all or nearly all Class members[;]" and (2) that "Plaintiffs' proposed classes may be defined so broadly as to include large numbers of people who were not necessarily harmed by **[**109]** Defendants' allegedly unlawful conduct." *Id. at 583*.

Underlying the court's opinion in High-Tech I, however, were issues with respect to discovery. *After* the hearing on the motion for class certification, the defendants "produce[d] significant amounts of discovery" (over ten thousand documents) and "[made] key witnesses available for depositions" (fifty high-ranking employees) *Id. at 584*. Additionally, the defendants' response to the motion for class certification "relied heavily on declarations from Defendants' current employees, some of whom were not timely disclosed and whose documents were not produced to Plaintiffs." *High-Tech I, 289 F.R.D. at 584*. On that basis, the court concluded that "some of the recently produced discovery may affect Plaintiffs' ability to satisfy the predominance requirement for one or both of their **[*510]** proposed Classes." Id. Specifically, the court explained its "belief" that "with the benefit of the discovery that has occurred since the hearing on this motion, Plaintiffs may be able to offer further proof to demonstrate how common evidence will be able to show class-wide impact to demonstrate why common issues predominate over individual ones." *Id. at 583*.

The plaintiffs in High-Tech I filed a supplemental motion for **[**110]** class certification, which was addressed in *High-Tech II. High-Tech II, 985 F.Supp.2d at 1171*. The plaintiffs in the supplemental motion "moved to certify only the Technical Class[,]" which consisted of: "salaried technical, creative, and research and development employees who worked for any Defendant while that Defendant participated in at least one anti-solicitation agreement with another Defendant." *Id. at 1177 n.5*. The plaintiffs excluded from their class definition "retail employees" among others. *Id. at 1177*. The members of the proposed class consisted of fourteen different job titles of technical employees. *Id. at 1177-78*.

The court in its discussion of predominance and antitrust impact in High-Tech II recognized that the plaintiffs set forth "substantial evidence, including documentary evidence and expert reports using statistical modeling, economic theory, and data, to demonstrate that common questions will predominate over individual questions in determining the impact of the antitrust violations." *Id. at 1192*. The court found that the evidence "paint[ed] a picture of Defendants' business practices and the market in which Defendants operate that suggests that common proof could be used to demonstrate the impact of Defendants' actions on Technical Class members." Id. Under **[**111]** those circumstances and after a "rigorous" review of the evidence, the court concluded that plaintiffs' proposed methodology satisfied the predominance standard. Id. The court explained:

> Specifically, the record suggests that all technical employees—not just those who would have received cold calls but for the anti-solicitation agreements—may have been impacted by the agreements. Plaintiffs note that cold calling, a recruitment tool that Defendants viewed favorably, has the effect of spreading information about salaries and benefits from recruiters of one firm to employees of another. Leamer Rep. ¶ 71-76. Such information could then spread to other employees within a firm and beyond, leading to widespread increases in employee compensation across the labor market due to increased access to information. Id.
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> Further, Plaintiffs contend that Defendants had company-wide compensation structures, which organized employees into job groups, levels, and families that were evaluated and paid in relationship to all other groups. Suppl. Mot. at 15-22. In addition, Defendants valued internal equity (the idea that similarly situated employees should be compensated similarly) within their firms. Id. **[**112]** Because of a desire to maintain equity between employees, the upward pressure that cold calls placed on the salaries of individual employees who would have received the calls would have also affected other employees who were part of the same salary structure. As such, variances in individual employees' salaries would affect other employees who were in a similar position. Each Defendant's compensation structure could then have been influenced by the other Defendants' structures as Defendants saw each other as competitors for the same labor pool.
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> Finally, Plaintiffs point to the fact that Defendants were motivated to retain their employees. This, Plaintiffs contend, **[*511]** would have motivated each Defendant to provide financial incentives to employees to respond to and to prevent poaching by other Defendants. Leamer Rep. ¶ 105. Yet, because of the anti-solicitation agreements, Defendants did not need to initiate such measures, which would have benefitted the entire Technical Class.

High-Tech II, 985 F.Supp.2d at 1192. The court concluded that "the extensive documentary evidence, economic theory, data, and expert statistical modeling" supported the plaintiffs' expert's theory of proving common impact. Id. Under those circumstances, **[**113]** the class was certified because, among other things, the plaintiffs satisfied their burden to show that common issues with respect to antitrust impact predominated in the case. Id.

In Seaman, the plaintiff, who was an assistant professor of radiology at Duke University ("Duke"), on behalf of herself and a putative class sued Duke and the University of North Carolina ("UNC") under *§ 1* of the Sherman Act. *Seaman, 2018 U.S. Dist. LEXIS 16136, 2018 WL 671239, at *1*. The plaintiff alleged that Duke entered into an agreement with UNC "not to permit lateral moves of faculty between Duke and UNC." Id. The plaintiff and UNC settled the case. *2018 U.S. Dist. LEXIS 16136, [WL] at *2*. The plaintiff sought to certify "a class of faculty, physicians, nurses, and skilled medical staff that worked for the defendants." Id. Duke opposed the motion for class certification arguing that the plaintiff could not satisfy the predominance requirement of *Rule 23(b)*. Id. The court found that the parties' evidence with respect to the "antitrust violation" element of a *§ 1* claim was a "common question that...[would] be addressed with common proof for all proposed class members." Seaman, 2018 U.S. Dist. LEXIS 16136, 2018 WL 671239, at *4.

The plaintiff alleged that the UNC and Duke no-poach agreement suppressed compensation in two ways: (1) UNC and Duke did not have to provide faculty **[**114]** "preemptive compensation increases...to ensure employee retention[;]" and (2) the "internal equity structures[13] ...spread the individual harm of decreased lateral offers and corresponding lack of retention offers to all faculty, thus suppressing compensation faculty-wide." 2018 U.S. Dist. LEXIS 16136, [WL] at *4. Although the plaintiff proposed a class comprised of faculty and non-faculty members, the evidence she presented in support of her motion for class certification was different for faculty than it was for non-faculty. The court, therefore, court addressed separately the plaintiff's evidence to prove antitrust impact and damages for faculty and non-faculty.

With respect to the faculty, the court held the plaintiff's evidence, which included testimony, expert reports, and documentation, supported her argument that the defendants' agreement caused the suppression of compensation for faculty, which could be proven on a class-wide basis. 2018 U.S. Dist. LEXIS 16136, [WL] at *4. **[*512]** The court held that the plaintiff's "preemptive compensation" theory as applied to the faculty-only class was a "class-wide theory supported with class-wide proof." Id. The court explained that the evidence showed that the medical schools of Duke and UNC were each other's main competitors **[**115]** for faculty and the expert evidence showed that "lateral hiring affects compensation generally and...encourage[d] the defendants to preemptively increase compensation to retain faculty." 2018 U.S. Dist. LEXIS 16136, [WL] at *5.

The court held that the plaintiff's "internal equity structures" theory as applied to faculty, was also a "class-wide theory supported by class-wide proof." Seaman, 2018 U.S. Dist. LEXIS 16136, 2018 WL 671239, at *6. The court explained that the expert evidence showed that UNC and Duke would "reactively increase compensation in response to a competing offer or to address overall attrition rates[,]" and "the lack of competing offers and corresponding individual compensation suppressed was spread to all faculty members through the defendants' internal equity structures." 2018 U.S. Dist. LEXIS 16136, [WL] at *5. The evidence also showed that the suppression of a faculty member's compensation caused by the lack of competing offers of employment was "spread" to all members of the faculty-only class via the defendants' internal equity structures. Id. The court explained:

> [The plaintiffs' experts] explain the general economic theory of how lateral hiring increases compensation for employees throughout an organization when that organization manages employee compensation to maintain parity within employment **[**116]** categories or to achieve compensation relationships between employee categories (e.g., Associate Professors to Assistant Professors).

2018 U.S. Dist. LEXIS 16136, [WL] at *5. The court described the evidence with respect to the defendants' internal equity structures as follows:

> Dr. Seaman provides documentary and testimonial evidence that Duke and UNC maintain internal equity structures for faculty. The evidence shows that the UNC defendants have policies that "set[ ] out identical salary ceilings across 18 departments by professor level" and expects departments "to work towards or maintain average salary profiles by academic rank ...; enable recruitment and retention ...; [ ] promote a good morale and sense of fair treatment amongst the faculty;" and consider "internal equity among groups of otherwise similarly-situated individuals in the [medical school] department." Doc. 151 at ¶¶ 33-39 (summarizing evidence). The UNC defendants also perform annual "Salary Equity Review[s]" to "identify[ ] instances of potential salary inequity amongst like subsets of faculty" and requires an explanation or remedial plan for any inequality that is discovered. Id. at ¶ 39.
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> While the evidence at Duke is less direct, it shows that the Dean **[**117]** of the School of Medicine "signs off" on all department head compensation decisions. See, e.g., Doc. 151 at ¶¶ 46, 49. For both new faculty and

[13] The court defined "internal equity structures" as "policies and practices that are alleged to have ensured relatively constant compensation relationships between employees." Seaman, 2018 U.S. Dist. LEXIS 16136, 2018 WL 671239, at *4.

> adjustments to current faculty's compensation, there is documentary evidence and testimony to support the assertion that internal equity is considered in setting and adjusting compensation, particularly within each department. See, e.g., Doc. 151 at ¶¶ 46-51, 54; Doc. 150 at ¶¶ 31, 33, 44-48; Doc. 94 at ¶¶ 91, 93, 97-98, 100; Doc. 95 at ¶¶ 54, 58(d), (e).

*Seaman, 2018 U.S. Dist. LEXIS 16136, 2018 WL 671239, at *5*. One of the plaintiff's experts performed a regression analysis to show that "an individual faculty member's compensation moved in relationship to other faculty compensation." Id. With respect to damages for faculty, the court found the regression analysis proffered by the plaintiff's expert also satisfied the predominance requirement of *Rule 23(b)*. Id.

With respect to the evidence about non-faculty, the court held that the plaintiff's theory that the suppression of compensation to faculty caused the suppression of compensation for non-faculty presented common questions for the putative class of nonfaculty "because proving the theory for a single non-faculty class member would prove it for all." *2018 U.S. Dist. LEXIS 16136, [WL] at *6*. The **[**118]** court explained that the plaintiff's evidence with **[*513]** respect to the non-faculty theory of proving antitrust impact, i.e., a regression analysis analyzing compensation metrics for non-faculty and a regression analysis analyzing the relationship between the compensation of faculty and non-faculty, showed that antitrust impact could be proven on a class-wide basis for the non-faculty class.[14] Id. The court also found that the plaintiff's expert's calculation of damages for the non-faculty class were based upon a theory and evidence that was common to the class. *2018 U.S. Dist. LEXIS 16136, [WL] at *7*.

The court after discussing the other pertinent requirements of *Rule 23*, however, held it would certify a class comprised of only faculty. *2018 U.S. Dist. LEXIS 16136, [WL] at 8*. The court rejected the plaintiff's invitation to certify a class comprised of faculty and non-faculty. Id. The court explained:

> Dr. Seaman's theories and evidence differ between faculty and non-faculty class members. It is apparent from the briefing on this motion and on the plaintiff's motion to exclude defendants' experts that the inclusion of faculty and non-faculty in the same class is likely to cause significant confusion. Disputes already have arisen as to whether witnesses are talking only **[**119]** about faculty, only about non-faculty, or both. See Doc. 163 at 22-23. And there are extra steps required for a finding of anti-trust impact and damages as to non-faculty as compared to faculty; these are not minor steps, but include detailed and complicated expert statistical analyses and additional fact witnesses. Moreover, the evidence as to non-faculty is substantially weaker, at least on this record, since it is based on several inferences-on-inferences; this gives rise to the possibility that the strength of the faculty claim or the weakness of the non-faculty claim might tend to bleed over to the other claim in the jury's mind. Finally, the plaintiff has put forth one theory as to non-faculty that seems to be driven by individualized evidence.
>
> Collectively these problems—different evidence, the likelihood of substantial confusion, potential for unfairness at trial, and the possibility of individual issues as to non-faculty—will make it very difficult to manage the class. Trial of the relatively straightforward faculty claims would be unduly complicated and there is a real potential for unfairness to both the class members and the defendant. For these reasons the Court finds that **[**120]** including non-faculty in the class would defeat predominance and superiority....*Reiter, 442 U.S. at 345* (recognizing the district court's discretionary authority to refuse to certify potentially cumbersome class actions with manageability issues).

[14] The court found that the plaintiff's theory that that "the no-hire agreement affected a subset of non-faculty more directly because they missed out on compensation increases associated with lateral moves undertaken in connection with a faculty-lead team" was not supported by any evidence. *Seaman, 2018 U.S. Dist. LEXIS 16136, 2018 WL 671239, at *7 n.8*. The court explained that the evidence did not "provide any indication or confirmation that faculty seek compensation increases for non-faculty during lateral moves." Id. The court also found that the plaintiff did not set forth a theory or evidence to calculate damages based upon that theory. Id.

*Seaman, 2018 U.S. Dist. LEXIS 16136, 2018 WL 671239, at *8*. The court explained that the "[n]on-faculty class members...[could] pursue a separate class action and obtain the corresponding economics of time, effort, and expense, and uniformity of decision." *2018 U.S. Dist. LEXIS 16136, [WL] at *8 n.11*.

As discussed above, the Third Circuit Court of Appeals has not foreclosed the possibility that a class maybe certified in a no-poach wage suppression case. **[*514]** *Weisfeld, 84 F. App'x at 259*. The foregoing discussion, however, shows that in order for a plaintiff in a no-poach wage suppression case to satisfy the requirement of predominance with respect to antitrust impact, there must be evidence that the compensation structures of the defendants in the pertinent industry were so rigid that the compensations of *all* class members were tethered together.[15] This case, unlike those just discussed, is not yet at the certification stage. Here, at the motion to strike stage, the burden on plaintiffs is less than at the certification stage. The court must determine only whether plaintiffs satisfied their burden **[**121]** to set forth factual allegations to advance a prima facie showing of predominance or that at least it is likely that discovery will reveal evidence that antitrust impact may be proven on a class-wide basis for all employees, e.g., evidence that the compensation structures for all defendants were so rigid that the compensation of all class members, including employees with skills specific to the railway equipment supply industry and employees without skills specific to that industry, were tethered together. Based upon the factual allegations in the consolidated class action complaint, plaintiffs failed to satisfy their burden with respect to predominance for a class of all defendants' employees. The allegations for a class of all employees are conclusory in that respect and the court cannot discern from the allegations anything about the compensation structures of defendants.

The motion to strike class allegations will be granted on that basis without prejudice. If plaintiffs are able to plead sufficient facts about the likelihood that discovery will reveal structured compensation schedules that affected all employees, plaintiff may seek to amend the consolidated class action complaint **[**122]** to include those allegations or to plead a class for which predominance may be shown.

4. Whether Plaintiffs' Class Definition is Overbroad

Even if defendants satisfied their burden at this stage with respect to predominance, their class definition is overbroad and the court would require it to be replead. "An order that certifies a class action must define the class...." *Fed. R. Civ. P. 23*. The definition of the class is a matter within the broad discretion of the district court." *Clarke v. Lane, 267 F.R.D. 180, 194 (E.D. Pa. 2010)* (citing *Battle v. Commw. of Pa., 629 F.2d 269, 271 n.1 (3d Cir. 1980))*. "Defining the class is of critical importance because it identifies the persons (1) entitled to relief, (2) bound by a final judgment, and (3) entitled under *Rule 23(c)(2)* to the 'best notice practicable' in a *Rule 23(b)(3)* action." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.222 (2004) (quoting *Fed. R. Civ. P. 23(c)(2)(B)*). *Rule 23* is "silent" with respect to the sufficiency of a class definition, *Jackson v. Se. Pa. Transp. Auth., 260 F.R.D. 168, 182 (E.D. Pa. 2009)* (citing 5 JAMES W. MOORE, *MOORE'S FEDERAL PRACTICE § 23.21[1]* (3d ed. 2019), but the court has a "responsibility to 'protect absentees by blocking unwarranted or overbroad class definitions[,]" *Sullivan v. CB Investments, Inc., 667 F.3d 273, 291 (3d Cir. 2011)* (quoting *In re Cmty. Bank of N. Va., 622 F.3d 275, 291 (3d Cir. 2010))*. "The definition must be precise, objective, and presently ascertainable." **[*515]** MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.222 (2004). "All class certification orders are conditional and 'the court retains the authority to re-define or decertify the class until the entry of final judgment on the merits.'" *Clarke, 267 F.R.D. at 194* **[**123]** (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 793 n.14 (3d Cir. 1995))*.

Plaintiffs in the consolidated class action complaint define the putative class as follows:

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[15] Satisfying the predominance requirement in a no-poach case, i.e., proving antitrust impact is capable of proof on a class-wide basis, may be an easier task when the putative class is comprised of a narrow, well-defined subset of employees. Here, plaintiffs' task is more difficult because they seek to represent an expansive class of all defendants' employees, which includes employees highly skilled in the railway equipment supply industry and employees without skills specific to that industry.

> All natural persons employed by, or hired through staffing agencies or vendors to work for, Defendants or their wholly owned subsidiaries, in the United States, at any time from the start of the conspiracy (no later than 2009) to the present. Excluded from the class are senior executives and personnel in the human resources, recruiting, and legal departments of the Defendants, and employees hired outside of the United States to work outside of the United States.

(ECF No. 88 ¶ 65.) Plaintiffs intend to represent one class comprised of all persons employed by any defendant beginning in 2009. The court finds this class definition lacks precision based upon the allegations of the consolidated class action complaint. *Duffy v. Massinari, 202 F.R.D. 437, 440 (E.D. Pa. 2001)* ("At this stage in the litigation, the Court also agrees that the proposed class definition is an appropriate one given the allegations and claims contained in the Amended Complaint.").

The reasonable inference drawn from the allegations of the consolidated class action complaint shows plausibly that the overarching conspiracy among Knorr, Wabtec, and Faiveley N.A. commenced **[**124]** in 2014 (at the earliest) when Wabtec and Faiveley N.A. formed the third bilateral conspiracy. Prior to 2014, there existed only two bilateral conspiracies: (1) between Knorr and Wabtec, formed no later than 2009; and (2) between Knorr and Faiveley N.A., formed no later than 2011. Based upon the allegations in the consolidated class action complaint, persons employed by Faiveley N.A. did not enter into a conspiracy until approximately 2011. Thus, plaintiffs' class definition that includes all defendants' employees from 2009 to the present is overbroad and lacks precision. Even if plaintiffs had satisfied their burden with respect to predominance, the court would require the class definition to be amended. See *Fed. R. Civ. P. 23(d)(1)(D)* ("[T]he court may issue orders that...require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly.").

Plaintiffs' failure to set forth a precise class definition, however, is not fatal to their class action. The Third Circuit Court of Appeals has explained:

> *Federal Rule of Civil Procedure 23(c)(5)* states that "[w]hen appropriate, a class action may be divided into subclasses that are each treated as a class under this rule." An advisory **[**125]** committee note for *Rule 23(c)* indicates that subclasses are appropriate "[w]here a class is found to include subclasses divergent in interest." Accordingly, "[a] district court hearing a class action has the discretion to divide the class into subclasses and certify each subclass separately." *In re Cendant Corp. Sec. Litig., 404 F.3d 173, 202 (3d Cir.2005)*. We have explained that the option to utilize subclasses "is designed to prevent conflicts of interest in class representation." Id.

In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 271 (3d Cir. 2009). Plaintiffs may seek to file an amended consolidated class action complaint in accordance with *Rule 15*. Plaintiffs may include additional factual allegations to make a prima facie showing **[*516]** that the class allegations are sufficient, i.e., factual allegations from which the court could reasonably infer that all defendants were engaged in an overarching conspiracy by at least 2009 or to define a class corresponding to the overarching conspiracy beginning at the earliest in 2014 and three subclasses corresponding to the three bilateral conspiracies.[16]

5. Summary

For the reasons set forth above, defendants' motion to strike must be granted without prejudice to plaintiffs in accordance with *Federal Rule of Civil Procedure 15* being able to file an amended consolidated class action complaint setting forth amended class allegations **[**126]** sufficient to show it is likely discovery will substantiate

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[16] The predominance issue may also impact the breadth of the class, i.e., all employees or only certain kinds of employees. See *Seaman, 2018 U.S. Dist. LEXIS 16136, 2018 WL 671239, at *8* (granting class certification for a faculty class but denying class certification for a class including faculty and non-faculty).

that antitrust impact on a class-wide basis can be shown by a common method of proof and to amend the class definition.

V. Conclusion

The motion to dismiss (ECF No. 124) will be denied with respect to defendants' arguments that the horizontal market allocation agreements alleged in the consolidated class action complaint must be plead under the rule of reason. The motion to dismiss is granted without prejudice with respect to Bendix and Ricon.

The motion to strike (ECF No. 124) is granted without prejudice with respect to striking the class allegations because plaintiffs did not make a prima facie showing in the consolidated class action complaint that discovery is likely to substantiate that the common issues of the proposed class of all employees predominate over the individual questions. The motion to strike is also granted to the extent plaintiffs will be required to amend the class definition, which is overbroad and lacks precision.

An appropriate order will be entered.

BY THE COURT,

Dated: June 20, 2019

/s/ JOY FLOWERS CONTI

Joy Flowers Conti

Senior United States District Judge

FashionPass, Inc. v. Rent the Runway, Inc.

United States District Court for the Central District of California

June 24, 2019, Decided; June 24, 2019, Filed

CV 19-3537-GW(JCx)

Reporter
2019 U.S. Dist. LEXIS 138238 *

FashionPass, Inc. v. Rent the Runway, Inc., et al.

Subsequent History: Dismissed by *Fashionpass, Inc. v. Rent the Runway, 2020 U.S. Dist. LEXIS 69022 (C.D. Cal., Apr. 20, 2020)*

Core Terms

manufacturers, allegations, clothing, intentional interference, Cartwright Act, merchandise, rent, contracts, rental, Label, motion to dismiss, accessories, antitrust, customers, amend, prospective economic advantage, failure to state a claim, relevant market

Counsel: [*1] Attorneys for Plaintiffs: George C. Rudolph, David E. Outwater.

Attorneys for Defendants: Eric S. Hochstadt, David R. Singh.

Judges: GEORGE H. WU, UNITED STATES DISTRICT JUDGE.

Opinion by: GEORGE H. WU

Opinion

CIVIL MINUTES - GENERAL

PROCEEDINGS: DEFENDANT RENT THE RUNWAY, INC.'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM [13];

SCHEDULING CONFERENCE

Court and counsel confer. The Tentative circulated and attached hereto, is adopted as the Court's Final Ruling. The Court would GRANT Defendant's Motion to Dismiss on all counts without prejudice. Counsel will confer and attempt to resolve discovery issues prior to the amendment. The Court continues the scheduling conference to July 1, 2019 at 8:30 a.m., with a joint report to be filed by noon on June 27, 2019.

I. Background

A. Factual Background

FashionPass, Inc. ("FashionPass" or "Plaintiff") sues Rent the Runway, Inc. ("RTR" or "Defendant") for: (1) violations of the Cartwright Act; (2) unfair competition; (3) intentional interference with contract; and (4) intentional interference with prospective economic advantage. *See generally* Notice of Removal, Ex. A, Complaint ("Complaint"), Docket No. 1-1. Plaintiff alleges the following relevant facts:

Plaintiff and Defendant **[*2]** are businesses that provide women's clothing and accessory rentals. *See id.* ¶ 8. Both are involved in extensive e-commerce, providing the majority of their clothing and accessory rentals through online internet sites. *See id.* "Fashion rental companies" ("FRCs"), such as Plaintiff and Defendant, allow customers to rent clothing and accessories for special events, work and casual, through subscriptions that permit the customer to rent designer and sought-after brand clothing, and to then return the items to the FRCs who professionally clean the items and make them available for others to rent. *See id.* ¶ 9. FRCs are generally distinguished amongst one another by the kinds of fashion offered, the brands they carry, the terms of rental, exchange and return of items, and cost. *See id.* ¶ 12. Plaintiff and Defendant are direct competitors with regard to the clothing and accessories that appeal to women in their 20s and 30s. *See id.* ¶ 15.

Plaintiff was founded in 2016 and conducts its business exclusively through its online site. *See id.* ¶¶ 13, 17. Defendant began its business in 2009 and conducts its business through its online site and through physical stores in five locations, two of which **[*3]** are located in California. *See id.* ¶¶ 14, 19. FRCs purchase merchandise at wholesale from clothing and accessory manufacturers three to four months ahead of each season, publicize the availability of merchandise on their websites, hold those items in inventory for rental, and supply the items to customers in accordance with the customers' selection of items from the website. *See id.* ¶¶ 16, 21. At the appropriate time prior to each season, FRCs review the season's offerings from manufacturers in person, with the assistance of the manufacturer's employees or representatives. *See id.* ¶ 22. The manufacturer's employees or representatives take notes, reflecting the FRCs tentative purchasing intentions, and these notes are turned in a purchase order, which is provided to the FRCs for revision and final submission. *See id.*

Prior to 2019, Plaintiff had been regularly buying from Yumi Kim, since no later than August 2016; from The Jetset Diaries, since no later than September 2016; from ASTR the Label, since no later than October 2016; from LIKELY, since no later than May 2017; from Show Me Your Mumu and Saylor, since no later than June 2017; from Amanda Uprichard, since no later than August **[*4]** 2017; from Dress the Population, since no later than October 2017; from Flynn Skye, since no later than February 2018; from Sanctuary Clothing, since no later than April 2018; from Blank NYC and Finders Keepers, since no later than August 2018; and from Elliatt, since no later than September 2018. *See id.* ¶ 29. Beginning in October and November 2018, Plaintiff sought to purchase merchandise in Los Angeles, California, from each of the following businesses: The Jetset Diaries, Show Me Your Mumu, Saylor, Blank NYC, Flynn Skye, ASTR the Label, Dress the Population, Elliatt, Finders Keepers, Yumi Kim, AGOLDE, Citizens of Humanity, Keepsake, CIMEO, Fifth Label, Cleobella, Sanctuary Clothing, LIKELY, Amanda Uprichard, and Fame and Partners. *See id.* ¶ 30. In each instance, Plaintiff's request to purchase merchandise was rejected upon the stated ground that the manufacturer had granted Defendant an exclusive right to purchase merchandise in the Fashion Rental Business. *See id.*

Between August and October of 2018, FashionPass entered into contracts to purchase merchandise from Blank NYC, Elliatt, Flynn Skye, ASTR the Label, and Yumi Kim. *See id.* ¶¶ 40-44. Plaintiff is informed and believes that **[*5]** RTR had knowledge of, and intended to cause the manufacturers to breach and cancel each of their contracts by and through their insistence that each of the above listed labels refuse to sell merchandise to FashionPass. *See id.* ¶¶ 45-46. As a result of RTR's demands, Blank NYC, Elliatt, Flynn Skye, ASTR the Label, and Yumi Kim breached and cancelled each of their contracts with FashionPass. *See id.* ¶ 47. FashionPass suffered injury and damages and will continue to suffer injury and damages based upon the cancellation of said contracts. *See id.* ¶ 48.

Furthermore, FashionPass and each of The Jetset Diaries, Show Me Your Mumu, Saylor, Blank NYC, Flynn Skye, ASTR the Label, Dress the Population, Elliatt, Finders Keepers, Yumi Kim, Sanctuary Clothing, LIKELY, Amanda Uprichard, and Fame and Partners were in an economic relationship that would have resulted in a significant economic benefit to FashionPass. *See id.* ¶ 51. RTR had full knowledge of FashionPass's economic relationship with each of the brands and intentionally interfered with those relationships. *See id.* ¶ 52-53. FashionPass has suffered and will continue to suffer economic damages as a result of RTR's interference. *See id.* ¶ 55. **[*6]**

B. Procedural Background

Now before the Court is Defendant's motion to dismiss. *See* Defendant Rent the Runway, Inc.'s Notice of Motion to Dismiss for Failure to State a Claim ("MTD"), Docket No. 13. Plaintiff filed an opposition. *See* Plaintiff FashionPass, Inc.'s Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss ("Pl. Opp."), Docket No. 20. Defendant filed a reply. *See* Defendant Rent the Runways, Inc.'s Reply in Support of its Motion to Dismiss for Failure to State a Claim ("Reply"), Docket No. 26.

II. Legal Standard

Under *Rule 12(b)(6)*, a defendant may move to dismiss for failure to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. A complaint may be dismissed for failure to state a claim for one of two reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts under a cognizable legal theory. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *see also* *Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008)* ("Dismissal under *Rule 12(b)(6)* is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.").

In deciding a *12(b)(6)* motion, a court "may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007)*; *see* **[*7]** *also* *Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006)* (indicating that a court may consider a document "on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the *12(b)(6)* motion"). The court must construe the complaint in the light most favorable to the plaintiff; accept all allegations of material fact as true; and draw all reasonable inferences from well-pleaded factual allegations. *Gompper v. VISX, Inc., 298 F.3d 893, 896 (9th Cir. 2002)*; *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)*, *amended on denial of reh'g*, *275 F.3d 1187 (9th Cir. 2001)*; *Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*. The court is not required to accept as true legal conclusions couched as factual allegations. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Where a plaintiff facing a *12(b)(6)* motion has pled "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," the motion should be denied. *Id.; Sylvia Landfield Trust v. City of Los Angeles, 729 F.3d 1189, 1191 (9th Cir. 2013)*. But if "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not show[n] . . . the pleader is entitled to relief." *Iqbal, 556 U.S. at 679* (citations omitted).

III. Analysis

A. Cartwright Act Claim

Defendant moves to dismiss Plaintiff's Cartwright Act claim on two grounds: (1) that FashionPass **[*8]** failed to allege harm to competition; and (2) that FashionPass failed to allege foreclosure of the relevant market. *See* MTD at 7-14. Defendant also asserts that FashionPass failed to allege that RTR devised a boycott, or any other *per se* antitrust violation and therefore, the complaint must be analyzed under the rule of reason. *See id.* at 14.

The Cartwright Act makes unlawful a "trust," defined as "a combination of capital, skill, or acts by two or more persons" for the purposes of restraining commerce and preventing market competition in the variety of ways listed in the statute. *Cal. Bus. & Prof. Code § 16720*. *See also* *Lowell v. Mother's Cake & Cookie Co., 79 Cal.App.3d 13, 22, 144 Cal. Rptr. 664 (1978)* (citing *Bondi v. Jewels by Edwar, Ltd., 267 Cal.App.2d 672, 678, 73 Cal. Rptr. 494 (1968))*. The Cartwright Act generally codifies the common law prohibition against the restraint of trade. *Kolling v. Dow Jones & Co., 137 Cal.App.3d 709, 717, 187 Cal. Rptr. 797 (1982)*. The Cartwright Act is patterned after the

Sherman Act and consequently, "federal cases interpreting the Sherman Act are applicable problems arising under the Cartwright Act." *Redwood Theatres, Inc. v. Festival Enterprises, Inc., 908 F.2d 477, 482 n.3 (9th Cir. 1990)* (citing *Redwood Theatres, Inc. v. Festival Enterprises, Inc., 200 Cal.App.3d 687, 694, 248 Cal. Rptr. 189 (1988))*.

Plaintiffs allege that RTR pressured manufacturers to grant RTR "an exclusive right to buy" and to refuse to sell merchandise to FashionPass. *See* Complaint ¶ 25. As an initial matter, the Court would agree with Defendant that Plaintiff's allegations do not rise to the level of a boycott, and therefore Plaintiff has not alleged **[*9]** a *per se* violation of the Cartwright Act. California courts have found that "vertical restraints of trade, such as exclusive dealing arrangements, can violate the Cartwright Act, though they are not illegal per se." *Pecover v. Electronics Arts Inc., 633 F.Supp.2d 976, 983 (N.D. Cal. 2009)* (citing *Fisherman's Wharf Bay Cruise Corp. v. Superior Court, 114 Cal.App.4th 309, 334-35, 7 Cal. Rptr. 3d 628 (2004)*. "The law conclusively presumes manifestly anticompetitive restraints of trade to be unreasonable and unlawful, and evaluates other restraints under the rule of reason." *Id.* Vertical restraints, including exclusive dealing arrangements, are proscribed when it is probable that performance of the arrangements will foreclose competition in a substantial share of the affected line of commerce. *Id.*

The rule of reason analysis requires a factual analysis of the line of commerce, the market area, and the affected share of the relevant market. *See Id.* Typically, such a factual inquiry is improper at the motion to dismiss stage. *See Pecover, 633 F.Supp.2d at 984*. However, here, Defendant argues that Plaintiff has failed to allege *any* harm to competition. *See* MTD at 7. The Court would agree. Although Plaintiff alleges economic harm to itself, the Court finds no allegations of harm to the *market*, or competition generally, in the complaint. Therefore, the Court would find that Plaintiff has failed to state a **[*10]** claim for antitrust injury under the Cartwright Act. *See NorthBay HealthCare Group, Inc. v. Kaiser Foundation Health Plan, Inc., 305 F.Supp.3d 1065, 1073 (N.D. Cal. 2018)* (finding that plaintiff's antitrust claims failed where plaintiff did "not allege any antitrust injury or harm to competition generally. It alleges injury only to itself.") (internal quotations and citations omitted).

The Court would not, however, find that Plaintiff has failed to "plausibly define the relevant market" as alleged by Defendant in the MTD. *See* MTD at 9. Plaintiff defines the relevant market as the "fashion rental business" in which companies such as FashionPass and RTR "allow customers to rent clothing and accessories for special events, work, and casual, through subscriptions that allow the customer to rent designer and sought-after brand clothing, and to then return the items to the Fashion Rental Company, which professionally cleans the items and makes them available for others to rent." *See* Complaint ¶ 9. Defendant argues that this market definition is "facially unsustainable." Defendants seem to focus on the assertion that traditional retail sellers should be included in the market definition, because they are "reasonably interchangeable." *See* MTD at 10 (citing *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*.

At this stage of the proceedings, without any evidence before **[*11]** the Court, it is impossible for the Court to determine the appropriate market definition. All Plaintiff must allege to state a valid claim is that a relevant market exists and that defendant has market power in said area. *See Newcal Industries, Inc. v. Ikon Office Solution, 513 F.3d 1038, 1044 (9th Cir. 2008)*. "There is no requirement that these elements be pled with specificity." *See id. at 1045*. Plaintiff has alleged a *plausible* market definition, and has alleged that RTR is "the dominant player" in that market. *See* Complaint at 1. Therefore, failure to plausibly define the market is not a basis upon which the Court would dismiss the claim.

However, given that Plaintiff has failed to sufficiently allege harm to competition, the Court would dismiss Plaintiff's first claim for relief. To the extent Plaintiff can amend the complaint to allege harm to the competition in general, the Court would allow Plaintiff leave to amend its Cartwright Act claim.

B. Unfair Competition Claim

Plaintiff alleges a violation of California's Unfair Competition Law ("UCL"), *Cal Bus. & Prof. Code § 17200*. Defendant argues that because Plaintiff does not sufficiently allege a claim for a violation of ***antitrust law***, it cannot properly allege a claim under the UCL. *See* MTD at 15. Plaintiff admits in its Opp. that its UCL claim is derivative **[*12]** of its claim under the Cartwright Act. *See* Opp. at 8. Given that the Court granted Defendant's motion to dismiss Plaintiff's first claim for relief, its second claim for relief also fails. To the extent Plaintiff is able to amend its complaint to plead a Cartwright Act claim, it may also reallege a claim under the UCL.

C. Intentional Interference with Contract Claim

Plaintiff asserts its claim for intentional interference with contract, based on five alleged contracts FashionPass entered into with five different clothing manufacturers, prior to the alleged anticompetitive conduct of RTR. *See* Complaint ¶¶ 40-47. Defendant argues that Plaintiff fails to "allege existing contractual relationships" with the manufacturers named, and therefore RTR "could not possibly have known of any order requests." *See* MTD at 17.

To state a claim for intentional interference with contractual relations, Plaintiff must allege: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." **[*13]** *United National Maintenance, Inc. v. San Diego Convention Center, Inc., 766 F.3d 1002, 1006 (9th Cir. 2014)* (quoting *Pacific Gas &Elec. Co. v. Bear Stearns & Co., 50 Cal.3d 1118, 1126, 270 Cal. Rptr. 1, 791 P.2d 587 (1990))*.

Defendant claims that Plaintiff's allegations that it submitted purchase orders which were accepted is insufficient, as Plaintiff does not allege "facts to support that the order requests were actually accepted." At this stage, Plaintiff's allegations that it submitted purchase orders, (with specific dates and order numbers) which were accepted by the specific named manufacturers is sufficient. *See* Complaint ¶¶ 40-44. If Defendant wishes to dispute this fact, it may do so at later stages of the proceeding, but it may not depend on factual disputes to support its MTD.

However, Defendant also claims that aside from a single conclusory allegation, Plaintiff fails to allege "any facts establishing that RTR knew of any contract between FashionPass and the Purchase Order Manufacturers." *See* MTD at 20. The Court would tentatively agree with Defendant. Plaintiff's only allegation as to Defendant's knowledge of the contracts states: "FashionPass is informed and believes, and upon such information and belief alleges, that RTR and Does 1 through 100, and each of them, had actual knowledge of each of the contracts." *See* Complaint ¶ 45. Although Plaintiff need not plead facts with specificity **[*14]** at the motion to dismiss stage, mere conclusory allegations will not suffice. *See* *Swipe & Bite, Inc. v. Chow, 147 F.Supp. 3d 924, 935 (N.D. Cal. 2015)* (finding dismissal appropriate where Plaintiff merely alleged knowledge of agreements without any facts showing knowledge). Therefore, the Court would dismiss Plaintiff's claim for intentional interference with contract. The Court would grant Plaintiff leave to amend to the extent it can allege facts showing RTR's knowledge of the contracts at issue.

D. Intentional Interference with Prospective Economic Advantage

Plaintiff's claim for intentional interference with prospective economic advantage is deficient for similar reasons as its first three claims. To state a claim for intentional interference with economic advantage the Plaintiff must plead: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (4) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." *See* *CRST Van Expedited, Inc. v. Werner Enterprises, Inc., 479 F.3d 1099, 1108 (9th Cir. 2007)*. Additionally, interference with prospective economic **[*15]** advantage "requires a plaintiff to allege an act that is wrongful independent of the interference itself." *Id.*

Plaintiff has not sufficiently pled its antitrust claim and has not alleged a separate basis upon which Defendant's actions would be legally wrongful. *See* Complaint ¶¶ 50-56. Therefore, Plaintiff cannot allege that the act constituting interference was independently wrongful.

However, unlike Plaintiff's claim for intentional interference with contract, the intentional interference with prospective economic advantage does not require knowledge of any specific contract that would be adversely impacted by Defendant's conduct. Rather, it only necessitates that Defendant be aware of an existing business relationship between the Plaintiff and the third-party vendor. As to this element, the Court would find that Plaintiff has sufficiently plead knowledge on the part of RTR. In paragraph 25 of the complaint, Plaintiff avers that "in or around October and November 2018, and continuing thereafter to the present date, RTR . . . communicated RTR's demand to various manufacturers that unless the manufacturers grant 'an exclusive right to buy' to RTR, and refuse to sell merchandise to FashionPass, **[*16]** RTR would not purchase any merchandise from those manufacturers." *See* Complaint ¶ 25.

The Court would grant Plaintiff leave to amend to the extent Plaintiff is able to successfully amend its Cartwright Act claims to establish a legally wrongful act, as well as allege facts showing Defendant's knowledge of the alleged contracts.

IV. Conclusion

The Court would **GRANT** Defendant's MTD on all counts without prejudice.

Rabbe v. Farmers State Bank of Trimont

Minnesota District Court, County of Martin, Fifth Judicial District

June 24, 2019, Filed

File # 46-CV-18-424

Reporter
2019 Minn. Dist. LEXIS 231 *

Joel S. Rabbe, Kirsten C. Rabbe, Jon E. Rabbe, Debra A. Rabbe, Joyce L. Rabbe, individually, Joyce L. Rabbe, as Trustee of the Residual Trust Created Pursuant to Article VII of the Last Will and Testament of John J. Rabbe of August 13, 2007, and Rabbe Farms, LLP, a Minnesota Limited Liability Partnership, Rabbe Ag Enterprises, LLC, a Minnesota Limited Liability Company, f/k/a Rabbe Ag Enterprises, a General Partnership, Plaintiff, v. Farmers State Bank of Trimont, a Minnesota Bank Corporation, and Michael Mulder, individually, Defendants.

Prior History: *Rabbe v. Farmers State Bank of Trimont, 2018 Minn. Dist. LEXIS 111 (Oct. 8, 2018)*

Core Terms

elevators, antitrust, summary judgment

Judges: [*1] Troy G. Timmerman, District Court Judge.

Opinion by: Troy G. Timmerman

Opinion

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER.

This matter came before the Honorable Troy G. Timmerman on April 16, 2019, for a Hearing on the Defendants' motion for summary judgment. Plaintiffs were represented by J. Robert Keena. Farmers State Bank of Trimont ("FSB") and Michael Mulder were represented by Dustan Cross.

The Court, having considered the arguments of counsel, and all of the files, records and proceedings herein, makes the following:

PROCEDURAL HISTORY

1. On October 8, 2018, an order was filed in this case in which the Court dismissed all counts alleged in the amended complaint and denied the requested amendments to the complaint except for the Plaintiffs' antitrust claim and related factual averments.

2. In denying Defendant's motion to dismiss the antitrust cause of action, the Court noted that Plaintiffs had made a prima facie case that FSB and Michael Mulder violated *Minn. Stat. § 325D.53*.

3. Following the filing of the Court's order, Plaintiffs filed a second amended complaint containing the single remaining count.

FINDINGS OF FACT

1. Pursuant to Rabbe Farms' bankruptcy, grain elevators owned by the Plaintiffs in Sherburn, Minnesota **[*2]** and Trimont, Minnesota were transferred to FSB.

2. Seeking to liquidate the elevators it acquired in the Rabbe Farms bankruptcy, FSB consulted Kevin Kahler, Ryan Kahler, and Dustyn Hartung, employees of Land Services Unlimited, Inc., about various ways the elevators could be sold.

3. After receiving interest from a number of potential buyers, FSB decided to dispose of the elevators through a private sale.

4. Neither Land Services Unlimited nor Kevin Kahler (hereinafter "Kahler") was retained to sell or market the elevators.

5. Prior to decision to conduct a private sale, Joel Rabbe (hereinafter "Rabbe") discussed his interest in reacquiring the Trimont elevator with Michael Mulder.[1]

6. Both Michael Mulder (hereinafter "Mulder") and Robert Connors (hereinafter "Connors") testified that they had little interest in dealing with the Plaintiffs given the history between the parties. Nonetheless, both admitted that, had Plaintiffs made a competitive offer for any of the elevators, they would have considered it. Neither Mulder nor Connors believed that Rabbe would make an offer.

7. Rabbe inquired with Mulder about the value of the Trimont elevator and was directed to Kahler, whom Mulder testified **[*3]** was able to provide information about the elevator's value. Kahler did not know why Mulder referred Rabbe to him.

8. No other potential buyer was directed to Kahler.

9. Kahler and Rabbe discussed the value of the Trimont elevator. When Rabbe attempted to reach Kahler afterward, Kahler informed Rabbe that FSB was conducting the sale of the elevators itself.[2] Kahler testified that Rabbe never communicated an intention to buy the Trimont elevator.

10. According to Mulder, Rabbe never asked how he could put in a bid on the Trimont elevator. However, Rabbe testified that Mulder directed him to Kahler if he wished to purchase the elevator.

11. At no time did FSB attempt to solicit an offer for any of the elevators from Plaintiffs, and at no point did Rabbe make an offer for either the Trimont or the Sherburn elevator.

12. Rabbe testified that he never considered making an unsolicited offer as he did not know how FSB was planning to sell the elevators.

13. The Trimont elevator was sold on July 11, 2017 and the Sherburn elevator was sold on July 6, 2017. The limited-liability company which purchased a portion of the Sherburn elevator was part-owned by Kahler.

CONCLUSIONS OF LAW

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[1] Rabbe testified that he discussed his interest in both the Trimont and Sherburn elevators with Mulder while Mulder only remembered discussing the Trimont elevator.

[2] This was memorialized in a text message between Rabbe and Kahler.

1. *Minnesota Rule of Civil Procedure 56.01* provides that "[t]he **[*4]** court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." The Minnesota Supreme Court has defined a material fact as "one of such a nature as will affect the result or outcome of the case depending on its resolution." *Zappa v. Fahey, 310 Minn. 555, 245 N.W.2d 258, 259-60 (Minn. 1976)*. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the party against whom summary judgment was granted. *See* *Frieler v. Carlson Mktg. Grp., Inc., 751 N.W.2d 558, 564 (Minn. 2008)*. Where summary judgment is sought, the moving party has the burden of proving that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See* *Sauter v. Sauter, 244 Minn. 482, 70 N.W.2d 351, 353 (Minn. 1955)*.

2. *Minn. Stat. § 325D.53* prohibits any "contract, combination, or conspiracy between two or more persons refusing to deal with another person."[3] This statute mirrors section 1 of the Sherman Act. *See* *15 U.S.C. § 1* ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.") Given these similarities, Minnesota ***antitrust law*** is generally interpreted in accordance with its federal counterpart. *See* *Lorix v. Crompton Corp., 736 N.W.2d 619, 626 (Minn. 2007)*.

3. Federal courts **[*5]** have recognized that "[a] demand and refusal is a prerequisite to a claim of concerted refusal to deal" and that "[a] plaintiff can have no relief when his failure to obtain a desired product is attributable to his own failure to make a request." *Cleary v. National Distillers & Chemical Corp., 505 F.2d 695, 697 (9th Cir. 1974)*.

4. Even where a refusal to deal exists, it is not dispositive of an antitrust violation. It is a long-standing principle of ***antitrust law*** that a private business may refuse to deal with another provided that it does so independently. *See* *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)* ("the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal"); *Fed. Trade Comm'n v. Beech Nut Packing Co., 257 U.S. 441, 453, 42 S. Ct. 150, 66 L. Ed. 307, 4 F.T.C. 583, 19 Ohio L. Rep. 586 (1922)* (noting that the *Colgate* rule does not extend to "contracts or combinations" that "unduly hinder or obstruct... trade").

5. Indeed, in order to survive a judgment against them, an antitrust plaintiff must present evidence which "reasonably tends to prove mat [defendants] had a conscious commitment to a common scheme designed to achieve an unlawful objective," *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 768, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*, and, conversely, "tends to exclude the possibility that the alleged conspirators acted independently." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., Ltd., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

6. Here, the evidence indicates **[*6]** that Plaintiffs' antitrust claim is futile. First, Plaintiffs admit that no offer was made on either me Trimont or Sherburn elevators.[4] While Plaintiffs have attempted to argue that the absence of an offer is not fatal where there is evidence mat the antitrust plaintiff was denied the product due to some concerted action by the defendants, such is not the case here, as there is no evidence of a refusal to deal.[5] Both Michael

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[3] "Person" is broadly denned as "any individual, corporation, firm, partnership, incorporated and unincorporated association, or any other legal or commercial entity." *Minn. Stat. § 325D.50, subd. 5*.

[4] Although Rabbe testified that Mulder directed him to Kahler if he wished to purchase the Trimont elevator, there is no indication in the record that Rabbe made any firm demand or offer to purchase any of the elevators. It appears that, at most, Rabbe expressed an interest in purchasing the elevators. However, such expressions are insufficient to constitute a demand or offer to deal. *See* *Cleary, 505 F.2d at 696-97*.

[5] Plaintiffs cite to *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)* in support of the proposition that this rule is not to be rigidly applied. While it is true that the United State Supreme Court declined to enforce this rule in *Continental Ore*, its rationale for doing so appears to be based on the peculiar facts of that case in which

Mulder and Robert Connors admitted that they were not inclined to do business with the Plaintiffs but testified that they would have entertained an offer for the elevators had it been in the best interest of FSB. Plaintiffs only evidence to the contrary is that Rabbe, unlike the other potential buyers, was directed by Defendants to Kahler to discuss the elevators' value and that the elevators were sold pending that discussion. However, this supposed "run around" is insufficient to create antitrust liability. *See* Cleary, 505 F.2d at 697. Absent the referral to Kahler, there is nothing in the record to indicate that Rabbe stood in any position substantively different from the purchasers of the elevators.

7. Second, Plaintiffs have failed to submit evidence **[*7]** reasonably tending to prove that Defendants and Kahler were colluding.[6] Kahler testified that he was "baffled" as to why Mulder had referred Rabbe to him. Kahler also informed Rabbe, prior to the sale of the Trimont and Sherburn elevators, that FSB was handling the sale itself. This undercuts any allegation that Kahler and Defendants were working in concert. If anything, the "run around" alleged by Plaintiffs was conducted by Defendants alone.[7] As there is insufficient evidence of a contract, combination, or conspiracy between FSB and Kahler, no antitrust action can be maintained.

Based on the above Findings of Fact and Conclusions of Law, **IT IS HEREBY ORDERED**:

1. Defendants' motion for summary judgment is **GRANTED** and the Plaintiffs' complaint is **DISMISSED** in its entirety.

LET JUDGMENT BE ENTERED ACCORDINGLY.

/s/ Troy G. Timmerman

Troy G. Timmerman

District Court Judge

JUDGMENT AND DECREE

The forgoing shall constitute the Judgment of the Court.

Entered: _

Court Administrator

By: /s/ [Signature]

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respondents had effectively monopolized the supply of vanadium oxide though conduct which appeared to violate both sections 1 and 2 of the Sherman Act (the Court's analysis does not distinguish between the two). As no much similar conduct exists in this case, the Court believes that *Continental Ore* is of limited applicability.

[6] It is unclear whether FSB and Kahler could have engaged in any type of prohibited collusive conduct given that Kahler's role appeared to be either as a de facto selling agent or a competitive purchaser. The former has been held to be immune from antitrust liability, *see* Howard v. Minnesota Timberwolves Basketball Ltd. Partnership, 636 N.W.2d 551, 557 (Minn. App. 2001) (agent or representative cannot incur antitrust liability) while the latter, in this context, invariably precludes other competitors from acquiring the sought-after product.

[7] Defendants have noted, rightfully so, that the allegation of collusive action on the part of Kahler and FSB is facially absurd given that FSB did not require Kahler's assistance in preventing Rabbe from purchasing the elevators.

Marion Diagnostic Ctr., LLC v. McKesson Corp. (In re Generic Pharms. Pricing Antitrust Litig.)

United States District Court for the Eastern District of Pennsylvania

June 26, 2019, Decided; June 26, 2019, Filed

MDL 2724 16-MD-2724; Civil Action No. 18-4137

Reporter
386 F. Supp. 3d 477 *; 2019 U.S. Dist. LEXIS 106708 **; 2019-1 Trade Cas. (CCH) P80,823; 2019 WL 2615592

IN RE: GENERIC PHARMACEUTICALS PRICING ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: Marion Diagnostic Center, LLC, et al. v. McKesson Corporation, et al.

Prior History: *In re Generic Drug Pricing Antitrust Litig., 227 F. Supp. 3d 1402, 2016 U.S. Dist. LEXIS 103005, 2016 WL 4153602 (J.P.M.L., Aug. 5, 2016)*

Core Terms

alleges, manufacturer, conspiracy, second amended complaint, purchaser, antitrust, alleged conspiracy, generic, cooperation, pricing, drugs, co-conspirator, asserts, concealment, conspirator, distributor, leave to amend, generic drug, healthcare, contends, supplier, damages, argues, motion to dismiss, state law claim, price fixing, overarching

LexisNexis® Headnotes

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

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

Fed. R. Civ. P. 12(b)(6) provides for dismissal of a complaint for failure to state a claim when a plaintiff's plain statement lacks enough substance to show that it is entitled to relief. On a motion to dismiss, the court considers plausibility, not probability. A claim is plausible when the facts pled allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Plaintiffs are not required to plead facts that, if true, definitely rule out all possible innocent explanations. But there is a difference between allegations that stand on well-pleaded facts and allegations that stand on nothing more than supposition. Judging the sufficiency of a pleading is a context-dependent exercise. In the antitrust context, a complaint must contain enough factual matter (taken as true) to suggest that an agreement was made.

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

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

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

A plaintiff must allege enough facts to state a claim to relief that is plausible on its face.

Antitrust & Trade Law > Sherman Act > Claims

HN3[] **Sherman Act, Claims**

A *15 U.S.C.S. § 1* claim will not be considered adequately pled because of the bare possibility that discovery might unearth direct evidence of an agreement. The moving party must state enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement, even if the court believes such proof is improbable. An agreement may be shown by alleging direct or circumstantial evidence, or a combination of the two.

Civil Procedure > Pleading & Practice > Pleadings > Complaints

HN4[] **Pleadings, Complaints**

Courts are not bound to accept as true legal conclusions couched as factual allegations.

Antitrust & Trade Law > Sherman Act > Claims

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

HN5[] **Sherman Act, Claims**

A Sherman Act claim based on parallel — even consciously parallel — conduct alone would be insufficient to survive dismissal. For circumstantial evidence of an agreement, a plaintiff must allege both parallel conduct and something more. This more could include evidence: (1) that the defendant had a motive to enter into a conspiracy, (2) that the defendant acted contrary to its interests, or (3) implying a traditional conspiracy.

Antitrust & Trade Law > Sherman Act > Claims

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

HN6[] **Sherman Act, Claims**

Sprinkling a Sherman Act complaint with conclusory assertions that a party was a participant in coordinated conduct or a conspirator or acted in concert with others does not make the requisite showing of entitlement to relief mandated by *Fed. R. Civ. P. 8(a)(2)*.

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

HN7[] **Complaints, Requirements for Complaint**

A district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.

Antitrust & Trade Law > Procedural Matters

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN8[] **Antitrust & Trade Law, Procedural Matters**

There is a general rule that only direct purchasers from antitrust violators may recover damages in antitrust suits.

Antitrust & Trade Law > Procedural Matters

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN9[] **Antitrust & Trade Law, Procedural Matters**

Indirect purchasers who are two or more steps removed from the violator in a distribution chain may not sue to recover antitrust damages.

Antitrust & Trade Law > Procedural Matters

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN10[] **Antitrust & Trade Law, Procedural Matters**

The limited co-conspirator exception to the direct purchaser rule allows an entity to sue its supplier and its supplier's supplier if: (1) it sues both at once, and (2) the immediate supplier (i.e., the middleman) was so wrapped up in the conspiracy that it would be barred from seeking antitrust relief against the top-level supplier in a suit of its own.

Antitrust & Trade Law > Procedural Matters

Civil Procedure > Special Proceedings > Class Actions

HN11[] **Antitrust & Trade Law, Procedural Matters**

The Illinois Antitrust Act prohibits indirect purchaser class actions.

Antitrust & Trade Law > Procedural Matters

Antitrust & Trade Law > Sherman Act

HN12[] **Antitrust & Trade Law, Procedural Matters**

The Illinois Antitrust Act ("Act") is patterned on the Sherman Act and should be construed as the Sherman Act is.

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

HN13[] **Amendment of Pleadings, Leave of Court**

Fed. R. Civ. P. 15(a)(2) directs the court to freely give leave to amend when justice so requires. Denial is justified on the grounds of undue delay, bad faith, prejudice to the opposing party, or futility. *Fed. R. Civ. P. 15(a)(2)*.

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For Bruce P. Merenstein, Special Master: BRUCE P. MERENSTEIN, LEAD ATTORNEY, SCHNADER HARRISON SEGAL & LEWIS, Philadelphia, PA.

For Linda D. Perkins, Special Master: LINDA D. PERKINS, LEAD ATTORNEY, WHITE AND WILLIAMS LLP, Philadelphia, PA.

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For Mckesson Medical-Surgical, Inc., Defendant: ABRAM J. ELLIS, PETER C. THOMAS, SARA YOUNG RAZI, SIMPSON THACHER & BARTLETT LLP, Washington, DC.

For United States of America, Intervenor: JAY OWEN, U.S. DEPT OF JUSTICE - ANTITRUST DIV, Washington, DC; NATHAN D BRENNER, U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, Washington, DC; RYAN J. DANKS, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

Judges: HON. CYNTHIA M. RUFE, J.

Opinion by: CYNTHIA M. RUFE

Opinion

[*480] Rufe, J.

In this multidistrict litigation, **[**5]** Plaintiffs allege that Defendants engaged in an antitrust conspiracy by allocating the market for and fixing the prices of certain generic pharmaceutical products. In this Opinion, the Court considers a motion by Defendants McKesson Corporation and McKesson Medical Surgical, Inc. (collectively, "McKesson")[1] to dismiss the claims brought against them by Plaintiffs Marion Diagnostic Center, LLC and Marion Healthcare, LLC (collectively "Marion"). For the reasons that follow, Marion's claims against McKesson will be dismissed.

I. BACKGROUND

"Marion Diagnostic Center LLC is a limited liability company formed under the laws of the State of Illinois, with its principal place of business in Marion. Illinois."[2] It "operates a multidisciplinary healthcare facility including an outpatient surgery practice, a diagnostic center, and a walk-in clinic."[3] "Marion HealthCare, LLC" also has its principal place of business in Marion, Illinois — a multi-specialty surgery center.[4] It is an LLC formed under Illinois law.[5]

In its second amended complaint, Marion asserts a claim under *Section 1 of the Sherman Act* against a number of generic drug manufacturers and against McKesson, "one of the four largest distributors **[**6]** of generic drugs in the

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1 Other Defendants have also filed motions to dismiss McKesson's second amended complaint. Their motions will be decided separately.

2 Marion Second Am. Compl. ¶ 12.

3 *Id.*

4 *Id.* ¶ 13.

5 *Id.*

United States."[6] Marion alleges it "directly purchased" a variety of generic drugs "through" McKesson[7] and brings its Sherman Act claim on behalf of a putative class of "[a]ll persons or entities that have directly purchased generic drugs from conspirator McKesson in the United States from September 25, 2014 though the present . . . ."[8] Marion also asserts claims against McKesson "in the alternative" under various state laws on behalf of a putative class of indirect purchasers encompassing "[a]ll United States healthcare providers purchasing the generic drugs of Defendant manufacturers through distributors and wholesalers from September 25, 2014 through the present."[9]

[*481] Marion contends that there are "compelling indications that the largest Defendant [generic drug] manufacturers . . . have enlisted tacitly or explicitly distributor McKesson as a cooperating co-conspirator (and possibly other unnamed distributors) to aid and conceal their price fixing and market allocation across the generic drug industry."[10] It asserts that members of its proposed class "have paid above-competitive prices" as a result of the alleged industry-wide conspiracy.[11] Marion contends **[**7]** that there is "strong circumstantial evidence of McKesson's cooperation" in the alleged conspiracy.[12] In support of its claims, Marion alleges that

> [n]umerous, sophisticated McKesson purchasing personnel can hardly have failed to notice that, for a number of years, bidding for McKesson's high-volume, attractive business for numerous generic drugs has been much less than robust and fully-competitive (because its business has been allocated to one of the Defendant manufacturers so that the manufacturer could obtain its agreed "fair share" of a particular drug).[13]

It also alleges that "McKesson's buying personnel can hardly have failed to notice . . . the radical . . . price spikes paid by McKesson in 2013 and 2014 for more than 1,200 generic medications (where prices increased on average 448 percent between July 2013 and July 2014)."[14] Marion alleges that McKesson "must have been [or] become aware that the only plausible explanation was anticompetitive conduct by Defendant manufacturers . . . ."[15] It contends that Defendant drug manufacturer Heritage "centrally coordinated" the alleged price-fixing and market allocation conspiracy, Heritage "claims to be closely 'strategically-aligned' with McKesson" **[**8]** and, as a result, "McKesson has a ready, close source of intelligence to confirm any suspicions of anticompetitive activity . . . ."[16] Marion also alleges that "the movement of officers between McKesson and additional central conspirators [drug manufacturers] Mylan and Teva has further facilitated its cooperation with, and concealment of, the overarching conspiracy."[17] It alleges that two former employees of Mylan Pharmaceuticals now work at McKesson and two now work at McKesson Canada.[18] Marion also alleges that five former McKesson employees now work for Defendants

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[6] Marion Second Am. Compl. ¶ 14 and ¶¶ 132-35.

[7] *Id.* ¶¶ 12-13.

[8] *Id.* ¶ 124.

[9] *Id.* ¶ 139. Marion's second amended complaint defines healthcare providers to include "hospitals, medical or diagnostic clinics, outpatient centers, long-term care facilities, and surgery centers" and to exclude "pharmacies operated by private or public corporations, insurance companies or pension plans purchasing generic drugs." *Id.*

[10] *Id.* ¶ 7.

[11] *Id.* ¶ 135.

[12] *Id.* ¶ 73.

[13] *Id.* ¶ 77.

[14] *Id.* ¶ 78.

[15] *Id.* ¶ 79.

[16] *Id.* ¶ 81.

[17] *Id.* ¶ 87.

Mylan and Teva in various capacities.[19] Marion contends that McKesson's "collusion is also highly probable if one follows the money."[20] It asserts that "McKesson has made each year (since at least 2013) billions of dollars of additional margins on its resale of generic drugs due to i[t]s routine percentage mark-up of the conspiracy's above-competitive pricing."[21] Marion alleges that "[t]hese additional billions realized by McKesson annually are powerful reasons why it has cooperated with, and concealed, several years of conspiracy . . . ."[22]

[*482] II. STANDARD OF REVIEW

McKesson moves to dismiss Marion's **[**9]** claims against it pursuant to ***HN1***[] *Federal Rule of Civil Procedure 12(b)(6)* which provides for dismissal of a complaint for failure to state a claim when a plaintiff's "plain statement" lacks enough substance to show that it is entitled to relief.[23] On a motion to dismiss, the Court "consider[s] plausibility, not probability . . . ."[24] A claim is plausible when the facts pled "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[25] Plaintiffs are not required "to plead facts that, if true, definitely rule out all possible innocent explanations."[26] "But there is a difference between allegations that stand on well-pleaded facts and allegations that stand on nothing more than supposition."[27] "[J]udging the sufficiency of a pleading is a context-dependent exercise."[28] In the antitrust context, a complaint must contain "enough factual matter (taken as true) to suggest that an agreement was made."[29]

III. DISCUSSION

A. FAILURE TO STATE A SHERMAN ACT CLAIM

McKesson argues that Marion cannot state a Sherman Act claim against it merely by alleging that McKesson "should have known about the conspiracy and . . . did not do enough to counteract it."[30] Indeed, to state a *Section 1* claim against McKesson, Marion **[**10]** must allege "some form of concerted action . . ., in other words, a unity of

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[18] *Id.* ¶¶ 92-95.

[19] *Id.* ¶¶ 96-99 and 102-104.

[20] *Id.* ¶ 105.

[21] *Id.* ¶ 123.

[22] *Id.* ¶ 112.

[23] *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

[24] *In re Lipitor Antitrust Litig., 868 F.3d 231, 260 (3d Cir. 2017)*; *see also* *Twombly, 550 U.S. at 570* (holding that ***HN2***[] a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face").

[25] *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 556*).

[26] *In re Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 753 (E.D. Pa. 2014)*.

[27] *Finkelman v. Nat'l Football League, 810 F.3d 187, 201 (3d Cir. 2016)*.

[28] *W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 98 (3d Cir. 2010)*.

[29] *Twombly, 550 U.S. at 556*.

[30] McKesson Mem. in Support of Mot. to Dismiss Marion Pls.' Am. Compl. at 8.

purpose or a common design and understanding or a meeting of minds or a conscious commitment to a common scheme . . . ."[31] "[T]he issue is whether the pleading delineates to some sufficiently specific degree that a defendant purposefully joined and participated in the conspiracy."[32] ***HN3***[] A *Section 1* claim will not be "considered adequately pled because of the bare possibility that discovery *might* unearth direct evidence of an agreement."[33] Marion must "state enough facts to 'raise a reasonable expectation that discovery will reveal evidence of illegal agreement,' even if the court believes such proof is improbable."[34]

[*483] An agreement may be shown "by alleging direct or circumstantial evidence, or a combination of the two."[35] Marion's claims against McKessson do not rest on direct evidence of an agreement.[36] In its second amended complaint, Marion asserts that "circumstantial evidence of tacit McKesson cooperation and concealment is sufficient as a matter of law plausibly to allege McKesson as a co-conspirator."[37] Marion maintains that it has plausibly alleged that McKesson "tacitly or expressly worked in parallel with [the manufacturer-level **[**11]** conspiracy] to provide the concealment essential for the conspiracy's continuance . . . ."[38]

McKesson argues that Marion has not met its obligation to plead parallel conduct because McKesson is "a distributor . . . situated at a different level of the supply chain from the manufacturers and fulfills a wholly different function from the manufacturers . . . ."[39] Indeed, in its second amended complaint, Marion makes no explicit allegations of parallel conduct by McKesson. Marion alleges only that McKesson, like the manufacturer Defendants, saw increased profits because of McKesson's "routine percentage mark ups of above-competitive pricing" and "unlawful inflation of pricing across the generic drug industry."[40] However, Marion has not directed the Court to any authority that would support the proposition that McKesson's conduct — pricing generic drugs for resale *after* purchase from the manufacturer Defendants — was parallel to the manufacturer Defendants' conduct simply because each are alleged to have seen increased profits. Marion has not plausibly alleged that McKesson engaged in parallel conduct.

Even if Marion's allegations were enough to plead parallel conduct, its second **[**12]** amended complaint would still fall short of stating a Sherman Act claim against McKesson. "[***HN5***[] A] claim based on parallel — even consciously parallel — conduct alone would be insufficient to survive dismissal . . . ."[41] Marion's "allegations of

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[31] *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 315 (3d Cir. 2010)* (citations and internal quotation marks omitted).

[32] *In re Processed Egg Prods. Antitrust Litig., 821 F. Supp. 2d 709, 720 (E.D. Pa. 2011)*.

[33] *Ins. Brokerage, 618 F.3d at 324* (emphasis added).

[34] *SigmaPharm, Inc. v. Mut. Pharm. Co., 772 F. Supp. 2d 660, 669 (E.D. Pa. 2011)* (quoting *Twombly, 550 U.S. at 556*), *aff'd 454 F. App'x 64 (3d Cir. 2011)*.

[35] *W. Penn Allegheny, 627 F.3d at 99*.

[36] Marion only speculates that documents discovered by the State Attorneys General "*may* reveal direct evidence of McKesson's knowledge of the conspiracy and (a) its express or tacit cooperation with the conspiracy; and (b) its concealment of the conspiracy." Marion Second Am. Compl. ¶ 72 (emphasis added).

[37] *Id.* ¶ 113. Of course, ***HN4***[] courts are not bound to accept as true legal conclusions couched as factual allegations. *Twombly, 550 U.S. at 555, 564*.

[38] Marion Opp'n to McKesson Mot. to Dismiss at 7.

[39] McKesson Mem. in Support of Mot. to Dismiss Marion Pls.' Am. Compl. at 11.

[40] Marion Second Am. Compl. ¶ 73; *see also id.* ¶ 109 (quoting 10-K forms McKesson filed with the U.S. Securities and Exchange Commission: "we benefit when the manufacturers increase their prices as we sell our existing inventory at the new higher prices").

parallel conduct . . . must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."[42]

> For circumstantial evidence of an agreement, . . . a plaintiff must allege both parallel conduct and something "more" . . . . This "more" could include evidence (1) "that the defendant had a motive to enter into a . . . conspiracy," (2) "that the defendant acted contrary to its interests," **[*484]** or (3) "implying a traditional conspiracy."[43]

Although Marion alleges that "[m]ultiple plus factors plausibly suggest" a "meeting of the minds" between McKesson and manufacturer Defendants,[44] the requisite "more" is missing from Marion's second amended complaint. Marion alleges in conclusory manner that "the largest Defendant manufacturers . . . have enlisted tacitly or explicitly distributor McKesson as a cooperating co-conspirator . . . ."[45] But Marion does not allege how McKesson was "enlisted" **[**13]** to cooperate in the alleged conspiracy. The second amended complaint includes no factual allegations that would give substance to McKesson's purported role in the alleged conspiracy. "***HN6***[] [S]prinkling a complaint with conclusory assertions that a party was a 'participant in coordinated conduct' or a 'conspirator' or acted in 'concert' with others does not make the requisite showing of entitlement to relief mandated by *Rule 8(a)(2)*."[46]

Marion asserts that McKesson "facilitated its cooperation with, and concealment of, the overarching conspiracy" through "the movement of officers between McKesson and additional central conspirators Mylan and Teva . . . ."[47] Marion alleges that it was "likely" that a former Mylan employee "carried his intimate knowledge of the overarching conspiracy with him to McKesson"[48] and that a second former Mylan employee hired by McKesson "likely had knowledge of the [Mylan's] pricing of" certain Mylan products.[49] Marion alleges that a third former Mylan employee hired by non-Defendant McKesson Canada "provides . . . another ready window into Mylan's participation in the overarching conspiracy"[50] and that another former Mylan employee hired by McKesson Canada "was likely aware of his **[**14]** employer's collusion."[51] However, Marion offers no facts to show how the "likely" knowledge of these former Mylan employees creates a reasonable inference that McKesson agreed to participate in the alleged conspiracy to allocate the market for and fix the prices of certain generic pharmaceutical products. Nor has Marion shown how the individuals alleged to have previously worked for McKesson and who now work for manufacturer Defendants[52] make McKesson's participation in the manufacturer Defendants' alleged conspiracy any more likely.[53]

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[41] *Lifewatch Servs. Inc. v. Highmark Inc., 902 F.3d 323, 335 (3d Cir. 2018)* (citing *Ins. Brokerage, 618 F.3d at 321*).

[42] *Twombly, 550 U.S. at 557*.

[43] *Lifewatch Servs., 902 F.3d at 333* (quoting *Ins. Brokerage, 618 F.3d at 321-22*).

[44] Marion Second Am. Compl. ¶ 123.

[45] *Id.* ¶ 7.

[46] *In re Pressure Sensitive Labelstock Antitrust Litig., 566 F. Supp. 2d 363, 376 (M.D. Pa. 2008)*.

[47] Marion Second Am. Compl. ¶ 87.

[48] *Id.* ¶ 92.

[49] *Id.* ¶ 95.

[50] *Id.* ¶ 94.

[51] *Id.* ¶ 93.

[52] *Id.* ¶¶ 96-104 (alleging former McKesson employees hired by manufacturer Defendants Mylan and Teva provided McKesson with "ready source[s] of information" regarding the alleged conspiracy).

[*485] The allegations of employee movement between McKesson and certain manufacturer Defendants are insufficiently specific to sustain Marion's *Section 1* claim against McKesson.

Marion alleges that it is "plausible" that McKesson cooperated with the alleged conspiracy because of "its close relationship with co-conspirators Heritage" and two Heritage executives who have pled guilty to engaging in price fixing and market allocation.[54] Marion contends that Heritage told another manufacturer Defendant not to bid for McKesson's business.[55] McKesson responds that "there is nothing suspicious" about a relationship between a distributor and a manufacturer.[56] **[**15]** Marion has not pleaded sufficient facts regarding McKesson's alleged relationship with Heritage to render plausible its claim that McKesson was cooperating in the alleged conspiracy with the manufacturer Defendants.[57]

Responding to McKesson's motion, Marion also argues that McKesson had an "exceptionally strong motive" to conspire,[58] echoing its allegation that "McKesson is certainly strongly financially motivated to cooperate with, and conceal, the conspiracy."[59] Marion's second amended complaint cites "billions of dollars of additional . . . margin[s]" McKesson has made each year since at least 2013 due to "its routine percentage mark-up" of the manufacturer Defendants' generic drug prices.[60] But "[p]rofit is a legitimate motive in pricing decisions, and something more is required before a court can conclude that competitors conspired to fix pric[es]."[61] Without more, McKesson's pricing structure is not enough to plead a plus factor suggestive of McKesson's participation in the alleged manufacturer conspiracy.

Marion also alleges that McKesson has "acted contrary to its independent, rational economic self-interest . . . by continually accepting large, unlawful price increases **[**16]** and submitting to reduced bidding . . . ."[62] The Third Circuit has recognized that a company's actions against its self-interest can constitute a plus factor.[63] But Marion' contention that McKesson acted against its own economic interest is contrary to the above-cited allegation that McKesson profited from the alleged increase in generic drug prices. Further, Marion has not alleged facts to show

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[53] *Cf. Hall v. United Air Lines, Inc., 296 F. Supp. 2d 652, 662 (E.D.N.C. 2003)* (finding on summary judgment that evidence that three executives were "former employees of airlines that were involved in prior antitrust litigation" was insufficient to establish a link between the alleged antitrust conspiracy and the defendant in the absence of evidence that the former employees "were involved in the alleged conspiratorial activity while they were employed by the other defendant airlines, or that they somehow implemented the conspiracy once they came to work for" the defendant airline). *But see In re Blood Reagents Antitrust Litig., 756 F. Supp. 2d 623, 632 (E.D. Pa. 2010)* (finding allegations of conspiracy were made more plausible by allegations that defendants hired high-ranking employees from one another because of the "personal networks and relationships that these employees brought with them").

[54] Marion Second Am. Compl. ¶ 84.

[55] *Id.* ¶ 85.

[56] McKesson Mem. in Support of Mot. to Dismiss Marion Pls.' Am. Compl. at 14.

[57] *See Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* ("[T]hat a manufacturer and its distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are not making independent pricing decisions.")

[58] Marion Opp'n to McKesson Mot. to Dismiss at 8.

[59] Marion Second Am. Compl. ¶ 73.

[60] *Id.*; *see also id.* ¶ 123.

[61] *In re Baby Food Antitrust Litig., 166 F.3d 112, 134-35 (3d Cir. 1999)*.

[62] Marion Second Am. Compl. ¶ 123.

[63] *In re Flat Glass Antitrust Litig., 385 F.3d 350, 360 (3d. Cir. 2004)*.

how it was irrational for McKesson to continue purchasing from the manufacturer Defendants or that McKesson had available alternative suppliers.[64] Absent such allegations, Marion has **[*486]** not shown McKesson's actions were so contrary to its own interests that they allow Marion's *Section 1* claim against McKesson to withstand dismissal.

Marion also suggests that McKesson had an opportunity to conspire with manufacturer Defendants because McKesson sponsored and attended trade association events.[65] However, the second amended complaint alleges only that "some of" the trade shows "were sponsored all or in part by McKesson" and that "any McKesson inquiries at the many 'cozy' trade shows . . . used to facilitate the overarching conspiracy . . . plausibly are sources of intelligence as to anticompetitive conduct."[66] McKesson **[**17]** argues these allegations are insufficient to permit Marion's claims against it to withstand dismissal because "Marion's complaint does not actually put McKesson in the room where the encounters allegedly happened . . . ."[67] The Court agrees. Marion does not identify any specific trade association meeting with McKesson's sponsorship or any McKesson employee with relevant authority who attended a trade association meeting alongside any manufacturer Defendant's representative. Marion's allegations are nothing more than impermissible supposition.

Marion's second amended complaint also alleges that an "industry intelligence-gathering firm" has reported that the Department of Justice "is investigating the extent to which trade associations and industry conferences have been used as forums for collusion among competitors."[68] Marion's allegations that McKesson is "reportedly" under investigation for participation in the alleged conspiracy[69] fall short of supporting a claim that McKesson purposefully joined and participated in the alleged conspiracy. "[I]n the right circumstances, 'government investigations may be used to bolster the plausibility of *§ 1* claims,'"[70] but those circumstances are not present **[**18]** where Marion has alleged only that McKesson *could* be the subject of an investigation. Here too, Marion's allegations amount only to impermissible supposition.

In sum, Marion has not sufficiently alleged any plus factor that would make plausible a claim that McKesson's conduct was the result of an agreement with the manufacturer Defendants "and not the result of independent business decisions . . . ."[71] Marion's *Section 1* claim rests only on McKesson's "likely" awareness of the manufacturer Defendants' alleged conspiracy. This is not enough to permit the Court to infer that McKesson agreed to participate. Indeed, without more, even "[k]nowledge of the existence of an agreement" amongst the manufacturing defendants to restrain competition is not enough to support an inference that McKesson was a co-conspirator.[72] ***HN7***[] "[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to **[*487]** proceed."[73] The Court will dismiss Marion's *Section 1* claim against McKesson.

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[64] McKesson Mem. in Support of Mot. to Dismiss Marion Pls.' Am. Compl. at 13.

[65] Marion Opp'n to McKesson Mot. to Dismiss at 8 (arguing that McKesson's purchasing and other officers and manufacturer Defendants' sales personnel had face-to-face meetings at "many trade association shows, some sponsored by McKesson").

[66] Marion Second Am. Compl. ¶ 82.

[67] McKesson Mem. in Support of Mot. to Dismiss Marion Pls.' Am. Compl. at 15.

[68] Marion Second Am. Compl. at ¶ 120.

[69] *Id.* ¶¶ 118-19.

[70] *In re Generic Pharms. Pricing Antitrust Litig., 338 F. Supp. 3d 404, 452 (E.D. Pa. 2018)*, (quoting *Hinds Cnty., Miss. v. Wachovia Bank N.A., 790 F. Supp. 2d 106, 115 (S.D.N.Y. 2011)*).

[71] *Baby Food, 166 F.3d at 122*.

[72] *Pressure Sensitive Labelstock, 566 F. Supp. 2d at 376*.

[73] *Twombly, 550 U.S. at 558* (citation and internal quotation omitted).

B. ANTITRUST STANDING

Even if Marion's allegations were sufficiently specific to plead a *Section 1* claim against McKesson — and they are not — the Court would still dismiss the claim because **[**19]** Marion has not plausibly alleged that it is a direct purchaser with statutory standing to recover antitrust damages. Pursuant to *Illinois Brick Co. v. Illinois*,[74] ***HN8***[] there is a "general rule that only direct purchasers from antitrust violators may recover damages in antitrust suits."[75] Although Marion characterizes itself as a direct purchaser,[76] the mechanics of the purchasing relationship set forth in the second amended complaint show otherwise. Marion alleges that it purchased generic drugs "through" McKesson. But Marion's use of the word *through* in the second amended complaint does not convert it into a direct purchaser *from* the manufacturer Defendants who are alleged to have fixed the prices and allocated the market for the drugs Marion purchased. Under the allegations in the second amended complaint, Marion is "the *second* purchaser in the chain of distribution" and is thus an indirect purchaser barred from seeking damages under the *Clayton Act*.[77]

Further, Marion's allegations do not permit it to take advantage of the co-conspirator exception to the *Illinois Brick* direct purchaser rule. As the Court of Appeals has explained,

> ***HN10***[] [T]he limited co-conspirator exception **[**20]** to the direct purchaser rule . . . allows an entity to sue its supplier and its supplier's supplier if (1) it sues both at once, *and* (2) the immediate supplier (i.e., the middleman) was so wrapped up in the conspiracy that it would be barred from seeking antitrust relief against the top-level supplier in a suit of its own.[78]

Marion has not alleged that McKesson's involvement in the alleged conspiracy "was so truly complete" that McKesson would be barred as a matter of law from bringing its own suit.[79] Marion's allegation that McKesson "must have known" about the alleged conspiracy is not enough to plead that McKesson is a co-conspirator, so as to exempt Marion from the *Illinois Brick* bar against indirect purchaser claims. Marion's *Section 1* claim against McKesson will be dismissed.

C. STATE LAW CLAIMS

Marion's second amended complaint asserts claims in the alternative under various state laws seeking to recover on behalf of itself and a putative indirect purchaser class.[80] However, Marion seeks to recover **[*488]** under Illinois law on behalf of itself alone, and not on behalf of a class.[81] Although the Illinois Antitrust Act permits Marion to seek

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[74] *431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*.

[75] *Howard Hess Dental Labs., Inc. v. Dentsply Intern., Inc., 424 F.3d 363, 369 (3d Cir. 2005)*; *see* *Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520, 203 L. Ed. 2d 802 (2019)* ("Our decision in *Illinois Brick* established a bright-line rule that authorizes suits by direct purchasers but bars suits by indirect purchasers.").

[76] Marion Second Am. Compl. ¶ 12.

[77] *Warren Gen. Hosp. v. Amgen, Inc., 643 F.3d 77, 88 (3d Cir. 2011)*; *see also* *Apple, 139 S. Ct. at 1520* ("[***HN9***[] I]ndirect purchasers who are two or more steps removed from the violator in a distribution chain may not sue.").

[78] *Wallach v. Eaton Corp., 837 F.3d 356, 362 n.3 (3d Cir. 2016)* (emphasis in original).

[79] *Howard Hess Dental Labs., Inc., 424 F.3d at 378-79*.

[80] Marion Second Am. Compl. ¶ 139.

to recover on its own behalf,[82] it cannot proceed with its Illinois **[**21]** Antitrust Act claim as an individual for the same reasons that it cannot proceed under the *Sherman Act*.[83] The Illinois antitrust claim, like the federal one, fails to state a claim upon which relief can be granted. Thus, Marion's Illinois Antitrust Act claim against McKesson will be dismissed.

In addition, because Marion does not (and cannot) pursue its Illinois Antitrust Act claim on behalf of a class and because Marion has not alleged that it suffered an injury anywhere else, McKesson argues that Marion lacks standing to bring class claims against McKesson under the laws of any other state.[84] Responding to McKesson's motion, Marion does not dispute that it has not alleged that it operates in or was injured in a state other than Illinois.[85] Rather, Marion argues that it may proceed with its class claims under other state laws because it "indisputably may seek damages for itself under Illinois law" and because it "would also have standing to seek injunctive relief under its federal claims."[86] Marion contends that whether it "may serve as a representative of classes of healthcare providers who have suffered damages in states other than Illinois is a . . . question[ ] which **[**22]** must be decided . . . in the context of the class certification analysis required under *Rule 23 of the Federal Rules of Civil Procedure*."[87]

The Court is faced once again with the "surprisingly difficult question" presented by "[t]he interplay between Article III standing and class standing . . . ."[88] When the Court in this multidistrict litigation was previously confronted with this question, the relevant defendants did not dispute that the relevant plaintiffs had standing to pursue *class* claims under the laws of jurisdictions where they had paid for generic drugs.[89] Under those circumstances, **[*489]** the Court declined to dismiss the relevant plaintiffs' claims on behalf of absent class members for lack of Article III standing. The Court held that it was "both proper and more efficient to consider whether" the named plaintiffs could pursue their state law claims on behalf of the unnamed class members in the context of the *Rule 23* class certification analysis because their state law claims were largely parallel to those of the putative class members.[90] The plaintiffs had alleged enough "to demonstrate a substantial and shared interest in proving that [the relevant]

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[81] *Id.* ¶ 149. The Court previously held in this multidistrict litigation that ***HN11***[] the *Illinois Antitrust Act* prohibits indirect purchaser class actions. *In re Generic Pharms. Pricing Antitrust Litig., 368 F. Supp. 3d 814, 834 (E.D. Pa. 2019)*.

[82] *See* 740 Ill. Comp. Stat. 10/7(2) ("No provision of this Act shall deny any person who is an indirect purchaser the right to sue for damages.").

[83] *See Laughlin v. Evanston Hosp., 133 Ill. 2d 374, 550 N.E. 2d 986, 989-90, 140 Ill. Dec. 861 (Ill. 1990)* (holding that ***HN12***[] the Illinois Act is patterned on the Sherman Act and should be construed as the Sherman Act is); *see also Tamburo v. Dworkin, 601 F.3d 693, 700 (7th Cir. 2010)* (holding the Illinois Antitrust Act "parallels the federal Sherman and Clayton Acts" and finding that the plaintiff's state antitrust claim failed to state a claim where it was based on "the inadequate allegations contained in the federal antirust claim"); *740 Ill. Comp. Stat. Ann. 10/11* ("When the wording of this Act is identical or similar to that of a federal ***antitrust law***, the courts of this State shall use the construction of the federal law by the federal courts as a guide in construing this Act.").

[84] McKesson Mem. in Support of Mot. to Dismiss Marion Pls.' Second Am. Compl. at 20.

[85] Marion Opp'n to McKesson Mot. to Dismiss at 18.

[86] *Id.* at 19.

[87] *Id.* (citation and internal quotation omitted).

[88] *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. 14-md-2503, 2015 U.S. Dist. LEXIS 125999, 2015 WL 5458570, at *13 (D. Mass. Sept. 16, 2015)*.

[89] *Generic Pharms. Pricing, 368 F. Supp. 3d at 828* ("No named Plaintiff seeks relief for itself under the laws of a jurisdiction where it would not have standing.").

[90] *Id. at 831*.

Defendants' alleged unlawful conduct resulted in overpayments for the [relevant] drugs, **[**23]** injuries redressable by an award of damages under the state antitrust, consumer protection and unjust enrichment laws cited in the [relevant plaintiffs'] complaints."[91]

The difference this time is that Marion has not alleged that it has standing for any state law claim that it may bring against McKesson on behalf of a class. Marion has not alleged that it suffered an injury in any state other than Illinois and would be able to assert only an *individual* claim under Illinois law (although it has not successfully done so in the second amended complaint). Because Marion may only proceed as a plaintiff under Illinois law on behalf of itself and because Marion's federal antitrust claim is not sufficiently pled to withstand dismissal, it is appropriate to dismiss Marion's other state law claims as against McKesson.

D. LEAVE TO AMEND

Because Marion has already amended its complaint, it may further amend its complaint "only with the opposing party's written consent or the court's leave."[92] In response to McKesson's motion to dismiss, Marion does not expressly seek leave to amend its *Section 1* claim against McKesson. Marion does ask that the Court **[**24]** grant it "leave to amend to add an additional class representative to allow the [state-law] claims to proceed for states other than Illinois."[93] ***HN13***[] *Rule 15(a)(2) of the Federal Rules of Civil Procedure* directs the Court to "freely give leave [to amend] when justice so requires."[94] Denial "is justified on the grounds of "undue delay, bad faith, prejudice to the opposing party, or futility."[95] So instructed, the Court will not preclude Marion from seeking leave to file a further amended complaint in the event that it is able to allege sufficient facts to state a claim against McKesson consistent with this Opinion.[96] Marion must file a **[*490]** motion for leave to amend prior to filing any amended complaint.

An appropriate Order follows.

ORDER

AND NOW, this 26th day of June 2019, upon consideration of the Motion to Dismiss by Defendants McKesson Corporation and McKesson Medical Surgical, Inc. (collectively, "McKesson") [Doc. No. 44] and the opposition of Plaintiff Marion Diagnostic Center, LLC and Marion Healthcare, LLC (collectively "Marion"), and for the reasons set forth in the accompanying Opinion, it is hereby **ORDERED** that the Motion is **GRANTED**. Counts I through XXX of Marion's Second Amended Complaint are **DISMISSED** as against McKesson.

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91 *Id.*

92 *Fed. R. Civ. P. 15(a)(2)*.

93 Marion Opp'n to McKesson Mot. to Dismiss at 19.

94 *Id.*

95 *Jang v. Boston Sci. Scimed, Inc., 729 F.3d 357, 367 (3d Cir. 2013)*.

96 In its motion, McKesson has also asked that the Court give "full and equal effect to" its February 15, 2019 Order with respect to any of Marion's surviving state law claims. McKesson Mem. in Support of Mot. to Dismiss Marion Pls.' Second Am. Compl. at 20. The Court's February 15 decision addressed the sufficiency of certain state antitrust claims asserted in other complaints in this multidistrict litigation. Because the Court has found that Marion has not sufficiently alleged that it has standing to pursue state antitrust claims on behalf of a class, it will not reach the substance of the other state law claims alleged in Marion's second amended complaint. If Marion decides to file a further amended complaint, it should review the Court's previous decision prior to reasserting any state antitrust claims. *See 368 F. Supp. 3d 814*.

It is further **[**25] ORDERED** that if Marion can allege sufficient facts to state a claim against McKesson, Marion may seek leave to amend its claims against McKesson by filing a motion for leave within 30 days of the Court's disposition of the last of the remaining motions to dismiss that are now pending in Civil Action No. 18-4137.

It is so **ORDERED**.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFE, J.

UNOX, Inc. v. Conway

North Carolina Superior Court, Gaston County

June 28, 2019, Decided

19 CVS 1331

Reporter
2019 NCBC LEXIS 41 *; 2019 NCBC 40; 2019 WL 2721778

UNOX, INC., Plaintiff, v. MICHAEL CONWAY; JAMES EMMERSON; TECNOEKA, INC.; and TECNOEKA, S.R.L., Defendants.

Core Terms

designation, trade secret, complex business, Mandatory, confidential information, proprietary information, material issue, misappropriation, confidential, allegations, misuse, unfair

Counsel: **[*1]** Gray, Layton, Kersh, Solomon, Furr, & Smith, P.A., by William E. Moore, Jr. and Christopher M. Whelchel, for Plaintiff UNOX, Inc.

Bryan Cave Leighton Paisner LLP, by Benjamin F. Sidbury, for Defendants Tecnoeka, Inc. and Tecnoeka, S.R.L.

Marcellino & Tyson PLLC, by Clay Campbell, for Defendants Michael Conway and James Emmerson.

Judges: Louis A. Bledsoe, III, Chief Business Court Judge.

Opinion by: Louis A. Bledsoe, III

Opinion

ORDER AND OPINION ON PLAINTIFF'S OPPOSITION TO DESIGNATION

1. **THIS MATTER** is before the Court on Plaintiff UNOX, Inc.'s ("UNOX") Opposition to Mandatory Complex Business Case Designation and Motion to Vacate Order of Designation ("Opposition"). (Pl. UNOX, Inc.'s Opp'n Mandatory Complex Business Case Designation & Mot. Vacate Order Designation [hereinafter "Opp'n"], ECF No. 9; *see also* Pl. UNOX, Inc.'s Br. Opp'n Mandatory Complex Business Case Designation & Supp. Mot. Vacate Order Designation [hereinafter "Opp'n Br."], ECF No. 10.) For the reasons set forth below, the Court **ALLOWS** the Opposition.

Bledsoe, Chief Judge.

2. This case arises out of a dispute between UNOX and its former employees, Michael Conway ("Conway") and James Emmerson ("Emmerson"). UNOX supplies ovens for the food service industry. **[*2]** In late 2018, Conway and Emmerson defected and opened an American subsidiary of UNOX's Italian competitor, Tecnoeka, S.R.L., known as Tecnoeka, Inc. (together, the "Tecnoeka Defendants"). UNOX now believes that Conway and Emmerson took its confidential information in breach of non-disclosure agreements and gave that information to their new employer to gain an unfair competitive advantage.

3. UNOX initiated this action on April 3, 2019, asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, constructive fraud, and fraud against Conway and Emmerson; for tortious interference with contract against the Tecnoeka Defendants; and for tortious interference with prospective economic advantage, violation of the North Carolina Unfair and Deceptive Trade Practices Act, civil conspiracy and facilitating fraud, aiding and abetting, and punitive damages against all Defendants. The Complaint also requests preliminary and permanent injunctive relief. (*See* Compl., ECF No. 3.)

4. The Tecnoeka Defendants timely filed a Notice of Designation on May 2, 2019. (Notice Designation Mandatory Complex Business Case [hereinafter "NOD"], **[*3]** ECF No. 7.) They asserted that designation as a mandatory complex business case would be proper because this action raises material issues related to disputes involving ***antitrust law*** and trade secrets under *N.C. Gen. Stat. §§ 7A-45.4(a)(3)* and *(8)*. (NOD 1-2.)

5. Based on the Notice of Designation, this case was designated as a complex business case by the Chief Justice of the Supreme Court of North Carolina on May 3, 2019, (Designation Order, ECF No. 1), and assigned by the undersigned to the Honorable Adam M. Conrad on the same day, (Assignment Order, ECF No. 2).

6. UNOX timely filed the Opposition on May 31, 2019, contending that the designation was not proper because its claims do not involve ***antitrust law*** or trade secrets. (Opp'n 2.) The Tecnoeka Defendants filed their Response to the Opposition on June 5, 2019. (Defs.' Resp. Pl.'s Opp'n Mandatory Complex Business Case Designation [hereinafter "Resp."], ECF No. 15.) This matter is now ripe for determination.

7. "For a case to be [designated] as a mandatory complex business case, the pleading upon which designation is based must raise a material issue that falls within one of the categories specified in *section 7A-45.4*." *Composite Fabrics of Am., LLC v. Edge Structural Composites, Inc., 2016 NCBC LEXIS 11, at *25 (N.C. Super. Ct. Feb. 5, 2016)*. "The inquiry of whether a case involves the requisite disputes **[*4]** falling with[in] the statutory requirements has not been historically confined to the actual causes of action asserted in a complaint[] but has also examined the underlying factual allegations." *Cornerstone Health Care, P.A. v. Moore, 2015 NCBC LEXIS 65, at *7 (N.C. Super. Ct. June 22, 2015)*.

8. The Court begins with *section 7A-45.4(a)(8)*, which permits designation of cases raising a material issue related to "[d]isputes involving trade secrets, including disputes arising under *Article 24 of Chapter 66 of the General Statutes*." The classic example of a dispute involving trade secrets is one for misappropriation of trade secrets. *See* *N.C. Gen. Stat. § 66-153*. On occasion, this Court has held that *section 7A-45.4(a)(8)* also reaches other types of claims, including contract claims, when the complaint puts the existence, ownership, or misuse of alleged trade secrets squarely in dispute. *See Union Corrugating Co. v. Viechnicki*, No. 14 CVS 6240, Order Opp'n Designation Action Mandatory Complex Business Case (N.C. Super. Ct. Sept. 9, 2014) (unpublished). But the Court has never construed the statute so broadly as to permit "designation of an action as a mandatory complex business case based on claims involving generalized confidential or proprietary information"—a fitting description of many claims for breach of restrictive covenants in employment agreements. *Cornerstone Health Care, 2015 NCBC LEXIS 65, at *6*.

9. UNOX's claims fall into this final **[*5]** category. UNOX alleges that Conway and Emmerson were subject to contractual restrictions not to misuse or disclose confidential and proprietary information and that they breached those restrictions by taking and using "product designs and materials, customer lists, techniques, business plans, strategic plans, marketing information and other business and financial information." (Compl. ¶ 26; *see also* Compl. ¶ 13.) UNOX further alleges that all Defendants engaged in unfair or deceptive trade practices by using the unlawfully obtained confidential information to gain a competitive advantage. (Compl. ¶ 84.)

10. Although the nondisclosure agreements include "trade secrets" as a category within the larger definition of UNOX's confidential or proprietary information, (Compl. ¶ 7), the Complaint does not purport to assert a claim for trade-secret misappropriation, nor does it allege that any of UNOX's information at issue in this action is subject to trade-secret protection. In the absence of such allegations, the asserted claims appear to be based on the misuse of generalized confidential or proprietary information. Thus, nothing in the Complaint "suggest[s] that the dispute will

require the **[*6]** Court to resolve material issues involving trade secrets[.]" Stay Alert Safety Servs., Inc. v. Pratt, 2017 NCBC LEXIS 101, at *5-6 (N.C. Super. Ct. Nov. 1, 2017).

11. The Tecnoeka Defendants insist that this is not a garden-variety dispute about a restrictive covenant in an employment agreement. They contend that UNOX drafted its claim under N.C. Gen. Stat. § 75-1.1 to include a freestanding claim for misappropriation of confidential information that is identical to a claim for misappropriation of trade secrets, other than carefully replacing "trade secrets" with "confidential and proprietary information." (Resp. 1.) In their view, "there is no way to prosecute or defend this case without treating [it] as a trade secret dispute." (Resp. 5.)

12. The Court disagrees. The plaintiff is the master of its complaint and free to choose which causes of action it will bring. Here, UNOX chose to allege the misuse of confidential information without also alleging or seeking to establish that the information qualifies as a trade secret. Perhaps UNOX could have pressed for trade-secret protection for some or all of the alleged confidential information at issue, but it did not, and this Court will not designate a case under section 7A-45.4 "merely because the pleadings include factual allegations that arguably touch upon facts that, when **[*7]** read together with other allegations, might have been a basis for a claim that the plaintiff chose not to allege." *Market Am., Inc. v. Doyle*, No. 15 CVS 9658, Order at 3 (N.C. Super. Ct. Feb. 29, 2016) (unpublished).

13. In reaching this decision, two points bear emphasis. First, the Court does not hold that designation under section 7A-45.4(a)(8) depends on the appearance or absence of magic words—such as "trade secret"—in the complaint. Rather, the question is whether the complaint puts the existence, ownership, or misuse of alleged trade secrets at issue. As discussed, even though "trade secrets" are included within the nondisclosure agreements' definition of "confidential or proprietary information," UNOX's claims in this case do not require or rely on a showing that its confidential information qualifies as a trade secret. *See* Stay Alert, 2017 NCBC LEXIS 101, at *5-6; *see also* Cornerstone Health Care, 2015 NCBC LEXIS 65, at *3-5.

14. Second, this is not an invitation to gamesmanship. The decision to assert one cause of action and to leave out another is one that carries with it meaningful and lasting consequences, affecting the elements of proof and the scope of available remedies, among other things. It may even be true, as the Tecnoeka Defendants argue, that "misappropriation of confidential **[*8]** information is not a recognized claim under North Carolina law." (Resp. 5 n.3.)[1] Put simply, having made the strategic choice to avoid application of trade secret laws, UNOX must now take the good with the bad.

15. Accordingly, the Court concludes that this action does not involve a material issue related to a dispute involving trade secrets. *See* Stay Alert, 2017 NCBC LEXIS 101, at *6; *COECO Office Sys., Inc. v. Rowland*, No. 16 CVS 9021, Order Regarding Designation at 1-2 (N.C. Super. Ct. Aug. 26, 2016) (unpublished); *Market Am*., No. 15 CVS 9658, Order at 3-4.

16. Next, the Court turns to N.C. Gen. Stat. § 7A-45.4(a)(3), which permits designation of actions involving a material issue related to "[d]isputes involving ***antitrust law***, including disputes arising under Chapter 75 of the General Statutes that do not arise solely under G.S. 75-1.1 or Article 2 of Chapter 75 of the General Statutes." The Tecnoeka Defendants argue that UNOX's claims for "anti-competitive conduct and activities, as well as an anticompetitive conspiracy," support designation under section 7A-45.4(a)(3). (NOD 4.) UNOX argues that designation under section 7A-45.4(a)(3) is improper because neither common law unfair competition claims nor

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[1] The Court need not and does not opine on whether there is a cause of action for misappropriation of confidential information that is not subject to trade-secret protection. *See* Edgewater Servs., Inc. v. Epic Logistics, Inc., 217 N.C. App. 399, 720 S.E.2d 30, 2011 N.C. App. LEXIS 2494, at *8 n.2 (N.C. Ct. App. Dec. 6, 2011) (unpublished) (questioning the existence of such a claim). If the Tecnoeka Defendants are correct on that point, they may have a basis for a motion to dismiss for failure to state a claim. Regardless, this Court may not convert the claim actually alleged by UNOX into a claim for misappropriation of trade secrets either to save it or to shoehorn it into section 7A-45.4(a)(8).

claims arising under Chapter 75 trigger designation, and the Complaint does not otherwise implicate ***antitrust law***. (Opp'n Br. 3-7.)

17. UNOX is correct. This Court has not historically **[*9]** designated cases based on restrictive covenants in the employment context under *section 7A-45.4(a)(3)* unless "they included additional claims of trade-secret misappropriation or . . . they asserted claims of unfair competition before unfair-competition claims were excluded by amendments to *section 7A-45.4*." *Van Gilder v. Novus Techs., Inc., 2017 NCBC LEXIS 46, at *2-3 (N.C. Super. Ct. May 24, 2017)* (citing *Cornerstone Health Care, 2015 NCBC LEXIS 65, at *6-7)*. Having decided that this action does not involve a dispute regarding trade secrets, the Court concludes that designation under *section 7A-45.4(a)(3)* is improper.

18. **WHEREFORE**, the Court concludes, having considered the NOD, the Complaint, and the arguments of counsel in support of and in opposition to designation, that this action does not qualify as a mandatory complex business case under either *section 7A-45.4(a)(3)* or *section 7A-45.4(a)(8)*, and the Opposition is therefore **ALLOWED**. This action should proceed on the regular civil docket of the Gaston County Superior Court.

19. The Court's ruling is without prejudice to the right of any party other than the Tecnoeka Defendants, if timely, to seek designation of this matter as a mandatory complex business case as provided under *section 7A-45.4*.

SO ORDERED, this the 28th day of June, 2019.

/s/ Louis A. Bledsoe, III

Louis A. Bledsoe, III

Chief Business Court Judge

End of Document

Unox, Inc. v. Conway

Superior Court of North Carolina, Gaston County

June 28, 2019, Decided

19 CVS 1331

Reporter
2019 N.C. Super. LEXIS 267 *

UNOX, INC., Plaintiff, v. MICHAEL CONWAY; JAMES EMMERSON; TECNOEKA, INC.; and TECNOEKA, S.R.L., Defendants.

Core Terms

Designation, trade secret, complex business, Mandatory, confidential information, proprietary information, material issue, misappropriation, confidential, allegations, misuse, unfair

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

Opinion by: Louis A. Bledsoe

Opinion

ORDER AND OPINION ON PLAINTIFF'S OPPOSITION TO DESIGNATION

1. **THIS MATTER** is before the Court on Plaintiff UNOX, Inc.'s ("UNOX") Opposition to Mandatory Complex Business Case Designation and Motion to Vacate Order of Designation ("Opposition"). (Pl. UNOX, Inc.'s Opp'n Mandatory Complex Business Case Designation & Mot. Vacate Order Designation [hereinafter "Opp'n"], ECF No. 9; *see also* Pl. UNOX, Inc.'s Br. Opp'n Mandatory Complex Business Case Designation & Supp. Mot. Vacate Order Designation [hereinafter "Opp'n Br."], ECF No. 10.) For the reasons set forth below, the Court **ALLOWS** the Opposition.

> *Gray, Layton, Kersh, Solomon, Furr, & Smith, P.A., by William E. Moore, Jr. and Christopher M. Whelchel, for Plaintiff UNOX, Inc.*
>
> *Bryan Cave Leighton Paisner LLP, by Benjamin F. Sidbury, for Defendants Tecnoeka, Inc. and Tecnoeka, S.R.L.*
>
> *Marcellino & Tyson PLLC, by Clay Campbell, for Defendants Michael Conway and James Emmerson.*

Bledsoe, Chief Judge.

2. This case arises out of a dispute between UNOX and its former employees, Michael Conway ("Conway") and James Emmerson ("Emmerson"). UNOX supplies ovens for the food service industry. **[*2]** In late 2018, Conway and Emmerson defected and opened an American subsidiary of UNOX's Italian competitor, Tecnoeka, S.R.L., known as Tecnoeka, Inc. (together, the "Tecnoeka Defendants"). UNOX now believes that Conway and Emmerson took its confidential information in breach of non-disclosure agreements and gave that information to their new employer to gain an unfair competitive advantage.

3. UNOX initiated this action on April 3, 2019, asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, constructive fraud, and fraud against Conway and Emmerson; for tortious interference with contract against the Tecnoeka Defendants; and for tortious interference with prospective economic advantage, violation of the North Carolina Unfair and Deceptive Trade Practices Act, civil conspiracy and facilitating fraud, aiding and abetting, and punitive damages against all Defendants. The Complaint also requests preliminary and permanent injunctive relief. (*See* Compl., ECF No. 3.)

4. The Tecnoeka Defendants timely filed a Notice of Designation on May 2, 2019. (Notice Designation Mandatory Complex Business Case [hereinafter "NOD"], **[*3]** ECF No. 7.) They asserted that designation as a mandatory complex business case would be proper because this action raises material issues related to disputes involving ***antitrust law*** and trade secrets under *N.C. Gen. Stat. §§ 7A-45.4(a)(3)* and *(8)*. (NOD 1-2.)

5. Based on the Notice of Designation, this case was designated as a complex business case by the Chief Justice of the Supreme Court of North Carolina on May 3, 2019, (Designation Order, ECF No. 1), and assigned by the undersigned to the Honorable Adam M. Conrad on the same day, (Assignment Order, ECF No. 2).

6. UNOX timely filed the Opposition on May 31, 2019, contending that the designation was not proper because its claims do not involve ***antitrust law*** or trade secrets. (Opp'n 2.) The Tecnoeka Defendants filed their Response to the Opposition on June 5, 2019. (Defs.' Resp. Pl.'s Opp'n Mandatory Complex Business Case Designation [hereinafter "Resp."], ECF No. 15.) This matter is now ripe for determination.

7. "For a case to be [designated] as a mandatory complex business case, the pleading upon which designation is based must raise a material issue that falls within one of the categories specified in *section 7A-45.4*." *Composite Fabrics of Am., LLC v. Edge Structural Composites, Inc., 2016 NCBC LEXIS 11, at *25 (N.C. Super. Ct. Feb. 5, 2016)*. "The inquiry of whether a case involves the requisite disputes **[*4]** falling with[in] the statutory requirements has not been historically confined to the actual causes of action asserted in a complaint[] but has also examined the underlying factual allegations." *Cornerstone Health Care, P.A. v. Moore, 2015 NCBC LEXIS 65, at *7 (N.C. Super. Ct. June 22, 2015)*.

8. The Court begins with *section 7A-45.4(a)(8)*, which permits designation of cases raising a material issue related to "[d]isputes involving trade secrets, including disputes arising under *Article 24 of Chapter 66 of the General Statutes*." The classic example of a dispute involving trade secrets is one for misappropriation of trade secrets. *See* *N.C. Gen. Stat. § 66-153*. On occasion, this Court has held that *section 7A-45.4(a)(8)* also reaches other types of claims, including contract claims, when the complaint puts the existence, ownership, or misuse of alleged trade secrets squarely in dispute. *See Union Corrugating Co. v. Viechnicki*, No. 14 CVS 6240, Order Opp'n Designation Action Mandatory Complex Business Case (N.C. Super. Ct. Sept. 9, 2014) (unpublished). But the Court has never construed the statute so broadly as to permit "designation of an action as a mandatory complex business case based on claims involving generalized confidential or proprietary information"-a fitting description of many claims for breach of restrictive covenants in employment agreements. *Cornerstone Health Care, 2015 NCBC LEXIS 65, at *6*.

9. UNOX's claims fall into this final **[*5]** category. UNOX alleges that Conway and Emmerson were subject to contractual restrictions not to misuse or disclose confidential and proprietary information and that they breached those restrictions by taking and using "product designs and materials, customer lists, techniques, business plans, strategic plans, marketing information and other business and financial information." (Compl. ¶ 26; *see also* Compl. ¶ 13.) UNOX further alleges that all Defendants engaged in unfair or deceptive trade practices by using the unlawfully obtained confidential information to gain a competitive advantage. (Compl. ¶ 84.)

10. Although the nondisclosure agreements include "trade secrets" as a category within the larger definition of UNOX's confidential or proprietary information, (Compl. ¶ 7), the Complaint does not purport to assert a claim for trade-secret misappropriation, nor does it allege that any of UNOX's information at issue in this action is subject to trade-secret protection. In the absence of such allegations, the asserted claims appear to be based on the misuse of generalized confidential or proprietary information. Thus, nothing in the Complaint "suggest[s] that the dispute will require the **[*6]** Court to resolve material issues involving trade secrets[.]" *Stay Alert Safety Servs., Inc. v. Pratt, 2017 NCBC LEXIS 101, at *5-6 (N.C. Super. Ct. Nov. 1, 2017)*.

11. The Tecnoeka Defendants insist that this is not a garden-variety dispute about a restrictive covenant in an employment agreement. They contend that UNOX drafted its claim under *N.C. Gen. Stat. § 75-1.1* to include a freestanding claim for misappropriation of confidential information that is identical to a claim for misappropriation of trade secrets, other than carefully replacing "trade secrets" with "confidential and proprietary information." (Resp. 1.) In their view, "there is no way to prosecute or defend this case without treating [it] as a trade secret dispute." (Resp. 5.)

12. The Court disagrees. The plaintiff is the master of its complaint and free to choose which causes of action it will bring. Here, UNOX chose to allege the misuse of confidential information without also alleging or seeking to establish that the information qualifies as a trade secret. Perhaps UNOX could have pressed for trade-secret protection for some or all of the alleged confidential information at issue, but it did not, and this Court will not designate a case under *section 7A-45.4* "merely because the pleadings include factual allegations that arguably touch upon facts that, when **[*7]** read together with other allegations, might have been a basis for a claim that the plaintiff chose not to allege." *Market Am., Inc. v. Doyle*, No. 15 CVS 9658, Order at 3 (N.C. Super. Ct. Feb. 29, 2016) (unpublished).

13. In reaching this decision, two points bear emphasis. First, the Court does not hold that designation under *section 7A-45.4(a)(8)* depends on the appearance or absence of magic words-such as "trade secret"-in the complaint. Rather, the question is whether the complaint puts the existence, ownership, or misuse of alleged trade secrets at issue. As discussed, even though "trade secrets" are included within the nondisclosure agreements' definition of "confidential or proprietary information," UNOX's claims in this case do not require or rely on a showing that its confidential information qualifies as a trade secret. *See* *Stay Alert, 2017 NCBC LEXIS 101, at *5-6*; *see also* *Cornerstone Health Care, 2015 NCBC LEXIS 65, at *3-5*.

14. Second, this is not an invitation to gamesmanship. The decision to assert one cause of action and to leave out another is one that carries with it meaningful and lasting consequences, affecting the elements of proof and the scope of available remedies, among other things. It may even be true, as the Tecnoeka Defendants argue, that "misappropriation of confidential **[*8]** information is not a recognized claim under North Carolina law." (Resp. 5 n.3.)[1] Put simply, having made the strategic choice to avoid application of trade secret laws, UNOX must now take the good with the bad.

15. Accordingly, the Court concludes that this action does not involve a material issue related to a dispute involving trade secrets. *See* *Stay Alert, 2017 NCBC LEXIS 101, at *6*; *COECO Office Sys., Inc. v. Rowland*, No. 16 CVS 9021, Order Regarding Designation at 1-2 (N.C. Super. Ct. Aug. 26, 2016) (unpublished); *Market Am.*, No. 15 CVS 9658, Order at 3-4.

16. Next, the Court turns to *N.C. Gen. Stat. § 7A-45.4(a)(3)*, which permits designation of actions involving a material issue related to "[d]isputes involving ***antitrust law***, including disputes arising under Chapter 75 of the General Statutes that do not arise solely under *G.S. 75-1.1* or Article 2 of Chapter 75 of the General Statutes." The Tecnoeka Defendants argue that UNOX's claims for "anti-competitive conduct and activities, as well as an anticompetitive conspiracy," support designation under *section 7A-45.4(a)(3)*. (NOD 4.) UNOX argues that designation under *section 7A-45.4(a)(3)* is improper because neither common law unfair competition claims nor claims arising under Chapter 75 trigger designation, and the Complaint does not otherwise implicate ***antitrust law***. (Opp'n Br. 3-7.)

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[1] The Court need not and does not opine on whether there is a cause of action for misappropriation of confidential information that is not subject to trade-secret protection. *See* *Edgewater Servs., Inc. v. Epic Logistics, Inc., 2011 N.C. App. LEXIS 2494, at *8 n.2 (N.C. Ct. App. Dec. 6, 2011)* (unpublished) (questioning the existence of such a claim). If the Tecnoeka Defendants are correct on that point, they may have a basis for a motion to dismiss for failure to state a claim. Regardless, this Court may not convert the claim actually alleged by UNOX into a claim for misappropriation of trade secrets either to save it or to shoehorn it into *section 7A-45.4(a)(8)*.

17. UNOX is correct. This Court has not historically **[*9]** designated cases based on restrictive covenants in the employment context under *section 7A-45.4(a)(3)* unless "they included additional claims of trade-secret misappropriation or . . . they asserted claims of unfair competition before unfair-competition claims were excluded by amendments to *section 7A-45.4*." *Van Gilder v. Novus Techs., Inc., 2017 NCBC LEXIS 46, at *2-3 (N.C. Super. Ct. May 24, 2017)* (citing *Cornerstone Health Care, 2015 NCBC LEXIS 65, at *6-7)*. Having decided that this action does not involve a dispute regarding trade secrets, the Court concludes that designation under *section 7A-45.4(a)(3)* is improper.

18. **WHEREFORE**, the Court concludes, having considered the NOD, the Complaint, and the arguments of counsel in support of and in opposition to designation, that this action does not qualify as a mandatory complex business case under either *section 7A-45.4(a)(3)* or *section 7A-45.4(a)(8)*, and the Opposition is therefore **ALLOWED**. This action should proceed on the regular civil docket of the Gaston County Superior Court.

19. The Court's ruling is without prejudice to the right of any party other than the Tecnoeka Defendants, if timely, to seek designation of this matter as a mandatory complex business case as provided under *section 7A-45.4*.

SO ORDERED, this the 28th day of June, 2019.

/s/ Louis A. Bledsoe, III

Louis A. Bledsoe, III

Chief Business Court Judge

In re Loestrin 24 FE Antitrust Litig.

United States District Court for the District of Rhode Island

July 2, 2019, Decided

MDL No. 13-2472-WES-PAS; Master File No. 1:13-md-2472

Reporter

2019 U.S. Dist. LEXIS 118308 *; 2019-2 Trade Cas. (CCH) P80,849

IN RE LOESTRIN 24 FE ANTITRUST LITIGATION; THIS DOCUMENT RELATES TO: ALL ACTIONS

Subsequent History: Class certification granted by, in part, Class certification denied by, in part, Dismissed by, in part, Motion granted by, in part, Motion denied by, in part *In re Loestrin 24 Fe Antitrust Litig., 2019 U.S. Dist. LEXIS 182299 (D.R.I., Oct. 17, 2019)*

Prior History: *Rochester Drug Co-Operative, Inc. v. Warner Chilcott Co. (In re Loestrin 24 Fe Antitrust Litig.), 814 F.3d 538, 2016 U.S. App. LEXIS 3049, Trade Reg. Rep. (CCH) P 79508 (1st Cir. R.I., Feb. 22, 2016)*

Core Terms

generic, Purchasers, damages, brand, class member, Defendants', prices, calculation, but-for, overcharges, antitrust, Rebuttal, methodology, class certification, manufacturer, class-wide, forecasts, class action, aggregate, reliable, putative class, demonstrates, predominate, class period, courts, robust, scenarios, discount, suppress, certify

LexisNexis® Headnotes

Evidence > Admissibility > Expert Witnesses

HN1[] **Admissibility, Expert Witnesses**

The court serves as the gatekeeper for expert testimony by ensuring that it both rests on a reliable foundation and is relevant to the task at hand. The evidence's proponent has the burden of establishing both its reliability and its relevance.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN2[] **Expert Witnesses, Daubert Standard**

Daubert neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance. Instead, it demands only that the proponent of the evidence show that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion.

Civil Procedure > Remedies > Damages

HN3[] Remedies, Damages

The use of aggregate damages calculations is well established in federal court and implied by the very existence of the class action mechanism itself.

Evidence > Types of Evidence > Testimony > Expert Witnesses

Evidence > Weight & Sufficiency

HN4[] Testimony, Expert Witnesses

Objections to the factual underpinnings of an expert's investigation often go to the weight of the proffered testimony, not to its admissibility.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > Remedies

HN5[] Purchasers, Direct Purchasers

Purchasers are injured at the point in time they incur the overcharge. Thus, even if generic bypass may have occurred in a but-for world, this does not negate injury. Direct purchasers may recover the full amount of overcharges. Overcharges are the principal measure of damages for plaintiffs injured as customers.

Antitrust & Trade Law > Regulated Practices > Private Actions > Remedies

HN6[] Private Actions, Remedies

Industry manufacturers have a lot of interest in maintaining the accuracy of their forecasts, and such forecasts reflect their own study of the market and analogous experiences of other drugs. The use of defendants' own forecasts to model a but-for world has been held to be a sound economic methodology.

Antitrust & Trade Law > Regulated Practices > Private Actions > Remedies

HN7[] Private Actions, Remedies

Damages award should not be offset by the amount of any purchases that would not have been made in a "but for" world.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN8[] Prerequisites for Class Action, Adequacy of Representation

To certify a class, the court must undertake a rigorous analysis to determine whether the putative class satisfies each of the four prerequisites set forth in *Fed. R. Civ. P. 23(a)*: numerosity, commonality, typicality, and adequacy of representation. In addition, the putative class must also demonstrate that it satisfies one of the requirements set forth in *Fed. R. Civ. P. 23(b)*, that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. *Fed. R. Civ. P. 23(b)(3)*. To meet this requirement, the putative class must demonstrate that the fact of antitrust impact can be established through common proof and that any resulting damages would likewise be established by sufficiently common proof.

Civil Procedure > Special Proceedings > Class Actions > Prerequisites for Class Action

HN9[] Class Actions, Prerequisites for Class Action

Fed. R. Civ. P. 23 does not set forth a mere pleading standard but rather, a plaintiff must affirmatively demonstrate its compliance with the Rule. To do so, a plaintiff has the burden to demonstrate by a preponderance of the evidence that *Rule 23*'s prerequisites to class certification are satisfied. Merits questions may be considered to the extent — but only to the extent — that they are relevant to determining whether the *Rule 23* prerequisites for class certification are satisfied. The court must determine whether the plaintiff's burden is satisfied under *Rule 23* even when that requires inquiry into the merits of the claim.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN10[] Prerequisites for Class Action, Numerosity

Under *Fed. R. Civ. P. 23(a)(1)*, to certify a class, a court must determine that the class is so numerous that joinder of all members is impracticable. *Fed. R. Civ. P. 23(a)(1)*. While there is no strict minimum number of plaintiffs required to demonstrate impracticability, there is a general presumption that if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of *Rule 23(a)* has been met.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN11[] Prerequisites for Class Action, Numerosity

In determining whether joinder would be impracticable, district courts may consider the following non-exhaustive factors, in addition to the size of the class: judicial economy, the claimants' ability and motivation to litigate as joined plaintiffs, the financial resources of class members, the geographic dispersion of class members, the ability to identify future claimants, and whether the claims are for injunctive relief or for damages. The court may also take into account such subjective factors as the geographic location of proposed class members, the nature of the action, and matters of judicial economy. Courts have certified smaller classes in generic suppression cases where judicial economy favors proceeding as a class action.

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

HN12[] Standing, Requirements

The considerations for establishing antitrust standing are: (1) the causal connection between the alleged antitrust violation and harm to the plaintiff; (2) an improper motive; (3) the nature of the plaintiff's alleged injury and whether the injury was of a type that Congress sought to redress with the antitrust laws; (4) the directness with which the alleged market restraint caused the asserted injury; (5) the speculative nature of the damages; and (6) the risk of duplicative recovery or complex apportionment of damages.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN13[] Prerequisites for Class Action, Commonality

Under *Fed. R. Civ. P. 23(a)(2)*, commonality requires a plaintiff to demonstrate that the class members have suffered the same injury. A plaintiff's claims must depend upon a common contention. And, that common contention must be of such a nature that it is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN14[] Prerequisites for Class Action, Typicality

Under *Fed. R. Civ. P. 23(a)(3)*, a court may certify a class only where the claims or defenses of the representative parties are typical of the claims or defenses of the class. *Fed. R. Civ. P. 23(a)(3)*. Many courts have found typicality if the claims or defenses of the representatives and the members of the class stem from a single event or a unitary course of conduct, or if they are based on the same legal or remedial theory. Other courts have used *Rule 23(a)(3)* to screen out class actions in which the legal or factual position of the representatives is markedly different from that of other members of the class even though common issues of law or fact are present. Moreover, *Fed. R. Civ. P. 23(a)(4)* provides for certification only where the representative parties will fairly and adequately protect the interests of the class. *Fed. R. Civ. P. 23(a)(4)*. The moving party is tasked with demonstrating that the interests of the representative party will not conflict with the interests of any of the class members. But interests need not be identical; only fundamental conflicts that go to the heart of the litigation prevent a plaintiff from meeting the *Rule 23(a)(4)* adequacy requirement.

Antitrust & Trade Law > Regulated Practices > Private Actions > Remedies

HN15[] Private Actions, Remedies

An assignee stands in the shoes of his assignor, deriving the same but no greater rights and remedies than the assignor then possessed.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN16[] Prerequisites for Class Action, Predominance

Certification under *Fed. R. Civ. P. 23(b)(3)*, requires a putative class to demonstrate that the questions of law or fact common to class members predominate over any questions affecting only individual members. *Fed. R. Civ. P.*

23(b)(3). This inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. To meet this requirement, the putative class must demonstrate that the fact of antitrust impact can be established through common proof and that any resulting damages would likewise be established by sufficiently common proof. An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN17[] **Prerequisites for Class Action, Predominance**

In order to satisfy *Fed. R. Civ. P. 23(b)(3)*'s predominance requirement, the plaintiffs must include some means of determining that each member of the class was in fact injured. Proof of injury, also called injury-in-fact, is a required element of a plaintiff's case in a class action. At the class-certification stage, plaintiffs must only show that antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual members.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN18[] **Class Actions, Certification of Classes**

Whether a product hop led the plaintiffs to purchase more of the expensive brand product over the cheaper generic product is a fact question for the jury, not to be determined on class certification.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN19[] **Class Actions, Certification of Classes**

The prospect that a handful of identifiable class members may be uninjured is not a barrier to class certification.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN20[] **Class Actions, Certification of Classes**

Fed. R. Civ. P. 23(b)(3) carries with it the additional requirement that a putative class demonstrate that damages can be calculated on a class-wide basis. The damages model must be consistent with the putative class's liability case, that is, the defendants cannot be held liable for damages beyond the injury they caused. It is well-established that the individuation of damages in consumer class actions is rarely determinative under *Rule 23(b)(3)*. Rather, where common questions predominate regarding liability, courts generally find the predominance requirement to be satisfied even if individual damages issues remain.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN21[] **Class Actions, Certification of Classes**

Damages may be demonstrated by a common methodology applicable to the class as a whole.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN22[] **Class Actions, Certification of Classes**

To earn certification, a putative class must establish that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. *Fed. R. Civ. P. 23(b)(3)*. In undertaking this analysis, the court examines four factors: (A) The class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

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Judges: William E. Smith, Chief United States District Judge.

Opinion by: William E. Smith

Opinion

OPINION AND ORDER

WILLIAM E. SMITH, Chief Judge.

In this putative class action, the Direct Purchaser Plaintiffs ("DPPs") allege that Defendants Warner Chilcott (US), LLC, Warner Chilcott Sales (US), LLC, Warner Chilcott Company LLC, Warner Chilcott plc, and Warner Chilcott Limited (collectively, "Warner Chilcott") and Defendants Watson Pharmaceuticals, Inc. and Watson Laboratories, Inc. (together, "Watson"[1] and collectively, with Warner Chilcott, "Defendants") violated federal law through a series of actions intended to delay and suppress generic competition for the oral contraceptive Loestrin 24 Fe ("Loestrin 24").[2] This decision resolves the DPPs' pending Motion for Class Certification.[3] See generally Direct Purchaser **[*10]** Class Pls.' Mot. for Class Certification, ECF No. 513. For the reasons discussed below, the DPPs'

[1] Warner Chilcott and Watson are part of the multinational corporation, Allergan plc. See Direct Purchaser Class Pls.' Third Am. Consolidated Class Action Compl. and Jury Demand ("DPP Compl.") ¶¶ 18-28, ECF No. 380.

[2] Loestrin 24 is an oral contraceptive with 24 tablets containing 1 mg norethindrone acetate and 20 mcg ethinyl estradiol and 4 placebo tablets with iron. DPP Compl. ¶ 109.

[3] A separate decision on the End-Payor Plaintiffs' Motion for Class Certification, ECF No. 526, is forthcoming.

Motion for Class Certification is GRANTED, and Defendants' Motion to Exclude the Opinions and Testimony of Dr. Leitzinger, ECF No. 570, is DENIED.

I. Background

The Court constrains its recitation to the factual and procedural background relevant to the Motion for Class Certification.[4]

The DPPs are corporate entities that purchased brand and/or generic Loestrin 24 directly from Warner Chilcott or a non-defendant generic manufacturer. Direct Purchaser Class Pls.' Third Am. Consolidated Class Action Compl. and Jury Demand ("DPP Compl.") ¶¶ 16-18. They allege that Warner Chilcott committed fraud on the Patent and Trademark Office in securing the patent for Loestrin 24 and proceeded to file sham litigation to enforce its patent against potential generic competitors. *Loestrin, 261 F. Supp. 3d at 318-21*. Plaintiffs further allege that Warner Chilcott then settled its sham patent lawsuits against Watson and Lupin Pharmaceutical, Inc. and/or Lupin Ltd. ("Lupin") by making large and unjustified payments in exchange for their agreement to stay out of the Loestrin 24 market. *Id. at 321-23*. Right before generic entry was set **[*11]** to occur, Warner Chilcott introduced a drug, Minastrin 24 (a chewable version of Loestrin 24 with added sweetener on the reminder days), to erode the brand Loestrin 24 prescription base. *Id. at 323-24*. This product hop allowed Warner Chilcott to retain branded sales (in Minastrin 24) once generic Loestrin 24 entered and state automatic-substitution laws kicked in. Id.

This order of events has consequences for the Court's ability to determine — as ***antitrust law*** requires — what the world would have looked like but for Defendants' alleged anticompetitive conduct.[5] Because Defendants executed the product hop and pulled brand Loestrin 24 from the market before automatic substitution laws could take hold, there is a dearth of evidence reflecting how the market would have responded to generic entry in a but-for world. See Feb. 11, 2019 DPPs' Mot. for Class Certification Hr'g Tr. ("DPP Hr'g Tr.") 18-20, ECF No. 806. This dearth of evidence means that the DPPs and Defendants, and their respective experts, do not agree on the best methodology to use to construct the contours of the but-for world.

II. Defendants' Motion to Exclude Dr. Leitzinger

Defendants have moved to exclude the opinions and testimony of the **[*12]** DPPs' proposed expert, Jeffrey J. Leitzinger, Ph.D.[6] They argue that (1) Dr. Leitzinger's opinions are based on "unsupported assumptions provided to him by counsel" rather than scientific method; (2) he improperly assumes that generic drug prices decrease with additional generic entrants, ignoring evidence specific to Loestrin 24 suggesting otherwise; and (3) his methodology for calculating the alleged aggregate overcharge due to generic delay and related calculations is unreliable. Defs.' Mem. of Law in Supp. of Mot. to Exclude the Opinions and Testimony of DPPs' Expert Jeffrey J. Leitzinger ("Defs.' Mot. to Exclude Leitzinger") 1-3, ECF No. 581.

Before dealing with the DPPs' *Rule 23* Motion for Class Certification, the Court must address Defendants' challenge to some of the expert analysis that underpins the DPPs' claims regarding what the but for world would look like, who was damaged, and to what extent.

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[4] The curious reader may refer to *In re Loestrin 24 Fe Antitrust Litig., 261 F. Supp. 3d 307, 314-25 (D.R.I. 2017)* ("Loestrin"), to put more flesh on the bones of the following summary.

[5] Reference to the "but-for world" throughout this decision connotes a hypothetical world in which Defendants did not engage in any of the anticompetitive conduct alleged by the DPPs.

[6] Dr. Leitzinger has worked as an economist for over forty years and is the president of Econ One Research, Inc., an economic research and consulting firm. He holds master's and doctoral degrees in economics from the University of California Los Angeles and a bachelor's degree in economics from Santa Clara University. Decl. of Jeffrey J. Leitzinger, Ph.D. ("Leitzinger Report") ¶¶ 1-2, ECF No. 518-3. He has testified in many pharmaceutical antitrust cases in federal court, id. ¶ 2 & n.2, and the Court gleans no dispute over his qualifications to provide an opinion in this matter.

Rule 702 of the Federal Rules of Evidence sets forth the criteria a party must satisfy in order to proffer expert opinion. *Rule 702* provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other **[*13]** specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

HN1[] The Court "serves as the gatekeeper for expert testimony by 'ensuring that [it] . . . both rests on a reliable foundation and is relevant to the task at hand.'" *Milward v. Rust-Oleum Corp., 820 F.3d 469, 473 (1st Cir. 2016)* (quoting *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993))*. The evidence's proponent "has the burden of establishing both its reliability and its relevance." Id. (citing *Daubert, 509 U.S. at 593 n.10*; *Fed. R. Evid. 702*, advisory committee's note). The First Circuit has advised that "***HN2***[] Daubert neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance." *Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co., 161 F.3d 77, 85 (1st Cir. 1998)*. Instead, "[i]t demands only that the proponent of the evidence show that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion." Id.

Counsel for the DPPs provided Dr. Leitzinger four baseline scenarios to consider. They assume that: two generic Loestrin 24 products (one manufactured by Watson, the other an authorized generic manufactured **[*14]** by Warner Chilcott) enter the market in September 2009; Minastrin either enters the market in July 2013 (which it did in the actual world) or never enters at all; and Lupin launches its generic Loestrin 24 in either July 2013 or, as it did in the real world, January 2016. See Decl. of Jeffrey J. Leitzinger, Ph.D. ¶ 26 (July 30, 2018) ("Leitzinger Report"), ECF No. 518-3. He made sixteen additional calculations applying his damages model to the four baseline scenarios but assuming later generic entry dates. Ex. 7 to Leitzinger Report, ECF No. 518-3. Dr. Leitzinger did not independently verify the scenarios provided by counsel. Leitzinger Dep. 48:6-50:1, 56:12-63:23 (Aug. 30, 2018), ECF No. 621-34.

In his report, Dr. Leitzinger concludes that there is evidence common to the proposed class that demonstrates "with high likelihood" that all DPP class members were injured by Defendants' alleged wrongdoing. Leitzinger Report ¶¶ 9(b), 27, 50. This common evidence includes: literature showing that generic competition converts upwards of 90% of the brand prescription base to generics at prices substantially below the brand price, and increasingly so as more generics enter; Defendants' and generic **[*15]** manufacturers' forecasts predicting that Loestrin 24 generic competition would lead to high rates of generic substitution at well below the brand price; evidence of the actual market following generic entry in 2014; and that DPP class members serve a wide range of prescription needs. Id. ¶ 27.

The DPPs can be broken into three subgroups of direct purchasers: (1) brand Loestrin 24 purchasers that later bought generic Loestrin 24 once it entered the market ("Brand-Generic Purchasers"); (2) brand Loestrin 24 purchasers that never ultimately purchased generic Loestrin 24 during the class period, even after it became available ("Brand-Only Purchasers"); and (3) generic Loestrin 24 purchasers that never purchased brand Loestrin 24 from Defendants during the class period, and made all their relevant purchases from generic-manufacturer Amneal[7] ("Generic-Only Purchasers"). With respect to Brand-Generic Purchasers, Dr. Leitzinger concludes that the

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[7] Watson divested its Loestrin Abbreviated New Drug Application ("ANDA") to Amneal when it acquired Warner Chilcott. Defs.' Mem. of Law in Opp'n to Direct Purchaser Class Pls.' Mot. for Class Certification ("Defs.' Opp'n to Class Cert.") 14, ECF No. 582. As a result, Amneal agreed to delayed entry of generic Loestrin 24 per Watson's alleged unlawful reverse payment to Warner Chilcott. See Reply in Further Supp. of Direct Purchaser Class Pls.' Mot. for Class Certification ("DPPs' Further Supp. for Class Cert.") Ex. 14 ¶ 2.4, ECF No. 621-3.

high rate of generic penetration that would have taken hold if generic Loestrin 24 had entered earlier, coupled with the discount on the wholesale acquisition cost ("WAC")[8] that generic purchasers enjoy, would have led Brand-Generic Purchasers to substitute **[*16]** more of their brand purchases with lower-priced generic Loestrin 24. Leitzinger Report ¶ 50. As a result, Defendants' anticompetitive conduct caused them to incur overcharges. Id.

Dr. Leitzinger similarly concludes that the Brand-Only Purchasers were injured. In his view, they suffered antitrust injury because, had there been sustained, robust generic competition in the Loestrin 24 market, these purchasers would have responded to their customers' demands and substituted some of their brand Loestrin purchases for cheaper generic Loestrin. Id. ¶¶ 28-32, 50-51; Rebuttal Decl. of Jeffrey J. Leitzinger, Ph.D. ("Leitzinger Rebuttal Report") ¶¶ 28-29, ECF No. 621-1.

Generic-Only Purchasers, in Dr. Leitzinger's view, also suffered antitrust injury at Defendants' hands. In forming this opinion, he uses the benchmark experiences of Minastrin and Ovcon-35 (another oral contraceptive) to demonstrate that as the number of generic competitors increase, the generic discount off the brand WAC increases over time as the market starts to operate more effectively. Leitzinger Rebuttal Report ¶¶ 8, 15, 27; DPP Hr'g Tr. 118-19. Dr. Leitzinger concludes that, in the but-for world, generic **[*17]** Loestrin would have cost less and thus its purchasers were injured by overcharges caused by Defendants' unlawful conduct. Leitzinger Rebuttal Report ¶¶ 25-27; DPP Hr'g Tr. 118-19. In reaching this conclusion, he determines the brand WAC at each point in time along with the generic discount expected based on forecasts, actual experience, and the number of generic competitors presumed to have been in the market at the time. DPP Hr'g Tr. 118-20; Dr. Jeffrey Leitzinger Slides from DPP Hr'g 9-13, ECF No. 987-3.

A. Dr. Leitzinger's Methodology and Reliance on DPP Counsel's Scenarios

The First Circuit has held that ***HN3***[] "[t]he use of aggregate damages calculations is well established in federal court and implied by the very existence of the class action mechanism itself." *In re Pharm. Indus. Average Wholesale Price Litig., 582 F.3d 156, 197 (1st Cir. 2009)*. Indeed, Dr. Leitzinger's proffered methodology has been accepted as reliable for proving class-wide impact by many courts. See Leitzinger Report ¶ 53 (citing his extensive past work analyzing aggregate overcharges associated with delayed generic entry for direct purchaser plaintiff classes); see also Direct Purchaser Class Pls.' Opp'n to Defs.' Mot. to Exclude the Opinions & Testimony of Jeffrey J. Leitzinger, Ph.D. ("DPPs' Opp'n") **[*18]** 1 n.3, ECF No. 620 (listing cases in which Dr. Leitzinger provided expert opinion). The Court is satisfied that here, as in other cases, Dr. Leitzinger's methodology calculates damages using common evidence and analysis that does not vary by class member, and leaves room for a range of jury findings. See infra Part III.E.2.

Nor is the Court troubled by Dr. Leitzinger's reliance on but-for scenarios provided by counsel. ***HN4***[] "Objections [to] the factual underpinnings of an expert's investigation[] often go to the weight of the proffered testimony, not to its admissibility." *Crowe v. Marchand, 506 F.3d 13, 18 (1st Cir. 2007)* (citing *Microfinancial, Inc. v. Premier Holidays Int'l., Inc., 385 F.3d 72, 81 (1st Cir. 2004)*; *Int'l Adhesive Coating Co. v. Bolton Emerson Int'l, Inc., 851 F.2d 540, 545 (1st Cir. 1988))*. Dr. Leitzinger opines that the DPPs were all impacted by Defendants' alleged anticompetitive conduct, that this impact resulted in antitrust damages, and that both may be proven with evidence common to the class. Leitzinger Report ¶¶ 9, 50. In reaching that opinion, Dr. Leitzinger relied upon class counsel's but-for scenarios, which in turn, class counsel will venture to establish at trial with their fact witnesses and merit experts' reports and testimony. See DPPs' Opp'n 7 ("Dr. Leitzinger concludes that if the jury finds that Defendants unlawfully delayed and suppressed generic competition as Plaintiffs **[*19]** allege, then there is a high likelihood that all Class members suffered antitrust injury in the form of overcharges."). The Court discerns no reason to throw out Dr.

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[8] The wholesale acquisition cost ("WAC") of a prescription drug refers to the list price of the branded drug. Leitzinger Report 28 n.83; see also DPP Hr'g Tr. 16. As discussed below, Dr. Leitzinger conceptualizes generic drug price in terms of its discount from the brand's WAC. See Leitzinger Rebuttal Report ¶ 15 ("While generic suppliers compete with one another, they are also engaged collectively in competing with and diverting sales from the brand. The key metric in this regard is the level of the generic price relative to brand prices, often summarized as the generic discount from brand WAC."); see also Expert Report of Pierre-Yves Cremieux ("Cremieux Report") ¶ 32 n.41, ECF No. 582-1 ("The WAC is the manufacturer's list price to wholesalers before considering discounts, rebates, and other price concessions.").

Leitzinger's opinion and testimony on the basis that he has relied upon scenarios based upon facts and opinions elicited from other witnesses; it is common for experts to rely on such in formulating their opinions, and Defendants may probe their quality and reliability on cross-examination.

What is more, Dr. Leitzinger's model can be adjusted to account for a variety of jury findings during the liability phase — for example, a jury determination that Warner Chilcott would have launched Minastrin 24 earlier in the but-for world can be incorporated into the model and reflected in the damages calculation. See Leitzinger Rebuttal Report ¶ 56 (explaining that his models may be adjusted to respond to various findings by a jury). At this juncture, however, Defendants have not demonstrated that any of Dr. Leitzinger's assumptions are sufficiently problematic to render his opinions and testimony unreliable. Defendants' criticisms, instead, go to the weight of the evidence. See *Crowe, 506 F.3d at 18*.

B. Dr. Leitzinger's Impact Analysis

Defendants take **[*20]** issue with Dr. Leitzinger's conclusion that additional generic entrants would have driven down prices because, in their words, Dr. Leitzinger "relies on generalized evidence and averages" and his opinion "is not grounded in the facts of the case." Defs.' Mot. to Exclude Leitzinger 11. Defendants contend that the Generic-Only and Brand-Only Purchasers were not injured by Defendants' alleged unlawful actions. Id. at 10-16.

In pressing this argument as to the Generic-Only Purchasers, Defendants say there "is no proof that Amneal's generic would have had a lower price in a but-for world where generic competitors entered earlier." Id. at 13 (quoting Cremieux Report ¶ 11). Indeed, the analysis of Defendants' rebuttal expert, Dr. Pierre-Yves Cremieux, suggests that the Generic-Only Purchasers experienced flat prices in the actual world after generic entry, and the actual prices paid by many Generic-Only Purchasers did not decline with additional generic entrants. Cremieux Report ¶¶ 11, 53. Because of this, he says, one must look at individualized evidence (the underlying contract, for example) to determine how each purchaser's price reacts to generic entry in the oral contraceptive space where branded generics **[*21]** abound. DPP Hr'g Tr. 221, 245 (testimony of Dr. Cremieux); Defs.' Mot to Exclude Leitzinger 12.

With respect to the Brand-Only Purchasers, Defendants argue that Dr. Leitzinger's opinion that common evidence can be used to demonstrate injury is "fundamentally flawed." Defs.' Mot. to Exclude Leitzinger 14. They reason that, in the actual world, none of the six[9] Brand-Only Purchasers in fact purchased generic Loestrin 24 — or any other Loestrin product - after it became available in January 2014. Id. at 14-15. At least in part, this can be attributed to wholesalers choosing not to carry generic drugs because many of their retailer customers purchase generics directly from the generic manufacturers.[10] Id. at 14 (citing Cremieux Report ¶ 69 n.92).

In response, the DPPs marshal Dr. Leitzinger's analysis to argue that Dr. Cremieux, along with other missteps, "ignores that, in the but-for world, more generics would have been on the market earlier, and the years of robust

[9] One of the six Brand-Only Purchasers, King Drug Company of Florence, Inc., went out of business in November 2010, and has submitted a declaration stating that, considering its business model, it would have purchased generic Loestrin 24 had it been available earlier. Leitzinger Rebuttal Report ¶¶ 28-29; Decl. of Keith Elmore (Nov. 23, 2018), ECF No. 621-25.

[10] This phenomenon is referred to as "generic bypass". Following generic entry, some wholesalers' customers shift their buying practices to purchase the generic drug directly from generic manufacturers, thereby "bypassing" the wholesaler. Leitzinger Report ¶ 68. As a result, wholesalers may lose volume in their sales. Id. ¶¶ 68-70.

HN5[] The weight of the authority on this issue sides with the DPPs, and the Court adopts those courts' reasoning that, consistent with *Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*, purchasers are injured at the point in time they incur the overcharge. Thus, even if generic bypass may have occurred in a but-for world, this does not negate injury. See *Illinois Brick v. Illinois, 431 U.S. 720, 724, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)* (holding that direct purchasers may recover the full amount of overcharges (citing *Hanover Shoe, 392 U.S. at 494*)); see also *In re Nexium (Esomeprazole) Antitrust Litig., 296 F.R.D. 47, 55 (D. Mass. 2013)* ("Nexium II")("The Supreme Court has 'long recognized [overcharges] as the principal measure of damages for plaintiffs injured as customers.'") (quoting *In re Relafen Antitrust Litig., 218 F.R.D. 337, 344 (D. Mass. 2003))*.

competition would have driven prices down." DPPs' Opp'n 14. Also, they contend, even if a jury determines there are some uninjured class members, Dr. Leitzinger's model allows for the exclusion of those class members from the **[*22]** aggregate damages calculation. See Leitzinger Rebuttal Report ¶ 56.

The DPPs, through Dr. Leitzinger, have set forth sufficient, reliable evidence supporting the conclusion that Generic-Only and Brand-Only Purchasers would have purchased cheaper generic Loestrin 24 in a but-for world with sustained and robust generic competition. See id. ¶¶ 28-29. While Defendants fashion a colorable argument on this score, the DPPs have satisfied their burden to produce a "scientifically sound and methodologically reliable" opinion. *Ruiz-Troche, 161 F.3d at 85*. It will be up to the jury to determine which party's theory wins the day.

C. Dr. Leitzinger's Damages Analysis

Defendants argue that aggregate damages cannot be accurately and readily calculated without reliance on individualized inquiry as to each class member. Specifically, they take issue with Dr. Leitzinger's reliance on unreliable forecasts; failure to account for the effects of generic bypass; inclusion of uninjured purchasers in his calculation of damages; and disregard for what Defendants term "key facts." Defs.' Mot. to Exclude Leitzinger 16.

Dr. Leitzinger's reliance on pre-launch forecasts of generic manufacturers does not render his damages analysis unreliable. **[*23]** Dr. Leitzinger determined that the forecasts were reliable because the "internal documents were used, among other things, for strategic planning and budgeting, and for production planning[,]" and, additionally, because they "predicted the same type of market-wide impact from AB-rated generic competition described in the literature." Leitzinger Report ¶ 33. It goes without saying that ***HN6***[] industry manufacturers have a lot of interest in maintaining the accuracy of their forecasts, and such forecasts reflect their "own study of the . . . market and analogous experiences of other drugs." *In re Namenda Direct Purchaser Antitrust Litig., 331 F. Supp. 3d 152, 181-82 (S.D.N.Y 2018)* ("Namenda"); see also *id. at 182* ("The use of Defendants' own forecasts to model a but-for world has been held to be a sound economic methodology."); *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. CV 14-MD-02503, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *8-9 (D. Mass. Oct. 16, 2017)* ("Solodyn") (rejecting Daubert challenge to Dr. Leitzinger's reliance on forecasts in an antitrust pharmaceutical case). Moreover, Dr. Cremieux acknowledged that he has no reason to believe that the twenty-two forecasts Dr. Leitzinger considered were cherry-picked to skew the analysis in the DPPs' favor. See DPPs' Opp'n Ex. 5 at 94-95, ECF No. 620-5.

As discussed above, consistent with the **[*24]** Supreme Court's pronouncement in Hanover Shoe, generic bypass does not affect the DPPs' damages award. See *In re Niaspan Antitrust Litig., No. 13-MD-2460, 2015 U.S. Dist. LEXIS 92534, 2015 WL 4197590, at *1 (E.D. Pa. Jul. 9, 2015)* (holding that***HN7***[] damages award should not be "offset by the amount of any purchases . . . that would not have been made in a 'but for' world"); *In re Lidoderm Antitrust Litig., No. 14-MD-02521-WHO, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *14 n.21 (Feb. 21, 2017)* ("Courts have also rejected attempts to decrease damages under [a generic bypass] theory."); *In re Prograf Antitrust Litig., No. 11-md-2242-RZW, 2014 U.S. Dist. LEXIS 180899, 2014 WL 7641156, at *4 (D. Mass. Dec. 23, 2014)* (holding that "reducing damages to plaintiff wholesalers under a bypass defense is inconsistent with Hanover Shoe"); *In re Skelaxin (Metaxalone) Antitrust Litig., No. 12-md-2343, 2014 U.S. Dist. LEXIS 66707, 2014 WL 2002887, at *4-5 (E.D. Tenn. May 15, 2014)* ("Skelaxin") (rejecting generic bypass theory for offsetting damages).

As discussed above, that Dr. Leitzinger's damages model may include a purchaser that was uninjured does not render his analysis unsound. It is for the jury to determine whether the Generic-Only and Brand-Only Purchasers were injured, and if so, to what extent; and if the jury concludes they were not, these subgroups will be extracted from Dr. Leitzinger's damages model. See Leitzinger Rebuttal Report ¶ 56 (explaining that his models may be adjusted to respond to various **[*25]** findings by the jury); see also Leitzinger Report ¶ 67 (noting that, to the extent the Court or jury renders legal or factual determinations inconsistent with the assumptions underlying his calculations, an "adjustment can be readily incorporated within the class-wide overcharge formulas, and such an adjustment will be class-wide in nature").

Finally, the key facts with which Defendants take issue are all within the realm of facts the jury may or may not accept during trial and, accordingly, Defendants' criticisms go to the weight, and not the admissibility, of Dr.

Leitzinger's opinion. However, the jury is free to accept, based on Dr. Leitzinger's robust analysis based on sound methodology, that the actual world was too tainted by Defendants' unlawful conduct to give credence to how prices in this market responded to generic entry. See DPPs' Opp'n 14.

Plaintiffs have satisfied their burden by demonstrating that Dr. Leitzinger's opinions and testimony "rest[] on a reliable foundation and [are] relevant to the task at hand." *Milward, 820 F.3d at 473* (quoting *Daubert, 509 U.S. at 597*). Now it is for the trier of fact to weigh the DPPs' evidence, with the aid of cross-examination and Defendants' rebuttal expert evidence. Accordingly, **[*26]** the Court DENIES Defendants' Motion to Exclude the Opinions and Testimony of Dr. Leitzinger, ECF No. 570.

III. DPPs' Motion for Class Certification

A. Legal Standard for Class Certification

HN8[] To certify a class, the Court "must undertake a 'rigorous analysis' to determine whether" the putative class satisfies each of the four prerequisites set forth in *Rule 23(a) of the Federal Rules of Civil Procedure*: numerosity, commonality, typicality, and adequacy of representation. *In re Nexium Antitrust Litig., 777 F.3d 9, 17 (1st Cir. 2015)* ("Nexium III") (quoting *Comcast Corp. v. Behrend, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)*; *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*; *Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982))*. In addition, the putative class must also demonstrate that it satisfies one of the requirements set forth in *Rule 23(b)*, *Nexium III, 777 F.3d at 18*; in this case, the putative class argues that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*. To meet this requirement, the putative class must demonstrate "that 'the fact of antitrust impact can[] be established through common proof' and that 'any resulting damages would likewise be established by sufficiently common proof.'" *Nexium III, 777 F.3d at 18* (quoting *In re New Motor Vehicles Can. Exp. Antitrust Litig., 522 F.3d 6, 20 (1st Cir. 2008)* ("New Motor Vehicles")).

HN9[] The Supreme Court has explained that "*Rule 23* does not set forth a mere pleading standard" **[*27]** but rather, a plaintiff "must affirmatively demonstrate [its] compliance with the Rule." *Dukes, 564 U.S. at 350*. To do so, a plaintiff has the burden to demonstrate by a preponderance of the evidence that *Rule 23*'s prerequisites to class certification are satisfied. *Nexium III, 777 F.3d at 27*. "Merits questions may be considered to the extent — but only to the extent — that they are relevant to determining whether the *Rule 23* prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans and Tr. Funds, 568 U.S. 455, 133 S. Ct. 1184, 1195, 185 L. Ed. 2d 308 (2013)*; see also *Comcast, 569 U.S. at 35* (stating that the Court must determine whether the plaintiff's burden is satisfied under *Rule 23* "even when that requires inquiry into the merits of the claim").

The DPPs move to certify a class of 47 members,[11] as defined as:

> All persons or entities in the United States and its territories who purchased brand or generic Loestrin 24 directly from Warner [Chilcott] or Amneal at any time during the period from September 1, 2009, through and until June 3, 2015, and all persons or entities in the United States and its territories who purchased brand Minastrin 24 directly from Warner at any time during the period from September 1, 2009, through and until March 14, 2017 (the "Class Period").
>
> Excluded from the Class are defendants, and their officers, directors, management, **[*28]** employees, subsidiaries, or affiliates, and, all federal governmental entities. Also excluded from the class are educational institutions such as universities and colleges.

DPPs' Mem. of Law in Supp. of Mot. for Class Certification ("DPPs' Mot. for Class Cert.") 4, ECF No. 518-1.

B. Numerosity

[11] In the DPPs' Further Support for Class Certification Memorandum, they adjust the putative class from comprising 48 to 47 members. DPPs' Further Supp. for Class Cert. 3 & n.7, ECF No. 621.

HN10[] Under *Rule 23(a)(1)*, to certify a class, a court must determine that "the class is so numerous that joinder of all members is impracticable." *Fed. R. Civ. P. 23(a)(1)*. While there is no strict minimum number of plaintiffs required to demonstrate impracticability, there is a general presumption that "if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of *Rule 23(a)* has been met." *Garcia-Rubiera v. Calderon, 570 F.3d 443, 460 (1st Cir. 2009)* (quoting *Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001))*; see also *In re Relafen Antitrust Litig., 218 F.R.D. 337, 342 (D. Mass. 2003)* ("Relafen"); *Solodyn, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *4*.[12]

HN11[] In determining whether joinder would be impracticable, district courts may consider the following non-exhaustive factors, in addition to the size of the class: "judicial economy, the claimants' ability and motivation to litigate as joined plaintiffs, the financial resources of class members, the geographic dispersion of class members, the ability to identify future claimants, and whether the claims are for injunctive relief or for damages." *In re Modafinil Antitrust Litig., 837 F.3d 238, 253 (3d Cir. 2016)*, as amended Sept. 29, 2016 ("Modafinil **[*29]** ") (citing 5 *Moore's Federal Practice § 23.22*; 5 Newberg on Class Actions § 3.12); accord *Solodyn, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *4* ("The Court may also take into account such 'subjective factors' as the 'geographic location of proposed class members, the nature of the action, and matters of judicial economy.'" (quoting *In re Nexium (Esomeprazole) Antitrust Litig., 296 F.R.D. 47, 52 (D. Mass. 2013)* ("Nexium II")). Moreover, "courts have certified smaller classes in generic suppression cases where judicial economy favors proceeding as a class action." *Solodyn, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *4* (citing *Nexium II, 296 F.R.D. at 53* (certifying class of twenty-four or twenty-nine); *Dale Electronics, Inc. v. R. C. L. Electronics, Inc., 53 F.R.D. 531, 535-36 (D.N.H. 1971)* (certifying class of thirteen)).

The DPPs contend they satisfy the numerosity requirement under *Rule 23*, arguing that their proposed class comprises forty-seven members, for which they have adduced common evidence of injury, and that joinder would be impractical. DPPs' Mot. for Class Cert. 20-21; Reply in Further Supp. of Direct Purchaser Class Pls.' Mot. for Class Certification ("DPPs' Further Supp. for Class Cert.") 3 & n.7. Defendants counter that, at most, the DPPs' class is made up of 16 members. Defs.' Opp'n to Class Cert. 11-12. First, they argue that 27 members of the proposed class (viz., the Brand-Only and Generic-Only Purchasers) must be excluded because they lack standing and/or a plausible claim of injury-in-fact. Id. at 12. Second, they argue that nine putative class members (or five more[13] must be consolidated because they are no longer stand-alone companies, but rather corporate affiliates of other class members. Id.

1. Generic-Only and Brand-Only Purchasers

Defendants argue that the Generic-Only Purchasers lack antitrust standing under *Illinois Brick v. Illinois, 431 U.S. 720, 724, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, and its progeny, because they never directly purchased brand or generic Loestrin 24 and/or Minastrin **[*30]** from Defendants during the class period. Defs.' Opp'n to Class Cert. 13-17. Illinois Brick, however, is inapposite. See Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application ¶ 347 (3d & 4th eds. 2019 Cum. Supp.). Illinois Brick holds that an indirect purchaser - one who purchases product from a defendant's customer rather than the defendant itself (like an End-Payor Plaintiff in this case) - may not recover antitrust damages under federal ***antitrust law***. *431 U.S. at 724*. But these Generic-Only Purchasers did not purchase indirectly - or otherwise - from Defendants.[14]

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[12] As a general matter, a class of 20 or fewer tends to carry the presumption that it is not sufficiently numerous; a class of 41 or more carries a presumption that it is sufficiently numerous; and "[c]lasses with between 21 and 40 members are given varying treatment," depending on the facts of the specific case. *Modafinil, 837 F.3d at 250* (quoting 5 James Wm. Moore, et al., *Moore's Federal Practice § 23.22*)).

[13] Four of these overlap with parties that Defendants allege have no direct injury. Defs.' Opp'n to Class Cert. 19.

[14] Indeed, but for the no-authorized-generic agreement between Warner Chilcott and Watson, the DPPs' theory posits, Generic-Only Purchasers would have made their generic purchases directly from Warner Chilcott. Only because Warner Chilcott had agreed not to market an authorized generic did generic purchasers need to look elsewhere. DPPs' Further Supp. for Class Cert. 13, 15-16.

Instead, the DPPs' theory of injury for the Generic-Only Purchasers is that Defendants, by delaying and suppressing generic competition, caused the Generic-Only Purchasers to pay more for generic Loestrin from non-Defendant Amneal than they would have absent Defendants' anticompetitive conduct. Leitzinger Rebuttal Report ¶ 25. To this point, the DPPs offer evidence of class-wide injury, including: studies observing that generic prices decline after generic entry; business planning documents of Defendants and Loestrin 24 generic manufactures predicting that inter-generic competition **[*31]** would lower prices; and the actual experience of class savings once the first generic entered the market, with additional savings as competition increased. Leitzinger Report ¶¶ 9(a), 29, 39, 49, 60.

HN12[] The Generic-Only Purchasers also have established that they have antitrust standing under the considerations set forth by the Supreme Court and enumerated by the First Circuit as:

> (1) the causal connection between the alleged antitrust violation and harm to the plaintiff; (2) an improper motive; (3) the nature of the plaintiff's alleged injury and whether the injury was of a type that Congress sought to redress with the antitrust laws . . .; (4) the directness with which the alleged market restraint caused the asserted injury; (5) the speculative nature of the damages; and (6) the risk of duplicative recovery or complex apportionment of damages.

Sullivan v. Tagliabue, 25 F.3d 43, 46 (1st Cir. 1994) (citing *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 537-45, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*. As to the first three factors, Dr. Leitzinger's analysis plainly demonstrates that the overcharges incurred by the Generic-Only Purchasers were the result of Defendants' unlawful conduct aimed at suppressing generic competition; an inference can readily be drawn that Defendants intended both to suppress generic competition and to cause prices **[*32]** to increase market-wide; and the Generic-Only Purchasers' injury (overcharges from an anticompetitive scheme) is the type the *Sherman Act* intends to redress.

The crux of Defendants' argument is that their alleged conduct did not directly cause the Generic-Only Purchasers' injury and, therefore, the damages calculation would be too speculative. But the Court is unconvinced. Defendants' alleged unlawful conduct is plainly the proximate cause of the Generic-Only Purchasers' alleged antitrust injury. While Amneal could have charged less for generic Loestrin 24 than the market would have dictated absent robust and sustained generic competition, where Defendants have foreclosed an entire market from additional generic competition, this purported break in causation is not sufficient to save Defendants from liability. See Areeda & Hovenkamp, ***Antitrust Law*** ¶ 347 ("[W]e should allow recovery by the umbrella plaintiff purchasing the 'self-same' product the defendants sold in the same clearly defined . . . market."). The Generic-Only Purchasers' alleged injuries are "the direct result of the asserted antitrust violation - they allege they paid higher prices for generic [Loestrin 24] because Defendants **[*33]** intentionally restricted and manipulated generic competition." See *Namenda, 331 F. Supp. 3d at 213*; see also *In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1168-69 (3d Cir. 1993)* (stating, in a market-exclusion case, where there are "no missing links in the causation chain," plaintiffs have standing); *Modafinil, 837 F.3d at 264-65* (permitting recovery in a pharmaceutical antitrust case where defendants have engaged in "market exclusion, as it concerns conduct that prevents a competitive market from forming at all"); *Solodyn, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *10* (certifying a class in a reverse payment and product hop case that included generic purchasers). But see *Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573, 583-84 (3d Cir. 1979)* (holding that a non-conspiring competitor of a defendant supplier did not have antitrust standing because of the "tenuous line of causation between [the] defendants' price-fixing and the prices paid by [the plaintiff]").

And, finally, as to the sixth consideration, the Generic-Only Purchasers, as direct purchasers vis-à-vis Amneal, do not present issues of "apportionment" or "burdens of duplicative recovery," in the way indirect purchasers may. Areeda & Hovenkamp, ***Antitrust Law*** ¶ 347.[15] The Generic-Only Purchasers are the only purchasers in a position

[15] This Court respectfully disagrees with the conclusion reached on this issue in *Skelaxin, 2014 U.S. DCist. LEXIS 66707, 2014 WL 2002887, at *11*. There, the court held that the plaintiffs did not have standing to pursue antitrust damages for "generic overcharges". *2014 U.S. Dist. LEXIS 66707, [WL] at *1, 11*. It reasoned that the causal connection between the defendant's

to prove injury and recover damages for the alleged overcharges on their purchases of generic Loestrin 24 from Amneal during the class period under **[*34]** federal ***antitrust law***.

2. Corporate Subsidiaries

Defendants also argue that nine putative class members should not be treated as separate entities for purposes of the numerosity analysis because other members of their corporate families are also direct purchasers. Defs.' Opp'n to Class Cert. 19-20. This argument gets no traction. The entities are separately incorporated companies, are separately listed in Warner Chilcott's transactional sales data, and are distinct from their corporate affiliates. DPPs' Further Supp. for Class Cert. Exs. 37-44. Because they each suffered independent injury, as reflected in their separately tracked purchases of brand and/or generic Loestrin 24, they are separate for purposes of this analysis. See *Solodyn, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *4*; *Namenda, 331 F. Supp. 3d at 207*; *Am. Sales Co., LLC, 2017 U.S. Dist. LEXIS 137222, 2017 WL 3669604, at *8*.

Defendants' remaining attempts to exclude the Generic-Only Purchasers and the Brand-Only Purchasers[16] are intertwined with their attacks on Dr. Leitzinger's methodology and analysis, as well as on whether the DPPs have established that common issues predominate under *Rule 23(b)*. As discussed in more detail above and below, the Court concludes that all forty-seven members are properly included in this class, and thus, the class presumptively satisfies *Rule 23(a)(1)*'s numerosity **[*35]** requirement. *Garcia-Rubiera, 570 F.3d at 460*. Moreover, the Court is further satisfied that joinder is impracticable after considering the non-exhaustive list of considerations, especially judicial economy; the class members' incentives to bring suit individually against their supplier(s); and the geographic dispersion of class members. See *Solodyn, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *4* (citing *Nexium II, 296 F.R.D. at 52*). Thus, *Rule 23(a)(1)* is satisfied.

C. Commonality

HN13[] Under *Rule 23(a)(2)*, "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury[.]'" *Dukes, 564 U.S. at 349-50* (quoting *Falcon, 457 U.S. at 157*). A plaintiff's "claims must depend upon a common contention . . . ." *Id. at 350*. And, "that common contention . . . must be of such a nature that it is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id. The Court concludes that commonality under *Rule 23(a)(2)* is easily met for this putative class. Each putative class member alleges that Defendants caused overcharges by engaging in an anticompetitive scheme to delay and suppress generic competition.

D. Typicality and Adequacy

HN14[] Under *Rule 23(a)(3)*, a court may certify a class only where "the claims or defenses of the representative parties are **[*36]** typical of the claims or defenses of the class[.]" *Fed. R. Civ. P. 23(a)(3)*. Courts have noted some uncertainty as to the independent significance of *Rule 23*'s typicality requirement. See 7A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1764 (rev. 4th ed. 2018). "[M]any courts have found typicality if the claims or defenses of the representatives and the members of the class stem from a single event or a unitary course of conduct, or if they are based on the same legal or remedial theory." Id. (citations omitted). Other courts have used *Rule 23(a)(3)* "to screen out class actions in which the legal or factual position of the representatives is

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alleged antitrust violation and the plaintiff-generic purchaser's harm was too attenuated. See *2014 U.S. Dist. LEXIS 66707, [WL] at *11* (citing *In re Vitamins Antitrust Litig., No. 99CIV5134, 2001 U.S. Dist. LEXIS 12114, 2001 WL 855463, at *4 (D.D.C. July 2, 2001))*. Moreover, the Court reasoned that, because it was satisfied that the defendants did not intend the plaintiff's harm, they had not satisfied the standing inquiry set forth by the Supreme Court in *Assoc. Gen. Contractors of Cal., Inc., 459 U.S. at 537-45*. *Skelaxin, 2014 U.S. DCist. LEXIS 66707, 2014 WL 2002887, at 8-9*. The Court, consistent with its reading of Areeda & Hovenkamp, concludes that in a market exclusion case like the one at bar, as opposed to a price fixing case, intervening pricing decisions of the non-defendant manufacturer do not require the same level of searching inquiry into causation.

[16] Defendants argue that the Brand-Only Purchasers should be excluded from the class because there is no proof that they would have purchased generic Loestrin had it been available. See Defs.' Opp'n to Class Cert. 17-18. For the reasons stated above, see supra Part II.B. (discussing this argument in connection with Defendants' Motion to Exclude Dr. Leitzinger's Expert Report), this argument fails.

markedly different from that of other members of the class even though common issues of law or fact are present." Id. (citations omitted).

Moreover, *Rule 23(a)(4)* provides for certification only where "the representative parties will fairly and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)(4)*. The moving party is tasked with demonstrating that "the interests of the representative party will not conflict with the interests of any of the class members . . . ." *Andrews v. Bechtel Power Corp., 780 F.2d 124, 130 (1st Cir. 1985)*. But interests need not be identical; only fundamental conflicts that "go to the heart of the litigation prevent a plaintiff **[*37]** from meeting the *Rule 23(a)(4)* adequacy requirement." *Matamoros v. Starbucks Corp., 699 F.3d 129, 138 (1st Cir. 2012)*.

Defendants argue that the DPPs do not satisfy *Rule 23*'s typicality and adequacy of representation prerequisites. Defs.' Opp'n to Class Cert. 27-34. Specifically, Defendants challenge the DPPs' class representative Ahold USA, Inc.'s ("Ahold") typicality and ability to adequately represent the class on the basis that: Ahold has no stake in the product hop allegations; Ahold's partial assignment from McKesson only gives it an interest in proving a generic entry date back to March 2011, while other class members' interest reaches back to September 2009; Ahold's purchasing habits are affected differently by the entry of generic products because it is a retailer and not a wholesaler; and Ahold is the only member of the class with an assignment. Id. at 27-29.

Here, as noted above, the putative class members' claims plainly stem from a unitary course of conduct. Ahold's status as a retailer with an assignment does not render its interest in pursuing these claims "markedly different." See *Modafinil, 837 F.3d at 251* (holding that, "no matter how intuitively appealing this argument may be, it lacks legal support" and "partial assignees are appropriately considered to be members of a class"); *Meijer, Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. 293, 296 (D.D.C. 2007)* (noting **[*38]** that the defendants, including Warner Chilcott, admitted that ***HN15***[] "an assignee stands in the shoes of his assignor, deriving the same but no greater rights and remedies than the assignor then possessed." (quoting *Fox-Greenwald Sheet Metal Co. v. Markowitz Bros., 452 F.2d 1346, 1358 n.69, 147 U.S. App. D.C. 14 (D.C. Cir. 1971))*. Moreover, the assignment gives Ahold a stake in the product hop allegations and purchases of Minastrin 24, as it encompasses "claims [that] relate to those acts alleged against Warner Chilcott in" litigation "to recover allegedly illegal overcharges imposed on purchasers of Loestrin 24." Defs.' Opp'n to Class Cert. Ex. 4; see also DPPs' Further Supp. for Class Cert. 64; DPP Compl. ¶¶ 257-96 (setting forth product hop allegations).

Establishing an earlier generic entry date is also plainly in Ahold's interest: the earlier the entry date for generic Loestrin, "the longer the delay period established, the sooner generic competition ensues, and the lower prices would have been at the start of Ahold's assignment and at the time of Ahold's direct purchases of generic Loestrin 24." DPPs' Further Supp. for Class Cert. 68. Ahold has already filed a Third Amended Complaint that covers the full class period (back to 2009), see DPP Compl. ¶ 297, and it has filed expert reports addressing **[*39]** and seeking damages for the full class period. See Leitzinger Report ¶ 5 n.4. In blunt, strategic terms, counsel for the DPPs explained that it is in Ahold's individual interest to pursue the whole claim period "[b]ecause the bigger the claim, the bigger the leverage on [Defendants] and hopefully the bigger the settlement [the DPPs will] try to get out of them before we go to trial or while we're in trial". DPP Hr'g Tr. 95:8-12. The Court sees how this would be motivating.

In sum, the Court concludes that Ahold's claims and defenses are typical of the class and is confident Ahold will fairly and adequately protect the interests of the class. Its status as a retailer pursuing claims with an assignment does not render it "markedly different" from the other class members, does not create a conflict with the class, and does not impair its ability to adequately represent the putative class. Indeed, Ahold has been named class representative in many pharmaceutical antitrust class actions, and no court has ever found Ahold to be atypical or inadequate due to its status as an assignee or for any other reason. See, e.g., *Solodyn, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777*; *Nexium II, 296 F.R.D. 47*; *Meijer, Inc., 246 F.R.D. 293*. Ahold satisfies *Rule 23*'s typicality and adequacy requirements.

E. *Rule 23(b)(3)*

HN16[] As stated **[*40]** above, the DPPs seek certification under *Rule 23(b)(3)*, which requires a putative class to demonstrate that "the questions of law or fact common to class members predominate over any questions affecting only individual members . . . ." *Fed. R. Civ. P. 23(b)(3)*. This "inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. To meet this requirement, the putative class must demonstrate "that 'the fact of antitrust impact can[] be established through common proof' and that 'any resulting damages would likewise be established by sufficiently common proof.'" *Nexium III, 777 F.3d at 18* (quoting *New Motor Vehicles, 522 F.3d at 20*)). "An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045, 194 L. Ed. 2d 124 (2016)* (internal quotation marks omitted).

1. Predominance: Common Proof of Injury-in-Fact

HN17[] In order to satisfy *Rule 23(b)(3)*'s predominance requirement, the DPPs must "include some means of determining that each member of the class was in fact injured." *New Motor Vehicles, 522 F.3d at 28*; see also *In re Asacol Antitrust Litig., 907 F.3d 42, 51 (1st Cir. 2018)* ("Asacol") ("Proof of injury, also called 'injury-in-fact,' **[*41]** is a required element of a plaintiff's case in an action such as this one." (quoting *New Motor Vehicles, 522 F.3d at 19 n.18*). At this stage, "plaintiffs must only show that 'antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual members." *Nexium III, 777 F.3d at 24 n.20* (quoting *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008))*.

DPPs' common theory of injury is that "every Class member would have purchased at least some lower-priced generic Loestrin [24] instead of higher-priced branded Loestrin 24, Minastrin 24 or generic Loestrin 24 that it did buy." DPPs' Mot. for Class Cert. 16 (quoting Leitzinger Report ¶ 50). Accordingly, in order to prevail on their motion for class certification, the DPPs must satisfy the Court that Dr. Leitzinger's model demonstrates, using common evidence, that each of the DPPs would have substituted some of their purchases of brand Loestrin 24 or Minastrin from Warner Chilcott, or generic Loestrin 24 from Amneal, for cheaper generic Loestrin 24 but for Defendants' allegedly unlawful generic suppression efforts.

Defendants, in turn, argue that individualized inquiry is required for twenty-seven of the forty-eight members of the proposed class to determine injury-in-fact. Defs.' Opp'n to Class Cert. 3. They take issue, **[*42]** specifically, with Dr. Leitzinger's model establishing injury-in-fact for the Generic-Only and Brand-Only Purchasers. Id. at 3-4. They say that Dr. Leitzinger improperly relies on aggregate trends and averages that do not account properly for the facts of this case and hide the need for individualized inquiry. Id. at 36.

a. Assumptions Regarding Early Minastrin Entry and an Authorized Generic

Defendants challenge Dr. Leitzinger's assumptions relating to whether Warner Chilcot would have launched Minastrin 24 earlier and/or an authorized generic in the but-for world. Defs.' Opp'n to Class Cert. 37-39; Cremieux Report ¶¶ 101-04.[17] But as discussed above, Dr. Leitzinger's sound methodology and analysis cannot be otherwise faulted for accepting reasonable assumptions supported by Plaintiffs' other experts and fact witnesses. See supra Part II.A. Whether Warner Chilcott would have launched Minastrin earlier and/or whether Warner Chilcott would have launched an authorized generic if generics had entered earlier goes to the heart of the merits of this case and is a classic fact question best suited for decision by a jury. See *Solodyn, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *10* (holding that ***HN18***[] whether the product hop led the plaintiffs to purchase more of the expensive **[*43]** brand product over the cheaper generic product was a fact question for the jury, not to be determined on class certification).

b. Brand-Only Purchasers

Defendants argue that the DPPs cannot demonstrate that the Brand-Only Purchasers incurred overcharges, because they did not purchase generic Loestrin 24, even after it became available. Defs.' Opp'n to Class Cert. 17-

[17] For what it's worth, as the kids say, Dr. Leitzinger has now performed, in response to Defendants' criticisms, the calculations necessary for jury findings that the product hop was lawful, that the product hop was unlawful, and that the product hop occurred six months before a non-delayed Watson generic entry. See Leitzinger Report ¶¶ 62-65; Leitzinger Rebuttal Report ¶¶ 35-41.

18. The DPPs counter that Dr. Leitzinger's analysis clearly demonstrates that most brand purchases would have been converted to generic Loestrin 24 purchases after generic entry. This, coupled with evidence that the Brand-Only Purchasers are wholesalers in the business of responding to their retail customers' demands, is strong evidence that most Brand-Only Purchasers would have converted at least one brand prescription into a generic prescription in the but-for world. See DPPs' Further Supp. for Class Cert. 33; Leitzinger Rebuttal Report ¶ 29.

The Court acknowledges that the Brand-Only Purchasers' failure to purchase generic Loestrin 24 once it was available "casts doubt on the fact that these entities would have purchased the generic earlier had it been available to them[;]" however, Defendants have not earned "the benefit **[*44]** of the doubt when the very reason we cannot know the answer to that question is because of their alleged wrongdoing." *Namenda, 331 F. Supp. 3d at 209* (citing *In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 689 (2d Cir. 2009))*. The Court reiterates the discussion on this score in relation to Defendants' Motion to Exclude Dr. Leitzinger's Report. See supra Part II.B. The Court is fully satisfied that Dr. Leitzinger's report and testimony establish that the Brand-Only Purchasers each likely would have purchased at least a single prescription of generic Loestrin 24 during the class period in a market with robust, sustained generic competition, given their business interests in meeting their customers' demand. As noted above, it will be for the jury to decide whether Dr. Leitzinger's theory wins the day, in whole or in part; but for present purposes - class certification - his theory more than suffices.

c. Generic-Only Purchasers

Defendants further argue that there is no common proof of injury for the Generic-Only Purchasers, and thus, individual issues predominate. Defs.' Opp'n to Class Cert. 39. Twenty-one of the putative class members purchased generic Loestrin 24 from non-defendant generic manufacturer Amneal and made no brand Loestrin 24 purchases from Defendants. Defs.' Opp'n to **[*45]** Class Cert. 13, 39. The DPPs allege that Defendants' conduct created market conditions that allowed other sellers, like generic-manufacturer Amneal, to charge higher prices than the market would have allowed absent the unlawful conduct. Leitzinger Report ¶ 49. Dr. Leitzinger's model demonstrates that purchasers obtained greater discounts relative to brand WAC as more generics entered the market. Leitzinger Rebuttal Report ¶¶ 25-27. In reaching this conclusion, Leitzinger relies upon economic literature regarding sustained generic entry; Defendants' and generic manufactures' own forecasts; market-wide sales data showing that prices fell substantially when generic entry finally occurred; and evidence that class members supply brand and generic Loestrin 24 to a broad cross-section of customers. DPPs' Further Supp. for Class Cert. 19-20 (citing Leitzinger Report ¶¶ 28-52).

Defendants retort that branded generics compete differently than generics generally and the actual data demonstrate "meaningful variation in generic prices and no common injury-in-fact/impact as to" the Generic-Only Purchasers. Defs.' Opp'n to Class Cert. 39-42. First, Defendants argue that the price for generic Loestrin **[*46]** 24 did not uniformly decline as additional generics entered the market. Instead, "the average prices paid for the generic products continued to vary" as generic competition became more robust later in the class period. Id. at 40 (quoting Cremieux Report ¶ 41 & Ex. 5).

But the DPPs do not dispute that the generic Loestrin 24 market did not respond in unison as additional generics entered. To the contrary, Dr. Leitzinger's methodology incorporates the "variation across Class members in the actual prices they paid and in the prices they would have paid", providing averages that "correctly summarize the combined effects of all of these Class members in a single classwide overcharge measure." Leitzinger Rebuttal Report ¶ 45. As discussed throughout, aggregating damages in this way is well accepted.

Second, Defendants argue that the data reveal that generic purchasers showed brand loyalty to their branded generics and did not just shift to the cheapest option. Defs.' Opp'n to Class Cert. 41. But this does not undercut DPPs' allegation that Generic-Only Purchasers would have paid less for the generics they were purchasing. Dr. Leitzinger's model demonstrates that Generic-Only Purchasers would have paid **[*47]** less for their purchases in a but-for world with robust, sustained generic competition; it does not purport to show that they shifted to the cheapest generic available. Leitzinger Rebuttal Report ¶¶ 25-27.

Third, Defendants point to individual data suggesting that some purchasers that bought generic Loestrin 24 from Amneal did not pay less once additional generic manufactures entered. Defs.' Opp'n to Class Cert. 42. Defendants' analysis, however, focuses in on the actual price a few months following generic entry with two and three generic competitors on the market, thereby failing to consider the effect of sustained, robust generic competition. Leitzinger Rebuttal Report ¶¶ 9-12. In particular, Dr. Leitzinger explains, the effects of manufacturer price concessions (viz., chargebacks and rebates) are often recorded in the data later than the original sale transitions. Id. As a result, Dr. Cremieux's data arguably overstates generic prices by understating the generic discounts. Id.; see also id. ¶ 13 (noting that some of the pricing data used by Dr. Cremieux did not provide any data on manufacturer price concessions). To combat this concern, Dr. Leitzinger uses a combination of transactional **[*48]** data and manufacturers' forecasts to predict prices in the but-for world. Leitzinger Report ¶ 27; see also id. ¶ 61; Table 1, Leitzinger Rebuttal Report (calculating discount off WAC with one through five generic entrants in the market). At trial, the jury will sort out the details, but for now, the Court is satisfied that the DPPs have evidence common to the class that the Generic-Only Purchasers sustained injury-in-fact.

HN19[] In sum, the DPPs have sufficiently shown that damages may be "demonstrated by a 'common methodology' applicable to the class as a whole." *In re Nexium (Esomeprazole) Antitrust Litig., 297 F.R.D. 168, 182 (D. Mass. 2013)* ("Nexium I"), aff'd sub nom. *Nexium III, 777 F.3d 9* (quoting *Comcast 569 U.S. at 30*)). While it may be borne out through the evidence at trial that there are a couple uninjured members of the DPP class, it would be a "very small absolute number of class members . . . picked off in a manageable, individualized process at or before trial." *Asacol, 907 F.3d at 53-54*. The prospect that a handful of identifiable class members may be uninjured is not a barrier to class certification. Cf. id. (holding that class should not be certified in pharmaceutical antitrust case where "any class member may be uninjured, and there are apparently thousands who in fact suffered no injury").

2. Predominance: Common Proof **[*49]** of Damages

HN20[] *Rule 23(b)(3)* carries with it the additional requirement that a putative class demonstrate that damages can be calculated on a class-wide basis. *Comcast, 569 U.S. at 35*. The damages model must be "consistent with [the putative class's] liability case," id.; that is, "the defendants cannot be held liable for damages beyond the injury they caused." *Nexium III, 777 F.3d at 18*. That said, "it is well-established that '[t]he individuation of damages in consumer class actions is rarely determinative under *Rule 23(b)(3)*.'" *Id. at 21* (quoting *Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 40 (1st Cir. 2003)*). Rather, "where . . . common questions predominate regarding liability, . . . courts generally find the predominance requirement to be satisfied even if individual damages issues remain." Id. (quoting *Smilow, 323 F.3d at 40*).

In his Declaration and Rebuttal Report, Dr. Leitzinger establishes a "formulaic approach to class-wide overcharges [that] does not require individualized analysis for each Class member." Leitzinger Report ¶ 67. Dr. Leitzinger develops a benchmark demonstrating (1) the prices that direct purchasers would have paid in a but-for world, and (2) the number of Loestrin 24 and Minastrin 24 purchases that would have instead been generic Loestrin 24 purchases in a but-for world. Id. ¶¶ 54, 57, 62. This allows him to calculate overcharges **[*50]** or, the "difference between the amounts actually paid for [generic and brand] Loestrin 24 . . . and Minastrin 24, and the amounts that would have been paid absent illegal conduct." Leitzinger Report ¶ 57.

Dr. Leitzinger's approach to calculating class-wide overcharges using evidence common to the class involves: (1) using generic manufacturers' own forecasts predicting the effect of genetic Loestrin 24 entry, along with the literature on the pharmaceutical industry, to calculate a generic entry rate, id. ¶¶ 58-59; (2) using pricing data from the actual experience of generic Loestrin 24 entry, coupled with the forecasts from generic Loestrin 24 manufacturers to calculate the discount off the brand price (i.e., discount off WAC) that would have been available in a but-for world, id. ¶¶ 60-61; (3) calculating the but-for volumes of Loestrin 24, Minastrin 24, and generic Loestrin 24 using generic penetration rates over time applied to actual purchase volumes over time, id. ¶¶ 62-64; and (4) multiplying the per unit overcharge by the actual sales volume to determine the aggregate class-wide overcharges incurred by the DPPs, id. ¶ 66, Table 1. Importantly, Dr. Leitzinger's calculations can **[*51]** be adjusted to account for whichever (if any) anticompetitive conduct the jury finds Defendants liable for, as well as when and how many generic competitors would have entered earlier in the but-for world. Id. ¶¶ 26, 66, 71-72. He further notes that additional adjustments could be made to account for additional or different determinations altering the calculations used in his model (e.g., generic entry dates). Id. ¶ 67.

Defendants contend that the DPPs, using Dr. Leitzinger's methodology and analysis, fail to establish that "damages are capable of measurement on a classwide basis." Defs.' Opp'n to Class Cert. 43 (quoting *Comcast, 569 U.S. at 34-35*). They argue that Dr. Leitzinger's model is "highly aggregated" and thus inaccurate and unreliable; it ignores Brand-Only and/or Generic-Only Purchasers that may not be injured; and it fails to separate out overcharges from the alleged generic delay and the alleged product hop. *Id. at 43-45*. In addition, they continue to take issue with Dr. Leitzinger's assumptions regarding Minastrin entry and his failure to account for decreased volume caused by generic bypass in his damages calculation. *Id. at 45-47*.

Most of these arguments have been addressed above at length. As stated, the DPPs have satisfied **[*52]** the Court that Dr. Leitzinger's analysis is based on sound and reliable methodology. For this reason, the Court is satisfied that Dr. Leitzinger's damages model does not ignore uninjured purchasers, nor does it improperly assume facts about the Minastrin entry. Moreover, as discussed, see supra Part II.C., the Court sides with the weight of authority in holding that a direct purchasers' damages model need not — and, indeed, should not — offset its damages calculation with any anticipated decrease in volume that may have occurred in a but-for world due to changes in buying practices.

Moreover, the Court rejects Defendants' plaint that Dr. Leitzinger's aggregated model of damages is unreliable. In an attempt to undermine Dr. Leitzinger's model, Dr. Cremieux disaggregated Dr. Leitzinger's calculations and determined that it yielded purchases of Minastrin for class members that never purchased Minastrin and, when the disaggregated overcharges were added back together for one but-for scenario, the result was $56 million less than Dr. Leitzinger's class-wide estimate of $625.2 million. Defs.' Opp'n to Class Cert. 44; see also Leitzinger Rebuttal Report ¶ 43. Dr. Leitzinger's methodology, **[*53]** as discussed above, involves calculating class-wide averages (including those of actual prices paid, but-for generic penetration rates, but-for brand prices, and but-for generic prices) and plugging them into his aggregate overcharge model. The output is a "single classwide overcharge measure." Id. ¶ 45. This methodology is widely accepted and does not purport to calculate individual damages for any one purchaser. See, e.g., *Solodyn, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, *9-10* (certifying a class of direct purchasers based upon Dr. Leitzinger's aggregated damages model). But it is nonsensical to disaggregate the model by taking the class-wide averages for certain measures and applying them to each class member.

This is easily illustrated by considering the application of the average generic penetration rate to Generic-Only Purchasers. By definition, Generic-Only Purchasers should have a one-hundred-percent generic penetration rate in the actual and but-for worlds. Leitzinger Rebuttal Report ¶ 47. If one were to disaggregate Dr. Leitzinger's model and apply the average generic penetration rate to the Generic-Only Purchasers, it results in the assignment of Minastrin 24 purchases to class members who never purchased a brand product. Id. **[*54]** The Court remains confident in Dr. Leitzinger's model sufficient to send it to a jury — indeed, Dr. Cremieux's alternative calculation, even with its weaknesses, produced a total overcharge damages number that is only 9% lower than Dr. Leitzinger's. Id. ¶ 44.

The DPPs have satisfied the Court that "***HN21***[] damages may be demonstrated by a 'common methodology' applicable to the class as a whole." See *Solodyn, 017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *10* (quoting *Nexium I, 297 F.R.D. at 182*) (internal quotation omitted).

3. Superiority

HN22[] To earn certification, a putative class must establish that a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*. In undertaking this analysis, the Court examines four factors:

> (A) The class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Id.

Defendants do not seriously dispute that superiority is met here, but rather regurgitate their arguments that joinder is **[*55]** not impracticable and common issue do not predominate. See Defs.' Opp'n to Class Cert. 48-50. The Court disagrees, for the reasons stated above, and concludes that a class action is the superior method for fairly and efficiently adjudicating this matter. With that, the DPPs have carried their burden in establishing that their proposed class should be certified under *Rule 23(a)(1)* and *(b)(3)* under the Federal Rules of Civil Procedure.

IV. Conclusion

For the reasons stated above, the DPPs' Motion for Class Certification (ECF No. 513) is GRANTED and Defendants' Motion to Exclude (ECF No. 570) is DENIED. The Court further APPOINTS as class representative Ahold USA, Inc., and APPOINTS Hagens Berman Sobol Shapiro LLP, Berger & Montague, P.C., Faruqi & Faruqi LLP, and Kessler Topaz Meltzer & Check LLP as Co-Lead Counsel for the DPP Class.

IT IS SO ORDERED.

/s/ William E. Smith

William E. Smith

Chief Judge

Date: July 2, 2019

Sheahan v. State Farm Gen. Ins. Co.

United States District Court for the Northern District of California

July 2, 2019, Decided; July 2, 2019, Filed

Case No. 18-cv-06186-EMC

Reporter

394 F. Supp. 3d 997 *; 2019 U.S. Dist. LEXIS 110800 **; 2019-1 Trade Cas. (CCH) P80,835; 2019 WL 2775647

BRIAN SHEAHAN, et al., Plaintiffs, v. STATE FARM GENERAL INSURANCE COMPANY, et al., Defendants.

Subsequent History: Dismissed by *Sheahan v. State Farm Gen. Ins. Co., 2020 U.S. Dist. LEXIS 37590 (N.D. Cal., Mar. 4, 2020)*

Core Terms

conspiracy, cause of action, software, estimate, allegations, antitrust, leave to amend, monopolization, insurance company, insurance policy, antitrust claim, insurers, replacement cost, fair dealing, competitors, misrepresentation claim, monopoly power, Sherman Act, misrepresentation, Defendants', purchasers, policies, rebuild, product liability, good faith, covenant, underinsured, calculate, benefits, monopoly

Counsel: **[**1]** For Brian Sheahan, Plaintiff: Rebecca McWilliams, Concord, NH; Julia Anne Donoho, Policyholder Pros, LLP, Santa Rosa, CA.

For Alison Sheahan, Douglas Pope, Sandra Wylie, Plaintiffs: Julia Anne Donoho, LEAD ATTORNEY, Policyholder Pros, LLP, Santa Rosa, CA; Rebecca McWilliams, Concord, NH.

For State Farm General Insurance Company, an Illinois company, Defendant: Frank Falzetta, Sheppard, Mullin, Richter & Hampton LLP, Los Angeles, CA; Jeffrey Scott Crowe, Sheppard, Mullin, Richter and Hampton LLP, Costa Mesa, CA; Jennifer Marie Hoffman, Sheppard Mullin Richter Hampton, Los Angeles, CA.

For Verisk Analytics, a Delaware corporation, Insurance Services Office, Inc., a Delaware corporation, Xactware Solutions Inc, a Delaware corporation, Defendants: Andrew David Yaphe, Davis Polk, Menlo Park, CA; Micah Galvin Block, Davis Polk and Wardwell LLP, Menlo Park, CA; Neal Alan Potischman, Davis Polk & Wardwell, Menlo Park, CA.

Judges: EDWARD M. CHEN, United States District Judge.

Opinion by: EDWARD M. CHEN

Opinion

[*1000] ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

Docket Nos. 34, 36

Plaintiffs are Brian and Alison Sheahan (collectively, the "Sheahans"), Douglas Pope, and Neil and Sandra Wylie (collectively, the "Wylies"). They have filed **[**2]** a class action against State Farm General Insurance Company

("State Farm") as well as three additional companies that are affiliated with one another, namely, Verisk Analytics, Inc.; Insurance Services Office, Inc.; and Xactware Solutions, Inc. (collectively, the "Verisk Defendants").[1] The gist of the operative class action complaint is **[*1001]** that (1) Plaintiffs and others similarly situated purchased homeowners insurance policies from State Farm and that (2) State Farm, using software developed by the Verisk Defendants, undervalued the replacement cost of Plaintiffs' homes when issuing the policies. After Plaintiffs' homes were destroyed during the October 2017 Northern California wildfires, they did not have enough money from the policies to rebuild their homes. Currently pending before the Court are two motions to dismiss: one filed by State Farm and the other filed by the Verisk Defendants.

Having considered the parties' briefs and accompanying submissions, as well as the oral argument of counsel, the Court hereby **GRANTS** both State Farm and the Verisk Defendants' motions to dismiss; however, Plaintiffs have leave to amend as to certain claims, as discussed below.

I. FACTUAL & PROCEDURAL [**3] BACKGROUND

In the operative second amended complaint ("SAC"), Plaintiffs allege as follows.

"State Farm is the largest property and casualty insurance provider in the United States." SAC ¶ 28. Plaintiffs all purchased homeowners insurance policies from State Farm. *See* SAC ¶¶ 43-44. State Farm uses software provided by the Verisk Defendants in conjunction with its homeowners insurance policies. *See* SAC ¶ 23. More specifically, the Verisk Defendants provide two software products to State Farm:

(1) 360 Value, which is a zip code calculator used to determine the initial insurance policy value, and
(2) Xactimate, which is used to determine the cost to rebuild or repair property after a loss.

See SAC ¶¶ 23, 45.

According to Plaintiffs, "with detailed inventory and input, including a site visit to document the insured property . . . , 360 Value can deliver an accurate result," but, "without detailed input[,] it gives [only] a generic, tract-home type cost valuation." SAC ¶ 49. The latter generally leads to an underinsured home. *See* SAC ¶ 49.

Xactimate is used after a loss to calculate the cost of rebuilding or repairing a home. Similar to above, Xactimate "may be used . . . to arrive at a valuation **[**4]** within a 10% margin of error for construction estimation." SAC ¶ 52. However, "Xactimate is based on manufactured home data, such as trailers and prefabricated homes, to price houses like a kit of parts"; therefore, unless used correctly, Xactimate "does not represent the true cost to rebuild homes in Northern California." SAC ¶ 50.

Plaintiffs allege that State Farm used 360 Value to determine their initial insurance policy limits. *See* SAC ¶ 57. But because Plaintiffs "were never specifically interviewed about the qualities of their [homes]," 360 Value did not yield an accurate result; accordingly, Plaintiffs' homes were underinsured and, after the wildfires, the policies did not give Plaintiffs enough money to rebuild their homes. SAC ¶ 84. "By underinsuring homeowners [such as Plaintiffs], State Farm has been able to lower the rates on their policy premiums [and] attract a greater volume of business . . . ." SAC ¶ 21; *see also* SAC ¶ 27.

According to Plaintiffs, State Farm represents that 360 Value is a tool that can accurately and reliably be used in setting insurance policy value. For example:

- In its website, State Farm states: "The most appropriate way to estimate the replacement **[**5]** cost of your home is to hire a building contractor or other building professional to produce **[*1002]** a detailed replacement cost estimate. Or your State Farm agent can utilize an estimating tool from Xactware Solutions [*i.e.*, a Verisk

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[1] *See* SAC ¶ 39 (alleging that "Insurance Services Office, Inc. and Xactware Solutions, Inc. are subsidiaries of Verisk Analytics, Inc.").

Defendant] to assist you with an estimate." SAC ¶ 55. Plaintiffs suggest that the second sentence above indicates that the 360 Value estimate is just as reliable as an estimate provided by a building contractor.

• Plaintiffs also assert that the "behavior" of State Farm agents indicates that 360 Value "is accurate and can be relied upon to determine policy limits." SAC ¶ 58. No specifics, however, are given on what this alleged "behavior" is.

Based on, *inter alia*, the above allegations, Plaintiffs have asserted the following claims for relief (against both State Farm and the Verisk Defendants, unless otherwise noted):

(1) Breach of the implied covenant of good faith and fair dealing (State Farm only).
(2) Fraud — intentional misrepresentation.
(3) Fraud — false promise.
(4) Negligent misrepresentation.
(5) Negligence.
(6) Reformation of insurance policies (State Farm only).

(7) Violation of *California Business & Professions Code § 17200*.

(8) Violation of the *California Cartwright Act*.

(9) Violation of *California Insurance Code § 790.03*.

(10) Violation **[**6]** of the *federal Sherman Act* — "Cartel."
(11) Violation of the federal Sherman Act — "Monopoly."
(12) Violation of the federal Sherman Act — "Conspiracy."
(13) Violation of California Products Liability Act.

II. DISCUSSION

A. Legal Standard

> To survive a [12(b)(6)] motion to dismiss for failure to state a claim after the Supreme Court's decisions in *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* and *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, [a plaintiff's] factual allegations [in the complaint] "must . . . suggest that the claim has at least a plausible chance of success." In other words, [the] complaint "must allege 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'"
>
> . . . . [The Ninth Circuit has] settled on a two-step process for evaluating pleadings:
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>> First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party **[**7]** to be subjected to the expense of discovery and continued litigation.

Levitt v. Yelp! Inc., 765 F.3d 1123, 1134-35 (9th Cir. 2014).

Notably,

> [t]he plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a **[*1003]** complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility 'of entitlement to relief.'"

Iqbal, 556 U.S. at 678.

B. First Cause of Action: Breach of the Implied Covenant of Good Faith and Fair Dealing

The first cause of action — for breach of the implied covenant of good faith and fair dealing — has been asserted against State Farm only. Plaintiffs allege that State Farm breached the implied 4 covenant because: (1) "Plaintiffs contracted with State Farm [to] obtain[] coverage sufficient to cover the total replacement and/or rebuild cost of [their] homes to pre-loss condition in the event of loss," SAC ¶ 93; (2) "State Farm promised to use its zip code calculator software [*i.e.*, 360 Value] to calculate replacement costs in such a way as they would be reasonably accurate," SAC ¶ 94; and (3) "State Farm has failed to pay out amounts sufficient to cover the total rebuild costs of Plaintiffs' **[**8]** homes, which is akin to denying [them] the benefit of their bargain." SAC ¶ 98.

In its motion, State Farm argues that the claim should be dismissed because the duty of good faith and fair dealing does not extend beyond the terms of an insurance contract and, here, Plaintiffs have not alleged that State Farm frustrated their right to receive the benefits of their insurance contracts; instead, Plaintiffs' theory is that "State Farm failed to pay *more* than [the] policy limits." Reply at 7 (emphasis in original).

State Farm is correct. The California Supreme Court has rejected the argument that

> the implied covenant [of good faith and fair dealing] can impose substantive terms and conditions beyond those to which the contract parties actually agreed. . . The covenant of good faith and fair dealing, implied by law in every contract, exists merely to *prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made*. The covenant thus cannot "'be endowed with an existence independent of its contractual underpinnings.'" *It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific* ***[**9]*** *terms of their agreement*.

Guz v. Bechtel Nat'l, Inc., 24 Cal. 4th 317, 349-50, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 (2000) (emphasis added).

The above principle, although articulated in an employment case, applies equally to an insurance case. That is, the implied covenant of good faith and fair dealing does not "'extend[] beyond the terms of the insurance contract in force between the parties. . . . The carrier's duty is to deal in good faith and fairly in discharging duties under the contract.'" Hellinger v. Farmers Grp., 91 Cal. App. 4th 1049, 1068, 111 Cal. Rptr. 2d 268 (2001); *see also Tilbury Constructors, Inc. v. State Comp. Ins. Fund, 137 Cal. App. 4th 466, 474, 40 Cal. Rptr. 3d 392 (2006)*. In the insurance context, "where no benefits are withheld or delayed, there is no cause of action for the breach of the covenant of good faith and fair dealing." Progressive W. Ins. Co. v. Superior Court, 135 Cal. App. 4th 263, 278, 37 Cal. Rptr. 3d 434 (2005); *see also* Brehm v. 21st Century Ins. Co., 166 Cal. App. 4th 1225, 1235-36, 83 Cal. Rptr. 3d 410 (2008) (stating that "there can be no breach of the implied covenant of good faith and fair dealing if no benefits are due under the policy"; but adding that "'an insurer that pays the full limits of its policy may be liable for breach of the implied covenant[] if improper claims handling **[*1004]** causes detriment to the insured'" — *e.g.*, delayed payment).

As State Farm argues, in the instant case, Plaintiffs have not alleged that they have been *denied* any benefits as provided for under the insurance contracts or that benefits have been *delayed*. Rather, Plaintiffs' complaint is that State Farm represented **[**10]** that it would give them "true" replacement coverage but failed to do so, with the insurance contracts leaving them in an underinsured position. The shortfall stems from the express terms of contract, not from the implementation of its terms. While Plaintiffs may have a claim for fraud or negligence as a result, they have not stated a claim for breach of the implied covenant.

In their opposition, Plaintiffs claim that they have alleged that they were underpaid under the terms of their insurance contracts. *See* Opp'n at 8. But tellingly, Plaintiffs have not cited any paragraph from the SAC to support their position.

Accordingly, Plaintiffs' claim for breach of the implied covenant is dismissed. The Court, however, shall give Plaintiffs leave to amend, if they can do so in good faith, given Plaintiffs' representation that they can provide specific examples of alleged underpayment inconsistent with the terms of the contract.

C. Second, Third, Fourth, and Sixth Causes of Action: Fraud/Intentional Misrepresentation, Fraud/False Promise, Negligent Misrepresentation, and Reformation of Insurance Policies

The second, third, fourth, and sixth causes of action are all predicated on misrepresentations, **[**11]** either fraudulent or negligent. The basic thrust of these claims is that State Farm misrepresented that 360 Value and/or Xactimate could provide accurate calculations (for determining insurance policy value and replacement cost, respectively). *See, e.g.*, SAC ¶¶ 104-05 (second cause of action for fraud/intentional misrepresentation); SAC ¶ 161 (sixth cause of action for reformation of insurance policies). All of the misrepresentation claims, except for the sixth (reformation of insurance policies), have been asserted against both State Farm and the Verisk Defendants. Both State Farm and the Verisk Defendants have moved to dismiss the misrepresentation claims.

1. State Farm

In its motion to dismiss, State Farm challenges the misrepresentation claims on multiple grounds. One of State Farm's main arguments is that Plaintiffs have failed to allege actual reliance (*i.e.*, on the representation that 360 Value could accurately and reliably determine insurance policy value).[2] State Farm notes, for example, that Plaintiffs have not alleged that they ever saw the statement on State Farm's website that

> "[t]he most appropriate way to estimate the replacement cost of your home is to hire a building contractor **[**12]** or other building professional to produce a detailed replacement cost estimate. *Or your State Farm agent can utilize an estimating tool from Xactware Solutions [i.e., a Verisk Defendant] to assist you with an estimate*."

SAC ¶ 55 (emphasis added). State Farm also points out that, although Plaintiffs indicated that the "behavior" of State Farm agents suggests 360 Value "is accurate and can be relied upon to determine policy limits," SAC ¶ 58, Plaintiffs never specified what that behavior was, as required **[*1005]** by *Federal Rule of Civil Procedure 9(b)*.

Confronted with this problem, Plaintiffs have tried to recast their SAC. In their opposition brief, Plaintiffs assert that

> they have never allege[d] that they relied on a 360 Value report, nor did they ever see one. Rather, Plaintiffs allege that [State Farm's] agents were either not trained or were trained (poorly) to create and rely on these zip code calculators in issuing policies. Plaintiffs requested copies of initial values and 360 Value reports after realizing their situation. Although Agents failed to disclose the reports or discuss any of the data entry upon which they were based at the beginning, *they asserted that the policy underwriting was sound and based upon solid data* ***[**13]*** . This intentional misrepresentation is what Plaintiffs relied upon in entering the policy.

Opp'n at 10 (emphasis added; discussing claim for fraud/intentional misrepresentation). The problem for Plaintiffs is that the SAC as pled does not allege what Plaintiffs assert in the excerpt from the opposition brief. Moreover, even if the Court were to credit Plaintiffs' opposition brief, it is too conclusory for Plaintiffs to claim that each of them was told by a State Farm agent that "the policy underwriting was sound and based upon solid data." Opp'n at 10. Plaintiffs need to allege with specificity what was told as to each of them in order to comply with *Federal Rule of Civil Procedure 9(b)*. *See* *Cafasso v. Gen. Dynamics C4 Sys., 637 F.3d 1047, 1055 (9th Cir. 2011)* (stating that, "[t]o satisfy *Rule 9(b)*, a pleading must identify 'the who, what, when, where, and how of the misconduct charged,' as well as 'what is false or misleading about [the purportedly fraudulent] statement, and why it is false'").

The Court therefore dismisses Plaintiffs' misrepresentation claims but with leave to amend. The Court acknowledges that State Farm has also challenged the misrepresentation claims based on disclaimers contained in Plaintiffs' insurance policies (or required by the California Insurance **[**14]** Code) and based on integration clauses contained in the insurance policies. However, the Court cannot assess these defenses without first having an understanding as to what the alleged misrepresentations were in the first place.

2. Verisk Defendants

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[2] The parties agree that reliance is an element of each of the causes of action at issue.

Like State Farm, the Verisk Defendants make multiple arguments in support of dismissal of the misrepresentation claims. For purposes of this order, however, the Court need only address one specific argument — *i.e.*, that Plaintiffs have failed to allege that the Verisk Defendants (as opposed to State Farm) made any misrepresentation to Plaintiffs. This argument has merit and nothing in Plaintiffs' opposition specifically addresses the argument.

At best, Plaintiffs suggest that State Farm and the Verisk Defendants have conspired or colluded to defraud Plaintiffs and other policyholders. *See* *AREI II Cases, 216 Cal. App. 4th 1004, 1021, 157 Cal. Rptr. 3d 368 (2013)* (stating that "'[c]onspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration'[;] [a] civil conspiracy 'must be activated by the commission of an actual tort'"). But Plaintiffs have only **[**15]** asserted in conclusory terms that State Farm and the Verisk Defendants engaged in some kind of conspiracy. There are no concrete factual allegations to support the claim. In fact, it is notable that Plaintiffs have conceded in their SAC that 360 Value and Xactimate can be used to yield accurate results. There is nothing to suggest that **[*1006]** State Farm and the Verisk Defendants had an agreement pursuant to which State Farm would use the software in a manner that would predictably yield inaccurate results. Indeed, nothing in the SAC even suggests that the Verisk Defendants knew (or should have known) that State Farm used 360 Value or Xactimate in such a way as to yield inaccurate results and encouraged State Farm to use the software in such a way.

Accordingly, the Court dismisses the misrepresentation claims against the Verisk Defendants. The dismissal is with leave to amend; however, Plaintiffs are admonished that, if they are going to allege a conspiracy, the allegations must satisfy the specificity requisites of *Twombly*/*Iqbal* and must be supported by good faith as required by *Federal Rule of Civil Procedure 11*.

D. Fifth Cause of Action: Negligence

In the fifth cause of action for negligence, Plaintiffs allege that "Defendants **[**16]** represented to Plaintiffs that they had a software tool that could produce an estimate equal to that of a contractor that could be relied upon to accurately calculate the costs of replacing or reconstructing Plaintiffs' homes following a loss event." SAC ¶ 148. Given this allegation, the negligence claim is duplicative of the claim for negligent misrepresentation and the Court need not entertain any additional arguments made by State Farm and the Verisk Defendants (*e.g.*, that they owed no duty to Plaintiffs).

As above, Plaintiffs are given leave to amend.

E. Seventh Cause of Action: Violation of *California Business & Professions Code § 17200*

In the seventh cause of action, Plaintiffs allege a violation of *California Business & Professions Code § 17200*. Plaintiffs invoke all three prongs of *§ 17200* — *i.e.*, fraudulent, unlawful, and unfair conduct.

To the extent Plaintiffs claim fraudulent conduct, the analysis above for the misrepresentation claims is applicable here.

To the extent Plaintiffs assert unlawful conduct, the SAC fails to state a claim for relief. Plaintiffs claim that Defendants violated *10 California Code of Regulations § 2695.183* (titled "Standards for Estimates of Replacement Value") but that regulation has no applicability to the Verisk Defendants because they are not insurance companies and, further, is not applicable **[**17]** to State Farm because the regulation did not go into effect until June 2011 and Plaintiffs have not alleged that there was a noncompliant estimate after the regulation went into effect.

To the extent Plaintiffs allege unfair conduct because State Farm did not include certain expenses in its estimate (*i.e.*, regardless of what *§ 2695.183* requires), that claim is not facially implausible but is viable against State Farm only.

Accordingly, the bulk of Plaintiffs' *§ 17200* claim, as currently pled, is problematic. Moreover, some of the remedies Plaintiffs' seek for the *§ 17200* claim are problematic. For example, Plaintiffs ask that their insurance claims be "adjust[ed] . . . without respect to the policy limits set forth in their homeowners insurance policies." SAC ¶ 178. This request for an adjustment amounts to a request for monetary damages, which is not cognizable for a violation of *§ 17200*. *See, e.g., Tucker v. Pac. Bell Mobile Servs., 208 Cal. App. 4th 201, 226, 145 Cal. Rptr. 3d 340 (2012)* (stating that "[t]he scope of the remedies available under the UCL . . . is limited"; because "[a] UCL action is equitable in nature . . . [,] damages cannot be recovered" and a plaintiff is "generally limited **[*1007]** to injunctive relief and restitution") (internal quotation marks omitted); *see also* ***[**18]*** *Saitsky v. DirecTV, Inc., No. CV 08-7918 AHM (CWx), 2009 U.S. Dist. LEXIS 134817, at *5 (C.D. Cal. Sep. 22, 2009)* (stating that "[r]emedies for private individuals bringing suit under the UCL are limited to restitution and injunctive relief" and that, "[i]n the context of the UCL, restitution is limited to the return of property or funds which the plaintiff has an ownership interest (or is claiming through someone with an ownership interest)") (internal quotation marks omitted). Also, to the extent Plaintiffs ask for an order "compelling State Farm to provide 'Truth in Insurance' disclosures at policy issuance, so that insureds understand the basis of the policy, the level of insurance and the maximum coverage afforded by the policy," SAC, Prayer for Relief ¶ 8(e), the relief is inappropriate for two reasons: (1) the request invades areas that are more appropriate for the California legislature, *cf. Crusader Ins. Co. v. Scottsdale Ins. Co., 54 Cal. App. 4th 121, 138, 62 Cal. Rptr. 2d 620 (1997)* (stating that "[t]he question of what type or level of [insurance] regulation is adequate or appropriate is uniquely a question for executive or legislative policy choice"; adding that plaintiff's "complaints are . . . properly directed either to the Department of Insurance or to the Legislature"), and (2) the request is largely unnecessary or moot because California law already provides **[**19]** for such relief through *California Insurance Code § 10101 et seq.* *See* *Cal. Ins. Code § 10101* (providing that "no policy of residential property insurance may be first issued or . . . . initially renewed in this state by any insurer unless the named insured is provided a copy of the California Residential Property Insurance disclosure statement as contained in *Section 10102*").

F. Ninth Cause of Action: Violation of *California Insurance Code § 790.03*

In the ninth cause of action, Plaintiffs assert a violation of *California Insurance Code § 790.03*, which provides that certain conduct constitutes "unfair methods of competition and unfair and deceptive acts or practices in the business of insurance." *Cal. Ins. Code § 790.03*. According to Plaintiffs, State Farm has violated *§ 790.03(a)*, *(b)*, *(c)*, and *(h)*. *See id.* *§ 790.03(a)* (referring to the making of "any estimate . . . or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby"); *id.* *§ 790.03(b)* (referring to the making or dissemination of "any statement . . . with respect to the business of insurance . . . which is untrue, deceptive, or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue, deceptive, or misleading"); *id.* *§ 790.03(c)* (referring to the entering of "any agreement to commit . . . any act of boycott, coercion, or intimidation **[**20]** resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance"); *id.* *§ 790.03(h)* (referring to "a general business practice [of] any of the following unfair claims settlement practices: (1) Misrepresenting to claimants pertinent facts or insurance policy provisions relating to any coverages at issue," etc.).

In their motions, Defendants argue that the *§ 790.03* claim should be dismissed because *§ 790.03* does not give rise to a private cause of action. Defendants are correct. *See* *Moradi-Shalal v. Fireman's Fund Ins. Cos., 46 Cal. 3d 287, 305, 250 Cal. Rptr. 116, 758 P.2d 58 (1988)* (stating that "nothing we hold herein would prevent the Legislature from creating additional civil or administrative remedies, including, of course, creation of a private cause of action for violation of **[*1008]** *section 790.03*" but "thus far the Legislature has not manifested an intent to create such a private cause of action"); *see also* *Copelan v. Infinity Ins. Co., 728 F. App'x 724, 726 (9th Cir. 2018)* (stating that *§ 790.03* "does not authorize a private cause of action"); *Zhang v. Superior Court, 57 Cal. 4th 364, 384, 159 Cal. Rptr. 3d 672, 304 P.3d 163 (2013)* (stating that, "[w]hen the Legislature enacted the [*Unfair Insurance Practices Act, § 790 et seq.*], it contemplated only administrative enforcement by the Insurance Commissioner").

In their opposition, Plaintiffs do not directly address the above authority, simply stating that they

> are in communication with various politicians, local[,] **[**21]** state, and national representatives, and the Attorney General for California and another state to discuss these issues. [They] ask for additional time to complete diligence with these officials, to September 1, 2019, to get a final answer whether the Attorney General of California will join in this action.

State Farm Opp'n at 22. That request is denied. If the state or the Insurance Commissioner wishes to take action against State Farm, then it or he/she may do so but Plaintiffs have no private right of action and there is no reason to delay dismissing their claim.

G. Thirteenth Cause of Action: Violation of California Products Liability Act

In the thirteenth cause of action, Plaintiffs assert a violation of the so-called "California Products Liability Act." Plaintiffs claim both defective design and a failure to warn. According to Plaintiffs, "State Farm designed and sold a defective insurance product, which was inherently a defective product, at the time that the insurance policy was issued, because it used [the Verisk Defendants'] defective data and software." SAC ¶ 214; *see also* State Farm Opp'n at 24 (arguing that the software is "defective" because it do[es] not and cannot provide **[**22]** consistent and reliable data"). In addition, State Farm "failed to warn [of] the potential risk of not covering the policyholder's actual cost to rebuild following a total loss of home." SAC ¶ 217.

As an initial matter, the Court dismisses the claim because there is no "California Products Liability Act." Moreover, even if the Court were to construe the claim as one under the common law, the claim is still not viable. As alleged, 360 Value and Xactimate are, in and of themselves, not defective. The SAC concedes these tools can yield accurate results if properly employed. Plaintiffs' criticism concerns how State Farm uses the software to achieve underinsurance. In addition, "a products liability action may be brought only by one who has already suffered a physical injury to his or her person of property, and the plaintiff in a products liability action is limited to recovering damages for such physical injuries." *Cty. of Santa Clara v. Atl. Richfield Co., 137 Cal. App. 4th 292, 310, 40 Cal. Rptr. 3d 313 (2006)*. Here, Plaintiffs are not claiming physical injuries to themselves or to their properties, but rather are asserting economic loss. *See* *Jimenez v. Superior Court, 29 Cal. 4th 473, 482, 127 Cal. Rptr. 2d 614, 58 P.3d 450 (2002)* (stating that "[d]amages available under strict products liability do not include economic loss, which includes damages for inadequate value, **[**23]** costs of repair and replacement of the defective product or consequent loss of profits — without any claim of personal injury or damages to other property") (internal quotation marks omitted); *Sacramento Reg'l Transit Dist. v. Grumman Flxible, 158 Cal. App. 3d 289, 293, 204 Cal. Rptr. 736 (1984)* (stating that, "where damage consists solely of 'economic losses,' recovery on a theory of products liability is precluded"). **[*1009]** Given the above, the Court need not address Defendants' arguments that products liability law does not apply to insurance and/or software. The claim is dismissed with prejudice.

H. Eighth, Tenth, Eleventh, and Twelfth Causes of Action: Violation of the California Cartwright Act and the Federal Sherman Act (Cartel, Monopoly, and Conspiracy)

The eighth, tenth, eleventh, and twelfth causes of action are antitrust claims brought pursuant to state and federal law — respectively, the Cartwright Act and the Sherman Act. Plaintiffs label the three Sherman Act claims as "cartel," "monopoly," and "conspiracy," although it is not clear why; the Sherman Act provides for two causes of action, one under *15 U.S.C. § 1* and the other under *§ 2*. *See* *15 U.S.C. § 1* (providing that that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, **[**24]** or with foreign nations, is hereby declared to be illegal"); *id.* *§ 2* (imposing liability on "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations").

1. Allegations in the SAC

The allegations in the SAC with respect to the antitrust claims are far from a model of clarity. However, Plaintiffs' position seems to be as follows: State Farm has engaged in predatory pricing, which is part of a conspiracy with the Verisk Defendants. State Farm deliberately sells inadequate homeowners insurance (*i.e.*, not enough to cover "true" replacement cost) so that it can offer a product cheaper than that offered by the competition. Because the insurance is cheaper, State Farm can sell at a greater volume. Although Plaintiffs make reference to State Farm selling insurance "below cost," *see, e.g.*, SAC ¶¶ 182-83, it does not appear that Plaintiffs are using that phrase in its ordinary sense — *i.e.*, State Farm selling insurance at a price cheaper than what it actually costs. Rather, Plaintiffs seem to be using "below cost" to refer to State Farm's **[**25]** alleged practice of selling *inadequate* insurance, which allows it to sell insurance at a cheaper price compared to insurance offered by other companies (which presumably offer "true" replacement cost at a higher price).

If the Court considers only those allegations in the SAC, then there are various reasons why the antitrust claims are deficient. For example, for the Cartwright Act claim:

• Plaintiffs indicate that the Cartwright Act claim is based on California Business & Professions Code § 16727. Section 16727 provides in relevant part that "[i]t shall be unlawful for any person . . . to fix a price charged [for goods], or discount from . . . such price, on the condition, agreement or understanding that the . . . purchaser thereof shall not use or deal in the goods . . . or services of a competitor or competitors of the . . . seller, where the effect of such . . . sale . . . or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in any section of the State." Cal. Bus. & Prof. Code § 16727. Given the text of the statute, the statute does not appear to have any application to the instant case. For example, Plaintiffs have not alleged in the SAC that State Farm is fixing a **[*1010]** price **[**26]** for its insurance on the condition that a homeowner not use or deal in the goods or services of a competitor. Nor have Plaintiffs alleged that the Verisk Defendants are fixing a price for their software on the condition that State Farm or another insurance company not use or deal in the goods or services of a competitor. *See also* Feitelson v. Google Inc., 80 F. Supp. 3d 1019, 1033 (N.D. Cal. 2015) (noting that "Section 16727 of the Cartwright Act is based on § 3 of the Clayton Act and has a similar scope," and "Section 3 of the Clayton Act prohibits tying and exclusive dealings in the lease, sale, or contract for sale of 'goods, wares, merchandise, machinery, supplies, or other commodities'").

• Plaintiffs have suggested a Cartwright Act claim based on a statute that is *not* part of the Act — namely, California Business & Professions Code which provides that "[i]t is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition." Cal. Bus. & Prof. Code § 17043. Aside from this problem, the claim is flawed because, as noted above, it does not appear that Plaintiffs are using "below cost" in its ordinary sense — *i.e.*, State Farm **[**27]** selling insurance at a price cheaper than what it actually costs. Rather, Plaintiffs seem to be using "below cost" to refer to State Farm's alleged practice of selling *inadequate* insurance, which allows it to sell insurance at a cheaper price compared to insurance offered by other companies (which presumably offer "true" replacement cost at a higher price).

Similarly, the §§ 1 and 2 Sherman Act claims are deficient[3]:

• For the §§ 1 and 2 claims, Plaintiffs have not clearly alleged what the relevant market is (*e.g.*, insurance, data analytics, some combination of both?), nor have Plaintiffs clearly alleged market power. *See* Newcal Indus. v. Ikon Office Sol., 513 F.3d 1038, 1044 (9th Cir. 2008) (stating that, "[i]n order to state a valid claim under the Sherman Act, a plaintiff must allege that the defendant has market power within a 'relevant market'[;] [t]hat is, the plaintiff must allege both that a 'relevant market' exists and that the defendant has power within that market"). "Market power is the ability to raise price profitability by restricting output.'" DocMagic, Inc. v. Ellie Mae, Inc., 745 F. Supp. 2d 1119, 1136 (N.D. Cal. 2010). "A plaintiff can show market power directly, by establishing that the defendant, by actually reducing its own output, raised market prices[] or indirectly, by showing that the defendant has a dominant share **[**28]** of the market, that there are significant barriers to entry into that market, and that existing competitors cannot increase their production in the short run." *Id.*

• For the §§ 1 and 2 claims, it is not clear that Plaintiffs' assertion of predatory price fixing is viable given that they are not making an argument **[*1011]** of "below cost" in the ordinary sense.

• For the §§ 1 and 2 claims, the SAC does not adequately allege a conspiracy between State Farm and the Verisk Defendants. As noted above, the allegations of conspiracy are too conclusory.

• For the § 2 claim, Plaintiffs have not made any substantive allegations on the possession of monopoly power or the willful acquisition or maintenance of that power. *See* Allied Orthopedic Appliances Inc. v. Tyco Health

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[3] The Court does not address the Verisk Defendants' contention that the McCarran-Ferguson Act bars the Sherman Act claims because, even assuming the Act is not a bar, Plaintiffs' claims fail.

> Care Grp. LP, 592 F.3d 991, 998 (9th Cir. 2010) (stating that "[t]here are three essential elements to a successful claim of Section 2 monopolization: (a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury") (internal quotation marks omitted). Monopoly power is "when a party has sufficient market power to exclude competition or control prices." DocMagic, 745 F. Supp. 2d at 1136.

Finally, as to all the antitrust claims, Plaintiffs fail to allege any antitrust injury. "Antitrust injury is 'injury **[**29]** of the type the antitrust laws were intended to prevent and that flows from that which makes the [antitrust] defendants' acts unlawful.'" Chip-Mender, Inc. v. Sherwin-Williams Co., No. C 05-3465 PJH, 2006 U.S. Dist. LEXIS 2176, at *14 (N.D. Cal. Jan. 3, 2006). In the SAC as pled, Plaintiffs suggest that State Farm's conduct has "disadvantag[ed] . . . other insurance companies not using [the Verisk Defendants'] software, methods and data," SAC ¶ 181, but, elsewhere in the pleading, Plaintiffs indicate that the Verisk Defendants do not limit distribution of their software tools to State Farm only. *See* SAC ¶ 45 (alleging that the Verisk Defendants "have two software products which they provide to State Farm and other national insurers"); SAC ¶ 201 (alleging that "the Xactware construction cost estimating software has become ubiquitous in the home insurance market"). At oral argument, Plaintiffs reaffirmed that, because of the Verisk Defendants' domination of the software tools market for insurance companies, virtually all insurance companies are using their tools and causing consumers throughout the marketplace to suffer underinsurance. If so, as noted below, there is no injury to competitors **[**30]** of State Farm; the other insurers are similarly situated.

Moreover, antitrust injury is injury that is suffered by competitors or consumers as a result from anti-competitive monopolistic practices. Here, Plaintiffs are neither. They are not competitors of State Farm or the Verisk Defendants. They are not direct consumers of the Verisk Defendants; any claim Plaintiffs might conceivably have as indirect purchasers of 360 Value and Xactimate (factually a stretch) would be barred by Illinois Brick Co. v. Illinois, 431 U.S. 720, 729-30, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977) (indicating that only direct purchasers, and not indirect purchasers, are injured by an antitrust violation; indirect purchasers cannot claim antitrust injury on a theory that an overcharge was passed on to them by the direct purchasers). *See also* Apple Inc. v. Pepper, 139 S. Ct. 1514, 203 L. Ed. 2d 802 (2019) (where iPhone owners sued Apple for unlawful monopolization of the aftermarket for iPhone apps, holding that iPhone owners were direct purchasers from Apple under *Illinois Brick*). The harm Plaintiffs (and other consumers) have suffered is not the anti-competitive result (such as paying higher prices), of, *e.g.*, unlawful monopolistic power. Rather, **[*1012]** it stems from the misuse of software and alleged misrepresentations by State Farm. While this may constitute harm resulting **[**31]** from, *e.g.*, breach of contract, misrepresentation, or negligence, it is not antitrust injury.

Accordingly, based on the allegations in the SAC, Plaintiffs have failed to state any antitrust claim.

2. Allegations in Opposition

Implicitly recognizing that the antitrust claims as pled are problematic, Plaintiffs have in their opposition dramatically overhauled the factual predicate for their antitrust claims, and who is harmed as a result. Plaintiffs have effectively abandoned a Cartwright Act claim and tried instead to assert Sherman Act claims only. As discussed below, the overhauled Sherman Act claims — as characterized in the opposition — are still deficient.

a. Section 1 Claim

Plaintiffs now assert as the factual predicate for their § 1 claim that the Verisk Defendants and "the insurance industry in general," including State Farm, have an agreement "to restrain trade by falsely estimating construction in a manner that affects domestic commerce." Opp'n (Verisk) at 13. In other words, no longer are the Verisk Defendants and State Farm conspiring to the detriment of State Farm's competition (*i.e.*, other insurance companies). Under their revised theory, all of the insurance companies are conspiring with **[**32]** the Verisk Defendants to the harm of, *e.g.*, contractors who lost business because they could not rebuild based on the limited insurance proceeds available under the policies. *See* Opp'n (Verisk) at 13 (stating that "Sheahan's contractor is available to testify that he engaged and then lost over $10-20 million in business when clients could not afford to build due to insurance undervaluation and claims process challenges").

Plaintiffs describe the conspiracy as a hub-and-spoke cartel. *See* Opp'n (Verisk) at 13-14; *see also* *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 255 (3d Cir. 2010)* (explaining that a hub-and-spoke conspiracy "'involves a hub, generally the dominant purchaser or supplier in the relevant market, and the spokes, made up of the distributors involved in the conspiracy. The rim of the wheel is the connecting agreements among the horizontal competitors (distributors) that form the spokes'"). An example of a hub-and-spoke conspiracy is where "a vertical player participates in and facilitates a horizontal conspiracy" — *e.g.*, to fix prices. *See* *United States v. Apple Inc., 952 F. Supp. 2d 638, 690 (S.D.N.Y. 2013)*. According to Plaintiffs, in the instant case, "Verisk is the hub of the cartel"; State Farm and other insurance companies are spokes, *i.e.*, competing entities that have entered into vertical agreements **[**33]** with Verisk"; and "all insurers utilizing Verisk tools are the rim of the cartel" who have horizontal agreements with one another. Opp'n (Verisk) at 14.

The basic problem with Plaintiffs' hub-and-spoke conspiracy theory is that Plaintiffs' assertion of a conspiracy — both vertical and horizontal — is entirely conclusory. *See* *Howard Hess Dental, 602 F.3d at 255* (stating that, "even assuming the Plaintiffs have adequately identified the hub (Dentsply) as well as the spokes (the Dealers), we conclude that the amended complaint lacks any allegation of an agreement among the Dealers themselves[;] [t]he amended complaint states only in a conclusory manner that all of the defendants — Dentsply and all the Dealers included — conspired and knew about the alleged plan to maintain Dentsply's market position"). Plaintiffs suggest that a conspiracy may be inferred **[*1013]** because (1) the Verisk Defendants require each insurance company who contracts with them to provide its construction and claim cost information which the Verisk Defendants then share with all contracting insurance companies, *see* Opp'n (Verisk) at 16 and (2) the contracting insurance companies are all able to pay out less if they use 360 Value to underinsure. *See* Opp'n (Verisk) **[**34]** at 15. But it is entirely speculative to assert there is an agreement among insurers to share information to their collective benefit with the purposes of harming the consuming public. Indeed, at oral argument, Plaintiffs' counsel stated that different insurers use different algorithms to determine insurance value with some being more generous than others. This is not emblematic of a conspiratorial agreement amongst insurers. At most, Plaintiffs assert allegations *consistent* with conspiracy but, as the Supreme Court has made clear, that does not mean that a conspiracy is *plausible* under *Twombly. See* *In re Animation Workers Antitrust Litig., 123 F. Supp. 3d 1175, 1208-09 (N.D. Cal. 2015)* (noting that, per *Twombly*, "[a]t the pleading stage, a complaint claiming conspiracy, to be plausible, must plead 'enough factual matter (taken as true) to suggest that an agreement was made,' i.e., it must provide 'some factual context suggesting [that the parties reached an] agreement,' not facts that would be 'merely consistent' with an agreement").

Moreover, even if Plaintiffs did adequately allege a conspiracy, it is far from clear what the purported restraint of trade is. *See* *15 U.S.C. § 1* (providing that that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in **[**35]** restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal"). And even if these deficiencies could be overcome, for the reasons stated above, it is not clear what the antitrust injury would be.

b. *Section 2* Claim

For the *§ 2* claim, Plaintiffs now suggest that they have a claim for illegal monopoly against the Verisk Defendants and a claim for attempted monopolization against State Farm. *See* Verisk Opp'n at 16. Presumably, Plaintiffs assert illegal monopoly against the Verisk Defendants because they have ">85% market share," Opp'n (Verisk) at 16, but assert only attempted monopolization against State Farm because it has only "10.05% market share," although that is "nearly double that of Berkshire Hathaway Group at 5.95% in the number two slot." Opp'n (Verisk) at 18.

"There are three essential elements to a successful claim of *Section 2* monopolization: (a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury." *Allied Orthopedic, 592 F.3d at 998* (internal quotation marks omitted). At the very least, the monopolization claim against the Verisk Defendants is not viable because, *inter alia*, Plaintiffs have not explained how they **[**36]** acquired or maintained monopoly power in an illegal way. The fact that the Verisk Defendants have been growing over the years in and of itself is not in and of itself an antitrust problem. *See* *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 879, 157 L. Ed. 2d 823 (2004)* (noting that the willful acquisition or maintenance of monopoly power must be "'distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident'"; also stating that, "[t]o safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct") (emphasis omitted). Moreover, as discussed **[*1014]** above, Plaintiffs would not appear to have standing given they are not direct purchasers of the Verisk Defendants' products.

As for attempted monopolization, there are also three elements: "'(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.'" *Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 893 (9th Cir. 2008)*. The claim against State Farm for attempted monopolization fails, *inter alia*, because Plaintiffs have not explained how there is a dangerous probability that State Farm will achieve monopoly power, especially **[**37]** given what appears to be on its face limited market power. Moreover, the claim for attempted monopolization seems highly problematic given that virtually all insurance companies (as indicated by Plaintiffs' SAC and as conceded at the hearing) use the Verisk Defendants' software tools.

Finally, there continues to be the problem of the failure to allege antitrust injury.

3. Summary

For the foregoing reasons, the Court dismisses the antitrust claims as pled in the SAC and further finds the new "allegations" in Plaintiffs' opposition brief insufficient to support any antitrust claim. The Court, however, shall give Plaintiffs leave to amend their antitrust claims, provided that they satisfy the specificity requisites of *Twombly*/*Iqbal* and the substantive requirements of ***antitrust law***, and their allegations are based on facts and made in good faith as required by *Federal Rule of Civil Procedure 11*.

III. CONCLUSION

For the foregoing reasons, the Court rules as follows:

- Claim for breach of the implied covenant of good faith and fair dealing (against State Farm only). The claim is dismissed but with leave to amend.
- Misrepresentation claims (fraudulent and negligent). The claims against both State Farm and the Verisk Defendants **[**38]** are dismissed with leave to amend.
- Negligence claim. The claim is dismissed as duplicative of the claim for negligent misrepresentation. Plaintiffs have leave to amend.
- *Section 17200* claim. The claim based on fraudulent conduct is dismissed with leave to amend. The claim based on unlawful conduct is dismissed with prejudice. The claim based on unfair conduct is viable but, based on the factual predicate, is sustainable as to State Farm only. Plaintiffs have leave to amend the unfair conduct claim as to the Verisk Defendants. Certain remedies sought by Plaintiffs for the alleged violation of *§ 17200* are not cognizable and are dismissed without leave to amend; but Plaintiffs are not barred at this juncture from seeking an order "enjoining Defendants from continuing" their alleged illegal conduct. SAC ¶ 178.
- Claim for violation of *§ 790.03*. The claim is dismissed with prejudice.
- Product liability claim. The claim is dismissed with prejudice, if only because of the economic loss rule.
- Antitrust claims. The claims are dismissed with leave to amend.

In short, at this juncture, the only viable claim Plaintiffs have is a claim for unfair conduct pursuant to *§ 17200*, which is asserted against State Farm only. Plaintiffs **[**39]** shall file their amended complaint by August 1, 2019. The only amendments permitted **[*1015]** at this juncture are those specified above.

This order disposes of Docket Nos. 34 and 36.

IT IS SO ORDERED.

Dated: July 2, 2019

/s/ Edward M. Chen

EDWARD M. CHEN

United States District Judge

Competition Commission of South Africa v Media 24 (Pty) Limited

Constitutional Court of South Africa

July 3, 2019

Case No: CCT 90/18

Reporter
2019 SACLR LEXIS 26

Competition Commission of South Africa v Media 24 (Pty) Limited

Core Terms

court of appeals, total cost, predatory, predation, competitor, tribunal, exclusionary, leave to appeal, interest of justice, the Competition Act, consumer, anti-competitive, variable, point of law, additional evidence, sacrifice, general public, recoupment, multi-product, exit, indirect, constitutional issue, sunk, right to appeal, monopoly, outweigh, marginal, appellate jurisdiction, investigatory power, pro-competitive

Summary:

CATCHWORDS:

Trade and competition - unlawful competition - Competition Act 89 of 1998 - prohibited practices - abuse of a dominant position - prohibition against engaging in exclusionary acts as listed in section 8(d) of the Competition Act - predatory pricing - appropriate benchmark to determine whether prices are predatory - issue raised but not determined decisively - in application for leave to appeal to the Constitutional Court, members of court dividing and producing four separate judgments - ultimate result effectively a decision by a majority that leave to appeal should be granted but that the appeal should be dismissed.

Editor's Summary Predatory pricing is conduct in which a dominant firm sets prices for goods or services at such a low level that it incurs losses in the short term and by means of that sacrifice eliminates, or improves the chances of eliminating, one or more of the firm's actual or potential competitors, and so has the further effect of strengthening or maintaining the firm's market power, thereby causing consumer harm. Predatory pricing is prohibited in two provisions contained in the Competition Act 89 of 1998. Section 8(d)(iv) creates a specific prohibition against pricing below two specific cost standards. It prohibits a dominant firm from engaging in an exclusionary act of "selling goods or services below their marginal or average variable cost" unless it can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of that act. Section 8(c) contains a general prohibition against anti-competitive behaviour. It provides that "[i]t is prohibited for a dominant firm to engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive, gain". The Competition Tribunal had held that Respondent, Media 24 (Pty) Ltd ("Media 24"), was guilty of predatory pricing in terms of section 8(c). Media 24 appealed to the Competition Appeal Court which held that it could not be established that Media 24 had violated section 8(d)(iv) or 8(c). The Competition Commission sought leave to appeal to the Constitutional Court against the Competition Appeal Court's judgment. There are different cost standards that can be used to determine whether prices are predatory. What the appropriate standard would be in a particular case was an issue both in the court a quo and in the Constitutional Court hearing. Four different judgments were written by members of the Constitutional Court. The first judgment (per Goliath AJ with Mogoeng CJ and Dlodlo AJ concurring) held that the matter did raise a constitutional issue and an arguable point of law of general public importance so that the Court had jurisdiction to deal with it. It further held that leave to appeal should be

granted and, for reasons set out in the judgment, that the appeal should succeed. The second judgment (per Cameron, Froneman and Khampepe JJ with Petse AJ concurring) held that it was not in the interests of justice to grant leave to appeal and that the application for leave should be dismissed. The third judgment (per Theron J with Basson AJ concurring) agreed with the first judgment to the extent that it held that the application raised an arguable point of law of general public importance within the Constitutional Court's jurisdiction and that leave to appeal should be granted. However, Theron J held that the appeal should be dismissed. A fourth judgment (per Mhlantla J) agreed with the third judgment to the extent that it held that the application raised an arguable point of law of general public importance within the Constitutional Court's jurisdiction and that leave to appeal should be granted. In respect of the merits Mhlantla J concurred in the first judgment and concluded that the appeal should succeed. The effect of these four judgments was that six members of the Court considered that the application raised an arguable point of law of general public importance within the Court's jurisdiction and that leave to appeal against the judgment and order of the Competition Appeal Court should be granted; and six members of the Court did not consider that the appeal should be upheld. There was thus effectively a majority decision that leave to appeal should be granted and that the appeal should be dismissed.

Counsel: For the applicant:

J Wilson SC, GD Marriott and T Ngcukaitobi instructed by Gildenhuys Malatji Incorporated

For the respondent:

W Trengove SC, M Norton SC and M Mbikiwa instructed by Werksmans Attorneys

Judges: Before: MTR Mogoeng Chief Justice; E Cameron, J Froneman, SSV Khampepe, NZ Mhlantla, LV Theron Justices; A Basson, DV Dlodlo, PL Goliath and XM Petse Acting Justices

Opinion by: The Court,Goliath AJ,Theron J,Mhlantla J,

Opinion

Judgment

BY The Court

[1]The first judgment in this matter was written by Goliath AJ and concurred in by Mogoeng CJ and Dlodlo AJ. The first judgment held that this application raises a constitutional issue and an arguable point of law of general public importance within this Court's jurisdiction. The first judgment further held that leave to appeal should be granted and the appeal must succeed.

[2]The second judgment in this matter was written by Cameron J, Froneman J and Khampepe J, and concurred in by Petse AJ. The second judgment held that it is not in the interests of justice to grant leave to appeal and that the application should be dismissed with costs, including the costs of two Counsel.

[3]Theron J wrote a judgment ("third judgment") concurring in the first judgment to the extent that this application raises an arguable point of law of general public importance within this Court's jurisdiction and that leave to appeal should be granted. Theron J held that the appeal must be dismissed with costs, including the costs of two Counsel. Basson AJ concurred in the judgment penned by Theron J. Mhlantla J wrote a judgment in which she concurred in

the third judgment to the extent that this application raises an arguable point of law of general public importance within this Court's jurisdiction and that leave to appeal should be granted. Mhlantla J concurred in the first judgment in respect of the merits and that the appeal must succeed.

[4]The effect of these four judgments is that six members of the Court held that this application raises an arguable point of law of general public importance within this Court's jurisdiction and granted leave to appeal against the judgment and order of the Competition Appeal Court. Six members of the Court did not uphold the appeal. There is thus a majority decision that this application raises an arguable point of law of general public importance within this Court's jurisdiction, that leave to appeal should be granted and that the appeal must be dismissed with costs, including the costs of two Counsel.

BY Goliath AJ

Introduction

"Predatory pricing is a paradoxical offense. Although ***antitrust law*** values low prices and abhors high ones, the 'predator' stands accused of charging too low of a price - of doing too much of a good thing. Society considers predation socially harmful because the artificially low prices of today drive out competitors and allow the high prices of tomorrow." [1]

[5]This matter is the first of its kind dealing with South African law prohibiting predatory pricing. Predatory pricing is conduct that involves a dominant firm setting prices for goods or services at such a low level that (a) the firm incurs losses relative to alternative non-predatory conduct in the short term (referred to as "sacrifice"); (b) the pricing has the effect of eliminating, or being likely to eliminate, one or more of the firm's actual or potential competitors; and, in turn, (c) the pricing has the further effect of strengthening or maintaining the firm's market power, thereby causing consumer harm.

[6]The principles underpinning the paradox of predatory pricing must be carefully balanced. An accurate test for predation must be capable of balancing the fine line between over-enforcing the prohibition, with the possibility of higher prices for goods and services, and under-enforcing it to the benefit of large firms aiming to monopolise the market.

[7]This case enjoins the Court to grapple with legal elements of the economic concept of predatory pricing. This involves establishing what must be proven when predatory pricing is alleged to have occurred. In making this evaluation, the Court is required to deal with two aspects. The first is whether it is in the interests of justice to grant the applicant leave to appeal to this Court. The second relates to the legal test for establishing predatory pricing.

Parties

[8]The applicant is the Competition Commission of South Africa, established in terms of section 19 of the Competition Act. [2] The respondent is Media24 (Pty) Limited ("Media24"), a company which acts as the print media arm of the South African media company Naspers Limited.

Background

[9]In 1971 and 1983, two community newspapers called Vista and Forum were established respectively. These two papers were fierce competitors in the Welkom community newspaper market. Both papers were acquired by

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[1] Crane "The Paradox of Predatory Pricing" (2005) *91 Cornell Law Review 1 at 2-3*.

[2] 89 of 1998. S 19 of the Competition Act, concerning the establishment and constitution of the Competition Commission, states:"(1)There is hereby established a body to be known as the Competition Commission, which -(a)has jurisdiction throughout the Republic;(b)is a juristic person; and(c)must exercise its functions in accordance with this Act.(2)The Competition Commission consists of the Commissioner and one or more Deputy Commissioners, appointed by the Minister in terms of this Act."

Media24 which, by doing so, acquired a monopoly in the community newspaper market in Welkom. When Media24 took over Vista, some staff chose to leave. One of these staff members was Ms Leda Joubert, who went on to establish Gold Net News ("GNN"). Ms Joubert appointed veteran Welkom newspaper editor, Mr Hans Steyl to run GNN. While GNN started strongly with loyal advertising support, it ended up struggling to attract advertising and eventually closed down in April 2009. Nine months later, in January 2010, Media24 closed down Forum.

[10]Shortly before GNN closed, Mr Steyl filed a complaint on behalf of GNN with the Competition Commission that Media24, through Vista and Forum, had abused its dominant position in the Welkom area by drastically cutting the rates that it charged advertisers for the period between 2004 and 2009. It was alleged that the rates were so low that they were below market price. Mr Steyl asserted that this anti-competitive behaviour forced GNN to close as it could not compete with the low prices and continue to meet the profit margins it needed to survive. In 2011, the Competition Commission, after investigating the complaint, referred a case of predatory pricing on the part of Media24 to the Competition Tribunal ("Tribunal"). The Tribunal's decision [3] and the subsequent decision on appeal to the Competition Appeal Court [4] are the foundation of the case before us.

Predatory pricing

[11]Because low prices are generally encouraged by competition law, costs standards have been developed to indicate the line between competitive price cutting and unreasonably low prices that are predatory. Predatory pricing is prohibited in two provisions in the Competition Act. Section 8(d)(iv) creates a specific prohibition against pricing below two specific cost standards. This section provides:

"It is prohibited for a dominant firm to:

. . .

(d)engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive, gains which outweigh the anti-competitive effect of its act:

. . .

(iv)selling goods or services below their marginal or average variable cost."

[12]Section 8(c) of the Competition Act contains a general prohibition against anti-competitive behaviour and is considered the "catch-all" provision to protect against abuses of dominance. The section provides:

"It is prohibited for a dominant firm to:

. . .

(c)engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive, gain."

[13]An "exclusionary act" is defined by the Competition Act as "an act that impedes or prevents a firm from entering into, or expanding within, a market." [5]

[14]Section 8(c) should be read to prohibit pricing that is below other appropriate cost standards besides the two listed in section 8(d)(iv). There are five cost standards that are important to understand for the determination of this case. They are the cost standards that are used in various foreign jurisdictions to determine whether prices are predatory, and they are the standards pleaded in this case. These are: marginal cost; average variable cost; average avoidable cost; long run average incremental cost; and average total cost. The first two are the standards

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[3] Competition Commission v Media 24 (Pty) Ltd (2016) ZACT 86.

[4] Media 24 (Pty) Ltd v Competition Commission 2018 (4) SA 278 (also reported at (2018) 1 CPLR 56 (CAC) - Ed).

[5] S 1 of the Competition Act.

applicable to complaints brought under section 8(d)(iv), while the latter three are of relevance to complaints brought under section 8(c).

[15]The various standards are defined as follows: Marginal cost refers to a comparison between the cost of producing an additional unit of output and the price that the firm is charging per unit of output. If the price exceeds marginal cost, then it makes sense to produce an additional unit. If it costs more to produce a unit of output than the firm can charge, then the rational firm would not produce that unit. Consequently, if a firm prices below marginal cost it is presumed to be participating in predatory pricing. Establishing marginal cost is extremely difficult; therefore, a second and similar test was created. [6]

[16]Average variable cost is this second test. It is referred to as the Areeda-Turner test in various local judgments and foreign commentaries. [7] This is the sum of the firm's variable costs (labour, electricity, etc) divided by the number of units produced. [8] Variable costs are costs that vary as output increases, as opposed to fixed costs, which do not. If a firm charges a price which does not cover its variable costs, it intentionally suffers a loss on every sale and is presumed to be participating in predatory pricing. [9]

[17]Average avoidable cost refers to the average costs that the firm could have avoided if it had not produced particular units of output. This includes variable costs and any fixed costs that are specifically incurred in the production of the particular product being examined. Average avoidable cost is generally equal to average variable cost plus product-specific fixed costs. [10]

[18]Average total cost is equal to the total cost of producing a product divided by the number of units produced. This number includes the costs associated with average variable cost, the product-specific fixed costs, and a proportion of the common costs of the company that have been apportioned to the particular product if the firm produces multiple products. Common costs are costs that the firm incurs regardless of how many different products are produced.

[19]Long-run average incremental cost refers to the total value of costs that are needed to enter and start supplying a specific product, represented as an average over output. This test is generally used in industries which have high barriers to entry but low operating costs, as it allows companies to average out the high sunk costs [11] that they must recover with the low operation costs. [12]

Litigation history

Competition Tribunal

[20]The case referred to the Tribunal was based firstly on a contravention of section 8(d)(iv), and in the alternative on a violation of section 8(c). The Tribunal found that Media24 had not priced its advertising below its average avoidable cost, and thus the Competition Commission failed to establish that Media24 priced below the lower

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[6] O'Donoghue and Padilla The Law and Economics of Article 82 EC (Hart Publishing, Oxford 2006) at 237.

[7] *Id at 240*.

[8] *Id at 237* and 245.

[9] *Id at 240*.

[10] *Id at 241*.

[11] "Sunk costs" refer to money that is spent by businesses upfront and cannot be recovered or refunded. For example, once money is spent on rent or expensive equipment which value will deflate over time that amount is not recoverable and is thus sunk. See Baumol "Fixed Costs, Sunk Costs, Entry Barriers, and Sustainability of Monopoly" (1981) 96 Quarterly Journal of Economics 405 at 406.

[12] O'Donoghue and Padilla above fn 6 at 242-3.

standards of average variable cost or marginal cost. [13] As a result, the Tribunal made its determination using section 8(c) and not section 8(d)(iv). The case presented by the Competition Commission was that Media24 had used Forum as a fighting brand. This means that it was kept in the market with the express purpose of charging prices that were lower than its competitors, who were then forced to leave the market. Once this task was completed, the fighting brand was closed down. The Tribunal held that the Competition Commission had established that the average total cost was an appropriate cost standard to use to evaluate predation in this case; [14] that Media24 had charged advertising prices for Forum below its average total cost; that it had intended to predate GNN; that Media24 had the ability to recoup what it had lost during this predation period and that GNN had not been excluded due to its relative inefficiency. It found that Media24's actions had an anti-competitive effect and that there was no evidence of pro-competitive gain which outweighed this effect. [15] Consequently, it held that Media24 had contravened section 8(c) of the Competition Act.

Additional evidence

[21]The Tribunal held that average total cost could be an appropriate costs standard for a finding under section 8(c) of the Competition Act when accompanied by additional evidence of predation. [16] The Tribunal evaluated the additional evidence under the following four headings: direct intention to predate, indirect intention to predate, recoupment, and the equally efficient competitor test.

Direct intention

[22]Direct intention relates to the subjective intention of Media24 as evidenced by witness statements. The Tribunal examined the factual evidence that was placed before it which consisted of oral and written testimony by persons who had been employed by Media24 during the complaint period. The evidence pointed to the fact that internal communication had taken place in terms of which employees had stated that they were attempting to undercut GNN, and that they intended to use Forum as a stopper in the market to keep business away from GNN. A similar sentiment was expressed at a Media24 strategy meeting. The Tribunal found that this constituted more than merely fighting words and indicated a direct intention to predate GNN. [17] Moreover, it held that Media24 had not done enough to rebut the evidence that had been put forward. It thus accepted that Media24 had acted with predatory intent and moved on to evaluate this finding in the light of other evidence of exclusion. [18]

Indirect intention

[23]Indirect intention is inferred from objective evidence and involves drawing economically pertinent inferences from certain behaviour. [19] The Tribunal examined three areas of evidence. These were: firstly, evidence that Forum was consistently making a loss for nine years before it eventually closed down. Secondly, the Tribunal examined the circumstances around the closing down of Forum such as the fact that Media24 closed Forum nine months after GNN left the market. It concluded that Media24 had intended to close Forum as soon as GNN had left the market but retained it to make them look less suspicious and ensure that they were not brought before the Commission. Finally, the Tribunal examined the cannibalism factor. This relates to the fact that during the period that Forum was

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[13] Tribunal decision above fn 3 at para (211).

[14] Id at para (221): the reason for this finding was based first on an understanding that South Africa's economy is characterised by high barriers to entry and second, that an information asymmetry exists between large, established firms and small and mediums ones. Information asymmetry refers to the way that large firms can manipulate their financial records to exacerbate the imbalance between them and their smaller rivals.

[15] Id at para (621).

[16] Id at para (222).

[17] Id at para (383).

[18] Id at paras (619) and (621).

[19] O'Donoghue and Padilla above fn 6 at 252.

maintained, it prevented some advertisers from advertising in Vista. Generally, allowing a product to draw customers away from another in the same firm would not be rational. The Tribunal held that this points to a separate strategic reason for maintaining Forum. The strategic value was that Forum was able to predate GNN.

Recoupment

[24]The Tribunal accepted that since GNN's exit from the market, Vista had increased its prices by 17%. This, it held, was substantial when compared to the price increases of previous years. Moreover, because no other competitors had entered the market after GNN and Forum exited, Vista was able to continue charging high prices to the detriment of consumers in an unchecked fashion. These factors taken together amount to strong evidence of recoupment.

Equally efficient competitor test

[25]Media 24 contended that the reason for GNN's exit from the market was because it was not an equally efficient competitor [20] and so could not survive in a true competitive market. The Commission contested this. The Tribunal held that it was unlikely that GNN left the market simply because it was inefficient. It based this finding on the fact that it was run by a veteran of the Welkom newspaper market who knew how to run a profitable business. Moreover, the fact that GNN was able to break into the market and gain market share pointed to the fact that it was efficiently run. [21]

[26]All of this evidence, taken together with the fact that Media24 priced below average total cost, led the Tribunal to hold that Media24 was guilty of predatory pricing in terms of section 8(c) of the Competition Act. [22]

Competition Appeal Court

[27]The Competition Appeal Court summarised the Commission's case as:

"(a)Appellant operated Forum solely as a 'fighting brand' in order to exclude GNN from the market;

(b)Forum's average revenues did not cover the average total costs of producing and publishing the paper;

(c)Forum's average revenues did not cover its average variable costs over a 12 month period (where all costs were considered variable and thus could have been avoided if Forum had ceased publication at this point); and/or

(d)Forum's incremental costs (calculated as Forum's total revenues reduced by the proportion of its revenues which would have been diverted to Vista if Forum had exited the market) did not cover its incremental costs, calculated as the total costs that were incremental to the operation of Forum based on two definitions:

(i)all costs that could have been eliminated over a period of one year; and

(ii)all Forum's costs." [23]

[28]The Competition Appeal Court held that the test envisaged in section 8(c) determines whether specific conduct amounts to an exclusionary act as defined in the Competition Act. This, it held, is an objective test. The court held that subjective evidence of intent should not be examined in proving predatory pricing and that, once this evidence was disregarded, average total cost was not an appropriate cost standard to illustrate that predatory pricing occurred. The Competition Appeal Court concluded that:

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[20] Elzinga "The goals of antitrust: other than competition and efficiency, what else counts?" (1977) Vol 125:6 University of Pennsylvania Law Review 1191 at 1192.

[21] Tribunal decision above fn 3 at para (557).

[22] Id at para (621).

[23] Competition Appeal Court judgment above fn 4 at para (17).

"[T]here is no escaping the conclusion that predation must focus on the likely economic effect of pricing below a particular cost measure to determine whether the low prices are due to a lawful competitive response to rivals or to predation and unlawful behaviour rather than on the intention with which a pricing strategy is adopted." [24]

[29]Having rejected average total cost plus intention, the Competition Appeal Court concluded that the only appropriate benchmark that had been relied upon by the Commission in their pleadings was average avoidable cost. This does not mean that it is the only appropriate benchmark to apply to section 8(c) in all cases, but rather that in this particular case it is the only appropriate test that remains. In the light of its rejection of the average total cost plus intent test, the Competition Appeal Court did not have to consider the balance of the evidence concerning the intention of Media24. In the result, the appeal by Media24 was upheld as it could not be established that Media24 had violated section 8(d)(iv) or 8(c).

Leave to appeal

[30]Both the Competition Commission and Media24 contend that this case raises a constitutional issue. This is because the Competition Act was enacted as transformative legislation. Section 2(e) and (f) of the Competition Act states that part of the purpose of the Competition Act is to ensure that small and medium sized businesses have equitable opportunities to participate in the economy and to promote a greater spread of ownership in the economy by those who were disadvantaged by apartheid. These purposes implicate the right of equality contained in section 9 of the Constitution. Section 9(2) enjoins the State to take legislative and other measures to advance the equality of previously disadvantaged people and section 2(e) and (f) of the Competition Act is a legislative measure of this kind.

[31]Section 8 of the Competition Act is an important component for the achievement of the purposes contained in section 2(e) and (f). Section 8 prohibits dominant firms from abusing their power to the detriment of the market and consumers. Consumer welfare lies at the heart of the matter before us. The prohibition of abuses of dominance is recognition of the fact that dominant firms attained this status due to our exclusionary history. The protection section 8 provides applies specifically to small and medium sized firms which are at the greatest risk of being excluded from the market by abuses of dominance or monopolies. Consequently, when a Court interprets the extent of the protection contained in section 8, it must do so in line with the purpose of the Competition Act and the Constitution as abuses of dominance and the resultant monopolies have the potential to perpetuate historic patterns of exclusion and inequality.

[32]Beyond this, this Court held in SOS and Hosken, that the ambit of the Commission's investigatory powers, in terms of section 21(1)(c) of the Competition Act, is an inherently constitutional issue. [25] This section empowers the Commission to investigate alleged violations of Chapter 2 of the Competition Act. The case before us involves an interpretation of the extent of the powers held by the Commission to prosecute alleged violations subsequent to an investigation. The effect of the Competition Appeal Court judgment is to limit the tools that the Commission has at its disposal to prove a violation of section 8(c).

[33]This is because on the test it applied, it was unnecessary to examine certain evidence regarding predation. While evaluations under section 8(c) are economic in nature, a limitation of the investigative and prosecutorial powers of the Commission may have adverse consequences. Surely, if the ambit of the Commission's investigatory powers raises a constitutional issue, the ambit of its ability to bring prosecutions based on findings made during investigation is, by parity of reasoning, similarly constitutional. What would be the purpose of the strong investigatory powers of the Commission if it cannot present all of the evidence that it has gathered in order to prosecute an offence?

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[24] Id at para (56).

[25] SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation (SOC) Limited (2018) ZACC 37; 2019 (1) SA 370 (CC); 2018 (12) BCLR 1553 (CC) at para (21); and Competition Commission of South Africa v Hosken Consolidated Investments Limited (2019) ZACC 2; 2019 (3) SA 1 (CC); 2019 (4) BCLR 470 (CC) at para (31).

[34]Aside from raising a constitutional issue, this matter engages the Court's jurisdiction because it raises an arguable point of law of general public importance which this Court ought to consider. The question whether pricing above average avoidable cost but below average total cost amounts to predation requires the interpretation of the law relating to exclusionary acts and the consideration of which tests can be used to equitably establish predation. This is unquestionably an arguable point of law, especially when the contradicting views in foreign jurisprudence, and between the Tribunal and Competition Appeal Court are considered. Moreover, given the impact that this determination will have on the interpretation and implementation of section 8(c) of the Competition Act going forward, it is certainly of general public importance and this Court ought to consider it. One problem exists in this regard, however: the Competition Act in section 62 states that for all matters, aside from those that raise constitutional issues, the Competition Appeal Court has exclusive and final appeal jurisdiction.

[35]Can this Court then hear competition cases which raise arguable points of law of general public importance? The answer must be yes. Section 62 was enacted prior to the seventeenth amendment of the Constitution, which imbued the Court with the power to hear arguable points of law of general public importance, and as such could not have predicted that the Court would one day have the jurisdiction to decide such cases. Section 62 of the Competition Act must be read in the context of section 167 of the Constitution. Section 167(3)(b)(ii) establishes that this Court can hear arguable points of law of general public importance and section 167(3)(c) states that this Court makes the final decision as to whether a matter falls within its jurisdiction. [26] If the Competition Act was read to finally exclude arguable points of law of general public importance from the jurisdiction of this Court, it would then be in conflict with the Constitution. Legislation should not be read to derogate from the constitutionally enshrined powers of this Court, instead a reading which aligns with the Constitution should be favoured. A contextual reading of the Competition Act therefore leads to the conclusion that the Competition Appeal Court has exclusive jurisdiction to hear appeals on all matters except those which fall into the constitutionally protected jurisdiction of the Constitutional Court. Resultantly, this Court has jurisdiction to hear this matter as it raises a constitutional issue, and in any event raises an arguable point of law of general public importance which this Court ought to consider.

Failure to approach the Competition Appeal Court

[36]Appellate jurisdiction in competition law matters is regulated by section 62 of the Competition Act. Section 62(1) stipulates which matters fall within the exclusive jurisdiction of the Tribunal and the Competition Appeal Court. [27] Section 62(3) of the Competition Act states that the Competition Appeal Court is the final court of appeal on all matters regulated by section 62(1). However, the appellate jurisdiction of the Competition Appeal Court is not final in competition matters which raise constitutional issues. [28] Resultantly, and crucial to this case, the appellate jurisdiction of the Competition Appeal Court is only final when the interpretation of Chapter 2 does not raise a constitutional issue.

[37]The Competition Act states that where a constitutional issue is raised, both the Supreme Court of Appeal and this Court have the jurisdiction to hear it. [29] An application for leave to appeal from the Competition Appeal Court to either of these courts is regulated by section 63(2) of the Competition Act. However, the right to appeal to the Supreme Court of Appeal and this Court is made conditional on a party first applying to the Competition Appeal Court for leave to appeal. Section 63(2) reads:

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[26] S 167 of the Constitution states:"(3)The Constitutional Court: . . . (b)may decide - . . . (ii)any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court."

[27] The matters that fall within the exclusive jurisdiction include the interpretation of Ch 2 of the Competition Act. S 8(c) is located in Ch 2.

[28] S 62(3)(b) of the Competition Act.

[29] Id at s 62(4) which states:"An appeal from a decision of the Competition Appeal Court in respect of a matter within its jurisdiction in terms of sub-section (2) lies to the Supreme Court of Appeal or Constitutional Court, subject to s 63 and their respective rules."

"An appeal in terms of section 62(4) may be brought to the Supreme Court of Appeal or, if it concerns a constitutional matter, to the Constitutional Court, only:

(a)with leave of the Competition Appeal Court; or

(b)if the Competition Appeal Court refuses leave, with leave of the Supreme Court of Appeal or the Constitutional Court, as the case may be." (Emphasis added.)

[38]The interpretation of section 63(2) has been the subject of extensive debate. The question is whether the use of the word "only" bars an applicant from applying to either the Supreme Court of Appeal or this Court without first approaching the Competition Appeal Court for leave, or whether the failure to approach the Competition Appeal Court is merely an obstacle that can be overcome in certain circumstances. This dichotomy was set out in the majority decisions in both Loungefoam and Yara. [30] However, this Court in those cases did not make a final pronouncement on whether a bar or an obstacle is created. [31]

[39]It has become necessary to decide this issue. In doing so, the judgments in Loungefoam and Yara, which I fully endorse, are instructive. These judgments both hold that the failure to seek leave to appeal from the Competition Appeal Court before appealing to the Supreme Court of Appeal and this Court creates an obstacle to the application which can be overcome if it is in the interests of justice for this Court to grant a direct appeal. [32]

[40]The restriction contained in section 63(2) of the Competition Act, and the right to appeal in section 62(4) are both qualified by section 63(1)(a). [33] Section 167(6) of the Constitution establishes that:

"National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court:

(a)to bring a matter directly to the Constitutional Court; or

(b)to appeal directly to the Constitutional Court from any other court."

[41]With regard to this, Cameron J in Yara noted the following:

"[T]he right of appeal is expressly subject to 'any law' that 'specifically grants' a right of appeal. Plainly, section 167(6) of the Constitution is a law of this kind. It provides that national legislation or the rules of this Court 'must allow' a litigant, 'when it is in the interests of justice and with leave of the Constitutional Court', to bring an appeal directly to this Court." [34] (Footnotes omitted.)

[42]The provisions of section 63 of the Competition Act must be interpreted so that they comply with the Constitution [35] . It appears that the section itself, by providing that the right of appeal is subject to any law that specifically grants a right of appeal, subordinates its requirements to the right of direct appeal to this Court

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[30] Competition Commission v Loungefoam (Pty) Ltd (2012) ZACC 15; 2012 JDR 1119 (CC); 2012 (9) BCLR 907 (CC) at paras (22)-(23) and Competition Commission v Yara South Africa (Pty) Ltd (2012) ZACC 14; 2012 JDR 1118 (CC); 2012 (9) BCLR 923 (CC) at para (20).

[31] Loungefoam id at para (24) and Yara id at para (21).

[32] Loungefoam id at para (24) and Yara id at para (68).

[33] S 63(1)(a) states:"The right to an appeal in terms of s 62(4) -(a)is subject to any law that -(i)specifically limits the right of appeal set out in that section; or(ii)specifically grants, limits or excludes any right of appeal."

[34] Yara above fn 30 at para (65).

[35] Id at para (66).

contained in section 167(6) of the Constitution. [36] In light of the provisions of section 167(6) of the Constitution, section 63(2) read with section 63(1)(a)(ii) cannot be said to create an absolute bar. As the minority in Yara held:

"[T]he fact that a litigant has not sought the leave of the Competition Appeal Court would be pertinent to its application to this Court, but will not disable it. This Court is at liberty to grant direct access, as the Constitution requires, and nothing in the legislation need be read to detract from its power." [37]

[43]The word "only" should be interpreted to mean that litigants are barred from approaching this Court directly only when the interests of justice do not warrant the granting of a direct appeal. [38] In such cases, leave of the Competition Appeal Court must first be obtained. Furthermore, on whether the interests of justice warrant the granting of leave to appeal directly to this Court appears later in this judgment.

Failure to approach the Supreme Court of Appeal

[44]It must be established whether the Supreme Court of Appeal can still be approached to hear appeals relating to competition law. If it retains its appellate jurisdiction in such matters, this creates difficulties for the Commission as it failed to approach the Supreme Court of Appeal before appealing to this Court. The seventeenth amendment to the Constitution amended section 168(3)(a) of the Constitution to read:

"The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in respect of labour or competition matters to such an extent as may be determined by an Act of Parliament." [39] (Own emphasis.)

[45]The question is how to interpret the express wording of the Constitution. The Commission contends that it should be interpreted to mean that the Supreme Court of Appeal's appellate jurisdiction has been excluded by this amendment, while Media24 contends that until an Act of Parliament is enacted limiting the Supreme Court's jurisdiction in these matters, it should continue to hear competition matters.

[46]Brand JA in Computicket [40] embraces the conclusion by Froneman J in National Lotteries Board which states:

"As a result of the Constitution Seventeenth Amendment Act of 2012, this right of appeal to the Supreme Court of Appeal no longer exists." [41]

[47]In Democratic Alliance, Zondo J, stated that the phrase "to such extent as may be determined by an Act of Parliament" in section 168(3), qualifies the words "except in respect of labour or competition matters" and not "the High Court of South Africa or a court of a status similar to that of the High Court". Resultantly, Zondo J held that appeals concerning all matters except competition and labour matters still lie with the Supreme Court of Appeal. [42] By implication, it appears that the seventeenth amendment did indeed remove the appellate jurisdiction of the Supreme Court of Appeal in respect of labour and competition matters. It may be that further Acts of Parliament will qualify this exclusion. However, the amendment itself constitutes an Act of Parliament and its express wording must be respected. Consequently, it was not necessary for the Competition Commission to approach the Supreme Court of Appeal before appealing to this Court.

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[36] Id.

[37] Id at para (70).

[38] Id at para (68).

[39] S 168(3)(a) of the Constitution.

[40] Competition Commission v Computicket (Pty) Ltd (2014) ZASCA 185; 2014 JDR 2507 (SCA) at para (10).

[41] National Union of Public Service and Allied Workers obo Mani v National Lotteries Board (2014) ZACC 10; 2014 (3) SA 544 (CC); 2014 (6) BCLR 663 (CC) at fn 26.

[42] Democratic Alliance v African National Congress (2015) ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) at paras (26)-(28).

[48]Even if this was not the case, there are instances where it is unnecessary for litigants to approach the Supreme Court of Appeal before approaching this Court. As Cameron J and Yacoob J held in Yara:

"The Act envisages appeals directly from the Competition Appeal Court to this Court. In matters involving the constitutionality of the Commission's interpretation and exercise of its statutory powers, this Court is necessarily the final Court. The questions at issue here are so important that it is nearly inevitable that, whoever succeeds in the Supreme Court of Appeal, this Court will be asked to have the last word. The issues do not involve matters of common law, on which this Court particularly values the views and experience of the Supreme Court of Appeal. It is true that even where common law matters are not at issue, this Court values the views of the Supreme Court of Appeal. Nevertheless, the largely statutory and constitutional nature of the questions at issue counts against requiring an appeal to the Supreme Court of Appeal first." [43] (Footnotes omitted.)

[49]The matter before us is an important one involving largely statutory interpretation and constitutional questions. This weighs against it being necessary for the Competition Commission to first approach the Supreme Court of Appeal.

[50]Besides, a proper reading of that excerpt from Yara relied on by the second judgment would reveal that Yara is no authority for the proposition that this Court ought to defer to the Supreme Court of Appeal in relation to the common law or to the Competition Appeal Court as a specialist court. Yara does no more than recognise that obvious benefit that this Court generally stands to derive from allowing courts with general jurisdiction and specialist courts to first express themselves on issues that fall within their jurisdiction before we deal with a matter. The apex court of the Republic of South Africa ought never to abdicate its constitutional responsibility of providing guidance to all courts in this country regardless of how complex or specialised the area of law under consideration might be. To do so could be misunderstood as a confession by this Court, of its incompetence and would probably undermine the jurisdiction and authority of this Court in relation to matters of a specialist nature. As a matter of fact, many complex issues that require speciality in certain areas of the law have served before this Court, but we have never deemed it appropriate to defer to any of the lower courts, for good reason.

Interests of justice

[51]The fact that this Court has jurisdiction to hear the matter is, however, not decisive and leave may still be refused if it is not in the interests of justice to hear the appeal. There are a number of elements to this case that indicate that it would be in the interests of justice for this Court to hear a direct appeal to it.

[52]First, the Commission pointed out that this matter involves statutory interpretation which ought to be developed in the legal framework of the Constitution and not parallel to it. This Court regularly undertakes interpretative exercises such as this in relation to the Labour Relations Act. [44] The analogy between the two areas of law, Media24 submits, is misplaced because this case seems to raise more specialised economic issues which require expert evaluation. This may be true, but this Court has the benefit of the expert opinions of both the Tribunal and the Competition Appeal Court in making its decision. Were this matter to confront the Court with a factual question, it might then be in the interests of justice to defer to the specialist courts but as the third judgment points out that, "this question entails critically examining the policy and normative implications of the various standards for predatory pricing" [45] , this Court is in a position to reach the best determinable conclusion in line with the interests of the public.

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[43] Yara above fn 30 at para (62).

[44] See South African Commercial, Catering and Allied Workers Union and others v Woolworths (Pty) Ltd (2018) ZACC 44; (2019) 40 ILJ 87 (CC) at para (20) (also reported at 2019 (3) BCLR 412 (CC) - Ed); National Union of Metalworkers of SA v Intervalve (Pty) Ltd (2014) ZACC 35; (2015) 36 ILJ 363 (CC); 2015 (2) BCLR 182 (CC) at para (25) and National Education Health and Allied Workers Union v University of Cape Town (2002) ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC).

[45] Third judgment at (144).

[53]Davis JP, in the introductory paragraph of the Competition Appeal Court judgment, places great emphasis on the fact that this matter is the first of its kind. [46] As a result, in interpreting the Competition Act's prohibition of predatory pricing, this Court must establish how the prohibition aligns with, and fulfils, the imperatives of the Constitution. Competition matters impact on the interests of the public, especially considering South Africa's evolving and transforming market economy. The need to provide the country with free and fair guidelines for an equitable competitive market is crucial, and something that this Court is qualified to do.

[54]Second, the implications of this case will be far-reaching. Media24 contested this by arguing that the Competition Act is being amended and amendments minimise the importance of this Court's decision. While it is true that the Competition Act is being amended and that the new sections may limit the implications of this judgment, section 8(c) will still remain in the amended version of the Competition Act. The question of what kind of evidence can be used to prove a violation of that section will continue to affect parties beyond those before us. The potential amendment of the Competition Act does not negate or counteract the importance of the issues raised in this matter.

[55]Third, the Competition Commission has reasonable prospects of success on appeal. Both the Tribunal and the Competition Appeal Court are specialist bodies, and in this case they have arrived at opposite conclusions. Ngcobo J in NEHAWU states that:

"[A]n important factor in considering the prospects of success in this application is the fact that members of the Labour Appeal Court and the Labour Court are divided on the proper construction of section 197. This factor alone suggests, at least prima facie, that there are prospects of success. It is true that the Labour Appeal Court, like all courts, is bound by the doctrine of precedent, and should not depart from its own decisions unless it is satisfied that they are clearly wrong. Nevertheless, given the clear division amongst the labour Judges, it is desirable for this Court to consider the issue." [47] (Footnotes omitted.)

[56]The division between the specialist Judges at these bodies, indicates that interference with the decision of the Competition Appeal Court may be warranted. In these circumstances, as is the case with labour law matters, this Court will not shy away from intervening and interpreting the law in a way that best caters for the interests of justice and the public at large.

[57]Consequently, it is in the interests of justice that leave to appeal directly to this Court from the Competition Appeal Court be granted. What must be decided now is whether the appeal should be upheld.

The appeal

Aims and purpose of the Competition Act

[58]It is a fundamental principle of competition law that competition between firms is desirable. Competition generally encourages efficiency, innovation and the charging of lower prices by firms. [48] Competition on the merits [49] includes price competition which involves firms lowering their prices to attract business away from their competitors. However, competition law also acknowledges that exceptionally low prices may be harmful to competition and thus, in the long run, consumers. This is because below-cost pricing has the effect of forcing

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[46] Competition Appeal Court judgment above fn 4 at para (1).

[47] National Education Health and Allied Workers Union v University of Cape Town (2002) ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para (26).

[48] Bishop and Walker The Economics of EC Competition Law: Concepts, Application and Measurement 1 (Sweet and Maxwell Ltd, London 2002) at 11.

[49] OECD "What is competition on the merits?" (June 2006), at 1 available at http://www.oecd.org/competition/mergers/37082099.pdf. "Competition on the merits" refers to competition between a dominant firm and its competitors which has the effect of increasing consumer welfare.

competitors out of the market which increases the likelihood of the formation of monopolies. [50] Monopolies are harmful to consumer welfare and should therefore be regulated. [51]

[59]The South African Competition Act acknowledges that the unjust distribution of wealth during apartheid has led to concentrations of power and capital in the market. One way of combatting this concentration is through the regulation of firms which hold dominant shares in the market. The Competition Act specifically regulates the behaviour of these firms to ensure that they are not abusing their dominant positions to the detriment of competition and consumers. [52] Section 8 of the Competition Act prohibits two forms of abusive behaviour by dominant firms: exploitative abuse and exclusionary abuse. Exploitative abuses result in direct harm to consumers. [53] Exclusionary abuse, on the other hand, is conduct that attacks the dominant firm's competitors and as a result, indirectly harms consumers. [54]

[60]The prohibition of predatory pricing contained in section 8(c) and (d)(iv) of the Competition Act is an example of the regulation of exclusionary abuse. This regulation is not an easy task. Approaches to evaluating whether predation has occurred are often criticised as being over-inclusive, in that they implicate innocent firms in predation, or under-inclusive, in that they fail to identify firms which are genuinely participating in predation, to the detriment of competition. [55] Any approach taken to prevent predatory pricing must strike a balance between over and under enforcement, while simultaneously fulfilling the purpose of the Competition Act. This case therefore requires a careful balancing act.

[61]Section 2 of the Competition Act sets out the purpose for which it was enacted. It states:

"The purpose of this Act is to promote and maintain competition in the Republic in order:

(a)to promote the efficiency, adaptability and development of the economy;

(b)to provide consumers with competitive prices and product choices;

(c)to promote employment and advance the social and economic welfare of South Africans;

(d)to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;

(e)to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

(f)to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons."

[62]This provision seemingly envisages the desired balance mentioned above. While competitive prices and product choices are important, so is the protection of small and medium-sized businesses. Therefore, any approach to prohibiting predatory pricing must avoid over-inclusion as this will harm the ability of firms to set competitive prices, while simultaneously not being under-inclusive as this makes it easy for dominant firms to force small and medium-sized competitors to exit the market.

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[50] Bishop and Walker above fn 48 at 51 at para 6.69.

[51] Id at 21 at para 2.21.

[52] S 8 of the Competition Act.

[53] S 8(a) of the Competition Act states that "it is prohibited for a dominant firm to charge an excessive price to the detriment of consumers".

[54] S 8(c) and (d) of the Competition Act prohibit examples of this kind of behaviour.

[55] Mackenzie "Are South Africa's predatory pricing rules suitable?" (September 2014) at 3, 5 and 6, available at http://www.compcom.co.za/wp-content/uploads/2014/09/Neil-Mackenzie-Predatory-Pricing-in-SA.pdf.

Examining predatory pricing in the Competition Act

[63]Predatory pricing is prohibited by sections 8(c) and 8(d)(iv) of the Competition Act. Section 8(d)(iv) contains a specific prohibition against predatory pricing. It presumes that prices which are below a firm's marginal cost or average variable cost will have exclusionary effects and are not motivated by a rational business rationale beyond the gains that a dominant firm makes by excluding competitors. Section 8(c), on the other hand, is a catch-all provision which prohibits unjustified exclusionary acts not listed in section 8(d)(iv). This appeal requires this Court to determine how best to interpret section 8(c) to ensure that predatory pricing that falls outside of section 8(d)(iv) is prohibited.

[64]The approach to evaluating claims in terms of section 8(c) was established by this Court in Senwes. Here the Court held:

"Plainly the section requires the presence of three conditions in order to establish that an abuse of dominance has occurred. First, the act in which the dominant firm was engaged must be an 'exclusionary act' as defined in the empowering legislation. . . .

Second, the act in which the dominant firm was engaged must fall outside the scope of section 8(d). Third, the anti-competitive effect of that act must outweigh its technological, efficiency or other pro-competitive gain." [56]

[65]However, when examining section 8(c), both parties before us argued that the section creates a two-stage test. This is likely because it is common cause that the exclusionary act falls outside of section 8(d). The Commission contends that first, it must be determined whether an exclusionary act had occurred, and second, whether the anti-competitive effect of that act outweighs some form of gain listed in the section. Media24 characterised the test for predation as pricing which is low enough to exclude an equally efficient competitor, which is done without a rational business justification. There is not much difference between the tests that the parties each propose. Moreover, while there are two stages to each test, they appear to be interrelated. This is because an act that leads to the exclusion of a competitor but does not have an anti-competitive effect, or has a rational business justification, will not be predatory and conversely an act that has anti-competitive effects but does not result in the exclusion of a competitor is not prohibited by section 8(c).

[66]Both stages of the test are effect-based and objective. [57] Whether an act excludes competitors is a question of factual causation. Once it has been determined that an act excluded a competitor, the extent of the anti-competitive effect of this exclusion is established by examining whether there has been actual harm to consumers or a foreclosing effect on the market. [58] Actual harm to consumers occurs when, upon a competing firm's exit from the market, the dominant firm raises the price that it charges for goods and services in order to recoup the losses that it made while charging below-cost prices. This is known as recoupment. It is often difficult to prove that recoupment has taken place. [59] Consequently, anti-competitive effect can also be proven by showing that there has been a substantial effect on the structure of the market and that this is likely to indirectly harm consumers. The exit of a firm from the market, where this exit results in the elimination or reduction of competition, is the kind of structural change that is envisaged.

Proving predatory pricing

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[56] Competition Commission of South Africa v Senwes Limited (2012) ZACC 6; 2012 JDR 0579 (CC); 2012 (7) BCLR 667 (CC) at paras (27)-(28).

[57] See definition of "exclusionary act" in (14).

[58] European Commission Communication from the Commission: Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (2009/C 45/02, February 2009) at para (71).

[59] O'Donoghue and Padilla The Law and Economics of Article 102 TFEU (2ed) (Hart Publishing, Oxford 2013) at 314.

[67]There is a debate about whether predatory pricing even exists. Some commentators suggest that pricing below-cost, even in the short term, is irrational as it runs contrary to the principle of profit maximisation. [60] However, it is now settled that predation is a tactic used by some dominant firms to cement their ability to maximise profits in the future. [61] This is because by making short term losses which drive a competitor from the market, the dominant firm is able to set the higher price at which they can recoup their losses and continue to charge in the medium to long term. [62] The principle of short term profit maximisation still underpins market strategy. Consequently, a determination that a firm is purposefully loss-making, and thus sacrificing some of the money it could have been earning, may be indicative that greater scrutiny of its pricing model is required. [63]

[68]The cost standards that are central to the dispute before this Court become relevant here. Costs standards identify the various expenses in creating a product and running a firm. Pricing below a particular cost standard indicates that a firm is not recovering all of the costs incurred in producing a product. [64] This means these standards are useful to establish whether predation has taken place because they point to profit sacrifice on the part of the dominant firm. [65]

[69]However, all costs measures have short-comings. Marginal cost is criticised as being too difficult to calculate. [66] Average variable cost, which was developed to supplement these difficulties, is difficult to determine when the line between fixed and variable costs is blurred. [67] Average avoidable cost, which is generally considered to be the most readily ascertainable and calculable cost standard, still encounters problems where predation has occurred over a long period of time and it is difficult to determine which costs are avoidable and which are not. [68] Long run average incremental cost is accused of being biased against firms that produce only one product, as the calculation will not include common or joint costs. [69] With regard to average total cost, there are often rational business justifications for pricing below this standard and determining the costs included in it is practically difficult due to the element of discretion present in the allocation of common costs to products in multi-product firms. [70]

[70]This case requires the Court to evaluate the merits of two of these cost standards which were pleaded to illustrate that Media24 was participating in predatory pricing. The Competition Commission contends that pricing below average total cost could amount to predatory pricing if it is accompanied by additional evidence of intention to predate or a predatory scheme. Media24, on the other hand, submits that relying on average total cost plus additional evidence is an unreliable way of evaluating whether predation has occurred. Instead, Media24 proposes that average avoidable cost be used as the appropriate costs standard below, which prices charged indicate a violation of section 8(c). The Tribunal found in favour of the Competition Commission, while the Competition Appeal Tribunal agreed with Media24 and excluded average total cost plus additional evidence as a relevant cost measure.

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60 Bolton, Brodley and Riordan "Predatory Pricing: Strategic Theory and Legal Policy" (2000) 88 Geo Law Journal 2239 at 2244.

61 O'Donoghue and Padilla above fn 6 at 237.

62 *Id at 236*.

63 *Id at 237*.

64 Bishop and Walker above fn 48 at 17-9.

65 Id at 12.

66 O'Donoghue and Padilla above fn 6 at 240.

67 Tribunal decision above fn 3 at para (82).

68 O'Donoghue and Padilla above fn 6 at 243.

69 Id.

70 Bishop and Walker The Economics of EC Competition Law: Concepts, Application and Measurement (Sweet and Maxwell, London 2010) at 305.

[71]However, because of the difficulties inherent in all cost standards, it would not be wise for this Court to tie itself too closely to any particular cost standard. The ultimate concern in cases such as these should be whether pricing below a cost standard could lead, or led, to the exclusion of a competitor, which exclusion had anti-competitive effects that are not outweighed by the gains listed in section 8(c).

Profit sacrifice

[72]One of the crucial indicators of predatory pricing is profit sacrifice. This refers to a dominant firm deliberately incurring losses relative to alternative non-predatory conduct in the short-term by pricing its products too low. The profit sacrifice test assumes that a firm would not rationally engage in exclusionary conduct unless it considers the short-term loss of profits to be less than any expected gains achieved as a result of excluding or discouraging rivals. [71] When a firm prices below average avoidable cost (or average variable cost), sacrifice is easily established because the firm is actively making a loss on a particular product line. This is because the product-specific costs incurred are not being covered by the price that is charged for the product. It is presumed that there can be no rational justification for making such a loss and thus, the pricing is predatory. However, a firm that prices below average total cost is still participating in profit sacrifice even if it is not actively loss-making. Common costs are allocated to product-lines in multi-product firms on some rational accounting basis. However, management makes the conscious decision to sacrifice part of the contribution that the firm could, and in accounting terms, should be making to common costs in favour of charging lower prices.

[73]While profit sacrifice is relied upon in many cases of predatory pricing, criticism of the test does exist. Academics question whether the profit sacrifice test requires a firm to opt for the most profitable business strategy to avoid a finding of exclusionary conduct. It is also unclear what degree of sacrifice is required to establish exclusionary conduct, or whether the rule is strict in that any profit sacrifice indicates abuse. [72] In response to these criticisms, some jurisdictions, such as the United States, have adopted a variant of the test called the "no economic sense" test. [73] This test establishes that conduct is not exclusionary unless it would not make economic sense for a dominant firm to pursue this behaviour save for its tendency to eliminate or lessen competition. [74]

[74]By combining the usual test for profit sacrifice with the "no economic sense" test, other jurisdictions have been able to develop an approach to predatory pricing that ensures that only profit sacrifice which is undertaken exclusively to eliminate competitors is prohibited. This is essentially the same approach which the parties before us argue section 8(c) requires. It is clear from the discussion above that there is no one cost standard that best illustrates profit sacrifice in all cases. Instead, the circumstances of each case must be considered to determine which cost standard is most appropriate to prove that sacrifice has occurred.

Anti-competitive effects

[75]Once profit sacrifice is established, it must be determined whether the sacrifice excluded or could exclude a competitor with anti-competitive effects. [75] The anti-competitive effect element can be determined based on whether the below-cost pricing was for a legitimate business reason, or whether the only rationale was to drive competitors out of the market.

[76]In SAA, the Competition Tribunal held:

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[71] O'Donoghue and Padilla above fn 59 at 227.

[72] *Id at 229*.

[73] *Id at 230*.

[74] Id. See also *Verizon Communications, Incorporated v Law Offices of Curtis V Trinko, LLP 540 US 398 (2004)*.

[75] O'Donoghue and Padilla above fn 59 at 227.

"If the conduct meets the requirements of the definition, we then enquire whether the exclusionary act has an anti-competitive effect. This question will be answered in the affirmative if there is (i) evidence of actual harm to consumer welfare or (ii) if the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals. This latter conclusion is partly factual and partly based on reasonable inferences drawn from proven facts. If the answer to that question is yes, we conclude that the conduct will have an anti-competitive effect. Whichever species of anti-competitive effect we have, consumer welfare or likely foreclosure, we have evidence of a quantitative nature and hence we can return to the scales with a concept capable of being measured against the alleged efficiency gain." [76]

[77]There are many legitimate business reasons why a firm might choose to price a product below average total cost. Two such examples come immediately to mind. First, the levels of competition in particular markets fluctuate over time. It may be, therefore, that new entrants can afford to charge lower prices and the dominant firm is forced to decrease its prices in the short-term to meet the prices that competitors are charging. [77] Second, when dominant firms want to encourage customers to become familiar with a product, they will drop the price of the product in the short-term as a promotion. [78] Neither of these price reductions are predatory because they are done with the intention of attracting customers and not of excluding competitors from the market. [79]

[78]Because of the multiple justifications that exist, pricing below average total cost is considered lawful in some jurisdictions, but competitors may adduce evidence to prove that, in the circumstances of the specific case, the pricing was predatory. The Tribunal relied on the decision of the European Court of Justice in AKZO, which is the seminal European authority for the contention that pricing below average total cost must be regarded as abusive if it is determined to be part of a plan for eliminating a competitor. [80] In terms of the rule established in AKZO, prices that are above average variable cost (or average avoidable cost) but below average total cost are only abusive when they are part of such an eliminatory plan, meaning that in all other instances, below average total cost pricing is considered to be lawful. [81] In terms of this decision, a plan is usually shown first through direct evidence of intent arising from the dominant firm's documents, and second through indirect factors which, taken together, show an anti-competitive intention underlying the price-cutting. [82]

[79]Europe is not the only jurisdiction that relies on the presumption that pricing below average total cost is lawful, but can be shown to be otherwise with additional evidence. The United States has not endorsed any particular cost standard and instead holds that predatory pricing must be shown to be below some measure of incremental cost. [83] This rule was articulated by the Supreme Court of the United States in Brooke Group, where the Court held that only below-cost pricing may be predatory. [84] In defining below-cost pricing, the Court held that this referred to pricing that was below the average total cost of producing a product. [85] Notably, the Court did not endorse average total cost but rather held that pricing anywhere below average total cost, including below the lower cost standards of

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[76] Competition Commission v South African Airways (Pty) Ltd (2005) ZACT 50 at para (132).

[77] O'Donoghue and Padilla above fn 59 at 285.

[78] *Id at 291*.

[79] *Id at 284*.

[80] Case C-62/86 AKZO Chmie BV v Commission of the European Communities (1991) ECR I-3359 at para (72).

[81] O'Donoghue and Padilla above fn 6 at 249.

[82] Id.

[83] Bolton, Brodley and Riordan above fn 60 at 20. See also *Brooke Group Ltd v Brown and Williamson Tobacco Corp 509 US 209 (1993) at 222-3*.

[84] *Brooke Group id at 223*.

[85] Hovenkamp Federal Anti-trust Policy: The Law of Competition and its Practice (3ed) (Thomas/West, St Paul 2005) at 346.

marginal cost and average variable cost, may be predatory. Pricing below a measure of incremental cost is only the first stage of the inquiry used by the Court. The second stage requires that the competitor alleging that a dominant firm is engaged in predatory pricing show that there is a reasonable prospect or dangerous probability of the dominant firm recouping more than the losses incurred through below-cost pricing. [86]

[80]While the requirement of recoupment has made successful prosecution of predatory pricing in the United States nearly impossible, the above is confirmation of the fact that other jurisdictions accept that pricing below average total cost may be predatory if it is accompanied by other evidence of a predatory scheme or predatory effects.

Average avoidable cost or average total cost plus intent

[81]This case neither requires the Court to determine the correct test to prove predatory pricing nor to create a new test to be applied to section 8(c). Instead, this Court is called upon to decide whether the Competition Appeal Court's decision to exclude a cost standard from the section is correct. If there are instances where the use of average total cost plus additional evidence may be the best test for the Competition Commission to rely upon to prove predation, then the appeal must succeed.

[82]Average avoidable cost has gained prominence in the past few decades as a reliable standard to determine whether predatory pricing has occurred. Both American and European academics recommend it as the cost standard of choice, and EU Guidance states that average avoidable cost should be used as the starting point in investigations into predatory pricing. [87] It is true that average avoidable cost is generally accepted as the most readily ascertainable and reliable cost measure. [88] However, as discussed above, it is not without its problems. The most pressing of these exists in multi-product firms where assets are transferred or redeployed from one operation to another. It is not clear in those instances which costs are avoidable and which are not. [89] The Competition Commission asserted that average avoidable cost may be difficult to determine as it is inherently uncertain. Resultantly, average avoidable cost should not be used dogmatically as the test for predation in all alleged cases of predatory pricing.

[83]Media24 characterises average avoidable cost as never considering non-avoidable common costs. Non-avoidable common costs refer to non-product specific fixed and sunk costs. It also appears that average avoidable costs are calculated from the dominant firm's perspective and not from the perspective of the firm that is the victim of predation. However, pricing below the cost of recovering fixed costs or sunk costs may, in some instances, exclude competitors.

Multi-product firms

[84]The Competition Commission points to a few instances where fixed and sunk costs may contribute to the exclusion of a competitor. The first is where a multi-product firm is competing with an equally efficient single-product firm. Multi-product firms are firms which produce multiple product lines. The firm incurs product-specific fixed and variable costs for each product line but also has unavoidable costs that would be incurred regardless of how many different product lines the firm produced. These unavoidable costs are also referred to as common costs. The multi-product firm can spread out its common costs, with each product line contributing something to the recovery of these costs, while the single-product firm must incur and recover all of its costs from money made by one product. In order to compete with the multi-product firm which spreads out its common costs, the single-product firm would consistently be making a loss as it is not covering its fixed and sunk costs. In this situation the Competition Commission contends that average total cost may be the appropriate standard to use to evaluate whether predation

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[86] Brooke Group above fn 83 at 224.

[87] European Commission above fn 58 at para (64).

[88] O'Donoghue and Padilla above fn 6 at 242 read with fn 19.

[89] O'Donoghue and Padilla above fn 59 at 248.

has occurred because average total cost is the only standard which considers a portion of the company's common costs.

[85]The length of the period over which predatory prices were charged is relevant to determining whether pricing above average avoidable cost but below fixed and sunk costs had exclusionary effects. Alleged predatory prices that last only one month may not cause an equally efficient rival to lose any money by not exiting the market unless those prices are lower than the short-run costs incurred by operating on a month-to-month basis. [90] However, fixed and sunk costs become very relevant when low pricing occurs over a long period of time. Pricing that lasts for one or ten years will cause an equally efficient rival to lose money, relative to exiting the market, if the price does not allow it to cover the fixed costs of producing anything, like its overhead costs, the following year. Moreover, the longer a dominant firm prices at a low price, the less likely competitors would be able to make future capital payments for sunk costs like long-term property rent or maintenance of facilities. [91] In these cases, it would be cheaper for the competitor to exit the market than remain in it and attempt to compete with the dominant firm's prices.

[86]Some academics, including Elhauge, believe that the difficulties associated with average avoidable cost stemming from its exclusion of fixed and sunk costs can be rectified by simply changing the perspective from which costs are examined when calculating average avoidable cost. They contend that the common costs faced by the dominant firm should be viewed from the perspective of the competitor and would thus be avoidable. [92] When deciding whether to sign a new long-term lease or exit the market, the lease has yet to be signed and is thus avoidable to the competitor. Therefore, the cost of rent could be factored into the average variable cost below which the dominant firm cannot price.

[87]This approach, while intuitively appealing, faces a few obstacles. The first is that other commentators contend that it would be nonsensical to accuse a dominant firm of predatory pricing every time a competitor finds itself unable to make a profit. [93] Moreover, expecting a dominant firm to price above the average avoidable cost of its competitors is inherently uncertain as to which costs are avoidable as it depends on the circumstances that the competing firm finds itself in. It is unclear how a dominant firm would ascertain a competitor's average avoidable cost to ensure that pricing is above it. Due to this uncertainty, a cautious firm would price its goods based on the assumption that the firm that will accuse it of predation is a competitor who is yet to enter the market. This prospective competitor's average avoidable cost would be equal to its average total cost as it has yet to incur any fixed or sunk costs, making all costs avoidable. Media24 argues that it is dangerous to require firms to price above their average total cost as it will harm the economy in the long run. It is unclear, however, why the criticisms that Media24 level against average total cost would not equally apply to the situation described here. The final problem with this approach stems from the fact that Media24 pleaded average avoidable cost based on the costs incurred by the dominant firm, and not those from the perspective of the competitor. This approach was not challenged by the Competition Commission or criticised by either the Tribunal or the Competition Appeal Court. It appears therefore that, at least in the context of the present case, it is common cause that average avoidable cost is examined from the dominant firm's perspective.

[88]Average total cost is the one cost standard that allows regulators to look at fixed and sunk costs in order to determine whether pricing below these costs resulted in the exclusion of a competitor. In his scathing critique of the average total cost standard, Baumol argues that there is, in reality, no such thing as a single-product firm. [94] And as a result, the reliance on average total cost in instances where a single-product firm competes with a multi-product

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[90] Elhauge "Why Above-Cost Price Cuts to Drive out Entrants Are Not Predatory and the Implications for Defining Costs and Market Power" (2003) 112 Yale Law Journal 681 at 708.

[91] Id.

[92] Id.

[93] Bishop and Walker above fn 70 at 306.

[94] Baumol "Predation and the Logic of the Average Variable Cost Test" (1996) 39 Journal of Law and Economics 49 at 59.

firm is only ever hypothetical. Even if single-product firms are indeed rare, it is far too much of a generalisation to assume that they do not exist outside of the pages of textbooks. Indeed, in the case before us, GNN was running a single-product firm for the duration of the alleged predation period even if it initially started out as a multi-product firm.

[89]The generally difficult task of calculating fixed and variable costs becomes more complex when a firm produces multiple products. [95] This is because the firm may have fixed and variable costs that are incurred jointly between the various products. [96] There is no unambiguous way of calculating what proportion of these common costs are incurred by any particular product. [97] There appears to be two approaches to the problem created by common costs in multi-product firms. The first is to ignore these costs altogether, while the second is to undertake the complicated task of allocating the costs between products. [98]

[90]The first approach essentially is to exclude common costs from all considerations of cost standards. [99] This approach is the one that is favoured by Media24 in that they argue that average avoidable cost, the cost measure which excludes common costs, is the most appropriate one to prove predation. This means that the only relevant concern is whether a price enables a firm to recover the product-specific costs of producing it, and not whether it is able to cover these costs and make a contribution towards common costs. [100] The problem with this approach is that it disadvantages competitors who produce only a single-product. Even if the firm is as efficient as the dominant firm, it may still be forced to exit the market as it must recover all of its costs from one product without the luxury of recovering common costs from different product lines. [101] This is the problem that the case before us presents.

[91]The second approach is to undertake to allocate the common costs between product lines in order to determine the average total cost of a particular product. [102] It is true that the calculation of this amount is complicated and cumbersome but other jurisdictions have developed guidelines for the allocation. In Claymore Dairies, the UK Competition Appeal Tribunal set out general guidance for the allocation of common costs. [103] The Tribunal held that:

"[t]here are conventional accounting methods for making such allocations (eg by volume, value, time, etc.) but the most appropriate yardstick to use may be debateable. One approach, shared by the expert witnesses in the present case, is to seek to identify "the cost drivers", ie to determine the factors that cause the costs to be incurred and then make allocations appropriately.

So far as possible, cost allocations should reflect the underlying business reality. A reasonably detailed understanding of the nature of the business, and how costs arise, is generally necessary when determining how particular costs should be allocated. Similarly, how the business itself treats the costs in its internal management accounts will normally be an invaluable source of information.

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[95] O'Donoghue and Padilla above fn 6 at 260.

[96] Id.

[97] Id.

[98] *Id at 261*.

[99] *Id at 260*.

[100] n100 Id.

[101] n101 *Id at 261*.

[102] n102 Id.

[103] n103 Claymore Dairies Limited and Arla Foods UK PLC v Office of Fair Trading (2005) CAT 30.

However the allocations are ultimately to be made, it is important in our view that the investigation is grounded on a firm and reliable assessment of what the total costs are, cross-checked as far as possible against the dominant undertaking's statutory and management accounts." [104]

[92]The above shows that while there may be difficulties with the allocation of common costs, it is neither an impossible task nor one that courts in other parts of the world are unwilling to undertake. Importantly, the use of any specific cost measure is motivated by the facts of the case. [105] For instance, where a multi-product dominant firm is operating in a market which has high barriers to entry, the long-run average incremental cost standard would likely be most appropriate and thus be used instead of average total cost. [106]

[93]In cases where a multi-product firm is predating an equally efficient single-product firm, it is the fact that the multi-product firm can spread out its common costs that contributes to the exclusion of the competitor. It would make sense therefore to consider common costs, and thus use average total cost, when evaluating whether predation has occurred in multi-product firms.

[94]The second example provided by the Competition Commission of a situation where fixed and sunk costs might lead to the exclusion of a competitor is where a less efficient competitor is the only firm competing with a dominant firm which would, but for that competitor, hold a monopoly in the market. As the firm is less efficient, it will not be able to compete with the prices levied by the dominant firm. While competition law is generally not concerned with protecting less efficient competitors, for the sake of protecting the market from monopoly, pricing below total costs should be considered as possibly exclusionary in this case. [107]

[95]The above illustrates that there are instances where it is possible to have profit-sacrificial conduct below average total cost which excludes an equally efficient competitor and thus, while pricing below average total cost should not be determinative of predation, it should be available to competition authorities. While the Competition Appeal Court is an expert body, the categorical exclusion of average total cost plus additional evidence of predation as a standard of proof is incorrect as it unduly limits the prosecutorial powers of the Competition Commission. This finding does not lay down a new standard, but rather makes the determination of the appropriate standard for predation dependent on the specific facts of each case.

Evidence of predation before the Tribunal

[96]Because there are often legitimate business justifications for pricing above average avoidable cost or average variable cost but below average total cost, the Tribunal held that pricing below average total cost alone was not sufficient to justify a finding of predation. [108] The Tribunal held that average total cost plus intent was an appropriate cost standard to examine in this case to establish whether predation occurred. While the test that it used has been colloquially referred to as "average total cost plus intent", it would be more accurate to describe it as "average total cost plus additional evidence including evidence of intent". This is because the Tribunal did not only examine evidence of subjective intention to predate. It relied on direct, subjective evidence of intention to predate, indirect and objective evidence of predation, evidence of recoupment and the equally efficient competitor test to show that the pricing below average total cost was executed for the purpose of eliminating GNN from the market. [109] The

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[104] n104 Id at paras (210)-(211) and (216). See also O'Donoghue and Padilla above fn 6 at 264.

[105] n105 O'Donoghue and Padilla id at 261.

[106] n106 Case COMP/35.141 Commission Decision of 20 March 2001 relating to a proceeding under Art 82 of the EC Treaty-Deutsche Post AG, 2001/354/EC. See also O'Donoghue id at 261-2 and case number 66/86 Ahmed Saeed Flugreisen and Silver Line Reisebro GmbH v Zentrale zur Bekmpfung unlauteren Wettbewerbs eV (1989) ECR 803.

[107] n107 European Commission above fn 58 at paras (23)-(24).

[108] n108 Tribunal decision above fn 3 at paras (233)-(238).

[109] n109 Id at paras (242)-(248).

Tribunal specified the meaning and content of both subjective intention [110] and objective intention. [111] This judgment endorses the Tribunal's interpretation of these terms. [112]

Intent

[97]The Competition Commission argues that evidence of subjective intention to predate is not determinative of predatory pricing, but rather that this evidence has probative value when coupled with other evidence, including objective evidence that corroborates the subjective evidence of intention. This argument is a considerable departure from the arguments that the Competition Commission presented before the Tribunal and the Competition Appeal Court. Before those bodies, the Commission contended that average total cost plus evidence of subjective intention was definitive proof of predation.

[98]The angle that the Commission's argument before us takes in terms of subjective intent is in line with the manner that this form of intent is treated in other jurisdictions. The European Court of Justice has examined what constitutes direct evidence of intention to predate. In AKZO, the Court relied on documentary evidence of a detailed plan to eliminate the competitor. [113] In Tetra Pak II, the Court relied on a report by the company's board of directors indicating that financial sacrifices should be made to fight competition. [114] In Wanadoo, the Court held that subjective intent could be proven by looking at both formal presentations by management and informal remarks made by staff members but that the former had higher evidential value. [115]

[99]The European Courts do recognise the difficulties with direct or subjective evidence of intention to predate. In AKZO, the Commission noted that it does not consider an intention to prevail over competitors as unlawful. [116] Moreover, commentators suggest that the enforcement of competition law should not be dependent on whether a firm uses "commercially correct" language in its correspondence. [117] Resultantly, evidence of subjective intent is treated with caution even in Europe, being the jurisdiction which relies most heavily on intent as an element of predation.

[100]In response to these problems, reliance has been placed on indirect evidence of intent, which is really just objective evidence that assists a court to make inferences about the explanation for the below-cost pricing. [118] This encompasses evidence of a plausible predatory strategy in a particular market. [119] Examples of indirect evidence include the actual or likely exclusion of a competitor, whether certain customers are selectively targeted, the scale, duration, continuity of the low pricing, the possibility of the dominant firm off-setting its losses with profits earned on

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[110] n110 See para (23).

[111] n111 See para (24).

[112] n112 The Tribunal decision above fn 3 at paras (260)-(261) held that:"Direct intent is the type of intent that we have discussed up until now - that which emanates from the documents of the accused firm and statements by its employees. Indirect intent has a greater economic basis. Examples cited would be reputational reasons for predation, targeting of specific customers and competitors reliant on external funding.As the name suggests, indirect intention is not reliant on direct intention as expressed by the impugned firm but circumstantial economic evidence that may give rise to an inference that conduct is predatory. Indirect intention received more attention in a document that preceded the Guidance, which is referred to as the Discussion Paper, yet the approach to analysing indirect intention still forms part of the present Guidance."

[113] n113 KZO above fn 80. See also O'Donoghue and Padilla above fn 6 at 249.

[114] n114 Case T-83/91Tetra Pak International SA v Commission (1994) ECR 11-765.

[115] n115 Case COMP/38.233 Wanadoo Interactive Commission Decision 16 July 2003. See also O'Donoghue and Padilla above fn 6 at 250.

[116] n116 AKZO above fn 80 at para (81).

[117] n117 O'Donoghue and Padilla above fn 6 at 250.

[118] n118 Id.

[119] n119 Id.

other sales and the possibility of recoupment of losses through a future return to high prices. [120] This approach was endorsed both in AKZO and Tetra Pak II. [121] However, when reliance is placed on indirect evidence, there must be a strong evidential basis for alleging that the below-cost pricing had no rational business justification. [122] If pricing below average total cost only makes commercial sense as part of a predatory strategy and there are no other reasonable explanations, indirect evidence will be sufficient to show that predation has occurred.

[101]The European approach to pricing below average total cost appears to be in line with the only South African authority on predatory pricing in terms of section 8(c) - the Competition Tribunal decision in Nationwide. [123] The Tribunal held:

"[I]f a complainant, relying on section 8(c), can show that a respondent's costs are below some other appropriate measure of costs not mentioned in [section 8(d)(iv)] it may prevail provided it adduces additional evidence of predation beyond mere evidence of costs." [124]

[102]While the decision of the Competition Tribunal in Nationwide is obviously not binding on this Court, both the Competition Tribunal and the Competition Appeal Court referred to the extract approvingly, despite their disagreement over what additional evidence should entail. [125] Nationwide has therefore been accepted as a useful starting point by both of the specialist bodies on matters of competition law. In my view, average total cost may be an appropriate cost standard in some instances and courts should be given the power to investigate pricing that is below average total cost, including examining the additional evidence that is adduced to illustrate predation.

[103]The critiques of subjective evidence are compelling and justify an approach that illustrates that the management of a firm had the subjective intention to predate does not mean that this conduct had exclusionary effects. It appears that section 8(c) focuses on the effects that conduct has on competition and there is no reason why objective evidence cannot be presented to prove that pricing that excluded a competitor had anti- competitive effects that outweighed pro-competitive gains. This evidence would include objective, indirect evidence.

[104]Media24 raised a number of potential harms that a finding endorsing average total cost plus additional evidence as an appropriate cost standard would have on the South African economy. Most notably, they argued that dominant firms would, because of fear of allegations of predation, primarily charge prices above average total cost and that this would harm consumers because they would have to pay high prices for products. The second concern was that multi-product firms would be discouraged from growing their firms and running different product lines because those lines would be less profitable. This, it was submitted, would harm consumers as it would limit their product choices.

[105]Both of these eventualities are extremely undesirable. It is important, therefore, that the approach taken strikes an appropriate balance between under and over-enforcement. Pricing below average total cost that is to the benefit of consumers and competition in general should not be discouraged. As a result, pricing below average total cost should be considered lawful. However, competitors may raise additional evidence to prove that the profit sacrifice undertaken by the dominant firm was only beneficial to the dominant firm insofar as it excluded competitors. This is a high evidential burden. If pricing behaviour only makes commercial sense as part of a predatory strategy, and there are no other reasonable explanations, this will meet the burden.

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[120] n120 Id at (251)-(252).

[121] n121 AKZO above fn 80 and Tetra Pak II above fn 114. See also, O'Donaghue above fn 6 at 252.

[122] n122 O'Donaghue id.

[123] n123 Nationwide Airlines v South African Airways (Pty) Ltd (2001) ZACT 1.

[124] n124 Id at 10.

[125] n125 Competition Appeal Court judgment above fn 4 at paras (45) and (55). See also the Tribunal decision above fn 3 at paras (100)-(101).

[106]The Competition Commission presented various pieces of evidence to the Competition Appeal Court, all of which potentially pointed towards proving that predation had occurred. Some of the evidence proves the intention to predate. However, the balance of the evidence was objective and allegedly pointed towards predation being the only rational reason for the low prices charged and towards the anti-competitive effect of these prices. The Competition Appeal Court dismissed all of the additional evidence out of hand on the basis that intention has no role to play in the interpretation of section 8(c). This meant that it failed to examine any of the other evidence that, while framed as indirect evidence of intent, is in actual fact objective evidence to establish the purpose for which the below cost prices were charged.

Equally efficient competitor test

[107]Media24 alleged before the Tribunal that the reason for GNN's exit from the market was not related to Forum's pricing but instead occurred because GNN was a less efficient competitor that was unable to survive in a volatile market. [126] It was contended that average avoidable cost and not average total cost is the appropriate cost standard to use in cases involving section 8(c) because pricing above average avoidable cost will not lead to the exclusion of an equally efficient competitor. It is a fundamental principle of competition law that firms should be allowed to maximise their profits by charging prices that are lower than those charged by their competitors. [127] In general, "less efficient firms should not receive any protection from aggressive competition since consumers are best served by more efficient firms". [128] This is because competition law is concerned with protecting competition and not competitors. [129]

[108]It should be noted that the second example that the Competition Commission points to in respect of which average total cost may be an appropriate cost standard to rely upon is where a less efficient competitor is the only competitor preventing a dominant firm from becoming a monopoly. The Tribunal held that GNN and Forum were equally efficient but even if that was not the case, this may not be fatal to the Competition Commission's case. [130]

[109]There are concerns in academia about the equally efficient competitor test. The first concern is that less efficient competitors can increase consumer welfare if the increased competition that their presence in the market creates outweighs their relative inefficiency. [131] In Europe this has led to an acceptance that the duty to protect firms from predation is not limited to protecting equally efficient firms, but also, in exceptional circumstances, less efficient firms. [132]

[110]The second concern with the equally efficient competitor test arises in cases where economies of scope and scale dominate the market and competitors only compete for a limited portion of the market. [133] The European courts seek to overcome this obstacle by putting aside the advantages that the dominant firm derives from being an unavoidable competitor for a portion of the market and focusing instead on equal efficiency only for that portion of the market that is contestable. [134]

[111]It is important that economies of scale exist and that we do not prohibit legitimate competition on the merits. The protection of equally efficient firms only does not appear to be a hard-and-fast rule that must be applied in all

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[126] n126 Tribunal decision id at paras (511)-(512).

[127] n127 Kelly et al Principles of Competition Law in South Africa (OUP, Cape Town 2016) at 2-3.

[128] n128 O'Donoghue and Padilla above fn 6 at 233.

[129] n129 Id.

[130] n130 Tribunal decision above fn 3 at paras (607)-(609).

[131] n131 O'Donoghue and Padilla above fn 6 at 232.

[132] n132 Id.

[133] n133 Id.

[134] n134 *Id at 233*.

investigations into potentially abusive pricing conduct. In terms of the definition of an "exclusionary act" in the Competition Act, [135] there is no textual basis which mandates the protection of equally efficient competitors only. The definition speaks merely of "a firm" being actually or potentially impeded or prevented and not an equally efficient firm. [136] Moreover, as discussed above, there are instances where the benefit that a competitor brings to the market through enhancing competition outweighs its inefficiency. The clearest example of this is where a dominant firm would be a monopoly but for the existence of one smaller, less efficient firm. The less efficient firm's existence protects consumers from monopoly pricing and thus benefits them greatly. International authorities appear to support the relaxing of the equally efficient competitor test in these circumstances. [137] This is the very instance that the Competition Commission relies upon to illustrate that pricing below average total cost may lead to exclusion in some cases.

[112]Further, in many industries the variable costs of large-scale production are cheaper than those associated with small-scale production. Here, new entrants are easily driven out of the market before they have had the opportunity to expand and reach their potential as an equally efficient competitor. [138] In markets which are already dominated by one or a few firms, new entry by firms is desirable, as is their allowance to blossom into large scale producers. [139] Given that the aims of the Competition Act include giving small- and medium-sized enterprises an equitable opportunity to participate in the economy, it would be inappropriate to rule that pricing below average total cost can never be predatory simply because it would not exclude an equally efficient competitor.

Recoupment

[113]The Tribunal found that there was evidence of recoupment by Media24. [140] Recoupment refers to the raising of prices by the dominant firm once the competitor has left the market. [141] The Commission alleged that once GNN had left the market, Media24 raised the prices that it was charging advertisers for advertising space in Vista.

[114]O'Donoghue and Padilla suggest that recoupment can be tested using two methods: either by examining the conduct itself or by looking at the structure of the market. [142] The examination of conduct refers to determining whether the predation has paid off in that it has enabled the dominant firm to raise its prices. Such an increase must be to a level that enables the firm to recoup the losses that it made previously. [143] To show that the structure of the market has changed, a number of factors can be examined. If the market share of a predator has grown, post predation, then it has gained power over a greater share of the market than it had before the predation period; in that sense there has been recoupment. [144] Other factors which indicate changes to the market structure include examining what barriers of entry have been created and whether there are significant constraints on the capacity of competitors to enter and survive in the market. [145]

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[135] n135 See definition in (14).

[136] n136 S 1(1) of the Competition Act.

[137] n137 European Commission above fn 58 at para (24) and International Competition Network "Predatory Pricing Analysis" in Unilateral Conduct Workbook (International Competition Network, Rio de Jeneiro 2012) at paras (35)-(37).

[138] n138 Bishop and Walker above fn 70 at 306.

[139] n139 Id.

[140] n140 Tribunal decision above fn 3 at paras (595)-(596).

[141] n141 O'Donoghue and Padilla above fn 6 at 253.

[142] n142 *Id at 253*.

[143] n143 Id.

[144] n144 *Id at 254*.

[145] n145 *Id at 253-4*.

[115]The Tribunal held that there was evidence of conduct of predation in that Media24 had raised its prices and there had been changes in the market structure as a result of GNN exiting the market. [146]

Treatment of evidence by the Competition Appeal Court

[116]The Competition Appeal Court held that average total cost plus intent was not an appropriate test to use to determine whether a violation of section 8(c) had occurred. It held that the test in section 8(c) for an exclusionary act is an objective one that examines the effect of conduct and not the intention behind it. [147] Moreover, the Court held that because all firms competing with one another on the merits intend to harm their competitors, with the potential result of their exit from the market, it is difficult to distinguish predatory intent from the intention to compete. [148] These criticisms are valid. However, they are largely directed at the subjective evidence of intent, and do not address the rest of the evidence which was objectively presented and aimed to show that the conduct had exclusionary effects.

[117]The Competition Appeal Court held that once the subjective evidence had been excluded, average total cost alone was not appropriate to illustrate that predation occurred. [149] The Court was correct to hold that unsupported evidence of subjective intention should be excluded from investigations into predatory pricing. However, the exclusion of this evidence does not require reliance on costing below average total cost alone as it is still supported by indirect, objective evidence of exclusionary effects, objective evidence of efficiency and objective evidence of recoupment.

[118]The failure to examine this evidence, particularly the evidence of recoupment is noteworthy, as many jurisdictions treat it as crucial to the establishment of predation. While the Competition Appeal Court may have concluded that there was insufficient evidence to prove recoupment, or that the indirect evidence and evidence of efficiency did not exclude all explanations for the below cost pricing, it was important for the Court to scrutinise the evidence to ensure the protection of consumer welfare. By failing to examine this evidence and excluding the average total cost standard altogether, the Competition Appeal Court impermissibly limited the ability of the Competition Commission to investigate, prosecute and present evidence of violations of section 8(c).

Remittal

[119]The Competition Appeal Court made no finding as to whether Media24 had participated in predatory pricing based on the average total cost plus additional evidence test. The court dismissed the evidence of intention and found that average total cost alone is not sufficient to ever prove predation. It is true that average total cost alone is not sufficient to prove predation but this Court has now held that, where below average total cost pricing is alleged, a complaint may be found to have statutory warrant if there is significant additional evidence that the pricing was purely to predate and had anti-competitive effects. The question whether Media24 participated in predatory pricing remains open and the parties requested that it be remitted to the Competition Appeal Court to make a final decision on this in the event that average total cost plus additional evidence was found to be an appropriate test.

[120]This Court has previously ordered that matters be remitted to lower courts when it would be just and equitable to do so. [150] The question whether Media24 engaged in predatory pricing based on the test that this Court has formulated is a question of fact combined with a question of economics. The Competition Appeal Court heard extensive arguments about the additional evidence proffered by the Competition Commission despite opting not to

[146] n146 Tribunal decision above fn 3 at para (621).

[147] n147 Competition Appeal Court judgment above fn 4 at para (111).

[148] n148 Id at para (38).

[149] n149 Id at para (111).

[150] n150 Qhinga v S (2011) ZACC 18; 2011 (2) SACR 378 (CC); 2011 (9) BCLR 980 (CC); Road Accident Fund v Mdeyide (2010) ZACC 18; 2011 (2) SA 26 (CC); 2011 (1) BCLR 1 (CC); and Merafong Demarcation Forum v President of the Republic of South Africa (2008) ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC).

make findings based on it. The Court has had the advantage of oral testimony and cross-examination that will best allow it to assess the expert evidence that was presented. Moreover, this Court does not have jurisdiction to determine pure questions of fact. The examination of evidence and a subsequent finding on the validity of the predation complaint would require this Court to investigate factual questions without having properly tested the evidence.

[121]The remittal of this matter to the Competition Appeal Court does not mean that Media24 will necessarily be found guilty of predation. As discussed above, the evidentiary burden placed upon a complainant alleging that predation has occurred due to pricing below average total cost is high. However, the remittal will compel the Competition Appeal Court to scrutinise the evidence presented and then come to a decision about whether predation has taken place. This is an additional accountability mechanism to ensure that dominant firms do not abuse their power and monopolise markets. This mechanism is important given that the Competition Act envisages the empowerment of small and medium-sized businesses and a more equitable share in the market by previously disadvantaged persons. [151]

Conclusion

[122]The Competition Commission has wide investigatory powers. This Court has recently held that the protection of these powers is paramount as it empowers the Commission to fulfil its envisaged role. [152] However, the decision of the Competition Appeal Court limits its prosecutorial powers arising from investigations which concluded that abuses of dominance had occurred. The Competition Appeal Court has dismissed all evidence of intention as irrelevant, even where that evidence is objective and points towards the effects of conduct rather than the motivation behind it. The Court's failure to look past the subjective evidence and consider the objective evidence relating to recoupment and efficiency has severely hamstrung the ability of the Commission to prosecute cases where the fixed and sunk costs included in average total cost have contributed to the exclusion of a competitor. The Commission should be empowered to plead whatever costs benchmark best suits the facts of the case. This should include allowing the Commission to plead average total cost when there is sufficient additional evidence to illustrate that the pricing was lowered for no rational reason besides to force the exit of a competitor.

[123]In the result, I would have made the following order:

1.Leave to appeal is granted.

2.The appeal is upheld to the extent that the finding by the Competition Appeal Court, that pricing below average total cost plus additional evidence is an inappropriate standard to establish a violation of section 8(c) of the Competition Act 89 of 1998, is set aside.

3.The matter is remitted to the Competition Appeal Court to determine whether Media24 engaged in predatory pricing.

4.Media24 is ordered to pay costs of the applicant, which costs shall include the costs of two Counsel.

(Mogoeng CJ and Dlodlo AJ concurred in the judgment of Goliath AJ.)

Cameron, Froneman and Khampepe JJ:

[124]We have had the privilege of reading the judgments of Goliath AJ ("first judgment") and Theron J ("third judgment"). Whilst we admire the breadth of the first judgment's treatment of predatory pricing benchmarks and recognise the added justification for doing so in the third judgment, we do not think it is in the interests of justice for this Court to embark on an exercise of that kind. In short, we doubt whether we have jurisdiction to entertain the

[151] n151 S 2(e) and (f) of the Competition Act.

[152] n152 Hosken above fn 25 and SOS above fn 25.

application for leave to appeal and, even if we have, we do not consider it to be in the interests of justice to grant leave. We would therefore dismiss the application for leave to appeal.

[125]The first judgment considerably extends the constitutional jurisdiction of this Court in respect of the workings of the Competition Act. [153] Previous cases have found constitutional jurisdiction in determining the boundaries of the powers and functions of the public bodies of the competition institutions created by the Competition Act, a legality issue. [154] This is not the starting point for finding constitutional jurisdiction in the first judgment. Understandably so, because section 8 of the Competition Act is not a provision that purports to delineate those boundaries. So the first judgment seeks the constitutional jurisdictional links elsewhere.

[126]The first purported link is equality:

"Section 2(e) and (f) of the Act states that part of the purpose of the Competition Act is to ensure that small and medium-sized business have equitable opportunities to participate in the economy and to promote a greater spread of ownership in the economy by those who were disadvantaged by apartheid. These purposes implicate the right of equality contained in section 9 of the Constitution. Section 9(2) enjoins the State to take legislative and other measures to advance the equality of previously disadvantaged people and section 2(e) and (f) of the Competition Act is a legislative measure of this kind." [155]

[127]The effect of this is to make the interpretation and application of the entire Competition Act a constitutional matter for purposes of the jurisdiction of this Court. This would mimic the way that the interpretation and application of the Promotion of Administrative Justice Act ("PAJA") [156] and the Labour Relations Act ("LRA") [157] are innately constitutional matters because they give legislative expression to fundamental rights in the Constitution. [158] But the PAJA and the LRA templates are not appropriate.

[128]First, the analogy is inapt. The Competition Act is not the legislation the Constitution mandated to give effect to the right to equality in the way that PAJA and the LRA are statutes specifically mandated by the Constitution in terms of, respectively, the rights to just administrative action [159] and fair labour rights. [160] The Competition Act is just legislation. It has no elite constitutional allure. All legislation must conform to the constitutional imperative of equality.

[129]Second, this roundabout way of seeking a legislative link in the Constitution's equality clause is unnecessary. If the interpretation and application of the provisions of the Competition Act do infringe the equality clause, this Court would have constitutional jurisdiction in any event, by virtue of that infringement alone. But this was not the basis on which the Commission brought its application. And notably and rightly, the first judgment does not dispose of the merits of the matter on equality grounds.

[130]The next link is said to reside in the indirect impact on the investigatory powers of the competition authorities:

"The effect of the Competition Appeal Court judgment is to limit the tools that the Commission has at its disposal to prove a violation of section 8(c).

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[153] n153 Above fn 2.

[154] n154 Hosken above fn 25; SOS above fn 25; and Senwes above fn 56.

[155] n155 First judgment at (31).

[156] n156 3 of 2000.

[157] n157 66 of 1995.

[158] n158 In respect of PAJA, see State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd (2017) ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC) at para (17). In respect of the LRA, see Woolworths above fn 44 at para (20).

[159] n159 S 33 of the Constitution.

[160] n160 S 23 of the Constitution.

This is because on the test it applied, it was unnecessary to examine certain evidence regarding predation. While evaluations under section 8(c) are economic in nature, a limitation of the investigative and prosecutorial powers of the Commission may have adverse consequences. Surely, if the ambit of the Commission's investigatory powers raises a constitutional issue, the ambit of its ability to bring prosecutions based on findings made during investigation is, by parity of reasoning, similarly constitutional. What would be the purpose of the strong investigatory powers of the Competition Commission if it cannot present all of the evidence that it has gathered in order to prosecute an offence?" [161]

[131]Apart from the objection that this is a "tail wagging the dog" argument, in that the tools to prove a violation and not the violation itself become the issue, it also entails that any wrongful exclusion of evidence in proceedings before the Tribunal and Competition Appeal Court will necessarily have a constitutionally significant impact on the investigatory powers of the Commission. As a general proposition this has attraction, but closer examination reveals that it has nothing to do with the legality issue relating to the nature and extent of the Commission's investigatory powers, which is a constitutional issue.

[132]Those investigatory powers are set out in section 21(1)(c) of the Competition Act. This section empowers the Competition Commission to investigate alleged violations of Chapter 2 of the Competition Act. A finding by the Tribunal or the Competition Appeal Court on what evidence may be led at a hearing into violations of Chapter 2 does not in any way diminish the legal competence of the Commission to investigate these violations. To hold that it does would be tantamount to saying, in other settings, that any ruling on excluding the admissibility of evidence in a criminal matter necessarily impacts on the powers of the South African Police Service to investigate crime. Any evidential matter then becomes a constitutional legality issue. That is not correct.

[133]This Court's decisions in SOS and Hosken offer no support for the proposition. They both dealt with the competence of the Commission to investigate specified aspects of merger activity under the Competition Act, not the manner in which the investigations should be executed. Whether the Commission has the competence to investigate particular subject matter under the Competition Act raises legality issues; what evidence it may legally present before the adjudicative bodies established under the Competition Act after its investigation does not.

[134]The first judgment finds final jurisdictional solace on the ground that the Commission's case raises an arguable point of law of general public importance, namely "whether pricing above average avoidable cost but below average total cost amounts to predation [which] requires the interpretation of the law relating to exclusionary acts and the consideration of which tests can be used to equitably establish predation". [162] The third judgment adds further justification for this jurisdictional ground. This does not, however, establish any persuasive basis for this Court to exercise its jurisdiction. It is only in those rare instances where purely legal issues of interpretation arise in the work of the Tribunal and the Competition Appeal Court that this Court should intervene. This is not one of those rare cases, because it does not raise a purely legal issue, but a mixed one of fact and law.

[135]And that is where the problem lies and remains, because mixed questions of fact and law require evaluative assessments, [163] and it is precisely those assessments that it is not the function of this Court to tread into.

[136]The adjudicative institutions under the Competition Act are expert bodies and due recognition must be given to this, also in determining the proper constitutional competence of this Court in relation to competition matters. In

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[161] n161 First judgment at (33) to (34).

[162] n162 First judgment at (35).

[163] n163 Media Workers Association of South Africa v Press Corporation of South Africa Limited (1992) ZASCA 149; 1992 (4) SA 791 (AD) (also reported at (1992) 2 All SA 453 (AD) - Ed). See also Mukaddam v Pioneer Foods (Pty) Ltd (2013) ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC); Dikoko v Mokhatla (2006) ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC); Betha v BTR Sarmcol, A Division of BTR Dunlop Ltd (1998) ZASCA 5; 1998 (3) SA 349 (SCA) (also reported at (1998) BLLR 793) (SCA) - Ed); National Union of Mineworkers and others v Free State Consolidated Gold Mines (Operations) Ltd - President Steyn Mine; President Brand Mine; Freddies Mine (1995) ZASCA 109; 1996 (1) SA 422 (SCA) (also reported at (1995) 12 BLLR 8 (A) - Ed).

addition to the accepted deference given to other courts in relation to factual findings, [164] this means a similar deference to the competition authorities as better qualified to determine economic issues. In Yara, Cameron J stated:

"In considering whether it is in the interests of justice to allow an appeal directly to this Court, the nature of the matter is relevant. In the same way as the views of the Supreme Court of Appeal are particularly pertinent in common law matters, so are the views of the Competition Appeal Court, as a specialist body, important in competition matters that lie at the complex intersection of law and economics." [165]

[137]Determining the appropriate benchmark for predatory pricing under section 8(c) of the Competition Act inevitably depends on an assessment of the relative merits of expert evidence in that regard. That does not fall within the functional competence of this Court. [166] It is not a purely legal interpretative exercise. Section 167(3)(b)(ii) requires that this Court "ought to" consider the legal point. As Paulsen trenchantly explained:

"[i]f - for whatever reason - it is not in the interests of justice for this Court to entertain what is otherwise an arguable point of law of general public importance, then that point is not one that 'ought to be considered by [this] Court'." [167]

And even if one clothes it as an assessment of the reasonableness of the Competition Appeal Court's assessment, one cannot escape that, in reality, it involves second-guessing the relative merits of different expert views.

[138]The final proof of this is in the remedy favoured in the first judgment: referral back to the Competition Appeal Court. What option does the Competition Appeal Court have other than to allow evidence of intention now? And how can we avoid the blunt reality that by compelling the Competition Appeal Court to allow evidence of intention this Court is itself setting the appropriate benchmark - in specialist territory that the statute specifically entrusts to that Court?

[139]For these reasons we would dismiss the application for leave to appeal with costs, including the costs of two Counsel.

(Petse AJ concurred in the judgment of Cameron, Froneman and Khampepe JJ.)

BY Theron J

[140]I have had the pleasure of reading the well-crafted judgments of my colleagues Goliath AJ ("first judgment") and Cameron J, Froneman J and Khampepe J ("second judgment"). I concur in the first judgment that we have jurisdiction to adjudicate the appeal as it raises an arguable point of law of general public importance. I also concur that it would be in the interests of justice to grant leave to appeal. [168]

[141]I, however, part ways with the first judgment and find that the Competition Appeal Court was correct in holding that the adoption of a test for predatory pricing under section 8(c) of the Competition Act that is based on the average total cost standard and the intention of a dominant firm is inappropriate. In this regard, I am of the view

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[164] n164 ST v CT (2018) ZASCA 73; 2018 (5) SA 479 (SCA) (also reported at (2018) 3 All SA 408 (SCA) - Ed); Matlou v Makhubedu 1978 (1) SA 946 (A) at 950A-E (also reported at (1978) 2 All SA 77 (A) - Ed); Protea Assurance Co Ltd v Casey 1970 (2) SA 643 (A) at 648E (also reported at (1970) 3 All SA 44 (A) - Ed); R v Dhlumayo and another 1948 (2) SA 677 (A) at 705-6 (also reported at (1948) 2 All SA 566 (A) - Ed).

[165] n165 Yara above fn 30 at para (71).

[166] n166 Hosken above fn 25 at para (31); and SOS above fn 25 at para (21).

[167] n167 Paulsen v Slip Knot Investments 777 (Pty) Ltd (2015) ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para (30).

[168] n168 See first judgment at (57).

that the interpretation adopted by the first judgment of section 8(c) of the Competition Act is contrary to the objectives of the Competition Act and may serve to severely undermine price competition and in so doing harm consumer welfare.

Jurisdiction

[142]In my view, and for the reasons given in the second judgment, this case does not raise a constitutional matter. It does, however, raise an arguable point of law of general public importance that ought to be considered by this Court.

[143]In Paulsen, this Court explained that a point of law is one that is not factual. [169] In K, this Court held (in the context of vicarious liability) that what renders an issue legal (and, in that context, potentially constitutional) as opposed to purely factual, is an enquiry into the social policy and normative content behind a rule. [170] When this Court is called upon to examine the otherwise inarticulate premises in the normative implications of a rule that is, in my view, a legal enquiry. [171] To view this examination, even in the context of where a common law rule is imbued with social norms as in K, as a factual enquiry over which this Court has no jurisdiction will "sterilise" the law and "purge it from any normative, social or economic considerations". [172]

[144]In this case, there is clearly a point of law: is it appropriate to determine whether prices are predatory in terms of section 8(c) of the Competition Act by considering the average total cost standard and the intention of a dominant firm to predate? Answering this question entails critically examining the policy and normative implications of the various standards for predatory pricing. There is nothing factual about this. On the contrary, the facts in this case are common cause: all parties agree that Media24 was pricing below average total cost (but above the standard of average avoidable cost). The question in this matter is legal. No facts are evaluated by this Court. [173]

[145]I also agree with the first judgment's argument that the Competition Act should not be read to deprive this Court of jurisdiction over arguable points of law of general public importance. [174] In this regard, section 62(2)(b) and (3)(b) of the Competition Act states that the Competition Appeal Court does not have exclusive and final appeal jurisdiction for those matters that raise constitutional issues. In Soda Ash, albeit in a slightly different context, the

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[169] n169 Paulsen above fn 167 at para (20), which explains:"The point must be one of law; and it must be arguable. Starting with the first prong, quite axiomatically, the point must not be one of fact. This Court's jurisprudence on purely factual matters, developed in the context of what constitutes a constitutional, as opposed to a factual issue, is an instructive guide on this."

[170] n170 K v Minister of Safety and Security (2005) ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at para (22), which reads:"Despite the policy-laden character of vicarious liability, our courts have often asserted, though not without exception, that the common-law principles of vicarious liability are not to be confused with the reasons for them, and that their application remains a matter of fact. If one looks at the principle of vicarious liability through the prism of s 39(2) of the Constitution, one realises that characterising the application of the common-law principles of vicarious liability as a matter of fact untrammelled by any considerations of law or normative principle cannot be correct. Such an approach appears to be seeking to sterilise the common law test for vicarious liability and purge it of any normative or social or economic considerations. Given the clear policy basis of the rule as well as the fact that it is a rule developed and applied by the courts themselves, such an approach cannot be sustained under our new constitutional order. This is not to say that there are no circumstances where rules may be applied without consideration of their normative content or social impact. Such circumstances may exist. What is clear, however, is that as a matter of law and social regulation, the principles of vicarious liability are principles which are imbued with social policy and normative content."

[171] n171 Id at para (23).

[172] n172 Id at para (22).

[173] n173 Even if this matter concerned a mixed question of facts and law, in Mtokonya v Minister of Police (2017) ZACC 33; 2018 (5) SA 22 (CC); 2017 (11) BCLR 1443 (CC) at paras (43)-(44), this Court endorsed the proposition that if a rule of law must be applied prior to the reaching of a conclusion, then that conclusion is necessarily one of law. It follows that we may have jurisdiction to adjudicate matters involving mixed questions of fact and law.

[174] n174 First judgment at (35).

Supreme Court of Appeal similarly interpreted the Competition Act to be consonant with the appellate jurisdiction that was conferred on the Supreme Court of Appeal by the Constitution (prior to the 17th Amendment). [175] The approach adopted in Soda Ash is equally apposite in this context: where it would not be unduly strained, as in this case, section 62(2) of the Competition Act must be interpreted to accord with section 167(3)(b)(ii) of the Constitution which founds this Court's jurisdiction. Our jurisdiction is accordingly engaged.

Leave to appeal

[146]Though this matter raises an arguable point of law of general public importance, it does not follow that it "ought to be considered" by this Court. In Paulsen, this Court explained that an arguable point should only be considered by this Court if it would be in the interests of justice to do so. This enquiry is identical to that employed by this Court in establishing whether leave to appeal should be granted in respect of a constitutional matter. [176]

[147]Media24 posited two reasons why leave to appeal should not be granted. First, it argued that the Commission should have approached the Competition Appeal Court for leave to appeal before approaching this Court. Second, it argued that the Commission should have also first approached the Supreme Court of Appeal before appealing to this Court.

Approaching the Competition Appeal Court for leave to appeal

[148]Media24 argued that section 63(2) of the Competition Act always requires the Commission to apply to the Competition Appeal Court for leave to appeal to this Court against a decision of that Court. [177] It contended that the Commission's failure to do so was fatal with the result that this Court cannot hear the Commission's appeal.

[149]Section 63(2) of the Competition Act provides:

"An appeal in terms of section 62(4) may be brought to the Supreme Court of Appeal or, if it concerns a constitutional matter, to the Constitutional Court, only -

(a)with leave of the Competition Appeal Court; or

(b)if the Competition Appeal Court refuses leave, with leave of the Supreme Court of Appeal or the Constitutional Court, as the case may be." [178]

[150]Media24 submitted that:

(a)the word "only" in section 63(2) implies that an application for leave to appeal in the Competition Appeal Court is a necessary condition for approaching this Court;

(b)the purpose of a prior approach to the Competition Appeal Court for leave to appeal ensures that this Court enjoys the views of that specialist Court; and

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[175] n175 American Natural Soda Ash Corporation v Competition Commission of South Africa (2005) ZASCA 42; 2005 (6) SA 158 (SCA) at paras (13)-(15) (also reported at 2005 (9) BCLR 862 (SCA) - Ed).

[176] n176 Paulsen above fn 167 at paras (29)-(31).

[177] n177 Such matters are listed in s 62(2) read with s 62(3)(b) and this Court's finding that s 62(2) must include appeals concerning "arguable points of law of general public importance".

[178] n178 S 62(4) reads that "(a)n appeal from a decision of the Competition Appeal Court in respect of a matter within its (non-exclusive) jurisdiction in terms of (s 62(2)) lies to the Supreme Court of Appeal or Constitutional Court, subject to s 63 and their respective rules".

(c)section 167(6)(b) of the Constitution envisages the promulgation of national legislation to allow for a direct appeal from any other court, [179] and the Competition Act is consistent with this. The Competition Act allows for a direct appeal to be made to this Court only after the procedural step of applying to the Competition Appeal Court for leave to appeal has been complied with.

[151]The challenge for Media24 is that the third leg of its argument cannot be accepted. This is for the reasons given by Cameron J and Yacoob J in their dissenting judgments in Yara [180] and Loungefoam. [181] Their reasoning in Yara is that the right to appeal to this Court under section 62(4) of the Competition Act is made subject to any law that specifically grants any right of appeal. [182] Section 167(6)(b) of the Constitution requires that national legislation or the Rules of this Court "must" allow a person to bring a matter directly to this Court when it is in the interests of justice to do so. [183] Section 167(6)(b) specifically grants a right of direct appeal to this Court. It follows that the right to appeal provided for in section 62(4) of the Competition Act must be subject to section 167(6)(b) of the Constitution, which gives persons the right of a direct appeal to this Court if the interests of justice require. [184]

[152]If a right to appeal in section 62(4) of the Competition Act is subject to section 167(6)(b) of the Constitution, then an applicant is entitled to rely on the pre-existing right to appeal directly to this Court in terms of rule 19 of this Court's Rules. This pre-existing right does not require that an applicant first obtain leave to appeal from the Court below. Moreover, an applicant need not rely on the right in section 62(4) of the Competition Act, which is subjected to the restriction in section 63(2)(a) (that leave of the Competition Appeal Court to appeal against its judgment must be applied for). An applicant is empowered to appeal directly to this Court without first seeking the leave of the Competition Appeal Court.

[153]However, where the leave of the Competition Appeal Court is not sought, and the procedure in rule 19(2) of this Court's Rules is invoked by an applicant, the matter is a direct appeal. In these circumstances, this Court must assess whether it is in the interests of justice to entertain the appeal without the Competition Appeal Court having had an opportunity to consider the application for leave to appeal. [185] Factors which will influence this assessment include the nature of the matter, the prospects of success of the appeal, the significance of the issues raised, whether the views of the Competition Appeal Court are useful or necessary to determine the appeal, and whether the subject matter of the appeal implicates complex questions of economics and law. [186]

[154]Both Yara and Loungefoam were handed down on the same day by this Court, but were heard in different terms and have slightly different quorums. It is worth mentioning that the minority's reasoning in Yara, while not endorsed by the majority in that matter, was considered to be "appealing" and assumed to be correct in the partial

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[179] n179 S 167(6) reads:"National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court - . . . (b)to appeal directly to the Constitutional Court from any other court."

[180] n180 Above fn 30.

[181] n181 Above fn 30.

[182] n182 S 63(1)(a)(ii) of the Competition Act. It would follow nonetheless that s 63(4) would be subject to and must be reasonably interpreted to accord with the Constitution. See s 1(2)(a) of the Competition Act, which requires that its provisions must be interpreted in a manner that is consistent with the Constitution, and Democratic Alliance v Speaker of the National Assembly (2016) ZACC 8; 2016 (3) SA 487 (CC); 2016 (5) BCLR 577 (CC) at para (33).

[183] n183 Rule 19(2) of the Rules of this Court provides for direct appeals as envisaged in s 167(6)(b) of the Constitution:"A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave."

[184] n184 Yara above fn 30 at paras (64)-(66); and Loungefoam above fn 30 at para (23).

[185] n185 Yara id at paras (68)-(70); and Loungefoam id.

[186] n186 Yara id at para (71); and Loungefoam id at para (36).

concurrence of Froneman J (with Skweyiya J and Van der Westhuizen J concurring) in Yara. [187] The issue whether the Competition Appeal Court must first be approached for leave to appeal was left open in the judgment of Zondo AJ (with Jafta J and Nkabinde J concurring). [188] It follows that no Justice of this Court has objected to the minority's reasoning in Yara and a majority found it to be, at the very least, "appealing".

[155]As in Yara, the majority in Loungefoam, per Maya AJ did not consider it necessary to decide the issue regarding section 63(2) and approaching this Court without the leave of the Competition Appeal Court. [189] The minority invoked their reasoning in Yara for why, in Loungefoam, the Commission did not need to approach the Competition Appeal Court for leave to appeal before this Court could consider the appeal. [190]

[156]On the facts of this case, do the interests of justice permit the Commission to approach this Court directly? It is true that this matter involves complex questions of law and economics. This suggests that the Commission should be required to first approach the Competition Appeal Court for leave to appeal. On the other hand, this Court has had the benefit of comprehensive argument. In addition, it has access to two judgments of the Tribunal and the Competition Appeal Court; these judgments each reach divergent conclusions on the relevant issues, which, along with reasons that will become apparent, indicate that there may be prospects of success; [191] the matter primarily concerns statutory interpretation; and the determination of the proper legal test for predatory pricing is of immense significance. For these reasons, leave to appeal ought to be granted notwithstanding the Commission's failure to approach the Competition Appeal Court for leave to appeal.

Failure to approach the Supreme Court of Appeal

[157]Media24 argued that even if the Commission was not required to approach the Competition Appeal Court for leave to appeal, the Commission should first have appealed to the Supreme Court of Appeal before coming to this Court. Their argument was that section 168(3)(a) of the Constitution anticipates that legislation may limit the jurisdiction of the Supreme Court of Appeal in competition matters; [192] Loungefoam held that sections 62 and 63 of the Competition Act confer appellate jurisdiction on the Supreme Court of Appeal in respect of matters mentioned in section 62(2) of the Competition Act; [193] therefore sections 62 and 63 of the Competition Act confer on the Supreme Court of Appeal jurisdiction in competition matters falling within section 62(2) of the Competition Act. It follows that the Commission could have applied to the Supreme Court of Appeal. There is then no reason why it would be in the interests of justice to allow it to bypass that Court.

[158]The Commission agreed that section 168(3)(a) removes the Supreme Court of Appeal's jurisdiction to hear appeals in respect of competition matters. The extent of such removal may be determined by an Act of Parliament. However, the Commission argued that sections 62 and 63(2), properly interpreted, do not give the Supreme Court of Appeal jurisdiction to hear appeals arising from the Competition Appeal Court that concerned constitutional matters under section 62(2)(b). Section 63(2) provides that an appeal "may be brought to the Supreme Court of Appeal or, if it concerns a constitutional matter, to the Constitutional Court".

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[187] n187 Yara id at para (77).

[188] n188 Id at para (21).

[189] n189 Loungefoam above fn 30 at para (24).

[190] n190 Id at para (32).

[191] n191 Similarly, this makes the point of law "arguable" as envisaged in Paulsen above fn 167 at para (23). It is also trite that prospects of success are an important factor in determining leave to appeal. See S v Boesak (2000) ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para (12).

[192] n192 The section was amended in 2012 by the 17th Amendment to the Constitution to read:"The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in respect of labour or competition matters to such extent as may be determined by an Act of Parliament."

[193] n193 Once again, s 62(2)(b) is now to be read as including arguable points of law.

[159]In support of its argument, the Commission invoked the Supreme Court of Appeal's decision in Computicket. [194] In that matter, that Court held that section 63(2) of the Competition Act excludes the Supreme Court of Appeal from hearing an appeal which raises a constitutional matter as envisaged in section 62(2)(b). The Supreme Court of Appeal read section 61(2)(b) to mean that appeals concerning constitutional matters must be determined by this Court; they cannot "also" be entertained by the Supreme Court of Appeal. [195] This approach would prevent a case which had already gone through two courts (the Tribunal and the Competition Appeal Court) from being considered by two further courts (the Supreme Court of Appeal and this Court) ostensibly without justification. [196]

[160]On the face of it, Computicket appears to contradict Loungefoam. In Loungefoam this Court held that the Competition Act confers "appellate jurisdiction on both the Supreme Court of Appeal and this Court from the Competition Appeal Court in respect of constitutional and other matters listed in section 62(2)" and that this "is evident from the plain wording of sections 62 and 63". [197] This Court also held that the Commission had not demonstrated why the Supreme Court of Appeal should be bypassed - a finding that presupposes that the Supreme Court of Appeal was vested with jurisdiction to adjudicate the appeal in question. [198] This Court could not have been clearer about its interpretation of the Competition Act:

"Further, until the Legislature decides otherwise, the Supreme Court of Appeal also serves as a further filter in the appellate hierarchy, even in matters that do not explicitly involve the development of the common law." [199]

[161]The first judgment appears to pronounce on this question in favour of the Commission by finding that the Supreme Court of Appeal no longer has jurisdiction over matters envisaged in section 62(2)(b) of the Competition Act as contemplated in Computicket. Its terse reasoning is that the 17th Amendment clearly removes the Supreme Court of Appeal's jurisdiction. [200] It does not deal with this Court's finding in Loungefoam that appellate jurisdiction is also conferred on the Supreme Court of Appeal from the Competition Appeal Court. It also fails to deal with whether section 63(2) nonetheless gives the Supreme Court of Appeal jurisdiction over section 62(2) matters as envisaged by the 17th Amendment. [201] It also does not have regard to the further complication flowing from its finding that arguable points of law are also appealable under section 62(2)(b). This finding might imply that the Supreme Court of Appeal can no longer adjudicate appeals from the Competition Appeal Court concerning an arguable point of law. This approach could severely restrict the jurisdiction of the Supreme Court of Appeal in competition matters.

[162]At the same time, the first judgment considers whether it is in the interests of justice to hear the appeal without the Supreme Court of Appeal having adjudicated it first. [202] It is accordingly unclear whether the first judgment's finding that the Supreme Court of Appeal lacks jurisdiction is obiter.

[163]In my view, the issue is best left open. I am prepared to assume in Media24's favour that the Commission could have approached the Supreme Court of Appeal. Even then, this is not fatal to the Commission's case. The interests of justice permit this Court to decide a matter without the Supreme Court of Appeal having heard it first.

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[194] n194 Computicket above fn 40.

[195] n195 Id at para (17).

[196] n196 Id.

[197] n197 Loungefoam above fn 30 at para (19).

[198] n198 Id at para (26).

[199] n199 Id.

[200] n200 First judgment at (47).

[201] n201 One cannot assume that it does not do so only because it was passed before the 17th Amendment.

[202] n202 First judgment at (48) to (50).

This is for the same reasons why it was not necessary for the Commission to seek the leave of the Competition Appeal Court to appeal the judgment. [203]

Functional competence

[164]The second judgment suggests that this matter falls outside the functional competence of this Court as it entails an evaluative assessment of economic policy issues. I agree that the first judgment's interpretation of the Competition Act implicates economic policy considerations. This Court has, however, repeatedly adjudicated over complex questions of public policy. In my opinion, there is no sound reason why public policy considerations of an economic nature suddenly swing the interests of justice in the opposite direction. The matter is properly before us and we should not shy away from our duty to determine the policy-laden issue of general public importance that it raises. [204]

[165]For these reasons, leave to appeal should be granted.

Merits

[166]On the merits, the first judgment reaches two conclusions:

(a)A firm can be guilty of predatory pricing if it charges prices above average avoidable cost; [205] and

(b)A firm can be guilty of predatory pricing if it charges prices below average total cost [206] and has an intention to predate.

[167]I agree with the first judgment on its first finding. [207] There may be instances where a firm charges above average avoidable cost but it is still guilty of predatory pricing. There is no need to spell out these circumstances in any detail. The Commission before us has pinned its case on one circumstance in which a firm would be guilty of predatory pricing even though it charged prices above its average avoidable cost. The Commission argued that where a firm with an intention to predate prices between average total cost and above average avoidable cost, then that firm is guilty of predatory pricing. I disagree that either average total cost or an intention to predate can ever be relevant to determining predatory pricing. This is borne out from a proper interpretation of section 8(c) of the Competition Act. For the reasons that follow, the Commission's appeal should be dismissed.

Proper approach to predatory pricing under section 8(c) of the Competition Act

[168]To determine the proper approach to prohibited predatory pricing under section 8(c) of the Competition Act, we are enjoined to interpret section 8(c) purposively, within its proper context, and in accordance with the ordinary grammatical meaning of its words. [208]

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[203] n203 See paras (151) to (156) above.

[204] n204 See S v Makwanyane (1995) ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para (187).

[205] n205 This standard is based on the costs a firm could have avoided by not engaging in a predatory strategy. The costs standard includes an element of fixed costs known as product-specific fixed costs. These are the fixed costs associated with the product or service that would not be incurred by the firm if it were to avoid producing the product or providing the service. See Competition Appeal Court judgment above fn 4 at para (19).

[206] n206 The average total cost standard advocated for by the Commission is calculated by dividing the total costs incurred by Forum in the production of its product by the number of units of the product that Forum produces. In this regard, Forum's total costs include both its variable and fixed costs.

[207] n207 To the extent that the Competition Appeal Court found otherwise, it must be overturned.

[208] n208 Road Traffic Management Corporation v Waymark (Pty) Limited (2019) ZACC 12 at para (29).

[169]A key objective of the Competition Act is to provide consumers with competitive prices. [209] A dominant firm may adopt a strategy of reducing its prices to exclude competitors from the market. This strategy may have short term pro-competitive effects for the economy in that prices for the goods or services in question are reduced. In the long term, however, the adoption of such a predatory pricing strategy may empower the firm to further abuse its position of dominance with exclusionary anti-competitive effects. The adoption of this predatory pricing strategy would not only lead to the undermining of competitive prices, but would violate the Competition Act's objective of reducing "excessive concentrations of ownership and control within the national economy". [210]

[170]The regulation of predatory pricing poses significant challenges. The Competition Act recognises that firms have a right to compete on price. In this regard, the adequate protection of the competitive process between firms is essential to the achievement of the Competition Act's objective of providing consumers with competitive prices. [211]

[171]This inherent tension that is associated with predatory pricing implies that the approach adopted to determine the existence of exclusionary abuses of dominance under section 8(c) of the Competition Act should be carefully developed to avoid two types of errors, (commonly referred to as type 1 and 2 errors, respectively):

(a)first, errors in which there is false condemnation of a dominant firm's pricing behaviour as constituting prohibited predatory pricing; [212] and

(b)second, errors in which there is a failure to condemn predatory pricing by a dominant firm.

[172]In Nationwide, the Tribunal held that section 8(c) requires the use of an appropriate measure of costs to assess the prices that are charged by a firm accused of adopting a prohibited predatory pricing strategy. [213] This must be correct because section 8(c) of the Competition Act, when interpreted in line with the object of the Competition Act to provide consumers with competitive prices, requires that a firm should not be penalised for merely reducing its prices. Additional evidence would also be required to demonstrate that the general requirements for prohibited exclusionary abuses of dominance in section 8(c) are met.

[173]Section 8(c) of the Competition Act does not prescribe the application of a specific test to determine whether a dominant firm has engaged in prohibited predatory pricing. Section 8(d)(iv) of the Competition Act, however, states that the selling of goods or services by a dominant firm below the marginal or average variable costs is a prohibited exclusionary act unless the firm is able to show that the technological, efficiency or other pro-competitive gains associated with the act outweigh its anti-competitive effect. In Senwes, we held that an exclusionary act must fall outside the scope of section 8(d) for it to be prohibited by section 8(c). [214] It follows that a complaint of predatory pricing brought in terms of section 8(c) of the Competition Act may not be founded on the cost formulas prescribed in section 8(d)(iv).

[174]I intend to demonstrate that the consideration of either average total cost or predatory intent under section 8(c) will lead to the type 1 and 2 errors referred to and consequently undermine the objectives of the Competition Act.

Is average total cost an appropriate standard to measure alleged unlawful predatory pricing?

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[209] n209 S 2(b) of the Competition Act.

[210] n210 See the preamble to the Competition Act.

[211] n211 See the Competition Appeal Court judgment above fn 4 at para (27).

[212] n212 For example, where a firm might have low prices (and is competing on the price) but is still labelled as predatory by the regulation in question.

[213] n213 Nationwide above fn 123 at 10.

[214] n214 Senwes above fn 56 at para (28).

[175]The key question raised in this case is whether it is appropriate to measure prices against the standard of average total cost. The answer is no. This is for four reasons.

[176]First, a firm could be pricing below average total cost, which includes fixed costs, but still be engaging in legitimate competition. For example, where the price is sufficient to cover the avoidable cost for producing the unit, the firm may still be acting competitively by producing that unit even if the price is less than the average total cost. To hold otherwise would prevent firms from producing new products in circumstances where they would be deriving more benefits than costs from such production.

[177]Second, the use of a dominant firm's average total cost in the determination of whether it has engaged in prohibited predatory pricing may operate as a price floor. This is because, if the average total cost standard is endorsed, a dominant firm that wishes to avoid being found to have engaged in a prohibited exclusionary abuse under section 8(c) may seek to avoid pricing its goods or services below its average total cost. This might encourage firms to raise their prices, especially in light of the potentially severe sanctions which they face under the Competition Act for engaging in prohibited exclusionary abuses of dominance. This price floor would undermine the objective of the Competition Act by inhibiting the achievement of competitive prices.

[178]Third, the average total cost standard without more can easily be manipulated by multi-product firms (which the respondent clearly is in this case, and which many dominant firms will be). [215] This is because in multi-product firms, there are fixed costs that are shared across different products. For example, the fixed cost of renting a factory may be common to all the different products produced by the firm in that factory. The issue is that there are multiple ways of apportioning these common costs to the various products. The Commission accepts that under their approach, it is up to the dominant firm to decide how to rationally apportion the common costs. Without additional guidance, this makes the standard susceptible to manipulation: a firm can account for common costs through one product and not another in order to avoid regulation aimed at preventing anti-competitive conduct. [216]

[179]Finally, the average total cost standard is inappropriate because it forces multi-product firms to ignore economies of scale. [217] In practice, firms can add new products to their lines of production and set prices close to or at marginal or avoidable cost because other products are funding fixed costs. This may be for the benefit of the consumer: it allows the lowering of prices.

[180]Given the finding that a dominant firm's average total cost is an inappropriate benchmark for predatory pricing under section 8(c), the Commission has failed to demonstrate that the prices charged by Forum violated section 8(c). This is because the only standard against which the Commission tests Forum's prices in this application is its average total cost.

Is the intention of a dominant firm a relevant consideration?

[181]Section 8(c) of the Competition Act prohibits a dominant firm from engaging in an exclusionary act in the form of predatory pricing if the anti-competitive effect of that act outweighs its technological efficiency or other pro-competitive gain. [218] An act is exclusionary if it impedes or prevents a firm from entering into, or expanding within, a market. [219] The determination of whether a dominant firm has engaged in prohibited predatory pricing under section 8(c) of the Competition Act accordingly involves:

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[215] n215 Baumol above fn 94 at 59.

[216] n216 As the Competition Appeal Court put it in its judgment above fn 4 at para (53), the average total cost of a firm is "a figure that is undefinable and unmeasurable in a multi-product firm and must therefore be rejected as part of any legitimate test of predatory pricing". See further Bolton, Brodley and Riordan above fn 60 at 2272.

[217] n217 Elhauge above fn 90 at 718.

[218] n218 Senwes above fn 56 at paras (27)-(28).

[219] n219 S 1 definition of "exclusionary act" in the Competition Act.

(a)assessing whether a dominant firm's pricing of its goods or services operates to prevent another firm from entering into or expanding within the market; and

(b)weighing up the anti-competitive and pro-competitive effects of a dominant firm's pricing of its goods or services.

[182]I endorse the finding by the Competition Appeal Court that these tests are objective in that they are outcome based. [220] A dominant firm alleged to have engaged in predatory pricing under section 8(c) will only commit a prohibited exclusionary act where its pricing decisions operate to exclude competitors, and the associated anti-competitive effects outweigh the associated pro-competitive effects. In this regard, the meaning of section 8(c) conveys the Legislature's chosen approach to the regulation of predatory pricing by dominant firms. As noted by the Competition Appeal Court in Mittal, a court "may not eschew the text to promote its own theory, however attractive the latter may appear to be. In the event that the language of the text is unable plausibly to support the advocated theory, then it is for Parliament, if it so wishes, to reconsider the text". [221]

[183]I also endorse the Competition Appeal Court's finding that when a competitive firm reduces its prices, it is possible that it intends to:

"increase its market share by taking away customers from its rivals. In a real sense, such a firm intends to 'harm' its rivals but in a way permitted by competition policy. The firm may even hope that a prolonged price war may drive its rival from the marketplace." [222]

[184]It follows that the consideration of a dominant firm's intent when assessing whether it has engaged in prohibited predatory pricing under section 8(c) is inappropriate. A firm's intention is an "unreliable guide to proving predation" that does not assist in the evaluation of the likely economic effects of a dominant firm's decision to price below a particular cost measure. [223]

[185]I am unpersuaded by the Commission's reliance on European jurisprudence in support of the use of predatory intent as a requirement for predatory pricing. This requirement was adopted by the European Court of Justice in AKZO [224] in relation to allegations that a firm had violated Article 102 of the Treaty on the Functioning of the European Union by cutting its prices below average total cost (but above average avoidable cost). [225] Although Article 102 was held to be capable of incorporating a consideration of a dominant firm's intent to predate, it does not resemble section 8(c) of the Competition Act. As warned by Kriegler J in Du Plessis, our Constitution does not "warrant the wholesale importation of foreign doctrines or precedents". [226] We may, of course, have regard to foreign law when interpreting section 8(c), but this should not displace the express meaning of the legislation regarding the appropriate test to be applied under the section.

Conclusion

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[220] n220 Competition Appeal Court judgment above fn 4 at para (52).

[221] n221 Mittal Steel South Africa Limited v Harmony Gold Mining Company Limited (2009) ZACAC 1 at para (28) (also reported at (2015) JOL 33493 (CAC) - Ed).

[222] n222 Competition Appeal Court judgment above fn 4 at para (56).

[223] n223 Id.

[224] n224 Above fn 80 at para (72).

[225] n225 Art 102 of the Treaty (which was Art 82 of the Treaty Establishing the European Community at the time AKZO was decided) provides in relevant part:"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market insofar as it may affect trade between Member States. Such abuse may, in particular, consist in -(a)directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions."

[226] n226 Du Plessis v De Klerk (1996) ZACC 10; 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para (144).

[186]Unlike in respect of a complaint of prohibited predatory pricing pursued against a dominant firm under section 8(d)(iv), the Commission bears the onus under section 8(c) of demonstrating that a dominant firm has engaged in an exclusionary act by implementing a predatory pricing strategy. The Commission is, however, afforded significant scope under this catch-all section to advance an appropriate cost standard against which to measure a dominant firm's pricing practices. In the present matter, the Commission has failed to advance such a test.

[187]For these reasons I would grant leave to appeal but dismiss the appeal with costs, including the costs of two Counsel.

(Basson AJ concurred in the judgment of Theron J.)

BY Mhlantla J

[188]I have had the benefit and pleasure of reading the judgments of my colleagues Goliath AJ ("first judgment"), Cameron J, Froneman J and Khampepe J ("second judgment"), and Theron J ("third judgment"). After due consideration, I find myself in the difficult position of agreeing with the third judgment on the issue of jurisdiction and leave to appeal only, and with the first judgment on the merits.

[189]I too am of the view that this matter does not raise a constitutional matter, but rather raises an arguable point of law. The first judgment notes that "[t]he case before us involves an interpretation of the extent of the powers held by the Competition Commission to prosecute alleged violations subsequent to an investigation", [227] which the first judgment notes is - amongst other reasons - indicative of the issue before us being a constitutional issue. I disagree with this. I wholly support the third judgment's formulation of the point of law at issue. [228]

[190]Further, I commend and support the third judgment's excursus of the issue of leave to appeal, as well as its conclusion that it is in the interests of justice to permit the Commission to appeal directly to this Court without seeking leave to appeal from the Competition Appeal Court. Finally, I agree that whether the Commission could have approached the Supreme Court of Appeal should have been left open. [229] I do not believe that this matter renders it necessary to decide whether or not the Supreme Court of Appeal's jurisdiction in competition matters should be restricted.

[191]However, I am unable to agree with the third judgment's conclusion and reasoning on the merits. [230]

[192]I agree with the approach of the first judgment to the issue of the merits. In my view, the first judgment correctly recognises that this Court should be hesitant to tie itself to a cost standard to show predatory pricing pursuant to section 8(c) and recognises the dangers in doing so. [231] However, it also recognises the dangers in not allowing various costs standards to be employed to determine predatory pricing pursuant to section 8(c). [232] In doing so, in my view, it does not commit to average total cost being used as a cost measure, but restricts it to instances where it is necessitated by the facts of each case. I agree with this approach.

[193]For these reasons and subject to the qualifications set out, I concur in the order made by the first judgment.

References

[227] n227 See (32).

[228] n228 See (144) (para (5) of the third judgment).

[229] n229 See (163) (para (24) of third judgment).

[230] n230 See (166)-(187) (para (27)-(48) of the third judgment).

[231] n231 See (71).

[232] n232 Id.

The following cases were referred to in the above judgment: South Africa American Natural Soda Ash Corporation v Competition Commission of South Africa 2005 (9) BCLR 862 ([2005] ZASCA 42; 2005 (6) SA 158) (SCA) - Referred to1090 Betha v BTR Sarmcol, A Division of BTR Dunlop Ltd [1998] BLLR 793 ([1998] ZASCA 5; 1998 (3) SA 349) (SCA) - Referred to1087 Competition Commission of South Africa v Hosken Consolidated Investments Limited 2019 (4) BCLR 470 ([2019] ZACC 2; 2019 (3) SA 1) (CC) - Referred to1058 Competition Commission of South Africa v Senwes Limited 2012 (7) BCLR 667 ([2012] ZACC 6; 2012 JDR 0579) (CC) - Referred to1066 Competition Commission v Computicket (Pty) Ltd [2014] ZASCA 185; 2014 JDR 2507 (SCA) - Referred to1062 Competition Commission v Loungefoam (Pty) Ltd 2012 (9) BCLR 907 ([2012] ZACC 15; 2012 JDR 1119) (CC) - Referred to1060 Competition Commission v Media 24 (Pty) Ltd [2016] ZACT 86 - Referred to1052 Competition Commission v South African Airways (Pty) Ltd [2005] ZACT 50 - Referred to1070 Competition Commission v Yara South Africa (Pty) Ltd 2012 (9) BCLR 923 ([2012] ZACC 14; 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Ashton Woods Holdings LLC v. USG Corp. (In re Domestic Drywall Antitrust Litig.)

United States District Court for the Eastern District of Pennsylvania

July 8, 2019, Decided; July 8, 2019, Filed

CIVIL ACTION MDL No. 13-2437; 15-cv-1712

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IN RE: DOMESTIC DRYWALL ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: Ashton Woods Holdings LLC, et al., Plaintiffs, v. USG Corp., et al., Defendants

Prior History: *In re Domestic Drywall Antitrust Litig., 939 F. Supp. 2d 1371, 2013 U.S. Dist. LEXIS 52566 (J.P.M.L., Apr. 8, 2013)*

Core Terms

purchases, principal place of business, choice-of-law, Plaintiffs', drywall, non-repealer, msf, Defendants', entities, parties, pricing, antitrust claim, manufacturers, indirect, Gypsum, headquartered, email, anti trust law, state law, increased price, due process, take place, announcement, contacts, material difference, nationwide, customers, borders, damages, governmental interest analysis

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Judges: Michael M. Baylson, UNITED STATES DISTRICT JUDGE.

Opinion by: Michael M. Baylson

Opinion

[*283] Baylson, J.

MEMORANDUM RE: MOTION FOR SUMMARY JUDGMENT (CHOICE-OF-LAW)

I. Introduction

In this multidistrict litigation, Plaintiffs, **[**3]** twelve large homebuilders who purchased gypsum wallboard (drywall) (collectively, "Plaintiffs"),[1] allege that Defendants, drywall manufacturers, conspired to eliminate job quotes and fix prices for the calendar years 2012 and 2013. Only three Defendants remain in this case: PABCO Building Products, LLC ("PABCO"); the United States Gypsum Company ("USG") and the United States Gypsum Corporation ("USG Corp.") (together, "USG"); and USG Corp.'s wholly-owned subsidiary, L&W Supply Corporation ("L&W"). The Third Amended Complaint (ECF 110, "TAC")-the operative Complaint in this action—alleges four Counts:

1. **Count I**: Violation of the *Sherman Act, 15 U.S.C. § 1*, by all Plaintiffs against all Defendants, seeking declaratory and injunctive relief, pre- and post-judgment interest, and costs, including attorneys' and expert fees;

2. **Count II**: Violation of the *Sherman Act, 15 U.S.C. § 1* by Plaintiffs Ashton Woods and D.R. Horton against all Defendants, seeking declaratory and injunctive relief, pre- and post-judgment interest, and costs, including attorneys' and expert fees;

3. **Count III**: Violations of the *California Business & Professions Code §§ 16750(a), et seq.* ("*Cartwright Act*") and, in the alternative, state antitrust and restraint of trade laws in Illinois, North Carolina, **[**4]** Arizona, District of Columbia, Michigan, Minnesota, Mississippi, Nevada, New Mexico, New York, Oregon, Tennessee, West Virginia, and Wisconsin by all Plaintiffs against all Defendants, seeking damages, pre- **[*284]** and post-judgment interest, and costs, including attorneys' and expert fees;

4. **Count IV**: Violations of state consumer protection and unfair competition laws of California, Colorado, Florida, Nevada, New Mexico, North Carolina, South Carolina, and Virginia by all Plaintiffs against all Defendants, seeking damages and/or restitution, pre- and post-judgment interest, and costs, including attorneys' and expert fees.

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[1] Plaintiffs are Ashton Woods Holdings, L.L.C. ("Ashton Woods"); Beazer Homes Holdings Corp. ("Beazer Homes"); CalAtlantic Group, Inc. ("CalAtlantic"); D.R. Horton Los Angeles Holding Company, Inc. ("D.R. Horton"); Hovnanian Enterprises, Inc.; KB Home; Meritage Homes Corporation; M/I Homes, Inc.; Pulte Home Corporation; The Drees Company; Toll Brothers, Inc.; and Tri Pointe Homes, Inc. ("Tri Pointe").

Currently before this Court is Defendants' Motion for Summary Judgment on Choice-of-Law (ECF 316, "MSJ"). At issue is Plaintiffs' allegation that they may pursue all of their state antitrust claims in Count III under California's Cartwright Act. (TAC ¶ 273.) Defendants seek dismissal of state antitrust claims made by Plaintiffs' purchasing entities that are headquartered in states that have not repealed *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)* ("non-repealer states"). Non-repealer states do not allow indirect purchasers to seek recovery from antitrust violators, unlike California, a "repealer state."[2] The parties **[**5]** agree that Alabama, Delaware, Georgia, Indiana, Kentucky, Louisiana, Maryland, New Jersey, Ohio, Pennsylvania, Texas, and Washington are non-repealer states. (See MSJ at 23.)[3]

For the reasons discussed below, Defendants' Motion is DENIED IN PART.

II. Background

A. Procedural History

As the Court has provided a thorough summary of the procedural history in this multidistrict litigation in several prior opinions, the Court includes only the procedural history relevant to the instant Motion. (See, e.g., ECF 351 ("February 2016 MSJ Opinion") (granting in part and denying in part manufacturers' motions for summary judgment in the direct and indirect purchaser actions)[4]; ECF 101 ("Homebuilder MTD Opinion") (granting in part and denying in part Defendants' motion to dismiss Plaintiffs' state law and Sherman Act *§ 1* claims in the Second Amended Complaint))[5].)

Plaintiffs filed the TAC on August 12, 2016 against Defendants USG; L&W; New NGC, Inc.; Continental Building Products, Inc. ("Continental")[6]; CertainTeed Gypsum, Inc. ("CertainTeed"); American **[*285]** Gypsum Company LLC ("American Gypsum"); and PABCO. (ECF 110.) Defendants New **[**6]** NGC, Inc., USG, L&W, and CertainTeed filed Answers to the TAC on August 26, 2016. (ECF 121 (Answer by New NGC, Inc.); ECF 123 (Answer by PABCO); ECF 124 (Answer by USG Entities: L&W and USG); ECF 125 (Answer by CertainTeed).) On the same date, all Defendants filed a Partial Motion to Dismiss the state consumer protection and unfair competition law claims—Count IV of the TAC—which the Court denied (ECF 122, 163).

On September 8, 2016, the Court approved the parties' Joint Stipulation dismissing all claims in the TAC against Defendant Continental with prejudice (ECF 129). The following year, on February 6, 2017, the Court granted Plaintiffs' unopposed Motion for Dismissal of CertainTeed, dismissing all claims against CertainTeed with prejudice

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[2] Throughout this Homebuilder action, Plaintiffs have disputed whether they are direct or indirect purchasers of drywall. The Court does not reach any conclusions as to whether Plaintiffs qualify as indirect purchasers in ruling on the instant Motion.

[3] As discussed at oral argument on the Motion for Summary Judgment, the parties dispute whether three states-Colorado, Virginia, and South Carolina—are repealer or non-repealer states. (See ECF 380, "Oral Arg. Tr." at 32:24-33:7.) The amicus brief in Stromberg v. Qualcomm Inc., which Defendants submitted to this Court, reveals that there is no genuine dispute that Colorado and Virginia are non-repealer states, and that South Carolina is a repealer state. (See ECF 387 Ex. A at 20.)

[4] The February 2016 MSJ Opinion is available on the MDL docket (No. 13-MD-2437) and at *In re Domestic Drywall Antitrust Litigation, 163 F. Supp. 3d 175 (E.D. Pa. 2016)* (Baylson, J.).

[5] The Homebuilder MTD Opinion is available on the Homebuilder action docket (No. 15-cv-01712) and at *In re: Domestic Drywall Antitrust Litigation Civil Action, No. 15-cv-1712, 2016 U.S. Dist. LEXIS 90619, 2016 WL 3769680 (E.D. Pa. July 13, 2016)* (Baylson, J.).

[6] Before the TAC was filed, on June 22, 2016, the Court dismissed Continental from the action (ECF 93, 94). Plaintiffs named Continental as a Defendant in the TAC to preserve all rights on appeal. (TAC at 1 n.2.)

(ECF 178). On May 21, 2018, the Court approved the parties' Joint Stipulation voluntarily dismissing all claims against American Gypsum (ECF 300).

On July 2, 2018, Defendants USG, L&W, New NGC, Inc., and PABCO moved for summary judgment with respect to claims arising from purchases made by Plaintiffs in non-repealer states, which do not allow indirect purchasers to recover damages for antitrust violations (ECF 316). On July 31, 2018, the parties **[**7]** filed a Joint Stipulation, which the Court approved, voluntarily dismissing all claims against Defendant New NGC, Inc. with prejudice, leaving Defendants USG, L&W, and PABCO in the action (ECF 331).

The following month, on August 27, 2018, Plaintiffs filed a Response in opposition to the Motion for Summary Judgment, arguing that summary judgment should be denied because Defendants failed to rebut the presumption that California law applies to all of Plaintiffs' claims, including those claims arising from purchases in non-repealer states that do not allow indirect purchaser claims (ECF 340, "Resp."). Plaintiffs attached to the Response a Separate Statement of Material Facts (ECF 781, "Pls. Supp. SOF").[7]

Defendants filed a Reply on September 17, 2018, reiterating that California law should not apply to all of Plaintiffs' claims, but rather, that the law of the states where purchases occurred should govern (ECF 350, "Rep."). Defendants also filed a Response to the Separate Statement of Material Facts (ECF 351, "Defs. Resp. SOF").

On February 19, 2019, Plaintiffs filed a Request for Judicial Notice of the then-pending Apple, Inc. v. Pepper case before the Supreme Court (ECF 375). According **[**8]** to Plaintiffs, an amicus brief filed by non-repealer states in that case, attached as Exhibit A to the Request for Judicial Notice, confirmed that there was no "true conflict" between the interests of California and non-repealer states and, therefore, California law should be applied to all of Plaintiffs' state antitrust claims (ECF 375 at 3; id. Ex. A). Defendants filed a Response on March 5, 2019, arguing that the amicus brief was irrelevant to the choice-of-law issue and seeking to refute Plaintiffs' contention that the amicus brief revealed that non-repealer states have no interest in preventing indirect purchaser recoveries under their states' laws (ECF 377 at 2-3).

On March 12, 2019, the Court held oral argument on the Motion for Summary Judgment (ECF 378-81). Following oral argument, on June 3, 2019, both parties filed Notices regarding the Supreme **[*286]** Court's decision in *Apple, Inc. v. Pepper, 139 S.Ct. 1514, 203 L. Ed. 2d 802 (2019)* (ECF 385, 386). On June 21, 2019, Defendants filed a Request for Judicial Notice of an amicus brief filed by the states of Louisiana, Ohio, Texas, and the Department of Justice in the pending Ninth Circuit case of Stromberg v. Qualcomm Inc., No. 19-15159 (9th Cir. 2019) (ECF 387). Plaintiffs filed a Response on **[**9]** June 28, 2019 (ECF 389).

B. UNDISPUTED FACTS

The following is a fair account of the factual assertions relevant to the instant Motion, as taken from both parties' Statements of Facts, and are not genuinely disputed.

i. Parties

1. Plaintiffs

Plaintiffs allege that during the relevant time period—January 1, 2012 through December 31, 2015-they purchased drywall in Alabama, Arizona, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and

[7] Plaintiffs' Statements of Facts can be found on the MDL docket.

Wisconsin that was manufactured by Defendants. (TAC ¶ 4.) During the relevant period, three Plaintiffs were headquartered or had their principal places of business in California: CalAtlantic, KB Home, and TRI Pointe. (Pls. Supp. SOF ¶¶ 45-47). The states where Plaintiffs have their headquarters and/or principal places of business are as follows:[8]

1. **Ashton Woods**, the named Plaintiff in this action, is a Georgia limited **[**10]** liability company with its principal place of business in Georgia. (MSJ Ex. 2, "DSOF" ¶ 1; ECF 781, "PSOF" ¶ 1.) None of the eight Ashton Woods entities that purchased drywall were incorporated in or have their principal places of business in California. (DSOF ¶ 2.)

2. **Beazer Homes** was incorporated in Delaware and has its principal place of business in Georgia. (Id. ¶ 3.) None of its three entities[9] that purchased drywall were incorporated or have their principal places of business in California. (Id. ¶ 4.)[10]

3. **CalAtlantic** was incorporated in Delaware and has its principal place of **[*287]** business in California. (Id. ¶ 5.) Two of its purchasing entities, Standard Pacific Corp. and Ryland Group, Inc., both have their principal places of business in California and purchased drywall during the relevant time period. (Id. ¶ 6.)[11] In total, CalAtlantic Group, Inc.'s purchasing entities purchased 103,725 millions of square feet ("msf") of drywall in California during the relevant time period. (Pls. Supp. SOF ¶ 45). (DSOF Ex. 16.)[12]

4. **D.R. Horton** was incorporated in California and has its principal place of business in Texas. (DSOF ¶ 7.) Of its 27 entities that purchased drywall, seven were incorporated **[**11]** in or have their principal places of business in California: Continental Residential, Inc., which was incorporated in and has its principal place of business in California and purchased 437.15 msf; D.R. Horton BAY, Inc., which has its principal place of business in California and purchased 26,430.75 msf; D.R. Horton Ven, Inc., which was incorporated in and has its principal place of business in California and purchased 4,130.92 msf; D.R. Horton, Inc.-Sacramento, which was incorporated in and has its principal place of business in California and purchased 2,238.91 msf; DRH Cambridge Homes, Inc., which was incorporated in California and purchased 21,075.53 msf; DRH Southwest Construction, Inc., which was incorporated in California and purchased 32.41 msf; and Western Pacific Housing, Inc., which has its principal place of business in California and purchased 15,174 msf. (Id. ¶ 8; id.

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[8] Appendix A to Defendants' Motion is a chart of each Plaintiff's state of incorporation/organization, headquarters, and the amount of drywall each Plaintiff purchased. (MSJ App. A.)

[9] Plaintiffs dispute Defendants' use of the term "separately-organized entity" to the extent that it implies that the entities did not function with the unified purpose of building and selling homes under the same Beazer Homes Holding Corp. name. (See PSOF ¶ 4.) Plaintiffs raise the same argument with respect to D.R. Horton; The Drees Company; Hovnanian Enterprises, Inc.; and KB Home. (Id. ¶¶ 4, 10, 12, 14.)

[10] The parties dispute whether any Beazer entities purchased drywall in California during the relevant time period. (Compare Pls. Supp. SOF ¶ 48 (stating that from January 1, 2012 through December 31, 2015, Beazer Homes purchased drywall in California "through its subsidiaries and affiliates"), with Defs. Resp. SOF ¶ 48 (stating that because no Beazer Homes Holdings Corp. entities were located in California, they did not make purchases in California during the relevant time period).) Defendants also argue that purchases by Beazer Homes are governed by Georgia law pursuant to Beazer Homes's purchase agreement. (Defs. Resp. SOF ¶ 48; id. Ex. 122.)

[11] It is undisputed that several of Standard Pacific Corp. and Ryland Group, Inc.'s California divisions purchased drywall. (See Defs. SOF Ex. 16.)

[12] Defendants contend that CalAtlantic did not purchase any drywall, but that Standard Pacific Corp. and Ryland Group, Inc., CalAtlantic's purchasing entities, did. (Defs. Resp. SOF ¶ 45.) Plaintiffs admit that CalAtlantic's purchasing entities "technically purchased the wallboard upon which Cal Atlantic Asserts its claims," but contend that Standard Pacific Corp. and Ryland Group, Inc. purchased drywall on behalf of CalAtlantic Group, Inc. (PSOF ¶ 6; Pls. Supp. SOF ¶ 45.)

App. A.) In total, from January 1, 2012 through December 31, 2015, D.R. Horton and/or its purchasing entities purchased 71,986 msf of drywall in California. (Pls. Supp. SOF ¶ 49.)[13]

5. **The Drees Company** was incorporated in and has its principal place of business in Kentucky. (DSOF ¶ 9.) Of its four entities **[**12]** that purchased drywall, none were incorporated in or have their principal places of business in California. (Id. ¶ 10.)

6. **Hovnanian Enterprises, Inc.** is a Delaware corporation with its principal place of business in New Jersey. (Id. ¶ 11.) Of its 15 entities that purchased drywall, two were incorporated in or have their principal places of business in California: K. Hovnanian Companies of California, Inc., which was incorporated and has its principal place of business in California and purchased 27,928 msf of drywall, and K. Hovnanian JV Services Company, L.L.C., a California limited liability company with its principal place of business in Florida that purchased 5,070 msf of drywall. **[*288]** (Id. ¶ 12; id. App. A.) In sum, Hovnanian Enterprises, Inc. and/or its entities purchased 27,928 msf of drywall in California from January 1, 2012 through December 31, 2015. (Pls. Supp. SOF ¶ 50.)[14]

7. **KB Home** was incorporated in Delaware and has its principal place of business in California. (DSOF ¶ 13.) Three of its nine entities that purchased drywall during the relevant tie period were incorporated in or have their principal places of business in California: Fremont Pat Ranch, LLC, which purchased 35 **[**13]** msf of drywall; KB Home Arroyo Vista, LLC, which purchased 1,865 msf; and KB Home South Bay Inc., which is both incorporated and headquartered in California and purchased 21,628 msf. (Id. ¶ 14; id. App. A.)[15]

8. **Meritage Homes Corporation** was incorporated in Maryland and has its principal place of business in Arizona. (DSOF ¶ 15.)[16]

9. **M/I Homes, Inc.** was incorporated in and has its principal place of business in Ohio. (Id. ¶ 17.) None of its 14 entities that purchased drywall were incorporated or have their principal places of business in California. (Id. ¶ 18.)

10. **Pulte Home Corporation** was incorporated in Michigan and has its principal place of business in Georgia. (Id. ¶ 19.)[17]

11. **Toll Brothers, Inc.** was incorporated in Delaware and has its principal place of business in Pennsylvania. (Id. ¶ 21.) Three of its four purchasing entities that bought drywall were formed in or have their principal places

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[13] The parties dispute whether these purchases may be attributed to D.R. Horton or only to its purchasing entities. (See Pls. Supp. SOF ¶ 49; Defs. Resp. SOF ¶ 49.)

[14] Defendants deny that Hovnanian Enterprises, Inc., which has its principal place of business in New Jersey, purchased drywall. (Defs. Resp. SOF ¶ 50.)

[15] The parties dispute whether KB Home or its purchasing entities purchased drywall in California. (See Pls. Supp. SOF ¶ 46; Defs. Resp. SOF ¶ 46.)

[16] The parties dispute whether Meritage Homes Corporation purchased 49,764 msf of drywall in California. (Compare Pls. Supp. SOF ¶ 51 ("From January 1, 2012 through December 31, 2015, . . . Meritage Homes Corporation purchased 49,764 msf of drywall in the State of California."), with Defs. Resp. SOF ¶ 51 ("Meritage Homes . . . has its principal place of business of Arizona. Meritage has no separately organized entities which purchased [drywall]. As a result, Meritage had no purchases in California during the relevant time period.").) Defendants also argue that Meritage's claims are governed Arizona law pursuant to the purchase agreement. (Defs. Resp. SOF ¶ 51; id. Ex. 123.)

[17] The parties dispute whether Pulte Home Corporation purchased drywall in California. (Compare Pls. Supp. SOF ¶ 52 ("From January 1, 2012 through December 31, 2015, Plaintiff Pulte Home Corporation purchased 51,881 msf of drywall in the State of California."), with Defs. Resp. SOF ¶ 52 ("Pulte Home Corporation has its principal place of business in Georgia. Pulte has no separately-organized entities which purchased [drywall]. As a result, Pule had no purchases in California during the relevant time period.").)

of business in California: Plum Canyon Master LLC, a Delaware limited liability company with its principal place of business in California, which purchased 1,177 msf of drywall; Porter Ranch Development Co., a California joint venture with its principal place of business in California that purchased **[**14]** 2,209 msf; and Shapell Industries, Inc., which was incorporated in Delaware and has its principal place of business in California and purchased 8,566 msf. (Id. ¶ 22.) From January 1, 2012 through December 31, 2015, Toll Brothers, Inc. **[*289]** and/or its purchasing entities purchased 47,089 msf of drywall in California. (Pls. Supp. SOF ¶ 53.)[18]

12. **TRI Pointe** was incorporated in Delaware and has its principal place of business in California. (DSOF ¶ 23.) Of its seven entities that bought drywall, two were incorporated in or have their principal places of business in California: Pardee Homes, which was incorporated in and has its principal place of business in California and purchased 32,258 msf of drywall, and TRI Pointe Contractors, LP, a Delaware limited partnership with its principal place of business in California that purchased 33,355 msf. (Id. ¶ 24.) From January 1, 2012 through December 31, 2015, TRI Pointe and/or its purchasing entities bought 65,100 msf of drywall in California. (Pls. Supp. SOF ¶ 47.)[19]

ii. Defendants

Defendant USG, which is headquartered in Illinois, a repealer state, operates a gypsum mine and manufactures **[**15]** drywall in California. (Pls. Supp. SOF ¶¶ 5-6.) USG also operates 14 drywall "plants" in Alabama, Florida, Indiana, Iowa, Maryland, Oregon, Pennsylvania, Texas, Utah, and Virginia. (Defs. Resp. SOF ¶ 5.) Further, USG operates gypsum rock mines and quarries in eight cities, including in Indiana, Iowa, Michigan, Oklahoma, Texas, and Utah. (Id. ¶ 5.) USG manufactures paper for drywall in four cities, including in Michigan, Missouri, New York, and Texas. (Id.)

Defendant L&W was the largest distributor of drywall and related building products in the United States during the relevant time period. (Pls. Supp. SOF ¶ 8.) During this time period, L&W, a wholly-owned subsidiary of USG, sold drywall manufactured by USG, PABCO, and American Gypsum. (Defs. Resp. SOF ¶ 9.) Until L&W was acquired by ABC Supply Co., Inc. in 2016, L&W purchased 90% of its drywall from USG. (Pls. Supp. SOF ¶¶ 7, 9.) L&W was also one of PABCO's largest customers; its purchasers comprised 10% of PABCO's sales and 6% of L&W's business. (Pls. Supp. SOF ¶ 12; Defs. Resp. SOF ¶¶ 11, 12.) Of the 6% of L&W's business that consisted of purchases from PABCO, the majority of that business was conducted in California. (Pls. Supp. **[**16]** SOF ¶ 12; Defs. Resp. SOF ¶ 12.)

PABCO, the smallest manufacturer among Defendants with a 4% national market share, is a limited liability company organized under the laws of Nevada and headquartered in California. (Defs. Resp. SOF ¶ 1.) PABCO began manufacturing and shipping drywall from its California facility in 1972, and it operates one paper mill in California that supplies to drywall production facilities. (Pls. Supp. SOF ¶¶ 1-3.) PABCO, which operates in 75 locations across the United States and Canada and employs individuals in 11 states, is the only **[*290]** remaining Defendant that is headquartered in California. (Defs. Resp. SOF ¶¶ 1, 4.) PABCO and USG have been operating in California for nearly fifty years. (Pls. Supp. SOF ¶¶ 4, 5.)

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[18] Defendants contend that purchases by Toll Brothers, Inc. were governed by Pennsylvania law pursuant to the purchase agreement. (Defs. Resp. SOF ¶ 53; id. Ex. 124.)

[19] Plaintiffs' Statement of Facts "admit[s] that the [] seven entities (majority of which were acquired by TRI Pointe in 2014) technically purchased the drywall upon which TRI Pointe asserts its claims." (PSOF ¶ 24.) However, in Plaintiffs' Separate Statement of Facts, Plaintiffs attribute these drywall purchases to TRI Pointe, which Defendants dispute. (Compare Pls. Supp. SOF ¶ 47 (averring that TRI Pointe Homes, Inc. purchased drywall), with Defs. Resp. SOF ¶ 47 ("Defendants deny that TRI Pointe Homes, Inc. purchased any drywall during the relevant time period. Instead, seven separately-organized entities purchased wallboard.").)

C. Alleged Conspiratorial Conduct in California

The parties do not dispute the following chronology of material facts. The Court considered the February 2016 MSJ Opinion to determine which facts were material and, where applicable, the Court provides the same description of events. The Court limits its analysis to material facts pertinent to the instant Motion but includes relevant background for context.[20]

1. **5/15/2011: PABCO and L&W internal reports [**17] confirm communications regarding PABCO and L&W price increases as well as USG's plans**.

Mark Burkhammer (PABCO's Director of Sales) emailed Ryan Lucchetti (President of PABCO), Foster Duval (PABCO's Southern California Sales Manager), and Todd Thomas (PABCO) and stated, "Just spoke to Marty Brand [(L&W)] and he informed me that USG is still planning on going up at the end of the month . . . hasn't heard about others . . . just FYI." (Id. ¶ 25 n.26.)

Mr. Burkhammer, who was responsible for all drywall sales made by PABCO in California during the relevant time period, works out of his home in Tracy, California and in PABCO's offices in both Newark and Rancho Cordova, California. (Pls. Supp. SOF ¶ 15; Defs. Resp. SOF ¶ 15.) Mr. Lucchetti was also based in California. (Pls. Supp. SOF ¶ 30.) Mr. Duval, who was also based in California, testified that he was tasked with meeting with customers to discuss product availability, pricing, "programs in place," and contractors that preferred to use PABCO's product line. (Defs. Resp. SOF ¶ 19; id. Ex. Q, Duval Dep. Tr. at 67:5-69:25.)

2. **9/19/2011: Dave Powers (President of American Gypsum) called Mr. Duval (PABCO)**.

The call lasted 19 minutes. (February **[**18]** 2016 MSJ Opinion at 57.) In his deposition testimony, Mr. Powers explained that he "seriously debated" whether to place the call because he knew that American Gypsum was about to release its price increase announcement that would eliminate job quotes, create calendar-year pricing, and impose a 35% price increase for January 1, 2012. (Id.) However, Mr. Powers decided to call Mr. Duval because Mr. Duval was a personal friend who had just had open-heart surgery. (Id.) Mr. Powers testified that they "mostly discussed Mr. Duvall's [sic] health and family, but that they ended the call as they always did by slamming their former employer, USG, which involved talking about a lack of leadership in the industry." (Id.) Mr. Duval does not remember the call or what was discussed, but he did not contest that it occurred. (Id. at 58.)

[*291] 3. **9/20/2011: American Gypsum circulated an announcement to customers that it would implement a 35% price increase and end job quotes effective January 1, 2012**. (Id.)

4. **9/20/2011-9/21/2011: PABCO's President commented on the American Gypsum announcement**.

The day after Mr. Powers and Mr. Duval's phone call, a customer forwarded American Gypsum's price increase announcement to **[**19]** Mr. Lucchetti (PABCO). (Pls. Supp. SOF ¶ 30.) Mr. Lucchetti forwarded the announcement to Mr. Duval and wrote, "Well here is the 1st." (Id.) Mr. Duval responded, "Dave [Powers] gave me a call yesterday and mentioned his frustration with the lack of leadership in the industry. Eliminating job quotes would be a great start for the price improvement." (Id. ¶ 31.) The next day, Mr. Lucchetti replied, "Dave Powers is my new hero." (Id.)

Mr. Burkhammer (PABCO) also received Mr. Lucchetti's email forwarding the announcement and stating, "Well here is the 1st." (February 2016 MSJ Opinion at 59.) Mr. Burkhammer forwarded the email to Marty Brand, Vice

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[20] In addition to the facts summarized above, Plaintiffs allege that Defendants facilitated and maintained the conspiracy by participating in trade association meetings and a retirement dinner in California during the relevant time period. (See Pls. Supp. SOF ¶¶ 41-44.) As Defendants recognize, when these meetings were identified by the Class Plaintiffs in support of their motion for summary judgment, the Court stated that it "w[ould] not give weight to any evidence that shows a bare opportunity to conspire, without more." (Defs. Resp. SOF ¶¶ 41-44 (quoting February 2016 MSJ Opinion at 37).) The Court maintains the same position in the instant Motion and does not consider the trade association meetings or dinner in its analysis.

President of Sales and Operations at L&W, and wrote, "Hope this works." (Id.) Mr. Brand responded, "Interesting idea. I hope this does fly. I like the way they put it out there 2-1/2 months ahead of time!" (Pls. Supp. SOF ¶ 21.) Mr. Burkhammer responded by stating, "probably not legal but what the heck." (Id. ¶ 22.)

Both Mr. Burkhammer and Mr. Brand worked in California. (Id. ¶¶ 14-17; Defs. Resp. SOF ¶¶ 14-17.) Mr. Brand worked out of his home in Yorba Linda, California, and in L&W's office in Orange, California. (Pls. Supp. SOF ¶¶ 16-17.) During **[**20]** at least part of the relevant time period, Mr. Brand and his supervisor, Rob Waterhouse, made decisions on pricing. (Defs. Resp. SOF ¶ 18.)

5. **9/27/2011: PABCO and L&W employees based in California discussed the elimination of job quotes**.

One week later, on September 27, 2011, after only American Gypsum announced the 35% price increase to take effect in January 2012, Mr. Burkhammer (PABCO) invited Mr. Brand (L&W) to dinner in an email. (February 2016 MSJ Opinion at 63.) In the email, Mr. Burkhammer wrote:

> Look forward to seeing you and sharing some tales...maybe talk a little strategy if all the announcements are out by then. Even though we haven't officially stated our intention I sent an email to the troops getting them ready. No more job quotes and 30 days to close any open quotes getting our system down to secured work through our distributors with footage and address's [sic]. I am suggesting, wherever and to whoever [sic] will listen, that the manufacturers have to police. . . .
>
> . . .
>
> . . . . Other distributors have not pushed back as anticipated...the small independents are uptight. I did quote a job in northern Cal that starts in Feb....2mmsft....ends in July....with the support **[**21]** of the distributor...even tho we haven't announced yet...we quoted up 40 dollars on 1-1-12. I don't know how this will all work out but it has some people thinking...but getting something done by seven manufacturers for the good of the industry is like being in the house of reps in DC.

(Pls. Supp. SOF ¶ 20.) Mr. Brand testified that he had no advance notice of USG's pricing plans before he received USG's **[*292]** September 28, 2011 letter. (Defs. Resp. SOF ¶ 20.)

6. **9/28/2011: USG sent letter announcing elimination of job quotes and a shift to calendar-year pricing, but not announcing the specific amount of the January 1, 2012 increase**. (February 2016 MSJ Opinion at 63.)

7. **10/12/2011: PABCO announced elimination of job quotes and implementation of calendar-year pricing with a 35% increase**. (Id. at 66.)

8. **10/12/2011: Phil Kohl, Vice President of Sales & Marketing at PABCO, sent a memo to PABCO leadership based in California indicating that unanimous manufacturer action would be required to achieve price improvement**.

Mr. Kohl sent a memo titled "July 2011 Market Condition Report" to Mr. Lucchetti (PABCO), copying Mr. Burkhammer (PABCO), Mr. Duval (PABCO), and Todd Thomas (PABCO), among others. (Pls. Supp. **[**22]** SOF ¶ 34.) The "General Market Conditions" section states, in relevant part:

> All wallboard manufacturers need this [$35 increase for calendar year 2012] to become profitable again. As stated last month, a $35 increase can happen if all players maintain a unanimous resolve to tighten pricing and strictly police all existing quotes with no exceptions. Just allowing one customer to abuse one quote could be the catalyst for the collapse of the hoped for increase.

(Pls. Supp. SOF ¶ 34; id. Ex. JJ.)[21] Both Mr. Kohl and Mr. Lucchetti were based in California. (Pls. Supp. SOF ¶ 34.)

9. **12/2011: Internal L&W communications allegedly demonstrated the need for pricing discipline**. (See Pls. Supp. SOF ¶ 33.)

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[21] Defendants contend that this email does not reflect illegal activity, but rather is evidence of legal, conscious parallelism. (Defs. Resp. SOF ¶ 34 (citing *Valspar Corp. v. E.I. Du Pont De Nemours & Co., 873 F.3d 185, 200 (3d Cir. 2017))*.)

In a December 15, 2011 email from Mr. Brand (L&W) to several L&W Regional Mangers, Mr. Brand wrote:

> I just got off a conference call concerning drywall pricing discipline going forward. I need all of you to make sure that we are firm in our pricing;
>
> 1) Every customer (no exceptions) are [sic] going up at least $40/msf on 1-2-12. . . .
>
> 3) Whatever the market number is now, we MUST hold to at least +$40/msf on all quoting going forward, no matter what our competitors are doing. Rob Waterhouse and I are **[**23]** the only ones who will be making decisions coming off that direction. . . .
>
> . . .
>
> There will be a lot of contractors that will lie about what our competitors are doing on price. Some contractors will switch business in an attempt to get us to move our number down. We are willing to lose business to hold firm on this increase. Please get back to me asap with your low (pre-increase) market sell price on wallboard. In So Cal, it is $165/msf and +$40/msf = $205/msf. This is the number that I want you to make sure we do not quote below without talking to me. Also, no reductions in every day price to any customers without discussing with me. It is extremely important that everyone understands this in each of your regions. There is so much riding on this increase, anything less than this compliance will not be tolerated.

[*293] (Pls. Supp. SOF ¶ 33; id. Ex. P.) As noted above, Mr. Brand was working in California. Chad Popma, the Northwest Regional Manager at L&W, who was located in Oregon, responded with the "NW low market number" prior to the increase. (Pls. Supp. SOF Ex. P.)[22]

Later that month, in an internal L&W email between Mr. Brand and Gerald Killian, Regional Manager of the Mountain West Region **[**24]** of L&W, Mr. Brand declined a request for a lower priced bid and stated, "[T]his would be viewed by . . . distributors and manufacturers as us not supporting the increase. We cannot send that message to the market place [sic]." (Pls. Supp. SOF ¶ 35; id. Ex. KK.)

10. **1/2012: PABCO and L&W employees based in California communicated about supporting price increases**.

On January 20, 2012, Mr. Burkhammer (PABCO) again emailed Mr. Brand (L&W) and wrote, "Our message to the market is that we will pull any deviated payers, (quotes or deviations) if they are not used in the manner they were intended. We believe it is our role to do everything possible to maintain transparency and signal support for the increase we all need so desperately." (Pls. Supp. SOF ¶ 23; id. Ex. T.)

Also in January 2012, Mr. Burkhammer communicated the need for manufacturers to support the price increases to Mr. Brand. (Pls. Supp. SOF ¶ 24.) For example, on January 5, 2012, Mr. Burkhammer forwarded an email to Mr. Brand stating, "I hope they know we are up [in price] and support this increase." (Id.; id. Ex. T.)[23]

11. **6/26/2012: Mr. Burkhammer (PABCO), who was based in California, emailed PABCO employees stating, "I [**25] would be very careful about stepping into other markets and dropping competitive numbers."**

Mr. Burkhammer emailed Mr. Kohl (PABCO) and Mr. Thomas (PABCO) and warned them about "stepping into other markets and dropping competitive numbers. We don't need that kind of press." (Pls. Supp. SOF ¶ 38; id. Ex. NN.)[24]

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[22] Defendants state that this email exchange "at most reflects the legal process of setting pricing in anticipation of competitor actions in an oligopolistic industry." (Defs. Resp. SOF ¶ 33.)

[23] (See also Pls. Supp. SOF Ex. V (August 15, 2011 email from Mr. Burkhammer to Mr. Brand and others ("I wanted to confirm that Pabco is going to support the upcoming increase and the number being tossed around is ten dollars.")); Pls. Supp. SOF Ex. W (October 25, 2012 email thread between Mr. Burkhammer and Mr. Brand (discussing PABCO's increase letter and confirming that PABCO would not be issuing job quotes in 2013)).)

[24] According to Defendants, earlier emails in this chain reflect that PABCO's "policy" is to not take on "new business until the needs of current customers [are] met" because this "endear[s] PABCO to current customers and [gives] competitor's customers the desire to join the PABCO team ASAP." (Defs. Resp. SOF ¶ 38) (citation omitted).)

12. **8/6/2012: PABCO and L&W employees communicated, through their offices in California, about going on "allocation" to maintain the alleged conspiracy**.

On August 6, 2012, Mr. Burkhammer (PABCO) sent an internal memo to Mr. Lucchetti (PABCO) indicating that Mr. Burkhammer had been informed by Mr. Brand (L&W) of USG's intention to go on allocation to protect the next round of price increases. (Pls. Supp. SOF ¶ 40 n.59; id. Ex. PP); (see also id. (citing id. Ex. QQ) (August 3, 2012 email from Mr. Burkhammer (PABCO) to Mr. Thomas (PABCO) and Mr. Duval (PABCO) discussing preparations **[*294]** to go on allocation)).)[25]

13. **10/24/2012: PABCO issued its price increase letter reflecting a 30% increase for 2013**. (February 2016 MSJ Opinion at 88.)

14. **11/30/2012: L&W noted that it could not accommodate a lower price for any customers because to do so "would show our competition that we are protecting work [**26] and that would have the potential to harm the chances of this increase sticking."** (Id.)

Mr. Brand (L&W) rejected a regional sales manager's request for a lower bid, stating, "I'm sorry but we cannot accommodate this request. There have been many similar requests across the country and the company's decision is to not make any of these type[s] [of] exceptions to our price increase at the present time. The reason, it would show our competition that we are protecting work and that would have the potential to harm the chances of this increase sticking." (Pls. Supp. SOF ¶ 36; id. Ex. LL.) Mr. Brand closed by writing, "Hold firm and keep me informed if you hear what the competition is doing in your markets." (February 2016 MSJ Opinion at 88.)

15. **12/11/2012: Mr. Kohl (PABCO) sent an internal memo to Mr. Lucchetti (PABCO) regarding how to maintain increased prices**.

In a November 2012 "Market Condition Report," Mr. Kohl explained: "With the higher prices, we should expect to see a stronger presence of board from both American Gypsum and the Temple-Inland plants . . . in the West. As long as we all ignore American's and Inland's effort to take a small share, the price will hold." (Pls. Supp. SOF **[**27]** ¶ 37; id. Ex. MM.)[26]

16. **1/9/2013: PABCO employees based in California rejected a request to "hold pricing" because of "the need to support the increase."**

At 7:58AM, Steve Benasso (Sales at PABCO), who was based in California, emailed Joe Burke (PABCO), and stated:

> After speaking with Mark we will not be able to hold any pricing for TFK due to the need to support the increase. We also had a customer with a similar situation in San Francisco with over 3 million feet of board that we gave the same answer, if we were to start making moves now it would send mixed messages to the market that contractors would try to leverage with distributors and manufacturers.

(Pls. Supp. SOF ¶ 39; id. Ex. OO.) At 4:09PM, Mr. Benasso forwarded the email to Mr. Burkhammer, who was also based in California, and wrote, "FYI...just in case Joe or Clint give you a call. They wanted us to hold pricing on 150k feet for TFK and I said no." (Pls. Supp. SOF Ex. OO.)

III. LEGAL STANDARD

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[25] Defendants argue that Exhibits PP and QQ "at most, reflect that drywall manufacturers instituted the same policy of controlled distribution that they had done in advance of many prior price increases, in order to ensure that all customers received the wallboard they needed." (Defs. Resp. SOF ¶ 40.)

[26] Defendants argue that this report only "reveals that American Gypsum and Temple Inland were increasing delivery of wallboard and attempting to recapture market share during the alleged conspiratorial period." (Defs. Resp. SOF ¶ 37.)

A district court should grant a motion for summary judgment if the movant can show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. A dispute is "genuine" **[*295]** if "the evidence **[**28]** is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A factual dispute is "material" if it "might affect the outcome of the suit under the governing law." Id. Under *Federal Rule of Civil Procedure 56*, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. *Id. at 255*.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." *Id. at 325*.

After the moving party has met its initial burden, the adverse party's response must, "by affidavits or as otherwise provided in this rule, [] set forth specific facts showing a genuine issue for trial." *Stell v. PMC Techs., Inc., No. 04-5739, 2006 U.S. Dist. LEXIS 62183, 2006 WL 2540776, at *1 (E.D. Pa. Aug. 29, 2006)* (Baylson, J.) (citing *Fed. R. Civ. P. 56(e)*); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (The nonmoving party "must do more than simply show that there is some metaphysical dispute as so the material facts."). Summary judgment is appropriate **[**29]** if the adverse party fails to rebut by making a factual showing "sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." *Celotex, 477 U.S. at 322*.

IV. DISCUSSION

A. Parties' Contentions

i. Defendants' Motion for Summary Judgment

Defendants contend that the law of the state where Plaintiffs' purchasing entities are located should apply to each of Plaintiffs' state antitrust claims under California choice-of-law principles and the United States Constitution. (MSJ at 22-23.) As to California choice-of-law principles, Defendants argue that California's three-step governmental interest analysis, which both parties agree is applicable, requires that the law of the state where each Plaintiff was headquartered during the relevant period should govern each claim.[27] In other words, Defendants contend that California law should only apply to claims arising from purchases made in California. Defendants reach the following conclusions at each step of the governmental interest analysis:

> (1) Under the first step, Defendants contend, and Plaintiffs concede, that there are material differences between the antitrust laws of California, a repealer state, and the laws of non-repealer **[**30]** states. (Id. at 11, 15.) Defendants also argue that there are several material differences between the antitrust laws of California and other repealer states, including that many states prohibit Plaintiffs from recovering to the extent that they passed **[*296]** through any drywall overcharge to customers, that Plaintiffs lack antitrust standing in many states, and that the availability of both treble damages and prejudgment interest varies state-to-state. (Id. at 16-17.)

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[27] At oral argument, Defendants specifically argued that the laws of the states where the purchasing entities are headquartered govern for choice-of-law purposes. (Oral Arg. Tr. at 35:6-8.)

(2) Under the second step, Defendants argue that each non-repealer state has a strong interest in applying local law to purchases made within its borders. (Id. at 12.) With respect to other repealer states, Defendants contend that California law recognizes that it would defeat the purpose of Illinois Brick to allow one state's law to replace the law of every state that permits indirect purchaser claims. (Id. at 17.)

(3) Finally, under the third step, Defendants argue that the interest of each state of purchase in applying local law outweighs California's interest. (Id. at 12-15, 18.)

Next, Defendants contend that nationwide applicable of California law would violate the Due Process and *Commerce Clauses of the Constitution*. Defendants argue that the *Due Process Clause* requires that the law of each state of purchase apply because California **[**31]** lacks significant contacts with purchases made in other states. (Id. at 19-20.) Defendants next argue that nationwide application of California law would violate the *Commerce Clause* by allowing Plaintiffs to recover for purchases made "wholly outside" of California's borders; namely, in states that have not repealed Illinois Brick. (Id. at 22.) As discussed in detail at oral argument, it is Defendants' position that if the Court determines that California law should not apply nationwide under California's governmental interest test, then the Court need not address Defendants' constitutional arguments. (See Oral Arg. Tr. at 31:11-22.)

ii. Plaintiffs' Response

Plaintiffs, on the other hand, argue that the Court must consider whether application of California law satisfies due process before conducting a choice-of-law analysis. According to Plaintiffs, there is a presumption that California law applies nationwide under the *Due Process Clause*, and because Defendants have failed to meet their burden of overcoming that presumption, California law applies to all of Plaintiffs' state antitrust claims. (Resp. at 17-18.) Plaintiffs argue that Defendants have more than "de minimis" contacts with California, as required to satisfy due process. (Id. at 18 (citation **[**32]** omitted).) Plaintiffs also argue that Defendants engaged in a nationwide conspiracy directed, at least in part, from California, and therefore, the application of California law does not violate the *Commerce Clause*. (Id. at 34-35.)

Plaintiffs then seek to refute Defendants' contention that California's three-step governmental interest analysis requires the application of the law of the state of purchase, as follows:

(1) Under the first step, Plaintiffs concede that there are material differences between the laws of repealer states, such as California, and non-repealer states. (Id. at 22-23.) However, Plaintiffs contend that Defendants cannot show that there are material differences between laws of California and other repealer states that would give rise to a "true conflict." (Id. at 23.)

(2) As to the second step, Plaintiffs argue that Defendants have failed to show that any non-repealer state has an interest in applying its laws to purchases within its borders. (Id. at 24.)

(3) Lastly, under the third step, Plaintiffs contend that Defendants have **[*297]** not demonstrated that non-repealer states' interests in applying their states' antitrust laws to this case trump California's interest. (Id. at 29.)

iii. Defendants' Reply

In the Reply, Defendants reiterate **[**33]** their position that the law of the state of purchase applies to indirect purchaser claims in antitrust actions, such as this case. (Rep. at 1.) Defendants seek to undermine Plaintiffs' arguments that once due process is satisfied, the Court must presume that the law of the forum state (California) applies, and that Defendants have failed to meet their "substantial burden" to overcome that presumption. (Id.) Defendants argue that they have met this burden by demonstrating that California's choice-of-law rules require application of the law of the state of purchase, not California law, to purchases made outside of California. (Id.)

According to Defendants, under California's governmental interest test, the states of purchase have the greatest interests in applying their antitrust laws to this matter. (Id. at 1-2.)

Further, Defendants contend that even if California's choice-of-law rules permitted nationwide application of California law, application of California law would violate the *Due Process Clause* because California lacks "significant contact or significant aggregation of contacts" to Plaintiffs' claims. (Id. at 2.) Specifically, Defendants argue that Plaintiffs have manipulated the record to suggest that three of Defendants' **[**34]** regional employees who work in California—Mr. Brand (L&W), Mr. Burkhammer (PABCO), and Mr. Duval (PABCO)-were "ringleaders" of the conspiracy. (Id. at 13.) In reality, Defendants argue that the facts cited by Plaintiffs demonstrate that lawful "conscious parallelism," not illegal conspiratorial conduct, took place in California. (Id. at 15.)

B. Analysis

i. Governing Law: Third Circuit Law Governs Issues of Federal Law, and California Law Governs the Choice-of-Law Analysis.

Plaintiffs originally filed their action in the Northern District of California, and the action was transferred to this Court on April 2, 2015 by the Judicial Panel on Multidistrict Litigation pursuant to *28 U.S.C. § 1407*. (ECF 1.) Throughout their briefing, both parties rely on Ninth Circuit law.

Before this Court addresses the challenges levied by Defendants, the Court must determine which law is binding and which is persuasive. As the Court has previously concluded, Third Circuit law is binding in this case on issues of federal law. (See Homebuilder MTD Opinion at 3-5); see also *Oil Field Cases, 673 F. Supp. 2d 358, 362-63 (E.D. Pa. 2009)* (Robreno, J.) ("In matters requiring the interpretation of the Constitution, a federal law or a federal rule of procedure, a transferee court applies the law of the circuit **[**35]** where it sits. Therefore, in cases where jurisdiction is based on federal question, . . . the transferee court[] will apply federal law as interpreted by the Third Circuit."). Though this Court previously concluded that Third Circuit law is binding on issues of federal law in this action, the Court stated that it would "give special consideration to Ninth Circuit law in the Homebuilder action" and that the Court would "do its best to prevent a scenario in which the California district court [would] be bound by law that is contradictory to Ninth Circuit law" if the action were transferred back to the Northern District of California for trial. (Homebuilder MTD Opinion at 5.)

[*298] With respect to issues of state substantive law, including choice-of-law rules, California law is binding on this Court because this case was transferred from the district court in California under *§ 1407*. See *Marshall Invs. Corp. v. Krones A.G., 572 F. App'x 149, 152 n.4 (3d Cir. 2014)* ("When a case is transferred under *28 U.S.C. § 1407* for consolidated pretrial proceedings, the transferee court must 'apply the same state substantive law, including choice-of-law rules, that would have been applied by a state court in the jurisdiction in which a case was filed.'") (citation omitted); see also *In re Sony Gaming Networks & Customer Data Sec. Breach Litig., 996 F. Supp. 2d 942, 977 (S.D. Cal. 2014)* ("[B]ecause the JPML **[**36]** transferred the instant litigation to this Court pursuant to *28 U.S.C. 1407*, the Court must apply the choice-of-law rules of each state where the individual actions were originally filed."). In sum, Third Circuit law is binding, and Ninth Circuit law is persuasive, on this Court's assessment of constitutional issues. California law, as enumerated by the California Supreme Court and interpreted by the Ninth Circuit, is binding on this Court's choice-of-law analysis.

ii. The Court Considers Defendants' Constitutional Arguments Before Conducting the Choice-of-Law Analysis.

As an initial matter, the parties dispute whether the Constitution provides an independent bar to the nationwide application of California law to Plaintiffs' state antitrust claims. Defendants contend that the Court need not address their constitutional arguments if the Court concludes, under California choice-of-law rules, that California law cannot apply nationwide. (See MSJ at 18; Oral Arg. Tr. at 31:11-22.) Plaintiffs, by contrast, argue that it is "widely recognized" that before the Court conducts a choice-of-law analysis, it must determine if Defendants have met their "substantial burden" to overcome the presumption that application of **[**37]** California law comports with due process. (Resp. at 1 (quoting *Keilholtz v. Lennox Hearth Prods. Inc., 268 F.R.D. 330, 340 (N.D. Cal. 2010)*).) Plaintiffs do not cite any judicial authority demonstrating that this proposition is "widely recognized." The parties also do not reference, nor is this Court aware of, any precedential, binding judicial decisions that address both constitutional and choice-of-law challenges to the application of state ***antitrust law***.

Under California law, the Court must consider Defendants' due process challenges prior to conducting a choice-of-law analysis. The Ninth Circuit has stated, in the context of class certification, "[u]nder California's choice of law rules, the class action proponent bears the initial burden to show that California has 'significant contact or significant aggregation of contacts' to the claims of each class member." *Mazza v. Am. Honda Motor Co., 666 F.3d 581, 589 (9th Cir. 2012)* (quoting *Wash. Mut. Bank v. Superior Court, 24 Cal. 4th 906, 103 Cal. Rptr. 2d 320, 15 P.3d 1071, 1080 (Cal. 2001)*); see also *AT&T Mobility LLC v. AU Optronics Corp., 707 F.3d 1106, 1111 (9th Cir. 2013)* ("The *Due Process Clause* . . . requires a court to invalidate the application of a state's law only where the state has 'no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.'" (quoting *Allstate Ins. Co. v. Hague, 449 U.S. at 308, 320 (1981)* (plurality opinion)).

After the proponent demonstrates that the requisite "significant contact or significant aggregation **[**38]** of contacts" exist, "the burden shifts to the other side to demonstrate 'that foreign law, rather than **[*299]** California law, should apply to class claims.'" *Mazza, 666 F.3d at 589* (quoting *Wash. Mut. Bank, 15 P.3d at 1081*); see also *Pecover v. Elec. Arts Inc., No. C 08-2820 VRW, 2010 U.S. Dist. LEXIS 140632, 2010 WL 8742757, at *17 (N.D. Cal. Dec. 21, 2010)* ("If th[e] due process test is satisfied, the presumption under California choice-of-law rules is that California law applies . . . . The court first addresses the due process issue before considering whether [the defendant], which seeks application of foreign law to plaintiffs' claims, has met its burden under California law.") (citation omitted).

Following California federal and state jurisprudence, this Court first determines whether Plaintiffs have shown that application of California law to their state antitrust claims is constitutional. Second, this Court considers whether Defendants have demonstrated that the law of the state of purchase applies to Plaintiffs' state antitrust claims under California's choice-of-law rules.

1. Application of California Law Does Not Violate the *Due Process Clause*.

The crux of the parties' due process dispute is whether application of California law to all of Plaintiffs' state law antitrust claims in **[**39]** Count III of the TAC violates the *Due Process Clause of the Fourteenth Amendment*, as interpreted by the Supreme Court in *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)*.

a. Relevant Law

The Court previously directed the parties to "carefully consider [Shutts] when it comes time to address the consumer protection choice-of-law issues." (Homebuilder MTD Opinion at 12 n.11.) Though the present Motion involves Plaintiffs' state antitrust claims, not its consumer protection claims, the Court considers Shutts in its Due Process analysis. See *AT&T Mobility, 707 F.3d at 1107 n.1* (stating that the Ninth Circuit's due process analysis with respect to the plaintiffs' claims under California's Cartwright Act "appl[ied] equally" to the plaintiffs' unfair competition claims).

Shutts stands for the proposition that a forum state's substantive law may apply to claims of a nationwide class under the *Due Process Clause* if the state has a "significant contact or significant aggregation of contacts" to the claims asserted by each class member. See *472 U.S. at 821-22*. As Defendants point out, this Court stated in its opinion denying class certification to the indirect purchasers, "Under the Supreme Court's decision in Shutts . . ., this Court would likely be required to apply the laws of each individual state which creates each particular cause of action." (ECF 632 **[**40]** at 31.)[28]

However, the Court's note at the class certification stage does not end the Court's due process analysis on summary judgment, particularly because Defendants' due process rights are at issue in this individual action, unlike in *Shutts*, which involved the plaintiffs' rights in a class action. See *Bristol-Myers Squibb Co. v. Superior Court of Calif., 137 S.Ct. 1773, 1782-83, 198 L. Ed. 2d 395 (2017)* (cited by Defendants) (stating that Shutts, which "concerned the due process rights of plaintiffs," "ha[d] no bearing on the question" of whether the exercise of jurisdiction in California over nonresident plaintiffs' claims violated a non-resident defendant's due process rights).

Rather than rely on Shutts, Plaintiffs contend that the Ninth Circuit's opinion in **[*300]** AT&T Mobility permits this Court to apply California law to all of Plaintiffs' state antitrust claims. (See TAC ¶ 273.) In AT&T Mobility, direct and indirect purchasers of liquid crystal display ("LCD") panels alleged that the defendants, manufacturers and distributors of LCD panels, violated the *Clayton Act*, the Sherman Act, California's Cartwright Act, California's Unfair Competition Law, and, in the alternative, a number of other states' laws. *707 F.3d at 1108*. The plaintiffs did business in California, **[**41]** but only one plaintiff's principal place of business was in California. Id. The defendants' principal places of business were located throughout Asia and United States, including in California. Id. Though none of the purchases at issue were made in California, the plaintiffs alleged that conspiratorial conduct took place in California, including that specific employees of particular defendants, operating in California offices, illegally obtained and shared co-conspirators' pricing information. *Id. at 1109*. The district court dismissed the plaintiffs' California law claims, concluding that the application of California law to claims involving purchases made outside of California violated the defendants' due process rights. Id.

On appeal, the Ninth Circuit reversed, rejecting the district court's focus on the place of purchase in its due process analysis. *Id. at 1110, 1114*. The Ninth Circuit held that anticompetitive conduct within a state that is related to a plaintiff's alleged injuries and is not "slight and casual" is sufficient to establish the "significant aggregation of contacts" necessary to satisfy due process. *Id. at 1113*. Specifically, the Ninth Circuit held that application of California's Cartwright Act did not **[**42]** violate the defendants' due process rights because more than a "*de minimis*" amount of the defendants' alleged conspiratorial conduct leading up the plaintiffs' purchases took place in California. Id.

In its analysis, the Ninth Circuit applied the Supreme Court's plurality opinion in Allstate, which imposed "modest restrictions on the application of forum law." *Shutts, 472 U.S. at 818* (citing *Allstate, 449 U.S. at 312-13*). In Allstate, the Supreme Court upheld the application of Minnesota insurance law even though the insurance policy at issue was delivered in Wisconsin, the automobile accident took place in Wisconsin, and all persons involved were Wisconsin residents at the time of the accident. *449 U.S. at 302*. The decedent, who had lived in Wisconsin, had been employed in Minnesota. Id. After the accident, the decedent's wife moved to Minnesota and brought an action against the insurer, Allstate, seeking a declaration that Minnesota law applied to the insurance policy. *Id. at 305-06*. The Supreme Court held that Minnesota had a "significant aggregation of contacts" with the parties and the accident because the decedent was employed in Minnesota, Allstate was at all times present and doing business in Minnesota, and the decedent's wife became a Minnesota resident **[**43]** before initiating litigation. *Id. at 313-20*.

When applying Allstate, the Ninth Circuit in AT&T Mobility explained that unlike in Allstate, where neither the delivery of the insurance policy nor the automobile accident took place in Minnesota, in AT&T Mobility, the plaintiffs alleged that "some portion of Defendants' alleged illegal price-fixing conduct took place in California." *707 F.3d at 1111*. Accordingly, the Ninth Circuit stated, "Wherever the outer limit of due process constraints may lie, it is clear to us that Defendants' alleged illegal activity within California created more significant contacts with California than the contacts described in Allstate created with Minnesota." Id.

[28] This opinion is available on the MDL docket and at *In re Domestic Drywall Antitrust Litig., No. 13-MD-2437, 2017 U.S. Dist. LEXIS 135758, 2017 WL 3700999 (E.D. Pa. Aug. 24, 2017)* (Baylson, J.).

[*301] b. Application

Defendants argue that Plaintiffs' reliance on AT&T Mobility is misplaced because "[c]ases in the Third Circuit hold that even if a product is manufactured in one state by a resident defendant, when the purchase occurs outside [of] that state, its law cannot be applied consistent[ly] with Due Process." (MSJ at 20.) Though Defendants are correct that the Third Circuit's interpretation of the *Due Process Clause* is binding on this Court, Defendants do not cite, nor has this Court located, any Supreme Court or precedential Third Circuit opinions **[**44]** rejecting AT&T Mobility or holding that the place of purchase exclusively governs for purposes of due process in the antitrust context.[29] As the Court has previously stated that it would give "special consideration" to Ninth Circuit law, the Court finds *AT&T Mobility* instructive. Further, because there is no dispute that this Court is bound by Supreme Court precedent, the Supreme Court's opinion in *Allstate* is also particularly helpful.

Defendants contend that even if AT&T Mobility were binding on this Court, Plaintiffs have failed to demonstrate that Defendants' conduct in California amounted to more than de minimis contacts with California. (MSJ at 20-21.) Put another way, Defendants argue that Plaintiffs' state antitrust claims lack "significant contact or significant aggregation of contacts" with California, as required to satisfy due process. (See Rep. at 13-17.) The Court disagrees.

The record reflects that California has a "significant aggregation of contacts" with Plaintiffs' state antitrust claims. Unlike in *Allstate*, where Minnesota law applied even though the individuals involved in the accident were **[**45]** not residents of Minnesota, the delivery of the insurance policy did not take place in Minnesota, and the accident did not occur in Minnesota, here, it is undisputed that during the relevant period, three Plaintiffs were headquartered in California, one Defendant was headquartered in California, and some portion Plaintiffs' purchasing entities headquartered in California purchased drywall. (See Pls. Supp. SOF ¶¶ 48-53.) Further, as the record evidence shows that the "alleged conspiracy took place, at least in part, in California[,]" Defendants "cannot reasonably complain that the application of California law is arbitrary or unfair[.]" See *AT&T Mobility, 707 F.3d at 1113*. Moreover, PABCO and USG were doing business in California during the relevant time period, as it is undisputed that they have had a business presence in California for nearly fifty years. See *Shutts, 472 U.S. at 822* ("When considering fairness in this context, an important element is the expectation of the parties."); *Allstate, 449 U.S. at 317-18* ("By virtue of its presence [in Minnesota], Allstate can hardly claim unfamiliarity with the laws of the host jurisdiction and surprise that the **[*302]** . . . courts might apply forum law to litigation in which the company is involved.").

While Defendants argue **[**46]** that Plaintiffs have cherry-picked from the 663 relevant facts identified by the class plaintiffs to manufacture a significant contact with California, the record reflects that "some portion" of Defendants' alleged conspiratorial conduct took place in California during the relevant time period. See *AT&T Mobility, 707 F.3d at 1111*. As the parties' contacts with California exceed those in *Allstate*, the Court need not reach any conclusions as to whether the facts cited amount to unlawful conspiratorial conduct to conclude that application of California law comports with the "modest restrictions" imposed by the *Due Process Clause*. See *Shutts, 472 U.S. at 818*.

2. Application of California Law Does Not Violate the *Commerce Clause*.

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[29] Defendants also argue the AT&T Mobility is of "minimal value" because it preceded the Supreme Court's decision in Bristol-Myers Squibb Co., which "re-emphasized" the "theme" that a state that permits indirect purchasers to recover for purchases made within the state cannot dictate recovery for purchases made in other states. (MSJ at 19-20.) The Court is not persuaded by Defendants' attempt to draw connections between Bristol-Myers Squibb Co. and the instant case. *Bristol-Myers Squibb Co.*, which involved a state's exercise of personal jurisdiction over an out-of-state defendant, is factually inapposite to this case, which involves the application of a state's substantive law to out-of-state plaintiffs. Further, Bristol-Myers Squibb Co. does not affect the Court's choice-of-law analysis because, as the Supreme Court recognized in Shutts, "[t]he issue of personal jurisdiction over plaintiffs in a class action is entirely different from the question of the constitutional limitations on choice of law." *Shutts, 472 U.S. at 821*.

Defendants further argue that application of California law violates the Commerce Clause of the Constitution, which "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects with the State." (MSJ at 21 (quoting Healy v. Beer Inst., Inc., 491 U.S. 324, 336-40, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989)).)

In Healy, an association of brewers and importers of beer sought declaratory judgment that a Connecticut statute violated the Commerce Clause. Id. at 326. The statute required out-of-state shippers of beer to affirm that their prices for beer sold to Connecticut wholesalers were no higher than prices in bordering **[**47]** states. Id. The Supreme Court held that the Connecticut statute violated the Commerce Clause because the interaction of the Connecticut statute with beer-pricing statutes of bordering states had the "practical effect" of controlling prices "wholly outside" of Connecticut's borders. Id. at 336-37.

Plaintiffs contend that Defendants "stretch Healy beyond its breaking point," and the Court agrees. (See Resp. at 34.) Unlike in Healy, where the plaintiff challenged the constitutionality of a state statute that regulated out-of-state conduct, in this case, Defendants challenge the application of a state law to out-of-state plaintiffs. Defendants are not arguing that California's Cartwright Act is unconstitutional. Further, whereas in Healy, where the statute at issue regulated prices "wholly outside" of the state's borders, here, it is undisputed that Plaintiffs and/or their purchasing entities headquartered in California purchased wallboard during the relevant time period.

In support of their position, Defendants cite only one Third Circuit decision: A.S. Goldmen & Co. v. New Jersey Bureau of Securities, 163 F.3d 780 (3d Cir. 1999). (See MSJ at 22; Rep. at 12 n.5.) Defendants' reliance on this factually inapposite case is misplaced. A.S. Goldmen, similar to Healy, involved an action for declaratory judgment to invalidate **[**48]** a state law. 163 F.3d at 781, 789. A.S. Goldmen also fails to demonstrate, as Defendants posit, that Commerce Clause jurisprudence is applicable to this Court's choice-of-law analysis. In fact, the only mention of choice-of-law in A.S. Goldmen is in Judge McKee's dissent, which underscores the distinction between a challenge to a state law as violating the Commerce Clause and a challenge to the application of a forum state's law under choice-of-law principles. See id. at 790 (McKee, J., dissenting) ("The approach the majority uses would be helpful to resolving a choice of law dispute, but it is only of limited assistance in adjudicating under the Commerce Clause.").

[*303] In sum, Plaintiffs have shown that application of California law to Plaintiffs' state antitrust claims violates the Commerce Clause, and Defendants have failed to support a finding to the contrary. Therefore, the Court proceeds to determine whether Defendants have met their burden of demonstrating that the laws of the states of purchase should apply to this matter under California's choice-of-law rules.

iii. Choice-of-Law Analysis

As noted above, the parties dispute whether the law of each state of purchase should apply to purchases made outside of California pursuant to California's choice-of-law rules. Even where **[**49]** California law may be constitutionally applied, "California follows a three-step 'governmental interest analysis' to . . . ascertain the most appropriate law applicable to the issues where there is no effective choice-of-law agreement." Wash. Mut. Bank, 15 P.3d at 1080; see also Paulsen v. CNF, Inc., 559 F.3d 1061, 1080 (9th Cir. 2009) ("California will apply its own rule of decision unless a party invokes a law of a foreign state that 'will further the interest of the foreign state and therefore that it is an appropriate one for the forum to apply to the case before it.'" (quoting Hurtado v. Superior Court, 11 Cal. 3d 574, 114 Cal. Rptr. 106, 522 P.2d 666, 670 (Cal. 1974))). California's "governmental interest analysis" involves three steps.

Under the first step, "the foreign law proponent must identify the applicable rule of law in each potentially concerned state and must show it materially differs from the law of California." Wash. Mut. Bank, 15 P.3d at 1080. "If . . . the trial court finds the laws are materially different, it must proceed to the second step and determine what interest, if any, each state has in having its own law applied to the case." Id. at 1080-81. "Only if the trial court determines that the laws are materially different and that each state has an interest in having its own law applied, thus reflecting an actual conflict, must the court take the final step and select the laws of the **[**50]** state whose interests would be 'more impaired' if its law were not applied." Id. at 1081 (citation omitted). In the third step, "the trial court must determine 'the relative commitment of the respective states to the laws involved' and consider 'the history and current status of the states' laws' and 'the function and purpose of those laws.'" Id. (citation omitted).

1. Step One: Whether California Law Materially Differs from the Laws of Each "Potentially Concerned State"

Differences between California law and foreign law are "material" "when they 'spell the difference between the success and failure of a claim' or determine availability of remedies." *Van Mourik v. Big Heart Pet Brands, Inc., No. 3:17-cv-03889-JD, 2018 U.S. Dist. LEXIS 34796, 2018 WL 1116715, at *3 (N.D. Cal. Mar. 1, 2018)* (quoting *Mazza, 666 F.3d at 591*) (concluding that the differences between Texas consumer protection law, which did not target unfair conduct and permitted only economic and treble damages, and California law, which prohibited unfair conduct and provided for actual damages, injunctive relief, restitution, punitive damages, and other relief, were material); see also *Mazza, 666 F.3d at 591-92* ("'Any differences in [the states'] laws must have a significant effect on the outcome of trial in order to present an actual conflict in terms of **[**51]** choice of law.'" (alteration in original) (quoting *In re Complaint of Bankers Trust Co., 752 F.2d 874, 882 (3d Cir. 1984)))*.

The parties do not dispute that there are material differences between the antitrust laws of California, a repealer state, and the **[*304]** laws of non-repealer states. (See MSJ at 11; Resp. at 22); see also *In re Packaged Seafood Prods. Antitrust Litig., 242 F. Supp. 3d 1033, 1066-67 (S.D. Cal. 2017)* (identifying the availability of indirect purchaser recovery as a material difference creating a true conflict between the laws of repealer and non-repealer states); *In re Qualcomm Antitrust Litig., 292 F. Supp. 3d 948, 979 (N.D. Cal. 2017)* (concluding that the differences between California's Cartwright Act and the antitrust statutes of states that did not allow damages suits by indirect purchasers suits were material); *In re TFT-LCD (Flat Panel) Antitrust Litig., No. 10-05625 SI, 2013 U.S. Dist. LEXIS 173319, 2013 WL 6327490, at *3 (N.D. Cal. Dec. 3, 2013)* (hereinafter, "TFT-LCD (Flat Panel) II") (noting, on partial summary judgment on choice-of-law grounds, that the parties did not dispute that the law of Virginia, a non-repealer state, was "materially different from California or Illinois law with respect to indirect purchaser actions").

Defendants also contend that there are four material differences between the antitrust laws of California and other repealer states. First, Defendants contend that unlike California, "many" repealer states, including New Mexico, Illinois, and Minnesota, prohibit Plaintiffs **[**52]** from recovering for wallboard overcharges passed to their customers. (MSJ at 16.)[30] Second, Defendants argue that Plaintiffs "may not" have antitrust standing under the laws of many states because they have failed to provide "reliable evidence" of whom they purchased from, the amount of wallboard purchased, the percentage of turnkey purchases allocated to wallboard, and the amounts of overcharges. (Id.) Third, Defendants argue that treble damages are unavailable in "at least" Florida and New Mexico, and they are limited in Arizona. (Id. at 17.) Finally, Defendant contends that the availability of pre-judgment interest varies state-to-state. For example, whereas prejudgment interest is available in California upon a showing of bad faith, Arizona may allow for pre-judgment interest on liquidated damages, and Nevada does not consider whether the judgment is for a liquidated or unliquidated sum in awarding pre-judgment interest. (Id.) Defendants do not cite any binding judicial authority indicating that these differences are "material."

While Defendants have identified differences between California law and the laws of a few other repealer states, as Plaintiffs note, Defendants do not explain how these **[**53]** differences are "material" to Plaintiffs' state antitrust claims. Without any analysis, the Court cannot conclude that Defendants have demonstrated that a true conflict would exist if California law were applied to claims arising from purchases in other repealer states. Cf. *Mazza, 666 F.3d at 591* (holding that "at least some differences" identified by the defendant, the foreign law proponent, were material where the defendant "exhaustively detailed the ways in which California law differ[ed] from the laws of the 43 other jurisdictions in which class members reside[d]").

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[30] Defendants contend that the availability of the pass-through defense is a material difference between California and other repealer states even though they dispute that California prohibits this defense. (Id.)

The Court also notes that in the class certification context, judges in the Northern District of California have certified classes in repealer states under the Cartwright Act after applying California's governmental interest analysis. See, e.g., *In re Korean Ramen Antitrust Litig., No. 13-cv-04115-WHO, 2017 U.S. Dist. LEXIS 7756, 2017 WL 235052, at *22 (N.D. Cal. Jan. 19, 2017)*; *In re Optical Disk Drive Antitrust Litig., No. 3:10-md-2143 RS, 2016 U.S. Dist. LEXIS 15899, 2016 WL 467444, at *14 (N.D. Cal.* **[*305]** *Feb. 8, 2016)*, appeal filed, No. 19-15538 (9th Cir. Mar. 25, 2019).

As the Court concludes that Defendants have failed to meet their burden of demonstrating that the antitrust laws of California and other repealer states are materially different, the **[**54]** Court need not proceed to the second step of the governmental interest analysis as to repealer states. See *In re Hyundai & Kia Fuel Econ. Litig., 926 F.3d 539, 562 (9th Cir. 2019)* (en banc) ("If the [foreign law proponents] fail to meet their burden at any step in the [choice-of-law] analysis, the district court 'may properly find California law applicable without proceeding' to the rest of the analysis." (quoting *Pokorny v. Quixtar, Inc., 601 F.3d 987, 995 (9th Cir. 2010))*. Therefore, the Court concludes that California law will govern as to state antitrust claims made by Plaintiffs who were headquartered in repealer states during the relevant period. The Court turns to the second step of the governmental interest analysis to assess the interests of only the non-repealer states.

2. Step Two: Each State's Interest in Having its Own Law Applied

In step two, "the court must determine whether a true conflict exists; that is, whether both states have a legitimate interest in having their state law applied to the case." *TFT-LCD (Flat Panel) II, 2013 U.S. Dist. LEXIS 173319, 2013 WL 6327490, at *3*. Defendants argue that each state of purchase has a legitimate interest in applying its own law to commercial activity within its borders. (See MSJ at 11-12.)

"The second step of the governmental interest analysis requires [this Court] to examine each jurisdiction's interest in the application of its own law in the **[**55]** circumstances of the particular case to determine whether a true conflict exists." *McCann v. Foster Wheeler LLC, 48 Cal. 4th 68, 105 Cal. Rptr. 3d 378, 225 P.3d 516, 529 (Cal. 2010)* (citation and internal quotation marks omitted). The Ninth Circuit has stated that "every state has an interest in having its law applied to its resident claimants." *Mazza, 666 F.3d at 591-92* (quoting *Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1187 (9th Cir. 2001))*. "California law also acknowledges that 'a jurisdiction has 'the predominant interest' in regulating conduct that occurs within its borders[.]'" *Mazza, 666 F.3d at 592* (quoting *McCann, 225 P.3d at 516*); see, e.g. *TFT-LCD (Flat Panel) II, 2013 U.S. Dist. LEXIS 173319, 2013 WL 6327490, at *3* (denying motion for summary judgment on choice-of-law as to claims under the Cartwright Act after considering, in detail, California and Virginia's interest in applying their antitrust laws to the matter).

California has a well-documented, articulated interest in applying the Cartwright Act. See *TFT-LCD (Flat Panel) II, 2013 U.S. Dist. LEXIS 173319, 2013 WL 6327490, at *4* ("California has repeatedly demonstrated its commitment to the application and enforcement of the Cartwright Act. . . . The California Supreme Court has held that the purposes of the Cartwright Act are better served by overcompensating plaintiffs than by failing to adequately deter anticompetitive behavior." (citing *Clayworth v. Pfizer, 49 Cal. 4th 758, 111 Cal. Rptr. 3d 666, 233 P.3d 1066, 1081, 1083 (Cal. 2010)))*. The Cartwright Act's objectives include "deterrence and full disgorgement of ill-gotten gains, especially in the context of price fixing cartels; that deterrence **[**56]** and full disgorgement include[] extending state-created remedies to out-of-state parties harmed by wrongful conduct occurring in California." *In re TFT-LCD (Flat Panel) Antitrust Litig., No. 10-cv-4945, 2013 U.S. Dist. LEXIS 97825, 2013 WL 4175253, at *2 (N.D. Cal. July 11, 2013)* (hereinafter "TFT-LCD (Flat Panel) I"); see also *AT&T Mobility, 707 F.3d at 1112-13* ("Applying California law to anticompetitive **[*306]** conduct undertaken within California advances the Cartwright Act's 'overarching goals of maximizing effective deterrence of antitrust violations, enforcing the state's antitrust laws against those violations that do occur, and ensuring disgorgement of any ill-gotten proceeds'" (quoting *Clayworth, 233 P.3d at 1070*)).

In contrast, there is disagreement amongst district judges in California regarding whether non-repealer states are interested in denying their citizens recovery for antitrust violations committed by out-of-state defendants. Compare

Korean Ramen, 2017 U.S. Dist. LEXIS 7756, 2017 WL 235052, at *22 (certifying a class of indirect purchasers under the Cartwright Act only in repealer states, not in non-repealer states, because "'[g]iven that the action simply could not go forward in non-repealer states, . . . it is too much of a stretch to employ California law as an end run around the limitations those states have elected to impose on standing'") (alteration in original) **[**57]** (citation omitted), and TFT-LCD (Flat Panel) I, 2013 U.S. Dist. LEXIS 97825, 2013 WL 4175253, at *2 (on a motion in limine to determine whether California or Texas law applied to indirect purchasers' claims, disagreeing with the plaintiffs' argument that Texas, a non-repealer state, had no interest in ensuring that out-of-state defendants were shielded from damages for antitrust violations) (citing Mazza, 666 F.3d at 592-93), and TFT-LCD (Flat Panel) II, 2013 U.S. Dist. LEXIS 173319, 2013 WL 6327490, at *3 (on a motion for partial summary judgment on choice-of-law, concluding that Virginia, a non-repealer state, had an interest in the application of its ***antitrust law*** where some of the impact of the alleged price fixing took place at the plaintiff's headquarters in Virginia, from which it placed purchased orders and generated payments), with Qualcomm, 292 F. Supp. 3d at 979-80 (where the sole defendant was a resident of California, a repealer state, the court concluded that applying non-repealer states' antitrust laws to bar recovery "would paradoxically disadvantage the other states' own citizens for injuries caused by a California defendant's unlawful activities that took place primarily in California").

Here, Defendants, without discussing the interests of specific non-repealer states, argue that states of purchase have legitimate interests in regulating commercial activities within their **[**58]** borders. Defendants' analysis cites only one precedential judicial decision in the Ninth Circuit, Mazza, and, in a conclusory fashion, contends that non-repealer states have interests in prohibiting antitrust suits arising from indirect purchases. (See Rep. at 4-6.) That is not sufficient for Defendants to satisfy their burden of demonstrating that a "true conflict" exists, as Defendants have failed to show that "each state has an interest in the application of its own law to 'the circumstances of the particular case[.]'" Hyundai & Kia Fuel Econ. Litig., 926 F.3d at 562 (quoting Kearney v. Salomon Smith Barney, Inc., 39 Cal. 4th 95, 45 Cal. Rptr. 3d 730, 137 P.3d 914, 922 (Cal. 2006)).

Though it is Defendants burden to demonstrate that there is a "true conflict," the Court also considers Plaintiffs' argument that no "true conflict" exists. According to Plaintiffs, non-repealer states have no interest in preventing indirect purchasers from recovering from Defendants, corporate citizens of repealer states. (See Resp. at 23-29.) In support of this position, Plaintiffs rely almost exclusively on Qualcomm. As Defendants note, the choice-of-law analysis in a subsequent opinion in the Qualcomm matter is currently on appeal to the Ninth Circuit. See Qualcomm, 292 F. Supp. 3d at 979-81 (cited by Plaintiffs) (denying the defendant's motion to strike indirect purchasers' nationwide class allegations **[**59]** under the Cartwright Act because **[*307]** non-repealer states had no interest in preventing their citizens from recovering for antitrust violations committed by a corporation in California, a repealer state); In re Qualcomm Antitrust Litig., 328 F.R.D. 280, 313-15 (N.D. Cal. 2018) (not cited by Plaintiffs) (applying the same choice-of-law analysis when granting the plaintiffs' motion for class certification), appeal filed sub nom. Stromberg v. Qualcomm Inc., No. 18-80135 (9th Cir. Oct. 11, 2018). Further, the only federal judicial decision cited by Defendants that applied Mazza in the context of a motion for summary judgment in an antitrust action, TFT-LCD (Flat Panel) II, took a contrary position to Qualcomm. See 2013 U.S. Dist. LEXIS 173319, 2013 WL 6327490, at *3-4 (concluding that both California and Virginia, a non-repealer state, had an interest in the application of its ***antitrust law*** to the matter).

Though the Court is not inclined to postpone ruling on Defendants' Motion until the Ninth Circuit issues an opinion in Qualcomm, the Court cannot conclude, as a matter of law, that California law applies to state antitrust claims brought by Plaintiffs located in non-repealer states based on the current record. Cf. Forcellati v. Hyland's, Inc., No. 12-1983-GHK (MRWx), 2014 U.S. Dist. LEXIS 50600, 2014 WL 1410264, at *4 (C.D. Cal. Apr. 9, 2014) (concluding that California law applied to the plaintiffs' **[**60]** proposed nationwide class "because [the] [p]laintiffs [ ] made a sufficient initial showing for application of California law, and [the] [d]efendants have failed to show otherwise").

In short, the parties have not adequately briefed the interests of non-repealer states in which Plaintiffs were headquartered, as required for the Court to draw any conclusions about the existence of a "true conflict." Therefore, the Court will require counsel for Plaintiffs and Defendants to confer as to future briefing on this issue, particularly in light of the Ninth Circuit's recent en banc ruling in Hyundai & Kia Fuel Economy Litigation, 926 F.3d 539. See id. at 562 n.6 (noting that a district court is not obligated to conduct a "comprehensive survey of every state's law" when the foreign law proponent has failed to do so) (citation and internal quotation marks omitted). Within ten (10) days, counsel shall file either a joint statement or individual statements, limited to five (5) pages, addressing whether supplemental briefing will be required. Any supplemental briefing must be filed by August 15, 2019 and is limited to twenty (20) pages.

As Defendants have not met their burden as to the second step of the governmental interest analysis, the Court need not proceed **[**61]** to the third step. See *Hyundai & Kia Fuel Econ. Litig., 926 F.3d at 562* ("If the [foreign law proponents] fail to meet their burden at any step in the [choice-of-law] analysis, the district court 'may properly find California law applicable without proceeding' to the rest of the analysis.") (citation omitted). Though the Court does not reach the third step, the Court notes that if the parties submit supplemental briefing, the briefs must address the degree to which non-repealer states' interests would be impaired by application of California law to Plaintiffs' state antitrust claims. In the absence of such briefing, the Court would be unable to "carefully evaluate[] and compare[] the nature and strength of the interest of each jurisdiction in the application of its own law," as the third step of California's governmental interest analysis requires. See *McCann, 225 P.3d at 527*.

V. Conclusion

For the foregoing reasons, Defendants' Motion will be denied as to repealer states. California law will apply to state antitrust claims in Count III brought by Plaintiffs located in repealer states. As to non-repealer **[*308]** states, the Court withholds judgment pending resolution by the parties or, if necessary, the Court's review of supplemental briefing.

ORDER RE: MOTION FOR [62] SUMMARY JUDGMENT (CHOICE-OF-LAW)**

AND NOW, this 8th day of July, 2019, for the reasons stated in the foregoing memorandum, upon consideration of Defendants' Motion for Summary Judgment on Choice-of-law (ECF 316), the response and reply thereto, and oral argument, it is hereby **ORDERED** as follows:

1. Defendant's Motion is **DENIED**, and California law will apply, as to claims brought by Plaintiffs in "repealer" states; and
2. Further briefing will be necessary for the Court to rule as to claims brought by Plaintiffs in "non-repealer" states.

BY THE COURT:

/s/ Michael M. Baylson

Michael M. Baylson, U.S.D.J.

In re McCormick & Co.

United States District Court for the District of Columbia

July 10, 2019, Decided; July 10, 2019, Filed

MDL Docket No. 2665; Misc. No. 15-1825 (ESH)

Reporter

422 F. Supp. 3d 194 *; 2019 U.S. Dist. LEXIS 114583 **; 2019 WL 3021245

IN RE: MCCORMICK & COMPANY, INC., PEPPER PRODUCTS MARKETING AND SALES PRACTICES LITIGATION; This Document Relates to: ALL CONSUMER CASES

Subsequent History: Petition denied by *In re McCormick & Co., 2019 U.S. App. LEXIS 28656 (D.C. Cir., Sept. 20, 2019)*

Prior History: *Watkins Inc. v. McCormick & Co. (In re McCormick & Co.), 215 F. Supp. 3d 51, 2016 U.S. Dist. LEXIS 143176 (D.D.C., Oct. 17, 2016)*

Core Terms

consumer, pepper, consumer protection, unjust enrichment, slack-fill, products, plaintiffs', deception, predominance, class certification, purchasers, multi-state, class member, proposed class, nonfunctional, container, single-state, black pepper, fill, cases, class action, causation, damages, common question, defendants', variations, courts, certify, classwide, packaging

LexisNexis® Headnotes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN1[] **Prerequisites for Class Action, Adequacy of Representation**

Fed. R. Civ. P. 23 governs the certification of class actions in federal court. *Rule 23(a)* sets out the four prerequisites for any class action: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. These four threshold requirements are referred to as numerosity, commonality, typicality, and adequacy of representation.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN2[] **Prerequisites for Class Action, Commonality**

Fed. R. Civ. P. 23(b) provides that a class action may be maintained if *Rule 23(a)* is satisfied and the action meets the requirements of either *Rule 23(b)(1)*, *(b)(2)*, or *(b)(3)*. *Rule 23(b)(3)* permits a class action if the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. *Fed. R. Civ. P. 23(b)(2)*. The first part of this criterion is known as predominance; the second part as superiority.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN3[] **Prerequisites for Class Action, Adequacy of Representation**

A party seeking to maintain a class action must affirmatively demonstrate his compliance with *Fed. R. Civ. P. 23*. *Rule 23* does not set forth a mere pleading standard. Rather, a party must not only be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation, as required by *Rule 23(a)*, but must also satisfy through evidentiary proof at least one of the provisions of *Rule 23(b)*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN4[] **Class Actions, Certification of Classes**

A court presented with a motion for class certification must engage in a rigorous analysis to be certain that the requirements of *Fed. R. Civ. P. 23(a)* and *(b)* are satisfied, which will frequently necessitate looking behind the pleadings and giving some consideration to the merits of the plaintiffs' underlying claims. While a court's class-certification analysis must be rigorous and may entail some overlap with the merits of the plaintiff's underlying claim, *Rule 23* grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the *Rule 23* prerequisites for class certification are satisfied. Ultimately, a district court exercises broad discretion in deciding whether to permit a case to proceed as a class action.

Civil Procedure > Preliminary Considerations > Venue > Multidistrict Litigation

Governments > Courts > Judicial Precedent

HN5[] **Venue, Multidistrict Litigation**

In a multidistrict litigation (MDL), the MDL transferee court must apply the law of its own circuit when analyzing questions of federal law. This principle extends to interpretations of *Fed. R. Civ. P. 23*. However, in the absence of controlling precedent, the law of a transferor forum on a federal question merits close consideration, but it does not have stare decisis effect in a transferee forum situated in another circuit.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN6[] **Class Actions, Certification of Classes**

The predominance prong of *Fed. R. Civ. P. 23(b)(3)* permits a class action if the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members. To satisfy this requirement for a proposed multi-state class, the movants must creditably demonstrate, through an extensive analysis of state law variances, that class certification does not present insuperable obstacles. Or, in other words, claims arising under different states' laws can be grouped into a single class only if they contain materially identical legal standards. The burden of showing groupability rests squarely with the plaintiffs. The crucial inquiry is not whether the laws of multiple jurisdictions are implicated, but whether those laws differ in a material manner that precludes the predominance of common issues. Courts can allow subclassing on motion or sua sponte, but are under no obligation to do so, and the burden remains on the party seeking certification.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN7[] **Class Actions, Certification of Classes**

In considering whether to certify a multi-state class, it is the trial court's job to critically consider variations in state law. The inquiry begins, of course, with the elements of the underlying cause of action. Any variations in state courts' interpretations of facially similar elements also is relevant. The absence of any clear interpretation of an element may also be material because each state must decide for itself how to resolve unanswered questions about the scope and evidentiary requirements needed to establish that element. Whether variations in elements or interpretations are material depends on the extent and nature of any variations, the plaintiffs' theory of liability, and the factual record.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Governments > Courts > Authority to Adjudicate

HN8[] **Class Actions, Certification of Classes**

A single difference among the state laws governing the plaintiffs' claims is not necessarily a substantial difference, but courts must exercise care in order to determine whether any conflicts in governing law will overwhelm the ability of the trier of fact meaningfully to advance the litigation through class-wide proof. Even differences in state laws that amount to nuances may suffice to make multistate classes inappropriate.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

HN9[] **Class Actions, Certification of Classes**

Plaintiffs seeking certification of a multi-state class bear the burden of demonstrating a suitable and realistic plan for trial of the class claims. If more than a few of the state laws differ, a court would face an impossible task of instructing a jury on relevant law.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN10[] **Class Actions, Certification of Classes**

Certifying multistate or nationwide classes is not categorically prohibited, but class certification analysis is necessarily contextual. The ultimate test for multi-state class certification is whether the relevant states establish a large number of different legal standards governing a particular claim.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN11[] **Class Actions, Certification of Classes**

An important caveat to the general principle that multi-state class certification depends on whether the relevant states establish a large number of different legal standards is that courts tend to be more receptive to certification of multistate settlement classes.

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

HN12[] **Deceptive & Unfair Trade Practices, State Regulation**

Differences in scienter are generally material because in cases where a defendant acted without scienter, a scienter requirement will spell the difference between the success and failure of a claim.

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

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

Although every state's consumer protection statute prohibits deceptive acts, they do not utilize a uniform definition of deception. Some states require that the deceptive act be material, while others only require that the deceptive act have the capacity or tendency to deceive.

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

Evidence > Burdens of Proof > Allocation

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

Consumer protection statutes do not use identical language when describing what is required in terms of causation and injury to recover damages in a private suit. The variations in statutory language would not matter if they had been interpreted to have the same meaning, but they have not. Rather, judicial interpretations of these statutes have confirmed that there are clear differences in what a plaintiff must show to prove causation and injury. Suggesting that proximate cause is required in all jurisdictions is not accurate. As for injury, several states have concluded that a legally cognizable injury must be distinct from the deception itself.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN15[] **Class Actions, Certification of Classes**

As to each proposed unjust enrichment class, the court must decide whether the covered jurisdictions have materially identical legal standards. Courts frequently refuse to certify multi-state unjust enrichment classes.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN16[] **Equitable Relief, Quantum Meruit**

To prevail on a claim for unjust enrichment, the plaintiffs must prove that the defendants' retention of the benefit is unjust. The specific language used to define unjustness varies by jurisdiction. The question of whether it would be unfair for the defendant to retain the benefit is a fact-intensive inquiry that focuses on the totality of the circumstances, not just the defendant's conduct.

Civil Procedure > Preliminary Considerations > Equity > Adequate Remedy at Law

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN17[] **Equity, Adequate Remedy at Law**

The unjust enrichment laws of many jurisdictions vary in terms of whether they have a "no adequate remedy at law" requirement and, if so, how that requirement is defined. There are states that have a "no adequate remedy at law" requirement and states that do not. In those states with a "no adequate remedy at law" requirement, its meaning varies. Courts applying the law of some states consistently dismiss unjust enrichment claims (including slack-fill cases), since the same underlying conduct would constitute a claim under the state's consumer protection statute. In other states, the requirement appears to have been interpreted as not barring an unjust enrichment claim for damages.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Civil Procedure > Preliminary Considerations > Venue > Multidistrict Litigation

HN18[] **Class Actions, Certification of Classes**

Plaintiffs bear the burden of proving that the *Fed. R. Civ. P. 23(a)* requirements are met and showing that *Rule 23(b)(3)* is satisfied through evidentiary proof. And, in multidistrict litigation, the D.C. Circuit's interpretations of *Rule 23* provide the controlling law, but where the D.C. Circuit has not addressed an issue, and there is a divergence among the circuits, a district court must apply the interpretation of *Rule 23* it finds most persuasive.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN19[] **Prerequisites for Class Action, Numerosity**

Fed. R. Civ. P. 23(a)(1) requires that the proposed class be so numerous that joinder of all members is impracticable. Impracticable means difficult or inconvenient rather than impossible. The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations. The plaintiffs must provide some evidence that a class is numerous, but courts may draw reasonable inferences from the facts presented to find the requisite numerosity. As a rule of thumb, a class of over 40 members satisfies the numerosity requirement.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN20[] **Prerequisites for Class Action, Commonality**

The requirement of commonality is satisfied when there are questions of law or fact common to the class. *Fed. R. Civ. P. 23(a)(2)*. If the class members claims involve no common question of law or fact, there will be no cause to believe that all their claims can productively be litigated at once. Even a single common question will do. But the common contention must be of such a nature that it is capable of classwide resolution—which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. What matters to class certification is not the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN21[] **Prerequisites for Class Action, Commonality**

To satisfy the requirement of commonality, class action plaintiffs need not show that a common question will be answered in their favor. Rather, they need only show that the common question is capable of generating a common answer even if that answer defeats their claim.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN22[] **Deceptive Labeling & Packaging, State Regulation**

A claim concerning alleged misrepresentations on packaging to which all consumers were exposed is sufficient to satisfy the commonality requirement for class actions because it raises the common question of whether the packaging would mislead a reasonable consumer.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN23[] Prerequisites for Class Action, Commonality

Fed. R. Civ. P. 23(a)(3) requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. Typicality differs from commonality in that typicality concerns the relationship between the representative's individual claims and the class's claims rather than the relatedness of the entire class's claims. Yet they both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical. The purpose of the typicality requirement is to assess whether the action can be efficiently maintained as a class action and whether the named plaintiffs have incentives that align with those of the absent class members so as to assure that the absentees' interests will be fairly represented.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN24[] Prerequisites for Class Action, Typicality

The typicality requirement is liberally construed. To destroy typicality, a distinction must differentiate the claims or defenses of the representatives from those of the class. *Fed. R. Civ. P. 23(a)(3)*. As a result, typicality is ordinarily met if the claims or defenses of the representatives and the members of the class stem from a single event or a unitary course of conduct, or if they are based on the same legal or remedial theory.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN25[] Prerequisites for Class Action, Adequacy of Representation

Fed. R. Civ. P. 23(a)(4) requires plaintiffs to show that the representative parties will fairly and adequately protect the interests of the class. The adequacy requirement aims to ensure that absent class members will not be bound by the outcome of a suit in which they were not competently and fairly represented. Two criteria for determining the adequacy of representation are generally recognized: (1) the named representative must not have antagonistic or conflicting interests with the unnamed members of the class, and (2) the representative must appear able to vigorously prosecute the interests of the class through qualified counsel. Among the many factors governing the district court's decision that the class members are adequately represented are the quality of class counsel, any disparity in interest between class representatives and members of a would-be subclass, communication between class counsel and the class, and the overall context of the litigation.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN26[] Class Actions, Certification of Classes

Fed. R. Civ. P. 23 does not expressly require that a class be ascertainable, and the D.C. Circuit has not addressed whether *Rule 23* contains an ascertainability requirement for class certification. Most federal circuits (unlike the D.C. Circuit) have held that ascertainability is an implied requirement under *Rule 23*. However, the circuits diverge as to the meaning of ascertainability.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN27[] Class Actions, Certification of Classes

As a baseline, courts generally agree that ascertainability means that a class definition must render potential class members identifiable according to objective criteria. The Third Circuit has added the additional requirement that the method of determining whether someone is in the class must be administratively feasible, while the Seventh and Ninth Circuits have expressly rejected that interpretation.

Civil Procedure > Special Proceedings > Class Actions > Prerequisites for Class Action

HN28[] Class Actions, Prerequisites for Class Action

The reasoning of courts that have rejected a requirement of administrative feasibility as part of ascertainability is persuasive. As those courts have noted, nothing in *Fed. R. Civ. P. 23* mentions or implies this heightened requirement.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN29[] Prerequisites for Class Action, Commonality

To authorize a class action under *Fed. R. Civ. P. 23(b)(3)*, a court must find that the questions of law or fact common to class members predominate over any questions affecting only individual members.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN30[] Prerequisites for Class Action, Maintainability

The predominance requirement of *Fed. R. Civ. P. 23(b)(3)* is more demanding than the commonality requirement of *Rule 23(a)*. It tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation, by asking whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues. Thus, the predominance inquiry calls upon courts to give careful scrutiny to the relation between common and individual questions in a case. An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof. When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under *Rule 23(b)(3)* even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to individual class members.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN31[] **Class Actions, Certification of Classes**

In determining whether class or individual issues predominate in a putative class action suit, courts must take into account the claims, defenses, relevant facts, and applicable substantive law, to assess the degree to which resolution of the classwide issues will further each individual class member's claim against the defendant.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

HN32[] **Class Actions, Certification of Classes**

Plaintiffs bear the burden of satisfying *Fed. R. Civ. P. 23(b)(3)* through evidentiary proof, which includes establishing that damages are capable of measurement on a classwide basis.

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

HN33[] **Deceptive & Unfair Trade Practices, State Regulation**

The consumer protection laws of California, Florida, Illinois, and Missouri require proof of an unfair or deceptive act. Although the states vary in how they define deception, proof of deception in each is judged by an objective, reasonable consumer standard and can be satisfied in each state without any individualized proof of reliance.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN34[] **Class Actions, Certification of Classes**

In order to prove predominance, plaintiffs have to establish that damages are capable of measurement on a classwide basis. Calculations need not be exact, but any model supporting a plaintiff's damages case must be consistent with its liability case.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN35[] **Class Actions, Certification of Classes**

Plaintiffs at the class certification stage are not required to prove damages by calculating specific damages figures for each member of the class, but rather they must show that a reliable method is available to prove damages on a classwide basis. The mere fact that damage awards will ultimately require individualized fact determinations is insufficient by itself to preclude class certification.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN36[] **Class Actions, Certification of Classes**

To gain certification under *Fed. R. Civ. P. 23(b)(3)*, plaintiffs need not establish that they will win the fray because the office of a *Rule 23(b)(3)* certification ruling is not to adjudicate the case; rather, it is to select the method best suited to adjudication of the controversy fairly and efficiently.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN37[] **Deceptive & Unfair Trade Practices, State Regulation**

A party seeking class certification must satisfy *Fed. R. Civ. P. 23(b)(3)* through evidentiary proof. Only a few courts have grappled with the question of what evidentiary proof is needed to satisfy *Rule 23(b)(3)*. Several California cases, including a decision by the Ninth Circuit, have held that in light of the objective standard for materiality under California law, extrinsic evidence of materiality is not required. But a Seventh Circuit decision and several subsequent district court cases in Illinois strongly suggest that even when materiality is judged by an objective standard, extrinsic evidence of materiality may be necessary for class certification of a consumer protection claim where there may be several explanations for consumers' behavior and motivations.

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

HN38[] **Deceptive & Unfair Trade Practices, State Regulation**

To prevail on a claim under California's Consumer Legal Remedies Act, *Cal. Civ. Code § 1770 et seq.*, plaintiffs must prove a deceptive act, causation of injury and reliance on the deceptive practice. However, in a class action causation, on a classwide basis, may be established by materiality, and if material misrepresentations have been made to the entire class, an inference of reliance arises as to the class. To prove materiality, a plaintiff must establish that a reasonable person would attach importance to the misrepresentation's existence or nonexistence in determining his choice of action. Thus, materiality is judged by an objective reasonable person standard.

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

Civil Procedure > ... > Class Actions > Class Members > Absent Members

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

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

HN39[] **State Regulation, Claims**

Causation is a required element under California's Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.* However, to establish causation in a class action, only the class representatives must establish reliance on the alleged misrepresentation, unnamed class members need not.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN40[] **Deceptive & Unfair Trade Practices, State Regulation**

A growing number of cases in California have concluded that when a case presents specific alleged misrepresentations common to the class, materiality is necessarily a common question for purposes of *Fed. R. Civ. P. 23(b)(3)* because it is judged by an objective reasonable person standard and, therefore, no evidence of materiality is necessary for purposes of class certification. The Ninth Circuit has also held that claims under California's Consumer Legal Remedies Act, *Cal. Civ. Code § 1770 et seq.*, are ideal for class certification because they do not require the court to investigate class members' individual interaction with the product. As a result, there is no risk whatever that a failure of proof on the common questions of deception and materiality will result in individual questions predominating. Instead, the failure of proof on the elements of deception and materiality would end the case for one and for all; no claim would remain in which individual issues could potentially predominate.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN41[] **Class Actions, Certification of Classes**

The Ninth Circuit has held (albeit in an unpublished opinion) that it is an error of law for courts at class certification to require extrinsic evidence of materiality to prove predominance. Neither *Fed. R. Civ. P. 23* nor California law requires plaintiffs to proffer a certain type of evidence at class certification. There is nothing in the United States Supreme Court's decisions to suggest that evidentiary proof of predominance must take a certain form. In addition, that court is disinclined to interpret *Rule 23* as requiring plaintiffs to proffer a particular type of evidence when such evidence is not required under state law for plaintiffs to prevail on the merits of their claims.

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

HN42[] **Deceptive & Unfair Trade Practices, State Regulation**

It is clear under California law that not only is materiality judged by an objective standard, but also materiality to a reasonable consumer does not mean it has to be material to every consumer. Thus, the case law has rejected the argument that predominance is not met where the evidence shows that people buy the defendant's products for reasons other than the challenged claim, such as taste, price, brand loyalty, nostalgia, and convenience. A defendant's argument that consumers have a variety of reasons for purchasing the product is a merits dispute as to materiality, and is therefore a dispute that can be resolved classwide.

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

HN43[] **Deceptive & Unfair Trade Practices, State Regulation**

Under California law, materiality is generally a question of fact unless the fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.

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

HN44[] **Deceptive & Unfair Trade Practices, State Regulation**

Prohibitions under state law are not dispositive of the issue of materiality in a consumer protection case, but federal and state courts in California have concluded that laws prohibiting certain conduct can be evidence of materiality.

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

HN45[] Deceptive & Unfair Trade Practices, State Regulation

To recover damages under the Illinois Consumer Fraud and Deceptive Practices Act (ICFA), 815 ILCS 505/1 et seq., a plaintiff must prove (1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in a course of conduct involving trade or commerce, and (4) actual damage to the plaintiff that is (5) a result of the deception. That the plaintiff must prove that actual damages were suffered as a result of the deceptive act imposes an obligation on the plaintiff to prove the deceptive act proximately caused any damages. In addition, to be actionable under the ICFA, a representation must be material, which is established by applying an objective standard. A material fact exists where a buyer would have acted differently knowing the information, or if it concerned the type of information upon which a buyer would be expected to rely in making a decision whether to purchase.

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

HN46[] Deceptive & Unfair Trade Practices, State Regulation

Although materiality under the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/1 et seq., is judged on an objective, reasonable person standard, proximate causation and actual damages are individualized inquiries, and require proof that the plaintiff was deceived in some manner and damaged by the deception. As such, absent proof as to why a particular plaintiff purchased a particular product, the plaintiff cannot establish that the defendants' conduct caused him or her to make that purchase. In addition, in a class action in Illinois plaintiffs must prove proximate causation and actual damages as to each class member.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN47[] Deceptive & Unfair Trade Practices, State Regulation

The mere presence of individualized issues does not require denial of certification of an Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/1 et seq., class. A court must decide whether the plaintiffs have shown that common issues will predominate despite the need under Illinois law for individualized inquiries into proximate causation and damages.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

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

HN48[] Trade Practices & Unfair Competition, State Regulation

Under the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/1 et seq., at class certification it is necessary to proffer common evidentiary proof as to the reasons behind class member's purchasing decisions if the issues of proximate causation and actual damages are not straightforward.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN49[] Deceptive & Unfair Trade Practices, State Regulation

While not necessarily required in every case under the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/1 et seq., evidence of materiality in the form of a consumer survey, market research, or an expert opinion has played an important role in Illinois in establishing the cohesiveness of a proposed class.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN50[] Deceptive & Unfair Trade Practices, State Regulation

In a state such as Illinois, where the individual reasons for purchasing a product are relevant under the consumer protection statute, there needs to be evidence of classwide materiality so that a court can have confidence that class members share the plaintiffs' grievance and that the individualized inquiries necessary to prove causation and injury will be relatively simple and straightforward. Where such evidence is lacking, a court must decide, based on the nature of plaintiffs' claim and evidence before it, whether such individualized inquiries predominate.

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

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

HN51[] Trade Practices & Unfair Competition, State Regulation

To prevail on a claim for damages under the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 et seq., a plaintiff must prove (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. (A party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue.

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

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > Benefit of the Bargain

HN52[] Deceptive & Unfair Trade Practices, State Regulation

In Florida, both causation and actual damages are judged by objective standards. To prove causation under the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 et seq., a plaintiff must simply prove that an objectively reasonable person would have been deceived. The mental state of each class member is irrelevant. Actual damages are incurred if the plaintiff does not receive the benefit of the bargain, which is measured according to the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

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

HN53[] Trade Practices & Unfair Competition, State Regulation

Causation under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), *Fla. Stat. § 501.201 et seq.*, is a common question for purposes of *Fed. R. Civ. P. 23(b)(3)*. It is judged by an objective, reasonable person standard and a failure of proof on that element will lead to the failure of all claims. Causation under the FDUTPA does not even require proof of materiality to the reasonable consumer; it only requires proof that a reasonable consumer would have been deceived. In addition, state courts, applying a similar standard, have concluded that issues pertaining to the proof of the alleged deceptive practice and issues relating to causation and damages are common to all members of the class. And, there is a long line of similar cases involving allegedly deceptive marketing of a consumer good where courts have certified FDUTPA classes without any evidentiary proof of causation.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN54[] Class Actions, Certification of Classes

If a putative class has not all been exposed to the same representations, it is not possible to determine on a classwide basis whether an objectively reasonable consumer would have been deceived.

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

HN55[] Deceptive & Unfair Trade Practices, State Regulation

To prevail on a claim under the Missouri Merchandising Practices Act, *Mo. Ann. Stat. § 407.010 et seq.*, a plaintiff must plead and prove he or she (1) purchased merchandise (which includes services) from the defendants; (2) for personal, family or household purposes; and (3) suffered an ascertainable loss of money or property; (4) as a result of an act declared unlawful under the Merchandising Practices Act.

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

HN56[] Deceptive & Unfair Trade Practices, State Regulation

Causation under the Missouri Merchandising Practices Act, *Mo. Ann. Stat. § 407.010 et seq.*, requires a showing that the unlawful practice caused the loss, but the statute does not require that the purchase be caused by the unlawful practice. Thus, class members are not individually required to show what they would or would not have done had the product not been misrepresented and the risks known.

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

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > Benefit of the Bargain

HN57[] Deceptive & Unfair Trade Practices, State Regulation

As for the element of ascertainable loss, Missouri courts apply the benefit of the bargain rule when determining if a plaintiff has suffered an ascertainable loss under the Missouri Merchandising Practices Act, *Mo. Ann. Stat. § 407.010 et seq.* The benefit-of-the-bargain rule under Missouri law compares the actual value of the item to the value of the item if it had been as represented at the time of the transaction.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN58[] Equitable Relief, Quantum Meruit

An unjust enrichment claim does not depend solely on the defendant's conduct in California, Connecticut, the District of Columbia, Illinois, Maryland, Missouri, or Pennsylvania. To the contrary, each state's unjust enrichment law requires consideration of both the plaintiff's and the defendant's conduct, as well as the factual context.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN59[] Class Actions, Certification of Classes

When confronted by motions for class certification of unjust enrichment claims under the laws of California, Connecticut, the District of Columbia, Illinois, Maryland, Missouri, and Pennsylvania, courts have denied such motions, concluding that the need for individualized inquiries into purchasers' knowledge and motivations precluded a finding of predominance.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN60[] Prerequisites for Class Action, Maintainability

The superiority requirement asks whether a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. *Fed. R. Civ. P. 23(b)(3)*. It aims to achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. The matters pertinent to a finding of superiority include: (A) the class members' interests in individually controlling the prosecution of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN61[] Class Actions, Certification of Classes

Class actions often involve an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit. The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually. This consideration supports class certification in cases where the total amount sought by each individual plaintiff is small in absolute terms. It also applies in situations where the amounts in controversy would make it unlikely that most of the plaintiffs, or attorneys working on a contingency fee basis, would be willing to pursue the claims individually.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN62[] **Prerequisites for Class Action, Maintainability**

Manageability is only one of the elements that goes into the balance to determine the superiority of a class action in a particular case. Other factors must also be considered, as must the purposes of *Fed. R. Civ. P. 23*, including: conserving time, effort, and expense; providing a forum for small claimants; and deterring illegal activities.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Class Attorneys > Appointments

HN63[] **Prerequisites for Class Action, Adequacy of Representation**

Fed. R. Civ. P. 23(g) requires that a court that certifies a class must appoint class counsel. *Rule 23(g)(1)*. In appointing class counsel, the court must consider four factors: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. *Rule 23(g)(1)(A)(i)-(iv)*. Moreover, the Court may also consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class. *Rule 23(g)(1)(B)*.

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Judges: ELLEN S. HUVELLE, United States District Judge.

Opinion by: ELLEN S. HUVELLE

Opinion

[*205] **REDACTED**

MEMORANDUM OPINION

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This multidistrict consumer litigation against McCormick & Co. and Wal-Mart Stores, Inc., arises from the sales of black pepper in tins and grinders allegedly containing "nonfunctional slack-fill" not visible to purchasers (the "Slack-Filled Pepper Products"). The Slack-Filled Pepper Products were sold between March 2015 and mid-2016. They include both McCormick-branded products and McCormick-filled private-label brands, such as Wal-Mart's Great Value products. Named plaintiffs are purchasers who claim that the sale **[**6]** of these products violated various state consumer protection statutes and unjust enrichment laws.[1]

Before the Court is plaintiffs' motion pursuant to *Federal Rule of Civil Procedure 23* for class certification and appointment of counsel. (Pls.' Mot. for Class Certification, ECF No. 156 ("Class Cert. Mot.").) With respect to their statutory consumer protection claims, plaintiffs seek certification of a multi-state class covering purchasers in 20 jurisdictions (the "Consumer Protection Multi-State Class") or, in the alternative, four single-state classes covering purchasers in California, Florida, Illinois, and Missouri. With respect to their unjust enrichment claims, plaintiffs seek certification of two multi-state classes, covering purchasers in a total of 29 jurisdictions (the "Unjust Enrichment (Restatement) Multi-State Class" and the "Unjust Enrichment (Appreciation) Multi-State Class") or, in the alternative, seven single-state unjust enrichment classes covering purchasers in California, Connecticut, the District of Columbia, Illinois, Maryland, Missouri, and Pennsylvania. In addition to opposing class certification, defendants **[*207]** have filed a joint motion to exclude the expert report and opinions of Dr. Armando **[**7]** Levy, plaintiffs' damages expert. (Defs.' Joint Mot. to Exclude the Report and Opinions of Dr. Armando Levy, Aug. 28, 2017, ECF No. 164 ("Defs.' Expert Mot.").)

For the reasons stated herein, plaintiffs' motion for class certification is granted in part and denied in part. Defendants' motion to exclude plaintiffs' damages expert is denied.

BACKGROUND

I. WHAT IS "NONFUNCTIONAL SLACK-FILL"?

A. Federal Law

Although plaintiffs' legal claims arise under state law, they rely on the federal definition and prohibition of "nonfunctional slack-fill." "Slack-fill" is defined as "the difference between the actual capacity of a container and the volume of product contained therein." *21 C.F.R. § 100.100(a)*. "Nonfunctional slack-fill" is defined as "the empty space in a package that is filled to less than its capacity for reasons other than:"

(1) Protection of the contents of the package;
(2) The requirements of the machines used for enclosing the contents in such package;
(3) Unavoidable product settling during shipping and handling;

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[1] Plaintiffs also brought antitrust claims, but those claims have been dismissed. *See* *In re McCormick, 217 F. Supp. 3d 124, 131 (D.D.C. 2016)*.

> (4) The need for the package to perform a specific function (e.g., where packaging plays a role in the preparation or consumption of a food), where such function is inherent to the nature of the **[**8]** food and is clearly communicated to consumers;
> (5) The fact that the product consists of a food packaged in a reusable container where the container is part of the presentation of the food and has value which is both significant in proportion to the value of the product and independent of its function to hold the food, e.g., a gift product consisting of a food or foods combined with a container that is intended for further use after the food is consumed; or durable commemorative or promotional packages; or
> (6) Inability to increase level of fill or to further reduce the size of the package (e.g., where some minimum package size is necessary to accommodate required food labeling (excluding any vignettes or other nonmandatory designs or label information), discourage pilfering, facilitate handling, or accommodate tamper-resistant devices).

21 C.F.R. § 100.100(a) (emphasis added); *see also* *Misleading Containers; Nonfunctional Slack-Fill, 58 Fed. Reg. 64123*-01, 64126 (Dec. 6, 1993) ("[T]he exceptions in *§100.100(a)* provide only for that amount of slack-fill that is necessary to accomplish a specific function."). Federal law deems "non-functional slack-fill" in "[a] container that does not allow the consumer to fully view its contents" "to be filled as to be misleading," *21 C.F.R. § 100.100(a)*, which is a violation **[**9]** of the federal law prohibiting the "misbranding" of foods. *See* *21 U.S.C. § 343(d)* ("[a] food shall be deemed to be misbranded— . . . [i]f its container is so made, formed, or filled as to be misleading.").[2]

[*208] B. State Laws

Although only a few of the states at issue in this litigation have laws or regulations that expressly prohibit or limit nonfunctional slack-fil1,[3] the remaining states either incorporate or mirror the defmition of "misbranding" in *21 U.S.C. § 343(d)*,[4] or define "misbranding" to include misleading or deceptive packaging.[5] In addition, a number of

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[2] In 1993, the U.S. Food and Drug Administration ("FDA") concluded that the "filled as to be misleading" portion of *§ 343(d)* had not been "adequately implemented." *See* *Misleading Containers; Nonfunctional Slack-Fill, 58 Fed. Reg. 2957-01, 2960 (Jan. 6, 1993)*. It thus proposed, *see* 58 Fed. Reg. at 2960, and ultimately adopted a regulation, *see* *21 C.F.R. § 100.100(a)*, to define when "slack-fill" is "nonfunctional" and when "nonfunctional slack-fill" is "misleading." *See* *58 Fed. Reg. 64123*. The FDA noted that it had "decided not to elaborate on ways in which a container may be "made" or "formed" as to be misleading," finding those terms to be "straightforward" and to "require little elaboration." 58 Fed. Reg. at 2960.

[3] California has adopted verbatim the federal definition of nonfunctional slack-fill, and it similarly provides that "[a] container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack-fill." *See* *Cal. Bus. & Prof. Code § 12606.2(c)*. New Jersey law provides that "nonfunctionally slack-filled" means "a container which is filled to substantially less than its capacity for reasons other than (a) protection of the contents of the container or (b) the requirements of machines used for enclosing the contents in the container" and that "[n]o container shall be so nonfunctionally slack-filled as to constitute deception." *N.J. Stat. Ann. § 51:1-29(c)(2)*. Colorado has adopted the same definition and its Department of Public Health and Environment is charged with enacting regulations, as necessary, to prevent "deception of consumers" by "preventing the nonfunctional slack-fill of packages containing consumer commodities." *Colo. Rev. Stat. Ann. § 25-5-419(4)*.

[4] *See, e.g.*, *Alaska Stat. Ann. § 17.20.040(a)(4)* ("food is misbranded if . . . its container is made, formed, or *filled* so as to be misleading") (emphasis added); *see also* *Ark. Code Ann. § 20-56-209(4)*; *Cal. Bus. & Prof. Code § 12606.2(b)*; *Colo. Rev. Stat. Ann. § 25-5-411(1)(e)*; *Conn. Gen. Stat. Ann. § 21a-102(a)(4)*; D.C. Code Mun. Regs. tit. 25-B, § 3602.1(d); *Fla. Stat. Ann.§ 500.11(1)(d)*; Haw. Rev. Stat. Ann. § 328-10(4); *Idaho Code Ann. § 37-123(d)*; *410 Ill. Comp. Stat. Ann. 620/11(d)*; *Iowa Admin. Code r. 481-31.2(6)*(137F); *Kan. Stat. Ann. § 65-665(d)*; *Ky. Rev. Stat. Ann. § 217.035(4)*; *Me. Rev. Stat. Ann. tit. 22, § 2157*; *Mass. Gen. Laws Ann. ch. 94, § 187*; *Mich. Comp. Laws Ann. §§ 289.1109(p)(iv)*, *289.5101(1)(a)*; *Minn. Stat. Ann. § 34A.03(a)(4)*; *Mo. Ann. Stat. § 196.075(4)*; *Nev. Rev. Stat. Ann. § 585.350*; *N.H. Rev. Stat. Ann. § 146:5*; *N.M. Stat. Ann. § 25-2-11*; *N.Y. Agric. & Mkts. Law § 201*; *N.D. Cent. Code Ann. § 19-02.1-10*; *Okla. Stat. Ann. tit. 63, § 1-1110(d)*; *3 Pa. Stat. & Cons. Stat. Ann. § 5729(a)(4)*; 21 *R.I. Gen. Laws Ann. § 21-31-11(4)*; *S.C. Code Ann. § 39-25-110(d)*; *Tenn. Code Ann. § 53-1-105(4)*;

states have consumer protection statutes that define unfair or deceptive acts or practices to include "[r]epresenting that goods . . . have . . . quantities that they do not have." *Cal. Civ. Code § 1770(a)(5)*.[6]

C. Slack-Fill Litigation

While there is no private right of action to enforce the federal regulations on nonfunctional slack-fill, consumers in recent years have filed numerous lawsuits seeking to hold manufacturers liable under state **[*209]** law for the sale of products allegedly containing nonfunctional slack-fill. For example, cases have been brought alleging nonfunctional slack-fill in the packaging of candy in cardboard boxes,[7] chips,[8] cerea1, **[**10]** [9] pretzels,[10] pasta,[11] risotto mix,[12] canned tuna,[13] gum,[14] protein powder,[15] ice cream,[16] cake mix,[17] dried fruit,[18] and a variety of other

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Utah Code Ann. § 4-5-201(2)(d) (formerly *§ 4-5-8*); *18 Vt. Stat. Ann. § 4060(4)*; *Wash. Rev. Code Ann. § 69.04.250* (repealed eff. June 7, 2018; replaced by § 15.130.210); *W.Va. Code Ann. § 19-2-7(11)*; *Wis. Stat. Ann. § 97.03*.

[5] *See* *Del. Code Ann. tit. 16, § 3309(4)* ("food is deemed to be misbranded . . . [i]f the package containing it . . . bears . . . design . . . regarding . . . the substances contained therein, which . . . design . . . is false or misleading in any particular"); *Md. Code Ann., Health-Gen. § 21-210(b)* ("A food is misbranded if: (1) Its labeling or packaging is false or misleading in any way."); *S.D. Codified Laws § 39-4-7* ("The term 'misbranded' as used in this chapter, shall apply to all substances used as food or which enter into the composition of food, the package, or label of which shall bear any statement, design, or device regarding such substance or the ingredients contained therein which shall be false, deceptive, or misleading in any particular. . . .").

[6] *See also* *Colo. Rev. Stat. Ann. § 6-1-105*; *Del. Code Ann. tit. 6, § 2532(a)(5)*; *D.C. Code Ann. § 28-3904(a)*; *Idaho Code § 48-603(5)*; *815 Ill. Comp. Stat. Ann. 510/2*; *Mich. Comp. Laws Ann. § 445.903(1)(c)*; *Minn. Stat. Ann. § 325D.44*; *N.H. Rev. Stat. Ann. § 358-A:2*; *N.M. Stat. Ann. § 57-12-2*.

[7] *See, e.g.*, *Escobar v. Just Born, Inc., No. 17-cv-01826, 2017 U.S. Dist. LEXIS 186573, 2017 WL 5125740, at *1 (C.D. Cal. June 12, 2017)*.

[8] *See, e.g.*, *Alce v. Wise Foods, Inc., No. 17-cv-2402, 2018 U.S. Dist. LEXIS 54009, 2018 WL 1737750, at *1 (S.D.N.Y. March 27, 2018)* (21 varieties of potato chips).

[9] *See* *Leonhart v. Nature's Path Foods, Inc., No. 13-cv-00492, 2014 U.S. Dist. LEXIS 164425, 2014 WL 6657809, at *7 (N.D. Cal. Nov. 21, 2014)*.

[10] *See* *Cordes v. Boulder Brands United States, Inc., No. 18-cv-6534, 2019 U.S. Dist. LEXIS 42906, 2019 WL 1002513, at *3-4 (C.D. Cal. Jan. 30, 2019)*.

[11] *See* *Stewart v. Riviana Foods, Inc., No. 16-cv-6157, 2017 U.S. Dist. LEXIS 146665, 2017 WL 4045952, at *1-2 (S.D.N.Y. Sept. 11, 2017)*.

[12] *See* *Buso v. Vigo Importing Co., No. 18-cv-1328, 2018 U.S. Dist. LEXIS 201726, 2018 WL 6191390, at *1 (S.D. Cal. Nov. 28, 2018)*.

[13] *See* *Hendricks v. StarKist Co., 30 F. Supp. 3d 917, 921-22 (N.D. Cal. 2014)*.

[14] *See* *Martin v. Wrigley, No. 4:17-cv-541, 2017 U.S. Dist. LEXIS 175502, 2017 WL 4797530, at *5 (W.D. Mo. Oct. 24, 2017)*.

[15] *See, e.g.*, *Miao Xin Hu v. Iovate Health Scis. U.S.A. Inc., No. 17-cv-09427, 2018 U.S. Dist. LEXIS 176206, 2018 WL 4954105, at *1 (S.D.N.Y. Oct. 12, 2018)*.

[16] *See* *Kamal v. Eden Creamery, LLC, No. 18-cv-01298, 2019 U.S. Dist. LEXIS 107263, 2019 WL 2617041, at *1 (S.D. Cal. June 26, 2019)*.

[17] *Reider v. Immaculate Baking Co., No. 8:18-cv-01085, 2018 U.S. Dist. LEXIS 223701, 2018 WL 6930890, at *3 (C.D. Cal. Nov. 8, 2018)*.

food[19] and non-food products.[20] The present litigation is the first challenge to allegedly nonfunctional slack-fill in spice tins and grinders.

Despite the volume of slack-fill litigation, all of which has been filed as putative class actions, very few have reached the stage of class certification. Many cases have been dismissed for failing to plausibly allege nonfunctional slack-fill or failing to plausibly allege that reasonable consumers would have been misled by the packaging even if there was nonfunctional slack-fill.[21] **[*210]** Slack-fill claims have also been dismissed on other grounds,[22] remanded to state court,[23] stayed,[24] **[**11]** or resolved on summary judgment,[25] or plaintiffs have decided not to pursue them.[26]

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[18] *Barrere v. Trader Joe's Co.*, No. 2:19-cv-04297 (C.D. Cal. filed May 17, 2019.)

[19] *See, e.g.,* Bush v. Mondelez Int 7, No. 16-cv-02460, 2016 U.S. Dist. LEXIS 174391, 2016 WL 7324990, at *1 (N.D. Cal. Dec. 16, 2016) (travel size snack products).

[20] *See, e.g.,* Macaspac v. Henkel Corp., No. 3:17-cv-01755, 2018 U.S. Dist. LEXIS 93772, 2018 WL 2539595, at *1 (S.D. Cal. June 4, 2018) (laundry fragrance booster).

[21] *See* Cordes, 2019 U.S. Dist. LEXIS 42906, 2019 WL 1002513, at *3-4 (pretzels); Morrison v. Barcel USA, LLC, No. 18-cv-531, 2019 U.S. Dist. LEXIS 1090, 2019 WL 95477, at *2 (S.D.N.Y. Jan. 2, 2019) (tortilla chips), *appeal withdrawn*, No. 19 176 (2d Cir. Mar. 5, 2019); Benson v. Fannie May Confections Brands, Inc., No. 17-cv-3519, 2018 U.S. Dist. LEXIS 207658, 2018 WL 6446391, at *3-4 (N.D. Ill. Dec. 10, 2018) (candy boxes), *appeal pending*, No. 19 1032 (7th Cir. Jan. 4, 2019); Buso, 2018 U.S. Dist. LEXIS 201726, 2018 WL 6191390, at *5-6 (risotto); Daniel v. Tootsie Roll Indus., LLC, No. 17-cv-7541, 2018 U.S. Dist. LEXIS 129143, 2018 WL 3650015, at *1, 14 (S.D.N.Y. Aug. 1, 2018) (boxed candy), *appeal voluntarily dismissed*, No. 18-2424 (2d Cir. Oct. 11, 2018); Macaspac, 2018 U.S. Dist. LEXIS 93772, 2018 WL 2539595, at *5-6, *appeal voluntarily dismissed*, No. 18-55880 (9th Cir. Aug. 24, 2018); Miao Xin Hu, 2018 U.S. Dist. LEXIS 176206, 2018 WL 4954105, at *2-3 (protein powder), *appeal voluntarily withdrawn*, No. 18 3217 (2d Cir. June 12, 2019); Alce, 2018 U.S. Dist. LEXIS 54009, 2018 WL 1737750, at *7-8 (potato chips) (no appeal filed); Wurtzburger v. Ky. Fried Chicken, No. 16-cv-08186, 2017 U.S. Dist. LEXIS 205881, 2017 WL 6416296, at *4-5 (S.D.N.Y. Dec. 13, 2017) (fried chicken in a bucket) (no appeal filed); Martin v. Wrigley, 2017 U.S. Dist. LEXIS 175502, 2017 WL 4797530, at *6 (W.D. Mo. Oct. 24, 2017) (chewing gum) (no appeal filed); Stewart, 2017 U.S. Dist. LEXIS 146665, 2017 WL 4045952, at *910 (pasta) (no appeal filed); Bautista v. CytoSport, Inc., 223 F. Supp. 3d 182, 189-90 (S.D.N.Y. 2016) (protein powder) (no appeal filed); Bush, 2016 U.S. Dist. LEXIS 174391, 2016 WL 7324990, at *1, 2-4, *appeal voluntarily dismissed*, No. 17-15126 (9th Cir. Sept. 21, 2017); Fermin v. Pfizer Inc., 215 F. Supp. 3d 209, 211-12 (E.D.N.Y. 2016) (pills) (no appeal filed).

[22] *See* Izquierdo v. Mondelez Int'l, Inc., No. 16-cv-04697, 2016 U.S. Dist. LEXIS 149795, 2016 WL 6459832, at *1, 7-8 (S.D.N.Y. Oct. 26, 2016) (boxed candy) (dismissed for failure to adequately allege injury under New York's consumer protection law); Bimont v. Unilever U.S., Inc., 14-cv-7749, 2015 U.S. Dist. LEXIS 119908, 2015 WL 5256988, at *1 (S.D.N.Y. Sept. 9, 2015) (dismissed because deodorant packaging claim preempted by federal law); O'Connor v. Henkel Corp., No. 14-cv-5547, 2015 U.S. Dist. LEXIS 140934, 2015 WL 5922183, at *6 (E.D.N.Y. Sept. 22, 2015) (same); Gordon v. Tootsie Roll Indus., No. 17-cv-2664, 2018 U.S. Dist. LEXIS 165643 at 2 (C.D. Cal. Sept. 25, 2018) (dismissed for lack of prosecution).

[23] *See* Waters v. Ferrara Candy Co., No. 4:17-cv-00197, 2017 U.S. Dist. LEXIS 92915, 2017 WL 2618271, at *6 (E.D. Mo. June 16, 2017) (boxed candy); Smith v. Abbott Labs., Inc., No. 16-cv-0501, 2017 U.S. Dist. LEXIS 135478, 2017 WL 3670194, at *1 (D.D.C. Mar. 31, 2017) (protein powder); Witte v. Gen. Nutrition Corp., 104 F. Supp. 3d 1, 2 (D.D.C. 2015) (dietary supplements).

[24] Ivie v. Kraft Foods Global, Inc., No. 12-cv-02554, 2013 U.S. Dist. LEXIS 25615, 2013 WL 685372, at *11 (N.D. Cal. Feb. 25, 2013) (multiple food products).

[25] *See* Bratton v. Hershey Co., No. 2:16-cv-4322, 2018 U.S. Dist. LEXIS 26031, 2018 WL 934899, at *2-4 (W.D. Mo. Feb. 16, 2018) (boxed candy) (granting summary judgment for defendant).

[26] *See* Trazo v. Nestlé USA, Inc., No. 5:12-cv-2272, 2013 U.S. Dist. LEXIS 113534, 2013 WL 4083218, at *13 (N.D. Cal. Aug. 9, 2013) (slack-fill claims dismissed and then not included in amended complaint); Samet v. P&G, No. 3:12-cv-01891, 2013 U.S. Dist. LEXIS 173522, 2013 WL 6491143, at *1 (N.D. Cal. Dec. 10, 2013) (slack-fill claims survived motion to dismiss, but were not included in motion for class certification, *see* Order (Jan. 15, 2019)).

In several cases, plaintiffs have voluntarily dismissed their claims (presumably due to a settlement), frequently with the plaintiffs individual claims dismissed with prejudice, while the class claims are dismissed without prejudice.[27] Courts have reached the question of class certification in only six cases - one granted certification,[28] two granted certification of a settlement class,[29] and three denied certification.[30]

II. THE PRESENT LITIGATION

A. Factual Background

Black pepper is the most widely traded spice in the international market, both in terms of quantity **[**12]** and value, and McCormick is the largest manufacturer and leading seller of black pepper products in the **[*211]** United States. (*See* Second Am. Cons. Class Action Compl. ¶ 3, ECF No. 128 ("2d Am. Compl."); Declaration of Elizabeth Fegan ¶¶ 10, 12, ECF No. 188-1 ("Fegan Decl."); Expert Report of Dr. Armando Levy ¶¶ 19, 20, ECF No. 188-3 ("Levy Rep.").) It buys black pepper from all over the world and transports it to its processing plants in the United States. (2d Am. Compl. ¶ 28; Levy Rep. ¶ 19 (citing McCormick 2014 Annual Report).) McCormick's processing plants produce both McCormick-branded pepper products and private-label pepper products for major retail chains, including Wal-Mart's Great Value brand. (2d Am. Compl. ¶¶ 3, 46; McCormick's Am. Answer to 2d Am. Compl. ¶ 3, ECF No. 151; Wal-Mart's Am. Answer to 2d Am. Compl. ¶¶ 3, 46, ECF No. 155; Levy Rep. ¶ 20.) In 2015, McCormick-branded pepper products represented 47% of the U.S. black pepper market, while the private-label pepper products produced by McCormick represented another 18.8% of the market. (*See* Fegan Decl. In 13, 16; Levy Rep. ¶ 20.)

Global consumption of black pepper has been growing rapidly since the 1990's. (2d Am. Compl. **[**13]** ¶ 29; Levy Rep. ¶ 17.) This rapid increase in demand, coupled with relatively stable world production, resulted in significant increases in the price of black pepper. (2d Am. Compl. ¶ 29; Levy Rep. ¶ 18; *see also* McCormick's Am. Answer ¶ 31.) For example, between 2005 and 2015, the spot price of black pepper in New York increased more than six-fold, from $0.75 per pound to more than $5.00 per pound. (Levy Rep. ¶ 18.) As the cost of pepper increased, McCormick repeatedly raised the retail prices for its black pepper products. At the same time, the gap between the

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[27] *See, e.g.*, Notice of Voluntary Dismissal at 2, *Leonhart*, No. 13-cv-00492 (N.D. Cal. Jan. 3, 2019) (cereal); Order, *Thomas v. Costco Wholesale Corp.*, No. 5:12-cv-02908 (N.D. Cal. Dec. 14, 2018); Order, *Hawkins v. Nestle U.S.A. Inc.*, No. 17-cv-205. *slip op. at 1 (E.D. Mo. Nov. 30, 2018)*; Stipulation of Voluntary Dismissal, *Yee Ting Lau v. Pret A Manger (USA) Ltd.*, No. 17-cv-5775 (S.D.N.Y. Feb. 25, 2019); Notice of Voluntary Dismissal, *Daniel v. Mondelez Int'l, Inc.*, No. 17-00174 (E.D.N.Y. Apr. 25, 2018); Order, *Martinez-Leander v. Wellnx Life Sciences, Inc.*, No. 2:16-cv-08220 (C.D. Cal. Mar. 17, 2017); Order, *Waldman v. New Chapter, Inc.*, No. 09-cv-3514 (E.D.N.Y. July 14, 2010).

[28] *See* *Escobar, 2019 WL 2619636, at *2 (C.D. Cal. Mar. 25, 2019)* (boxed candy).

[29] *See* *Berni v. Barilla G. e R. Fratelli, S.p.A., No. 16-cv-4196, 332 F.R.D. 14, 2019 U.S. Dist. LEXIS 92440, 2019 WL 2341991, at *1 (E.D.N.Y. June 3, 2019)* (pasta) (injunctive relief only); *Hendricks v. StarKist Co, No. 13-cv-00729, 2016 U.S. Dist. LEXIS 134872, 2016 WL 5462423, at *16 (N.D. Cal. Sept. 29, 2016)* (canned tuna fish), *aff'd sub nom*. *Hendricks v. Ference, No. 16-16992, 754 F. App'x 510 (9th Cir. Oct. 19, 2018)*.

[30] *See* *Spacone v. Sanford, L.P., No. 2:17-cv-02419, 2018 U.S. Dist. LEXIS 153916, 2018 WL 4139057, at *1 (C.D. Cal. Aug. 9, 2018)* (glue), *appeal voluntarily dismissed*, *No. 18-56208, 2019 U.S. App. LEXIS 1126 (9th Cir. Jan. 11, 2019)*; *White v. Just Born, Inc., No. 2:17-cv-04025, 2018 U.S. Dist. LEXIS 132466, 2018 WL 3748405, at *1 (W.D. Mo. Aug. 7, 2018)* (*"White IT)* (boxed candy), *appeal voluntarily dismissed*, *No. 18-8011, 2018 U.S. App. LEXIS 36971 (8th Cir. Nov. 14, 2018)*; *Turcios v. Carma Labs., Inc., 296 F.R.D. 638, 641 (C.D. Cal. 2014)*, *voluntarily dismissed*, No. 2:12-cv-08487 (Feb. 7, 2014) (lip balm).

retail price for McCormick-branded products and private-label brands grew, while McCormick's overall market share declined. (*See* Pls.' Exs. 101, 102.[31])[32]

On May 30, 2014, McCormick embarked on a "Black Pepper Net Weight Reduction" Project. (*See* Fegan Decl. ¶ 22; Pls.' Ex. 103.) The project's "objective" was "to mitigate commodity cost increases expected on black pepper through a net weight reduction across branded and private label metal cans" and thus avoid any further price increases for its own products. (*See* Fegan Decl. ¶ 24; Pls.' Ex. 103; *see also* Pls.' Exs. 104-106, 118, 121.) McCormick recognized that reducing **[**14]** the net weight in a container without changing the "absolute price" was effectively a price increase because the cost per ounce would increase. (*See* Fegan Decl. In 29, 39; Pls.' Exs. 107, 114.) McCormick sought to avoid an absolute price increase on products on the shelves, since it believed that such a price increase would lead to a decline in sales. (*See* Fegan Decl. ¶ 36; Pls.' Exs. 112-113.)

Over the next few months the final details of McCormick's net weight reduction **[*212]** project were decided. (*See* Fegan Decl. ¶¶ 25-34, 58-59, 77; Pls.' Ex. 104, 109.) Although McCormick had initially contemplated a 10% net weight reduction, due to the continued increase in the cost of black pepper, it ultimately decided on a larger reduction, reducing the weight of ground pepper in its tins by 25% and the weight of peppercorn in its grinders by 19%. (*See* 2d Am. Compl. ¶ 5; Fegan Decl. ¶¶ 24, 31, 33; Pls.' Exs. 103, 108-110.) Plaintiffs claim that "McCormick contemplated it would receive a monetary benefit in the form of a cost savings increase from $4.6MM with 10% reduction to $11.1MM with a 25% reduction." (Fegan Decl. ¶ 34 (citing Pls.' Ex. 110).)

During this time, McCormick employees discussed the **[**15]** impact of a net weight reduction on "visual fill" levels, specifically the need to make sure that the reduced-weight products would meet McCormick's internal visual fill requirement of 75%, a level it believed complied with the federal regulation prohibiting nonfunctional slack-fill. (*See* Fegan Decl. ¶¶ 52, 70, 73, 74, 77, 79, 81, 82; Pls.' Exs. 100, 103, 109, 111, 119-121, 124, 125, 131, 133, 137-138, 142-143.) Several possibilities to avoid any "fill" problem were discussed, including using less dense (bulkier) pepper[33] or reducing McCormick's internal visual fill requirements. (*See* Fegan Decl. ¶¶ 76, 77; Pls.' Exs. 101, 109, 111, 119-120, 124, 137.)

McCormick employees also discussed what to do about the McCormick-produced private-label brands, which were in identically-sized containers. (*See* Fegan Decl. ¶¶ 24, 25, 35 59; Pls.' Ex. 116.) McCormick documents indicate that employees were concerned that if the private-label brands did not also reduce the weights in their comparable products, they might advertise the difference in quantity and price and that McCormick would appear to be "deceptive" for reducing weights while maintaining the same size containers. (*See* Fegan Decl. ¶ 37; **[**16]** Pls.' Ex. 113.) Ultimately, the majority (59%) of the private-label brands supplied by McCormick, including Wal-Mart, agreed to follow McCormick and reduce weights by the same amounts without changing container sizes. (*See*

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[31] Any citation to "Pls.' Ex." refers to the exhibits attached to the Declaration of Elizabeth Fegan, which was filed with plaintiffs' motion for class certification. (*See* ECF No. 158 (exhibits 1-34); ECF No. 157-5 to 157-48 (exhibits 100-144).) Exhibits 101-144 have been filed under seal, so the Court will cite where appropriate but will not disclose the substance of these documents unless revealed in an unsealed filing. "Pls.' Reply Ex." will be used to refer to exhibits attached to the Supplemental Declaration of Elizabeth Fegan. (*See* Supp. Fegan Decl., ECF No. 171.) "Pls.' Supp. Ex." will be used to refer to exhibits attached to plaintiffs' supplemental brief (*See* Pls.' Supp. Br., ECF No. 203-1 to 203-6.)

[32] McCormick's retail prices increased by [TEXT REDACTED BY THE COURT]% between 2010 and November 10, 2014. The price gap for a 4-ounce tin of black pepper grew from approximately [TEXT REDACTED BY THE COURT]% to [TEXT REDACTED BY THE COURT]% (McCormick's price increased from $[TEXT REDACTED BY THE COURT] to $[TEXT REDACTED BY THE COURT] while the private label price went from $[TEXT REDACTED BY THE COURT] to $[TEXT REDACTED BY THE COURT]). McCormick's share of the market of the 4-ounce tin declined by [TEXT REDACTED BY THE COURT] percentage points. *See* Pls.' Exs. 101, 102.)

[33] According to McCormick's Materials Manager, James Michael Hester, "[d]epending on the type of black pepper, the climate conditions, the age of the black pepper, the maturity of the plants and other factors, there can be wide variation in the density of the product, both before and after it is ground." (Hester Decl. ¶ 2, ECF No. 188-2.)

Fegan Decl. ¶¶ 58-59; Pls.' Exs. 132, 134.) But several private-label brands did not reduce weights, opting instead to take a wholesale price increase. (*See* Fegan Decl. ¶ 59.)

In its final executed form, the Net Weight Reduction Project resulted in the following changes: (1) for both McCormick and participating private-label brands, including Wal-Mart, the net weights of the 2-, 4-, and 8-ounce metal tins of ground black pepper were reduced by 25% to 1.5, 3, and 6 ounces, with no changes in container size or price; and (2) for McCormick, the net weights of the 1.24-ounce and 3.1-ounce black peppercorn grinders were reduced to 1.00 ounce and 2.5 ounces, again with no change in container size or price. (*See* Fegan Decl. ¶¶ 62 68; Pls.' Ex. 122; McCormick's Am. Answer If 34, 35, 40, 41; Wal-Mart's Am. Answer If 5; 2d Am. Compl. ¶¶ 5, 36-38, 42-45.) New Universal Product Codes ("UPC") were assigned to all new products. (*See* Fegan Decl. ¶ 71.) The "net weight decreases" **[**17]** were "effective with all shipments on February 23, 2015." (*See* Fegan Decl. ¶ 69; Pls.' Ex. 135.) As discussed in greater detail *infra*, McCormick claims that even though it reduced the label weights on these products, the fill levels did not decrease because it "overfill[ed]" when necessary to meet a new **[*213]** internal minimum fill level of 80%. (*See* Hester Decl. ¶¶ 11-12, ECF 188-2.)

The reduced-weight products began to reach store shelves in March 2015. Consumers looking at any of these products on store shelves saw the same containers they had always seen. The label on the container stated the new weight in the same size print and location as the prior weight had appeared. Consumers could not see the fill levels in any of the products; the metal tins were opaque and the fill level of the grinders was obscured by an opaque label. (*See* Fegan Decl. ¶¶ 62-68; 2d Am. Compl. ¶¶ 2, 33, 35-46.) Nor were fill levels necessarily observable even after the products were opened. (*See* Fegan Decl. ¶ 81 (internal McCormick email dated 8/7/2014 states "keep in mind consumers do not really know the fill level right now" (quoting Pls.' Ex. 110).) Below are pictures (copied from the Second Amended Complaint **[**18]** ¶¶ 36, 43, 44) showing (1) the reduced-weight 1.5-ounce tin and the original-weight 2-ounce tin; and (2) the reduced-weight 1-ounce grinder with the label on; and (3) the reduced-weight 1-ounce grinder with the label removed next to the original-weight 1.24-ounce grinder with the label removed.

Picture 1

Picture 2

[*214] **Picture 3**

Until retailers sold out of the original weight products, both the original and the reduced-weight product could have been on store shelves at the same time. In addition, in some locations there would also have been pepper products from other **[*215]** pepper producers and/or private-label brands produced by McCormick where the weights had not been reduced.

In May 2015, Wal-Mart told McCormick that it was concerned that the new tins had "too much air space." (*See* Fegan Decl. ¶ 77 n.2; Pls.' Exs. 139-40.) On June 9, 2015, Watkins Inc., another pepper producer and a McCormick competitor, filed a lawsuit in Minnesota complaining that the new McCormick products were deceiving consumers and causing Watkins to lose sales. *See Watkins Inc. v. McCormick & Co.*, No. 15-cv-02688 (D. Minn. filed June 9, 2015). That same day, the *Minneapolis Star Tribune* newspaper published a story about the **[**19]** *Watkins* lawsuit. *See* Mike Hughlett, *Watkins sues spice giant McCormick & Co. over pepper tins*, Minneapolis Star Tribune, June 9, 2015 ("Watkins Inc., a small player in the pepper business, filed a lawsuit Tuesday claiming that the nation's largest spice company has 'deceived' consumers by stealthily slashing the amount of black pepper in its tins, without shrinking the container or lowering the price."). Several other news articles followed, including one in the *Wall Street Journal. See* Paul Ziobro, *Same Package, Same Price, Less Product—It's Called a 'Weight-Our in the Business—a*

Less Direct Way to Raise Prices for Consumers, Wall Street Journal, June 12, 2015, at B 1; *see also* Mike Hughlett, *McCormick Says It Is Not Deceiving Customers with Product Labeling*, Minneapolis Star Tribune, June 10, 2015.

On June 15, 2015, a pepper consumer filed in federal court in New York the first putative class action against McCormick. *See Dupler v. McCormick & Co.*, No. 2:15-cv-6760 (S.D.N.Y.). Other consumer cases, filed in federal district courts throughout the country, followed.[34] Only one of the cases also named Wal-Mart as a defendant. *See Vladimirsky v. McCormick & Co.*, No. 1:15-cv-08102 (N.D. **[**20]** Ill. filed Sept. 15, 2015). These consumer cases alleged that, by reducing the weight of black pepper in a container without changing the container size or price, so that the products contained "nonfunctional slack-fill" that was not visible to consumers, McCormick had deceived consumers into believing that they were buying more pepper than they actually received.

In the spring of 2016, McCormick discontinued production of the reduced-weight, same container-sized products, replacing them with reduced-size containers. The reduced-weight products remained on store shelves until they were sold out, which was no later than June 2016. (*See* Hr'g Tr. at 81, July 10, 2018, ECF No. 196 ("7/10/18 Tr.").)

B. Procedural History of the Multi-District Litigation

In December 2015, the United States Judicial Panel **[**21]** on Multidistrict Litigation **[*216]** transferred all pending black pepper "slack-fill" cases against McCormick to this Court for coordinated or consolidated pretrial proceedings. *See In re McCormick & Co., Inc., Pepper Prods. Mktg. & Sales Practices Litig., 148 F. Supp. 3d 1364, 1365 (J.P.M.L. 2015)*. Ultimately, a total of 16 separate actions were transferred, 15 consumer cases (*see supra* note 34) and the *Watkins* competitor suit.[35]

After the cases were transferred, plaintiffs filed a consolidated and amended class action complaint against McCormick and Wal-Mart ("Amended Complaint").[36] (*See* Cons. Am. Class Action Compl., Mar. 2, 2016, ECF No. 34.) The Amended Complaint included fifteen named plaintiffs from eleven jurisdictions: California, Connecticut, the District of Columbia, Florida, Illinois, Iowa, Maryland, Missouri, New York, New Jersey, and Pennsylvania.[37] It alleged that each named plaintiff had purchased a black pepper product that was part of McCormick's reduced-weight program and that these products contained nonfunctional slack-fill in containers without a visible fill line. It further alleged that by selling these products defendants had violated federal ***antitrust law*** (Count I), the consumer protection statutes of 24 states and the District of Columbia (Count II), and the unjust enrichment **[**22]** law of all

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[34] *See Bunting v. McCormick & Co.*, No. 3:15-cv-01648 (S.D. Cal. filed July 23, 2015; *Esparza v. McCormick & Co.*, No. 2:15-cv-05823 (C.D. Cal. filed Aug. 1, 2015); *Ferreri v. McCormick & Co.*, No. 7:15-cv-06760 (S.D.N.Y. filed Aug. 26, 2015); *Linker v. McCormick & Co.*, No. 4:15-cv-01340 (E.D. Mo. filed Aug. 27, 2015); *Jung v. McCormick & Co.*, No. 15-cv-1448 (D.D.C. filed Sept. 4, 2015); *Bittle v. McCormick & Co*. No. 3:15-cv-00989 (S.D. Ill. filed Sept. 4, 2015); *Vladimirsky v. McCormick & Co.*, No. 1:15-cv-08102 (N.D. Ill. filed Sept. 15, 2015); *Marsh v. McCormick & Co.*, No. 2:15-cv-01625 (E.D. Cal. filed Sept. 29, 2015); *Pellitteri v. McCormick & Co.*, No. 9:15-cv-81521 (S.D. Fla. Nov. 3, 2015); *Barnes v. McCormick & Co.*, No. 3:15-cv-01224, (S.D. Ill. filed Nov. 4, 2015); *Theis v. McCormick & Co.*, No. 3:15-cv-01228 (S.D. Ill. filed Nov. 5, 2015); *Thornton v. McCormick & Co.*, No. 3:15-cv-00566 (D. Nev. filed Nov. 20, 2015); *Gerstnecker v. McCormick & Co.*, No. 2:15-cv-01671 (W.D. Pa. filed Dec. 17, 2015); *Marron v. McCormick & Co.*, No. 16-cv-0104 (D.D.C. filed Jan. 20, 2016); *Fernandez v. McCormick & Co.*, No. 16-cv-0117 (D.D.C. filed Jan. 22, 2016).

[35] One of the California cases, *Esparza*, had been consolidated into another California case, *Bunting*, before the transfers occurred.

[36] The *Watkins* case has proceeded independently of the consumer cases, and it is not part of the pending motion for class certification. *See In re McCormick, 215 F. Supp. 3d 51, 62 (D.D.C. 2016)* (granting in part and denying in part motion to dismiss in underlying case *Watkins, Inc. v. McCormick & Co.*, No. 15-cv-2188).

[37] The named plaintiffs in the amended complaint were Julia Vladimirskiy, Bernard Ortiz, Hubert L. Gerstnecker, Cynthia Fernandez, Anne Marron, Scott Allan Bittle, Debbie Esparza, Nicholas Hilla, Carmen Pellitteri, Brenda Theis, Holly Marsh, Lillian Ferreri, Catherine Grindel, Sandra Robinson, and Paula Cole Jones. Several of the named plaintiffs from the transferred cases were not included and several new plaintiffs were added.

50 states and the District of Columbia (Count III). Plaintiffs brought all three types of claims on their own behalf and on behalf of putative classes of consumers.

Defendants moved to dismiss the Amended Complaint. The Court granted the motions as to the federal antitrust claim but denied them as to the consumer protection and unjust enrichment claims. *See In re McCormick, 217 F. Supp. 3d 124, 129 (D.D.C. 2016)*.

Relevant to the pending motion for class certification, defendants argued in their motion to dismiss that legal variations among state laws and factual variations among individual purchasers precluded class treatment of the consumer protection and unjust enrichment claims. *See id. at 139*. The Court disagreed, concluding that dismissal on either ground would be premature given that plaintiffs had not yet moved for class certification. With respect to legal variations among state laws, the Court recognized that multi-state consumer protection and unjust enrichment classes were theoretically possible, so plaintiffs were entitled to try to demonstrate, through an extensive analysis of state laws, that there was a workable grouping. *Id. at 140-42*. As to defendant's argument that factual variations among **[**23]** individual purchasers would preclude a consumer protection class because "the alleged injury depends on individual consumers' state of mind at the time they purchased the pepper," the Court concluded that the argument was "not fairly presented" because defendants made the argument without "specify[ing] any particular state consumer protection statute." *Id. at 146*. The Court noted, however, **[*217]** that it "expect[ed] to confront this issue again at class certification." *Id.* As to defendants' argument that the factual variations among individual purchasers would preclude an unjust enrichment class because unjust enrichment requires evaluation of plaintiffs' individual circumstances, the Court declined to address that argument because the parties had "not yet provided analyses of all fifty states' unjust enrichment law," so it could not "be certain that every state requires an individualized showing of injustice." *Id. at 145-46*.[38] For those states that did, though, the Court noted that it was "likely that plaintiffs' unjust enrichment claims against McCormick and Wal-Mart will require individualized factual inquiries that bar class treatment" because

> [s]ome plaintiffs presumably bought McCormick pepper with full knowledge **[**24]** of the quantity of the pepper in the container, either because they understood that the listed weight had changed or because they had already purchased another container and seen the reduced quantity. Other plaintiffs might not have realized the quantity had been reduced but would have bought the pepper regardless. There would be no injustice in defendants' retaining what these plaintiffs paid for their pepper.

Id. at 145.

After the ruling on defendants' motion to dismiss, plaintiffs moved for leave to file a Second Amended Complaint in order to add new factual allegations aimed at addressing the deficiencies that had led to the dismissal of the antitrust claim. (*See* Pls.' Mot. for Recons., Dec. 9, 2016, ECF No. 105.) After the Court granted the motion, *see In re McCormick, 275 F. Supp. 3d 218. 219 (D.D.C. 2017)*, defendants moved to dismiss the Second Amended Complaint. Defendants' motions focused on the revived antitrust count but also "renew[ed] by reference the arguments set forth as to [the] state law claims in McCormick's initial Motion to Dismiss." (*See* McCormick's Mot. to Dismiss 2d Am. Compl. at 2, Apr. 7, 2017, ECF No. 132; *see also* Wal-Mart's Mot. to Dismiss 2d Am. Compl. at 1, Apr. 7. 2017, ECF No. 134.) The Court again granted the motion **[**25]** as to the antitrust claim and denied it as to the state law consumer protection and unjust enrichment claims. (*See* Order, June 13, 2017, ECF No. 146; Mem. Op. at 4, June 13, 2017, ECF No. 148.)

C. Current Plaintiffs and Remaining Claims

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[38] In the alternative, defendants argued that the Court should dismiss claims under the laws of states where no named plaintiffs resided because they had no standing to pursue those claims. *In re McCormick, 217 F. Supp. 3d at 142*. The Court rejected this argument, concluding that "Mt is more logical to consider named plaintiffs' ability to raise other state-law claims as a question of commonality, typicality, and adequacy under *Rule 23*, rather than a question of standing." *Id. at 144*.

The Second Amended Complaint is now the operative pleading. In addition to adding new factual allegations, it eliminated four named plaintiffs, who had voluntarily dismissed their claims since the filing of the Amended Complaint, and added one additional plaintiff. As a result, there are now twelve named plaintiffs (instead of fifteen) from eight jurisdictions (instead of eleven): Deborah Esparza and Holly Marsh (California), Cynthia Fernandez (Connecticut), Paula Cole Jones (District of Columbia), Carmen Pellitteri (Florida), Scott Allan Bittle, Alexander Liberov, Brenda Theis and Julia Vladimirskiy (Illinois), Sandra Robinson (Maryland), Catherine Grindel (Missouri), and Hubert Gerstnecker (Pennsylvania).[39] The Second **[*218]** Amended Complaint alleges that each named plaintiff purchased a reduced-weight pepper product for personal use, believing that it was "full" or "substantially filled to capacity," and "did not know that in fact the tin contained just 75% **[**26]** of the pepper that the tin was designed to hold[] and was actually deceived." (2d Am. Compl. ¶¶ 10-21.) The complaint further alleges, on behalf of the named plaintiffs and a putative class, that "[a]s a result of Defendants' actions, Plaintiffs and the Class were deceived when they paid for full tins of ground black pepper that in fact contained just 75% pepper and 25% air, or paid for full bottles of black peppercorns that in fact contained just 81% peppercorns and 19% air, and thus were overcharged, did not receive the benefit of the bargain and/or suffered out-of-pocket loss." (2d Am. Compl. ¶ 9; *see also id.* ¶ 52 ("[a]s a result of Defendants' blatantly misleading and deceptive use of traditional-sized, non-transparent metal tins and grinders with unlawful slack-fill, Plaintiffs and the Class have been deceived into believing that the containers contain the amount of ground black pepper that the containers are designed to hold").)

The counts that have survived allege that defendants' actions violated twenty-five state consumer protection statutes (Count II) and constituted unjust enrichment under the common law of all fifty states plus the District of Columbia (Count III). Specifically, **[**27]** Count II alleges that by "selling black pepper in non-transparent containers containing nonfunctional slack-fill," defendants committed unfair, deceptive or fraudulent acts prohibited by state consumer protection statutes. (2d Am. Compl. ¶ 116.) Count II further alleges that plaintiffs and the proposed class members were "directly and proximately injured by Defendants' conduct and would not have paid for Defendants' black pepper had they known that the containers were under-filled," that "as a proximate result of Defendants' misrepresentations and omissions, Plaintiffs and the proposed Class members have suffered an ascertainable loss and are entitled to relief, in an amount to be determined at trial," and that they "are entitled to damages, restitution, disgorgement, and/or such orders or judgments as may be necessary to restore to any person in interest, any money which may have been acquired by means of such unfair practices and to the relief set forth below." (2d Am. Compl. ¶¶ 115-22.) Count III alleges that by selling "black pepper to Plaintiffs and the Class, in containers that included nonfunctional slack-fill while maintaining price levels for full containers," defendants "have **[**28]** unjustly retained a benefit to the detriment of Plaintiffs and members of the Class," that "Defendants' retention of the benefit violates the fundamental principles of justice, equity and good conscience" because "Defendants did not disclose to Plaintiffs and the Class that the black pepper containers contained nonfunctional slack-fill," and that "[a]s a direct and proximate result of the Defendants' misrepresentations and/or omissions with respect to the nonfunctional slack-fill in the pepper tins and grinders, Plaintiffs and the Class have suffered damages in an amount to be proven at trial." (211 Am. Compl. ¶¶ 127-29.)

III. MOTION FOR CLASS CERTIFICATION

Pursuant to *Fed. R. Civ. P. 23(a)* and *(b)(3)*, plaintiffs now move for class certification of their consumer protection and unjust enrichment claims.

[*219] A. Proposed Classes

Each proposed class consists of individuals who purchased, for their personal or household use, a "Slack-Filled Pepper Product" - which plaintiffs have defined as the following 29 black pepper products:

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[39] The named plaintiffs who voluntarily dismissed their claims without prejudice were Anne Marron, Nicholas Hilla, Bernard Ortiz, and Lillian Ferreri. Without these plaintiffs, the named plaintiffs no longer include anyone from Iowa, New Jersey, or New York. In addition, the case in which Marron was the sole plaintiff, No. 16-cv-00104 (D.D.C.), has been dismissed.

Description	Size (oz)	UPC
MCCORMICK BLACK PEPPER GROUND	1.50	5210002992
MCCORMICK BLACK PEPPER GROUND	3.00	5210002996
MCCORMICK BLACK PEPPER GROUND	6.00	5210003010
MCCORMICK BLACK PEPPER GRINDER	1.00	5210003026 **[**29]**
MCCORMICK PEPPERCORN GRINDER MED	2.50	5210003065
WAL-MART GREAT VALUE PEPPER BLK GRD 3 OZ	3.00	7874206710
WAL-MART GREAT VAL PEPPER BLK GRD 6 OZ	6.00	7874206711
5TH SEAS PEPPER BLK GRD 1.5 OZ	1.50	5210003037
ESSN EVDAY PEPPER BLK GRD 1.5 OZ	1.50	4130305760
ESSN EVDAY PEPPER BLK GRD 3 OZ	3.00	4130305759
HANNAFORD BROS PEPPER BLK GRD 1.5 OZ	1.50	4126820212
HANNAFORD BROS PEPPER BLK GRD 3 OZ	3.00	4126820211
FOOD LION PEPPER BLK GRD 1.5 OZ	1.50	3582609860
FOOD LION PEPPER BLK GRD 3 OZ	3.00	3582609859
PUBLIX PEPPER BLK GRD 1.5 OZ	1.50	4141500731
PUBLIX PEPPER BLK GRD 3 OZ	3.00	4141500031
PUBLIX PEPPER BLK GRD 6 OZ	6.00	4141500631
PUBLIX PEPPER BLK WHL 3.5 OZ	3.50	4141505731
SOUTHERN HOME PEPPER BLK GRD 3 OZ	3.00	788003806
FAMILY GOUR PEPPER BLK GRD 1.5 OZ	1.50	3225115974
FAMILY GOUR PEPPER BLK GRD 3 OZ	3.00	3225115973
CVS GE PEPPER BLK GRD 1.5 OZ	1.50	5042852014
AHOLD WEDGE PEPPER BLK GRD 1.5 OZ	1.50	8826715510
AHOLD WEDGE PEPPER BLK GRD 3 OZ	3.00	8826715511
AHOLD WEDGE PEPPER BLK GRD 6 OZ	6.00	8826715512
WINN DIXIE PEPPER BLK GRD 3 OZ	3.00	2114002679
WINN DIXIE PEPPER BLK GRD 6 OZ	6.00	2114002680
SPRINGFIELD PEPPER BLK GRD 1.5 OZ	1.50	4138029502
SPRINGFIELD PEPPER BLK GRD 3 OZ	3.00	4138029503

(Pls.' Mem. at 4-5; Fegan Decl. ¶¶ 60-61.) The list includes five McCormick **[**30]** brand pepper products and twenty-four McCormick-supplied, private-label brand pepper products. Each product is identified by a unique UPC code. As previously noted, these products were on retail store shelves starting in March 2015 until June 2016, but the specific time periods that the products were on store shelves varied by retailer. (*See* 7/10/18 Tr. at 81-82.)

1. Consumer Protection Claims

For their consumer protection claims, plaintiffs seek to certify a multi-state class, covering twenty jurisdiction[40] or, in the alternative, four single-state classes.

a. Multi-State Consumer Protection Class

The proposed Consumer Protection Multi-State Class would consist of:

> **[*220]** All persons residing in Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Idaho, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey,

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[40] Plaintiffs' motion is narrower than the complaint, which alleges violations of the consumer protection statutes in 24 states and the District of Columbia.

> New Mexico, New York, North Dakota, or Washington who purchased Slack-Filled Black Pepper Products for their personal or household uses.

(Class Cert. Mot. at 1-2.) This class would bring claims against both McCormick and Wal-Mart under the consumer protection statutes of the 20 jurisdictions where class members reside. The proposed **[**31]** class representatives are the nine named plaintiffs who are from the states included in this grouping: Esparza and Marsh (California); Fernandez (Connecticut); Jones (District of Columbia); Pellitteri (Florida); Bittle, Liberov, Theis, and Vladimirskiy (Illinois); and Grindel (Missouri). Because Liberov is the only proposed class representative who purchased Wal-Mart's private label brand pepper, he is the proposed class representative for the claims against Wal-Mart.

b. Single-State Consumer Protection Classes

As an alternative to one multi-state class, plaintiffs initially sought certification of six single-state consumer protection classes — California, Connecticut, the District of Columbia, Florida, Illinois, and Missouri. The proposed class representatives were the named plaintiffs from each state. Because Liberov is from Illinois, only the Illinois consumer protection class includes claims against Wal-Mart. However, plaintiffs subsequently narrowed their request, withdrawing their request to certify single-state classes for Connecticut and the District of Columbia and no longer seeking to have two of the named plaintiffs from Illinois (Theis and Bittle) serve as class representatives. **[**32]** (*See* Pls.' Supp. Br. at 1, 10, Oct. 3, 2018, ECF No. 203.) Accordingly, plaintiffs' current request is to certify four single-state consumer protection classes with six proposed class representatives: Esparza and Marsh (California); Pellitteri (Florida); Liberov and Vladimirskiy (Illinois); and Grindel (Missouri).

2. Unjust Enrichment Claims

For their unjust enrichment claims, plaintiffs seek to certify two multi-state classes, covering 29 jurisdictions[41] or, in the alternative, seven single-state classes.

a. Multi-State Unjust Enrichment Classes

Plaintiffs' two proposed multi-state unjust enrichment classes are designed to account for two different definitions of unjust enrichment.

The Unjust Enrichment (Restatement) Multi-State Class ("Restatement Class") would include jurisdictions that follow the Restatement (First) of Restitution's definition of unjust enrichment. This class would consist of:

> All persons residing in Arkansas, Colorado, Connecticut, District of Columbia, Hawaii, Illinois, Iowa, [], New York, Oklahoma, or West Virginia who purchased Slack-Filled Black Pepper Products for their personal or household use.

(Class Cert. Mot. at 2.) It would bring claims against McCormick and **[**33]** Wal-Mart under the unjust enrichment laws of the 10 jurisdictions where class members reside, with the proposed class representatives being the named plaintiffs from those jurisdictions: Fernandez (Connecticut); Jones (District of Columbia); and Bittle, Liberov, Theis, and Vladimirskiy (Illinois).

[*221] The Unjust Enrichment (Appreciation) Multi-State Class ("Appreciation Class") would include jurisdictions that follow the Restatement but require proof of one additional element — "appreciation." This class would consist of:

> All persons residing in Alaska, California, Kansas, Kentucky, Maine, Maryland, Massachusetts, [Missouri, New Mexico], Nevada, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont,

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[41] Plaintiffs' motion is narrower than the Amended Complaint, which alleges that defendants violated the unjust enrichment laws in all 50 states and the District of Columbia.

> Washington, or Wisconsin who purchased Slack-Filled Black Pepper Products, for their personal or household use.

(Class Cert. Mot. at 2.)[42] This class would bring claims under the unjust enrichment laws of the 19 jurisdictions where class members reside with the proposed class representatives being the named plaintiffs from those jurisdictions: Esparza and Marsh (California); Robinson (Maryland); Grindel (Missouri); and Gerstnecker (Pennsylvania).

b. Single-State Unjust [34] Enrichment Classes**

As an alternative to two multi-state classes, plaintiffs seek certification of seven single-state unjust enrichment classes. The proposed class representatives for each class are the named plaintiffs from that jurisdiction: Esparza and Marsh (California); Fernandez (Connecticut); Jones (District of Columbia); Bittle, Liberov, Theis, and Vladimirskiy (Illinois); Robinson (Maryland), Grindel (Missouri); and Gerstnecker (Pennsylvania). Only the Illinois class has claims against Wal-Mart.

B. Class Certification Record

In support of their motion for class certification, plaintiffs submitted tables comparing consumer protection and unjust enrichment law from the relevant jurisdictions, proposed jury instructions for the proposed multi-state classes, excerpts from the depositions of the twelve proposed class representatives, corporate documents that had been produced by McCormick during discovery, the Expert Report of Dr. Armando Levy, and declarations from the custodians of records of various retailers who sold Slack-Filled Pepper Products. (*See* Pls.' Mem. in Support of Class Cert. Mot., ECF No. 157-2 ("Pls.' Mem."); Pls.' Exs. 1-32, 100-144; Pls.' Reply to McCormick's Opp., **[**35]** ECF No. 172-1 ("Pls.' McCormick Reply"); Pls.' McCormick Reply Exs. 1-2; Pls.' Supp. Exs. A-H.)

Defendants each filed an opposition. (*See* McCormick's Opp. to Class Cert. Mot., Aug. 28, 2017, ECF No. 160 ("McCormick's Opp."); Wal-Mart's Resp. to Class Cert. Mot., Aug. 28, 2017, ECF No. 165 ("Wal-Mart's Opp.").) McCormick's opposition, which Wal-Mart joined in, was supported by its own analysis of the relevant consumer protection and unjust enrichment laws, additional deposition excerpts from proposed class representatives and three former named plaintiffs, a declaration from James Hester, the Materials Manager for McCormick, the Expert Report of Dr. John H. Johnson, IV, as a rebuttal to Dr. Levy's Report, and excerpts from Dr. Levy's deposition. (*See* McCormick's Exs. 1-16, 19, 21-28.) Defendants also jointly moved to exclude the report and opinions of Dr. Levy.

At the Court's first hearing on plaintiffs' motion on July 10, 2018, plaintiffs informed the Court that all fact discovery had been completed and that all experts had been identified. (7/10/18 Tr. at 5.) Plaintiffs also presented the Court with additional materials **[*222]** in support of their request to certify multi-state classes — a **[**36]** PowerPoint presentation and a collection of examples of jury instructions — both of which were added to the record. (*See* Notice of Filing, Aug. 13, 2018, ECF No. 198.) Plaintiffs subsequently filed a statement on Maryland's law of unjust enrichment, and defendants filed a response to plaintiffs' PowerPoint. (*See* Pls.' Statement Concerning Md. Law, July 11, 2018, ECF No. 193; Defs.' Resp. to Certain Statements in Pls.' PowerPoint Presentation, July 17, 2018, ECF No. 195.)

On September 18, 2018, the Court held a telephone conference call with the parties to advise them that it intended to deny their motion to certify multi-state consumer protection and unjust enrichment classes, but that additional briefing would be necessary before any decision could be made on whether to certify any single-state classes, particularly the single-state consumer protection classes. The Court therefore asked the parties to address in their supplemental briefing: (1) whether there was "a typical/adequate plaintiff for each state?"; (2) whether "the requirements under each state's law regarding materiality/causation/injury (as distinct from deception)?"; and (3)

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[42] Plaintiffs initially included Missouri and New Mexico in the Restatement Class, but they subsequently agreed with defendants that they belonged in the Appreciation Class. (*See* McCormick's Opp. at 41; Pls.' McCormick Reply at 22.)

whether "evidentiary proof [was] necessary **[**37]** for plaintiffs to sustain their burden under *Rule 23(b)(3)*?" and, if so, whether plaintiffs had "met their burden to show factual predominance based on the 'common proof' cited on page 23 of their PowerPoint presentation?" (*See* Order at 1, Sept. 18, 2018, ECF No. 200.) The parties filed supplemental memoranda on October 3, 2018, and responses on October 16, 2018. (*See* Defs.' Joint Supp. Br., Oct 3, 2018, ECF No. 202 ("Defs.' Supp. Br."); Pls.' Supp. Br., Oct. 3, 2018, ECF No. 203; Defs.' Joint Resp. to Pls.' Supp. Br., Oct. 3, 2018, ECF No. 204 ("Defs.' Supp. Resp."); Pls.' Resp. to Defs.' Supp. Br., Oct. 3, 2018, ECF No. 205 ("Pls.' Supp. Resp.").) In their first filing, plaintiffs withdrew their request to certify single-state consumer protection classes in Connecticut and the District of Columbia, withdrew their request to have Bittle and Theis appointed as class representatives for Illinois, and submitted additional deposition testimony from the remaining proposed class representatives: Esparza and Marsh (California), Pellitteri (Florida), Liberov and Vladimirskiy (Illinois), and Grindel (Missouri). (*See* Pls.' Supp. Br. at 1, 12 & Exs. A-F.)

On October 24, 2018, the Court held a second hearing, **[**38]** focusing exclusively on the four-remaining single-state consumer protection classes. The parties agreed during the September 18, 2018 conference call that the decision whether to certify any single-state classes should be resolved by this Court.

ANALYSIS

Plaintiffs have asked the Court to certify either three multi-state classes or four single state classes to bring consumer protection claims and seven single-state classes to bring unjust enrichment claims against defendants McCormick and Wal-Mart. As explained herein, the Court will not certify any of the proposed multi-state classes. Nor will it certify the Illinois Consumer Protection Class or any of the single-state unjust enrichment classes. However, it will certify the California, Florida, and Missouri Consumer Protection Classes.

I. LEGAL STANDARD FOR CLASS CERTIFICATION

HN1[] *Federal Rule of Civil Procedure 23* governs the certification of class actions in federal court. *Rule 23(a)* sets out the four "prerequisites" for any class action:

(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;

[*223] (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

[39]** (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). These four "threshold requirements" are referred to as "numerosity," "commonality," "typicality," and "adequacy of representation." *In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 106, 351 U.S. App. D.C. 223 (D.C. Cir. 2002)*.

HN2[] *Rule 23(b)* provides that "[a] class action may be maintained if *Rule 23(a)* is satisfied," and the action meets the requirements of either Rule23(b)(1), (b)(2), or (b)(3). *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. Here, plaintiffs seek certification under *Rule 23(b)(3)*, which permits a class action "if . . . the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(2)*. The first part of this criterion is known as "predominance"; the second part as "superiority." *Amchem., 521 U.S. at 615*. *Rule 23(b)(3)* further provides that:

The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;
(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims **[**40]** in the particular forum; and
(D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

HN3[] "A party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with *Rule 23*." *Comcast Corp. v. Behrend, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)* (quoting *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011))*. *Rule 23* 'does not set forth a mere pleading standard.'" *Id.* (quoting *Wal-Mart, 564 U.S. at 350*). "Rather, a party must not only 'be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact,' typicality of claims or defenses, and adequacy of representation, as required by *Rule 23(a)*," but "must also satisfy through evidentiary proof at least one of the provisions of *Rule 23(b)*." *Id.* (quoting *Wal-Mart, 564 U.S. at 350*).

HN4[] A court presented with a motion for class certification must engage in a "rigorous analysis" to be certain that the requirements of *Rule 23(a)* and *(b)* are satisfied, which will frequently necessitate looking behind the pleadings and giving some consideration to the merits of plaintiffs' underlying claims. *Comcast, 569 U.S. at 33*. While a court's "class-certification analysis must be rigorous and may entail some overlap with the merits of the plaintiff's underlying claim, *Rule 23* grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455, 465-66, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013)*. "Merits questions may be considered to the extent—but only to the extent—that **[**41]** they are relevant to determining whether the *Rule 23* prerequisites for class certification are satisfied." *Id. at 466*. Ultimately, "[a] district court exercises **[*224]** broad discretion in deciding whether to permit a case to proceed as a class action." *Hartman v. Duffey, 19 F.3d 1459, 1471, 305 U.S. App. D.C. 256 (D.C. Cir. 1994)*.

HN5[] In a multidistrict litigation, the MDL transferee court must apply the law of its own circuit when analyzing questions of federal law. *See* *In re Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1174, 265 U.S. App. D.C. 39 (D.C. Cir. 1987)*, *aff'd sub nom.* *Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 109 S. Ct. 1676, 104 L. Ed. 2d 113 (1989)*; Multidistrict Litig. Man. § 9:18. This principle extends to interpretations of *Rule 23*. *See, e.g.,* *In re Yasmin & Yaz Mktg., No. 3:09-cv-20001, 2012 U.S. Dist. LEXIS 33183, 2012 WL 865041, at *9 (S.D. Ill. Mar. 13, 2012)* (applying Seventh Circuit precedent to class certification motion in MDL); *In re Toys "R" Us - Del., Inc. - Fair & Accurate Credit Transactions Act (FACTA) Litig., No. 06-cv-08163, 2010 U.S. Dist. LEXIS 133583, 2010 WL 5071073, at *2-4 (C.D. Cal. Aug. 17, 2010)* (applying Ninth Circuit precedent to class certification motion in MDL). Also, the parties here agree that the D.C. Circuit's *Rule 23* precedent applies to the class certification motion. (*See* Hr'g Tr. at 6, 43, Oct. 24, 2018, ECF No. 211 ("10/24/18 Tr.").).

However, in the absence of controlling precedent, "the law of a transferor forum on a federal question . . . merits close consideration, but [it] **[**42]** does not have stare decisis effect in a transferee forum situated in another circuit." *See* *In re Korean Air Lines Disaster, 829 F.2d at 1176*. For, as held by the D.C. Circuit:

> [I]n the context of *28 U.S.C. § 1407*, a statute authorizing transfers only for pretrial purposes, we are persuaded by thoughtful commentary that the transferee court [should] be free to decide a federal claim in the manner it views as correct without deferring to the interpretation of the transferor circuit.

Id. at 1174.[43]

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[43] Then-Circuit Judge Ruth Bader Ginsburg explained:

> Applying divergent interpretations of the governing federal law to plaintiffs, depending solely upon where they initially filed suit, would surely reduce the efficiencies achievable through consolidated preparatory proceedings. Indeed, because there is ultimately a single proper interpretation of federal law, the attempt to ascertain and apply diverse circuit interpretations simultaneously is inherently self-contradictory. Our system contemplates differences between different states' laws; thus a multidistrict judge asked to apply divergent state positions on a point of law would face a coherent, if sometimes difficult,

II. MULTI-STATE CLASSES

Plaintiffs seek certification of three multi-state classes. Defendants oppose certification on a number of grounds, but because the Court agrees that plaintiffs have not met their burden under *Rule 23(b)(3)* to show that common issues of law predominate, it will limit its discussion to that issue.

HN6[] The predominance prong of *Rule 23(b)(3)* permits a class action "if . . . the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." *Fed. R. Civ. P. 23(b)(3)*. To satisfy this requirement for a proposed multi-state class, movants must "creditably demonstrate, through an 'extensive analysis' of state law variances, 'that class certification does not present insuperable obstacles.'" *Walsh v. Ford Motor Co., 807 F.2d 1000, 1017, 257 U.S. App. D.C. 85 (D.C. Cir. 1986)* (quoting *In re School Asbestos Litig., 789 F.2d 996, 1010 (3d Cir. 1986))*. Or, in other words, **[*225]** claims arising under different states' laws can be "grouped" into a single class only if they contain "*materially* identical legal standards." *Klay v. Humana, Inc., 382 F.3d 1241, 1262 (11th Cir. 2004)*, *abrogated in part on other grounds by* *Bridge v. Phx. Bond & Indem. Co., 553 U.S. 639, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008)*; *see also* *Grandalski v. Quest Diagnostics Inc., 767 F.3d 175, 183 (3d Cir. 2014)* ("grouping, in general, may be a permissible approach to nationwide class action litigation," but "plaintiffs face a significant burden to demonstrate that grouping is a workable solution"); 1 McLaughlin on Class Actions **[**44]** § 5:46 (15th ed.) ("If there is no true conflict between or among the substantive laws of the relevant states, the need to apply multiple state laws will not defeat a predominance finding.")

The burden of showing "groupability" "rests squarely with the plaintiffs." *Klay, 382 F.3d at 1262* (citing *Walsh, 807 F.2d at 1017*); *see also* *Langan v. Johnson & Johnson Consumer Cos., 897 F.3d 88, 96-97 (2d Cir. 2018)* ("the party seeking certification has the ultimate burden to demonstrate that any variations in relevant state laws do not predominate over the similarities"). "[T]he crucial inquiry is not whether the laws of multiple jurisdictions are implicated, but whether those laws differ in a material manner that precludes the predominance of common issues." *In re U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 127 (2d Cir. 2013)*. Courts can allow subclassing on motion or *sua sponte*, but are under no obligation to do so, and the burden remains on the party seeking certification. 3 Newberg on Class Actions § 7:30 (5th ed.).

HN7[] In considering whether to certify a multi-state class, it is the trial court's job to critically consider variations in state law. *See, e.g.,* *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc., 601 F.3d 1159, 1180 (11th Cir. 2010))*. The inquiry "begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011)*. Any variations in state courts' interpretations of facially similar elements will also be relevant. *See, e.g.,* *Mazza v. Am. Honda Motor Co., 666 F.3d 581, 591 (9th Cir. 2012)* ("Consumer protection laws are a **[**45]** creature of the state in which they are fashioned. They may impose or not impose liability depending on policy choices made by state legislatures or, if legislators left a gap or ambiguity, by state supreme courts."). The absence of any clear interpretation of an element may also be material because "each state must decide for itself how to resolve [] unanswered questions about the scope and evidentiary requirements needed to establish [that element]." *Mullins v. Premier Nutrition Corp., No. 13-cv-01271, 2016 U.S. Dist. LEXIS 79983, 2016 WL 3440600, at *5 (N.D. Cal. June 20, 2016)*; *see also* *In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig., 276 F.R.D. 336, 342 (W.D. Mo. 2011)* (providing a "sampling of the legal disputes that the Court is unable to resolve without delving into a legal inquiry more extensive than has been provided by the parties in order to ascertain (or predict) the holdings of the highest courts in these jurisdictions").

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task. But it is logically inconsistent to require one judge to apply simultaneously different and conflicting interpretations of what is supposed to be **[**43]** a unitary federal law.

In re Korean Air Lines Disaster, 829 F.2d at 1175-76.

Whether variations in elements or interpretations are material will depend on the extent and nature of any variations, plaintiffs' theory of liability, and the factual record.[44] *See, e.g.,* *Grandalski, 767 F.3d at 184* **[*226]** (plaintiffs failed to provide "analysis describing how the grouped state laws might apply to the facts of this case"); *In re Pharm. Indus. Average Wholesale Price Litig., 252 F.R.D. 83, 99-100 (D. Mass. 2008)* (considering whether variations in scienter requirements among states' unfair trade practice statutes were **[**46]** material "[i]n the context of plaintiffs' theory in this case"); *In re Telectronics Pacing Sys., Inc., 172 F.R.D. 271, 292 (S.D. Ohio 1997)* (court should "determine whether the variations are significant and whether they are material to the issues contested in the case").

HN8[] A 'single difference' [among] the [s]tate laws governing plaintiffs' claims is not necessarily a substantial difference," but "[c]ourts must exercise care . . . in order to determine whether any conflicts in governing law will overwhelm the ability of the trier of fact meaningfully to advance the litigation through class[-]wide proof" *Hughes v. Ester C Co., 317 F.R.D. 333, 352 (E.D.N.Y. 2016)* (quoting *Rodriguez v. It's Just Lunch, Intern., 300 F.R.D. 125, 140 (S.D.N.Y. 2014)* and then quoting *Johnson v. Nextel Commc'ns Inc., 780 F.3d 128, 141 (2d Cir. 2015)*. "Even differences in state laws that amount to 'nuances' [may] suffice to make multistate classes inappropriate." *Marshall v. H & R Block Tax Servs., Inc., 270 F.R.D. 400, 407 (S.D. Ill. 2010)* (quoting *In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1300 (7th Cir.1995))*.

Finally, ***HN9***[] plaintiffs seeking certification of a multi-state class "bear[] the burden of demonstrating 'a suitable and realistic plan for trial of the class claims.'" *Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1189 (9th Cir.)*, *opinion amended on denial of reh'g*, *273 F.3d 1266 (9th Cir. 2001)*. "If more than a few of the [state] laws . . . differ, [a court] would face an impossible task of instructing jury on relevant law." *In re Am. Med. Sys., Inc., 75 F.3d 1069, 1085 (6th Cir. 1996)*. In the end, ***HN10***[] "certifying multistate or nationwide classes is not categorically prohibited," but "class certification analysis is necessarily contextual." ***[**47]*** *In re 100% Grated Parmesan Cheese Mktg. & Sales Practices Litig., 348 F. Supp. 3d 797, 812 (N.D. Ill. 2018)*. The ultimate test for multi-state class certification is whether the relevant states "establish a large number of different legal standards governing a particular claim." 1 McLaughlin on Class Actions § 5:46.[45]

A. Multi-State Consumer Protection Class of Twenty Jurisdictions

Plaintiffs seek certification of a single multi-state consumer protection class covering 20 jurisdictions: the Consumer Protection Multi-State Class. They argue that the consumer protection statutes in these 20 jurisdictions (Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Idaho, **[*227]** Illinois, Iowa, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Dakota, and Washington) can be grouped into one class because they contain the following "common elements of proof': (1) "[d]efendant(s) engaged in an act or practice prohibited by state statute"; (2) "[p]laintiffs suffered damage"; and (3) "the challenged act or practice caused that damage." (Pls.' Mem. at 28.) In addition, they contend

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[44] The Court does not agree, as defendants appear to suggest, that because so many courts have denied certification of multi-state consumer protection and unjust enrichment classes, the burden is essentially insurmountable. (*See* McCormick's Opp. at 26-27, 38-39 & Exs. 29-30 (Tables of Cases).)

[45] ***HN11***[] An important caveat to this general principle is that courts tend to be "more receptive to certification of multistate settlement classes." 7AA Fed. Prac. & Proc. Civ. § 1780.1 (3d ed.); *see* *Amchem, 521 U.S. at 620* ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial. But other specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context"); *In re Hyundai & Kia Fuel Econ. Litig., 926 F.3d 539, 556-57 (9th Cir. 2019)* (en banc) ("The criteria for class certification are applied differently in litigation classes and settlement classes. In deciding whether to certify a litigation class, a district court must be concerned with manageability at trial. However, such manageability is not a concern in certifying a settlement class where, by definition, there will be no trial"); *In re Mexico Money Transfer Litig., 267 F.3d 743, 747 (7th Cir. 2001)* ("Given the settlement, no one need draw fine lines among state-law theories of relief.").

that each law "provides a private right of action to consumers," "utilizes objective (rather than subjective) standards for deception," "implements **[**48]** the general legal requirement that the damage was proximately caused by the challenged conduct," and "does not require individual reliance." (*Id.* at 30; *see also* Pls.' Exs. 13, 15-17.) Thus, plaintiffs propose that classwide liability could be determined by asking a jury these four questions:

Do you find by a preponderance of the evidence the following:

(1) Did Defendant engage in a deceptive business act or practice?

(2) Did Defendant engage in an unfair business act or practice?

(3) Did Defendant make representations that a good has quantities that it does not have?

(4) Did Defendant's conduct cause Plaintiffs and the Class to lose money?

(Pls.' Ex. 21.)

Defendants counter that plaintiffs have grossly oversimplified matters by "ignoring numerous material state-by-state variations," including "varying descriptions of 'deceptive' or 'unfair' conduct," the differing requirements as to scienter, materiality, causation, injury, and reliance, the need in some states for showing a public impact or interest and for providing notice, and the differences among states in available remedies. (*See* McCormick's Opp. at 26-34.)

Although the Court does not adopt all of defendants' criticisms, it does agree that there are material variations **[**49]** among the 20 consumer protection statutes that preclude certification of the proposed multi-state class. The most significant of these variations involve differences in the burden of proof; scienter requirements; definitions of deception, in particular whether there is a materiality component and, if so, how it is defined; and the requirements for proving causation and injury.

Burden of proof: Plaintiffs' proposed jury instructions use a "preponderance of the evidence" standard, but at least the District of Columbia requires a higher burden of proof (clear and convincing evidence) to prove a consumer protection violation. *See* D.C. Std. Civ. Jury Instr. No. 20-11 (2007 ed. rev.). Accordingly, a single jury instruction on burden of proof could not be used for the proposed multi-state class.

Scienter: Plaintiffs' proposed jury instructions do not include a scienter requirement, although scienter requirements vary among the 20 jurisdictions. While there are states in the proposed class that have no scienter requirement, e.g., California, Connecticut, the District of Columbia, Florida, Massachusetts, New York, and Washington (*see* McCormick's Opp. at 31), there are also states, including Illinois, Iowa, Minnesota, **[**50]** and North Dakota, which require proof that a defendant intended consumers to rely on the allegedly deceptive conduct. *See De Bouse v. Bayer AG, 235 Ill. 2d 544, 922 N.E.2d 309, 313, 337 Ill. Dec. 186 (Ill. 2009)*; *McKee v. Isle of Capri Casinos, Inc., 864 N.W.2d 518, 532 (Iowa 2015)* (citing *Iowa Code Ann. § 714H.3*); *Graphic Commc'ns Local 1B Health & Welfare Fund "A" v. CVS Caremark Corp., 850 N.W.2d 682, 694 (Minn. 2014)* (citing *Minn. Stat. Ann. § 325F.69*); *N.D. Cent. Code Ann. § 51-15-02*.

[*228] ***HN12***[] Differences in scienter are generally material because "[i]n cases where a defendant acted without scienter, a scienter requirement will spell the difference between the success and failure of a claim." *See, e.g., Mazza, 666 F.3d at 591*. Here, plaintiffs do not dispute that there are variations in scienter requirements, but they assert that the variations are "immaterial" because they plan to "use common evidence to prove that Defendants acted with complete knowledge." (Pls.' McCormick Reply at 17.) Plaintiffs' response, though, does not fully address the problem posed by variations in scienter requirements. First, they do not explain why proving that defendants acted "with complete knowledge" is the same as proving they acted with the intent that others would rely on the deception. Second, if liability is premised on a jury finding that defendants acted with a certain level of intent, but the jury fails to find that intent, recovery would be precluded for all class members, even those in the states that **[**51]** do not require any showing of scienter. Accordingly, a single jury instruction on scienter could not be used for the proposed multi-state class.

Definition of Deception: ***HN13***[] Although every state's consumer protection statute prohibits deceptive acts, they do not utilize a uniform definition of deception. The most obvious difference is that some states require that the deceptive act be "material," while others only require that the deceptive act have the capacity or tendency to deceive. For example, in Connecticut, "the misleading representation . . . or practice must be material — that is, likely to affect consumer decisions or conduct." Conn. Judicial Branch Civil Jury Instr. 5.2-7. But in New Hampshire, a "'deceptive' act or practice is simply one that has the capacity to deceive." *Fowler v. O'Hara*, No. 2182015-cv-01109, 2016 WL 9137116 (N.H. Super.) (jury instructions) (Dec. 22, 2016).

Plaintiffs did not initially acknowledge this difference, but they now suggest that this variation can be accommodated within a single multi-state class by asking the jury two questions: (1) "Was the size of the black pepper tin *material to a reasonable consumer's decision to purchase* the pepper product?" and (2) "Did the size of the **[**52]** black pepper tin have the *capacity or tendency to deceive consumers*?" (Pls.' Powerpoint Presentation at 20, ECF No. 198-1 ("Powerpoint") (emphasis added).) According to plaintiffs, eight states would be covered by the first question and twelve states would be covered by the second. (*See id.*) But plaintiffs have failed to establish that these two questions fully account for the all the potential differences in the states' definitions of deception. For example, among the "materiality" states: Connecticut law defines "materiality" as "likely to affect consumer decisions or conduct," Conn. Judicial Branch Civil Jury Instr. 5.2-7; in the District of Columbia a fact is considered to be material if "a reasonable man or woman would attach importance to its existence or nonexistence in determining his or her choice of action in the transaction in question, *Saucier v. Countrywide Home Loans, 64 A.3d 428, 442 (D.C. 2013)*; and in Michigan "a material fact . . . [is] one that is important to the transaction or affects a consumer's decision to enter into a transaction," *Laura v. DaimlerChrysler Corp., 269 Mich. App. 446, 711 N.W.2d 792, 794 (Mich. Ct. App. 2006)* (quoting *Zine v. Chrysler Corp., 236 Mich. App. 261, 600 N.W.2d 384, 398 (Mich. Ct. App. 1999))*. As for the "capacity or tendency to deceive" states: in Arkansas, a plaintiff "need only prove that the defendant engaged in a practice that has the capacity to deceive a reasonable **[**53]** consumer," *City of Clinton v. Pilgrim's Pride Corp., 632 F.3d 148, 156 (5th Cir. 2010)*; in Massachusetts, an act is deceptive "if it could reasonably be found to have caused a person to act differently from the way he otherwise **[*229]** would have acted." *Lowell Gas Co. v. Attorney Gen., 377 Mass. 37, 385 N.E.2d 240, 249 (Mass. 1979)*; in New Mexico, an act is deceptive if it "would have induced a reasonable consumer in [p]laintiffs' shoes to enter into [the transaction in question]," *Azar v. Prudential Ins. Co., 2003- NMCA 062, 133 N.M. 669, 68 P.3d 909, 930 (N.M. Ct. App. 2003)*; and in Washington, a plaintiff must prove "that the act or practice 'had the *capacity* to deceive a substantial portion of the public.'" *Thornell v. Seattle Serv. Bureau, Inc., 184 Wn.2d 793, 363 P.3d 587, 591 (Wash. 2015)* (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 719 P.2d 531, 535 (Wash. 1986)* (en banc)).

Since plaintiffs have made no attempt to explain how the two questions they propose asking a jury would account for all of the above-described variations in the states' definitions of deception, they have failed to establish materially identical legal standards for deception.

Causation/Injury/Loss: Plaintiffs propose that proving causation and injury for each of the 20 jurisdictions can be handled by asking one question: "Did Defendant's conduct cause Plaintiffs and the Class to lose money?" But causation, injury and loss must themselves be defined. And, it is the variations in those elements that plaintiffs' proposed instruction fails to address.

First, the ***HN14***[] consumer protection statutes do not use identical **[**54]** language when describing what is required in terms of causation and injury to recover damages in a private suit. For example, in Arkansas, a plaintiff must prove "actual damage or injury as a result of an offense or violation." *Ark. Code Ann. § 4-88-113(f)* (repealed Aug. 1, 2017). In California, a plaintiff can recover for "any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful." *Cal. Civ. Code. § 1780(a)*. In Colorado, a plaintiff must have been "injured as a result of [a] deceptive trade practice." *Colo. Rev. Stat. § 6-1-113(1)(a)*. In Connecticut, Idaho, Iowa, Missouri, and New Jersey, the plaintiff must have "suffer[ed] an ascertainable loss of money or property, real or personal, as a result of the [deceptive act]." *Conn. Gen. Stat. § 42-110g(a)*; *Idaho Code § 48-608(1)*; *Iowa Code § 714.15*; *Mo. Ann. Stat. § 407.025*; *N.J. Stat. § 56:8-19*. In Florida, the plaintiff must have "suffered a loss as a result of a violation of this part." *Fla. Stat. Ann. § 501.211*. In Illinois, the plaintiff must have "suffer[ed] actual damage as a result of a violation." *815 ILCS 505/10a(a)*.

The variations in statutory language would not matter if they had been interpreted to have the same meaning, but they have not. Rather, judicial interpretations of these statutes have confirmed that there are clear differences in what a plaintiff must show to prove causation and injury. Plaintiffs **[**55]** suggest that "proximate cause" is required in all jurisdictions, but that is not the case. Washington, for example, requires "but for" causation. *See* Patrick v. Wells Fargo Bank, 196 Wn. App. 398, 385 P.3d 165, 171 (Wash. 2016) ("A claimant must show a causal link 'between the unfair or deceptive acts and the injury suffered.' That link must establish that the alleged injury would not have occurred 'but for' the defendant's unlawful acts." (quoting Hangman Ridge, 719 P.2d at 539)). In Illinois, a plaintiff can prove causation by showing actual deception. Avery v. State Farm Mut. Auto. Ins. Co., 216 Ill. 2d 100, 835 N.E.2d 801, 861, 296 Ill. Dec. 448 (Ill. 2005). In Florida, a plaintiff can prove causation by showing that "an objectively reasonable person would have been deceived." Fitzpatrick v. Gen. Mills, Inc., 635 F.3d 1279, 1283 (11th Cir. 2011). By contrast, in New Mexico, no direct causation is needed, at least to obtain the minimum damages set forth by statute. *See* Jones v. GMC, 1998- NMCA 020, 124 N.M. 606, 953 P.2d 1104, 1109 **[*230]** (N.M. Ct. App. 1998) ("In the absence of actual losses, [a] [p]laintiff is still entitled under [the New Mexico consumer protection statute] to recover the statutory damages of one hundred dollars").

As for injury, several states have concluded that a legally cognizable "injury" must be distinct from the deception itself. In New York, for example, the applicable statute has been interpreted as having a "direct injury requirement," meaning that a plaintiff "cannot rely on the deceptive act itself as the alleged injury" **[**56]** but "must prove actual injury, although not necessarily pecuniary harm." Comm. on Pattern Jury Instr. Assoc. of Sup. Ct. Justices, N.Y. PJI-Civ. 3:20.4 (2017). Massachusetts also has held that "legally cognizable injuries . . . must involve objective, 'identifiable' harm that goes beyond the deception itself." Shaulis v. Nordstrom, Inc., 865 F.3d 1, 10 (1st Cir. 2017) (quoting Tyler v. Michaels Stores, Inc., 464 Mass. 492, 984 N.E.2d 737, 745 (Mass. 2013)). In other words, plaintiffs must suffer a "'separate, identifiable harm arising from the [regulatory] violation' that is distinct 'from the claimed unfair or deceptive conduct itself.'" *Id.* (quoting Bellermann v. Fitchburg Gas and Electric Light Company, 475 Mass. 67, 54 N.E.3d 1106, 1111 (Mass. 2016)).

Plaintiffs do not dispute that there are variations among state causation standards, but they argue that "any variations in state causation standards are not material" because they "can satisfy the strictest causation standard of any of the state laws at issue (i.e., states requiring direct, 'but for' causation)." (Pls.' McCormick Reply at 15.) But, as noted above, applying a stricter standard than is legally required in some jurisdictions creates a risk that some plaintiffs will be wrongly denied a recovery.

In light of the many material variations among the state consumer protection statutes, and plaintiffs' failure to show how these variations could be accounted for **[**57]** in a manageable way at a trial, the Court concludes that common issues of law do not predominate for the proposed multi-state consumer protection class.

B. Multi-State Unjust Enrichment Classes

Plaintiffs seek certification of two multi-state unjust enrichment classes, covering a total of 29 jurisdictions: the Unjust Enrichment (Restatement) Multi-State Class ("Restatement Class") and the Unjust Enrichment (Appreciation) Multi-State Class ("Appreciation Class"). The Restatement Class would include Arkansas, Colorado, Connecticut, District of Columbia, Hawaii, Illinois, Iowa, New York, Oklahoma, and West Virginia; the Appreciation Class would include Alaska, California, Kansas, Kentucky, Maine, Maryland, Massachusetts, [Missouri, New Mexico], Nevada, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, and Wisconsin.

According to plaintiffs, two classes are appropriate because all 29 jurisdictions follow the Restatement (First) of Restitution's definition of unjust enrichment, which requires proof that "(1) the plaintiff conferred a benefit on the defendant, (2) the defendant retained the benefit, and (3) the defendant's retention of the benefit **[**58]** would be unjust," but the jurisdictions in the Appreciation Class also require proof of one additional element — "the defendant's appreciation or knowledge of the benefit." Thus, plaintiffs propose that a jury could be asked the following common questions to determine liability for both the Restatement and Appreciations Classes:

Do you find by a preponderance of the evidence the following:

[*231] (1) Did Plaintiffs and the Class confer a benefit on Defendant?
(2) Did Defendant accept a benefit from Plaintiffs and the Class?
(3) Under the circumstances, would it be unfair for Defendant to retain the benefit?
Then, for the Appreciation Class, there would be one additional question:
(4) Did Defendant appreciate the benefit it was receiving from Plaintiffs and the Class?

(Pls.' Ex. 21; *see also* Powerpoint at 32-33.)

HN15[] As to each proposed unjust enrichment class, the Court must decide whether the covered jurisdictions have "materially identical" legal standards. Courts frequently refuse to certify multi-state unjust enrichment classes. (*See* McCormick's Opp. at 38-39 (citing cases).) However, plaintiffs have addressed a number of potential problems by not seeking a nationwide class,[46] by excluding certain clearly problematic states,[47] and by dividing **[**59]** the remaining states into two groups.[48] Nonetheless, plaintiffs have failed to show that the unjust enrichment law for all the jurisdictions in each of the two proposed classes is materially identical. Nor are the cases they cite particularly helpful as they either do not involve the same proposed groupings,[49] had very different underlying facts,[50] or lack any analysis explaining their decision to certify.[51] In addition, although plaintiffs submitted tables purporting to establish that the unjust enrichment law for the jurisdictions within each proposed class is materially identical, those tables alone do not account for the material differences in how the element of unjustness is defined and whether there is a "no adequate remedy at law" requirement and, if so, how that requirement might apply to the current case.

1. Element of Unjustness

It is undisputed that ***HN16***[] to prevail on a claim for unjust enrichment in any of the jurisdictions at issue, plaintiffs must prove that defendants' retention of the benefit **[**60]** is "unjust." Plaintiffs do not dispute that the specific language used to define unjustness varies by jurisdiction, but they assert, **[*232]** without any further analysis, that "these differences are not material." (Pls.' McCormick Reply at 24.) Thus, they suggest that a jury could simply be asked, "Under the circumstances, would it be unfair for Defendant to retain the benefit?"

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[46] *See, e.g.,* *Mazza, 666 F.3d at 591* (affirming denial of certification to nationwide unjust enrichment class).

[47] For example, plaintiffs have excluded Florida, Idaho, and Ohio, which "preclude indirect purchasers from asserting claims for unjust enrichment unless they have conferred a benefit directly on the defendant," *In re ConAgra Peanut Butter Prods. Liab. Litig., 251 F.R.D. 689, 697 (N.D. Ga. 2008)*; Alabama, which requires a showing that "'the recipient of the benefit . . . engaged in some unconscionable conduct, such as fraud, coercion, or abuse of a confidential relationship,'" *Thompson v. Bayer Corp., No. 4:07-cv-00017, 2009 U.S. Dist. LEXIS 15190, 2009 WL 362982, at *5 (E.D. Ark. Feb. 12, 2009)* (quoting ***Mantiply v. Mantiply, 951 So. 2d 638, 654-55 (Ala. 2006))***; and Arizona, which includes "impoverishment" as an element of unjust enrichment, *see In re Grand Theft Auto Video Game Consumer Litig., 251 F.R.D. 139, 148 (S.D.N.Y. 2008)*.

[48] *See, e.g.,* *Vista Healthplan, Inc. v. Cephalon, Inc., No. 2:06-cv-1833, 2015 U.S. Dist. LEXIS 74846, 2015 WL 3623005, at *29 (E.D. Pa. June 10, 2015)* (denying certification to proposed class that grouped states with an "appreciation" requirement with states lacking such a requirement).

[49] See, e.g., *In re TD Bank, N.A. Debit Card Overdraft Fee Litig., 325 F.R.D. 136, 174 (D.S.C. 2018)*.

[50] *See, e.g.,* *In re Abbott Labs. Norvir Anti-Trust Litig., No. 04-cv-1511, 2007 U.S. Dist. LEXIS 44459, 2007 WL 1689899, at *8-10 (N.D. Cal. June 11, 2007)* (antitrust case); *In re Terazosin Hydrochloride Antitrust Litig., 220 F.R.D. 672, 697-98 (S.D. Fla. 2004)* (same); *In re Thalomid & Revlimid Antitrust Litig., No. 14-cv-6997, 2018 U.S. Dist. LEXIS 186457, 2018 WL 6573118, at *16-17 (D.N.J. Oct. 30, 2018)* (same).

[51] *See, e.g.,* *Keilholtz v. Lennox Hearth Prods. Inc., 268 F.R.D. 330, 343 (N.D. Cal. 2010)*; *Overka v. Am. Airlines, Inc., 265 F.R.D. 14, 19-21 (D. Mass. 2010)*.

Plaintiffs appear to ignore the fact that the question they pose is a fact-intensive inquiry that focuses on the totality of the circumstances, not just defendant's conduct. Plaintiffs also fail to provide an in-depth analysis of the critical question — whether the definition of unjustness is identical for every state within each proposed class. To that question, the Court will now turn.

Among the states in the Restatement Class, for example, unjustness is defined in a variety of ways: Arkansas defines unjustness to mean that "a person has received money or its equivalent under such circumstances that, in equity and good conscience, he or she ought not to retain," *El Paso Prod. Co. v. Blanchard, 371 Ark. 634, 269 S.W.3d 362, 372 (Ark. 2007)*; in Colorado, "[w]hether retention of the benefit is unjust is a fact-intensive inquiry in which courts look to, among other things, the intentions, expectations, **[**61]** and behavior of the parties," *Melat, Pressman & Higbie, LLP v. Hannon Law Firm, LLC, 287 P.3d 842, 847, 2012 CO 61 (Colo. 2012)*; in Connecticut, unjust enrichment is defined as "a very broad and flexible equitable doctrine that has as its basis the principle that it is contrary to equity and good conscience for a defendant to retain a benefit that has come to him at the expense of the plaintiff," *Gagne v. Vaccaro, 255 Conn. 390, 766 A.2d 416, 427 (Conn. 2001)*, and plaintiffs must prove that "the failure of payment was to the plaintiffs' detriment," *Town of New Hartford v. Connecticut Res. Recovery Auth., 291 Conn. 433, 970 A.2d 592, 609 (Conn. 2009)*; in Illinois, plaintiffs must prove that "defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience," *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc., 131 Ill. 2d 145, 545 N.E.2d 672, 679, 137 Ill. Dec. 19 (Ill. 1989)*; New York requires that it be "against equity and good conscience to permit the defendant to retain what is sought to be recovered," *Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 944 N.E.2d 1104, 1110, 919 N.Y.S.2d 465 (N.Y. 2011)* (quoting *Paramount Film Distrib. Corp. v. New York, 30 N.Y.2d 415, 285 N.E.2d 695, 698, 334 N.Y.S.2d 388 (N.Y. 1972))*; Oklahoma courts hold that "[u]njust enrichment arises from the failure of a party to make restitution in circumstances where it is inequitable, or one party holds property that, in equity and good conscience, it should not be allowed to retain," *Harvell v. Goodyear Tire & Rubber Co., 2006 OK 24, 164 P.3d 1028, 1035 (Okla. 2006)*; and in West Virginia, unjustness means that "if benefits have been received and retained under such circumstance that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the party receiving **[**62]** the benefits to pay their reasonable value," *Realmark Developments, Inc. v. Ranson, 208 W. Va. 717, 542 S.E.2d 880, 884-85 (W.Va. 2000)*; *see also* W. Va. Pattern Jury Instr. Civ. § 1124 ("Unjust enrichment means that one party has unfairly kept some benefit that actually belonged to another party, that this benefit was not freely given to the party keeping it, and that there was no legal justification for keeping it.").

Similarly, among the states in the Appreciation Class, unjustness is defined in a variety of ways: Alaska courts define unjustness to mean that "the defendant must receive a true windfall or something for nothing," *Alaska Sales & Serv., Inc. v. Millet, 735 P.2d 743, 746 (Alaska 1987)*; in California, "[t]here is no equitable reason for invoking restitution when the plaintiff gets the exchange which he expected," *Peterson **[*233]** v. Cellco P'ship, 164 Cal. App. 4th 1583, 80 Cal. Rptr. 3d 316, 323-24 (Cal. Ct. App. 2008)* (quoting *Comet Theatre Enters. v. Cartwright, 195 F.2d 80, 83 (9th Cir. 1952))*; in Maryland, "the right to restitution is . . . subject to any counter-equities that the recipient of benefits may assert," *Hill v. Cross Country Settlements, LLC, 402 Md. 281, 936 A.2d 343, 352 (Md. 2007)*; in Massachusetts, unjustness is "a quality that turns on the reasonable expectations of the parties," *Metro. Life Ins. Co. v. Cotter, 464 Mass. 623, 984 N.E.2d 835, 850 (Mass. 2013)* (quoting *Global Investors Agent Corp. v. National Fire Ins. Co., 76 Mass. App. Ct. 812, 927 N.E.2d 480, 494 (Mass. Ct. App. 2010)*; in Missouri, "[t]here can be no unjust enrichment if the parties receive what they intended to obtain," *Howard v. Turnbull, 316 S.W.3d 431, 436 (Mo. Ct. App. 2010)* (quoting *Am. Std. Ins. Co. v. Bracht, 103 S.W.3d 281, 293 (Mo. Ct. App. 2003))*; in Vermont, "[u]njust enrichment applies if 'in light of the totality of the circumstances, equity and good conscience demand' that the benefitted party return **[**63]** that which was given," *Kellogg v. Shushereba, 194 Vt. 446, 82 A.3d 1121, 1130 (Vt. 2013)* (quoting *Gallipo v. Rutland, 178 Vt. 244, 882 A.2d 1177, 1191 (Vt. 2005))*, and, in addition, "[w]hether there is unjust enrichment present 'may not be determined from a limited inquiry confined to an isolated transaction. It must be a realistic determination based on a broad view of the human setting involved,''" *Mueller v. Mueller, 192 Vt. 85, 54 A.3d 168, 176 (Vt. 2012)* (quoting *Legault v. Legault, 142 Vt. 525, 459 A.2d 980, 984 (Vt. 1983))*.

Given the varied definitions of unjustness within each proposed class, plaintiffs have failed to meet their burden to show that the element of unjustness has been given a materially identical definition by all of the jurisdictions within each proposed class.

2. No Adequate Remedy at Law Requirement

HN17[] The unjust enrichment laws of the jurisdictions at issue also vary in terms of whether they have a "no adequate remedy at law" requirement and, if so, how that requirement is defined. Plaintiffs have failed to establish that these variations are not material.

First, there are states within each proposed class that have a no adequate remedy at law requirement and states that do not. In the Restatement Class, for example, Connecticut, Hawaii, Illinois, Iowa, New York, and West Virginia have the requirement,[52] but Arkansas does not.[53] In the Appreciation Class, Kansas, Massachusetts, South Carolina, Utah, and Washington **[**64]** have the requirement,[54] but Rhode Island does not.[55]

Second, in those states with a "no adequate remedy at law" requirement, its meaning varies. For example, in New York **[*234]** (Restatement Class) and Massachusetts (Appreciation Class), the requirement would almost certainly bar plaintiffs' unjust enrichment claims. Courts applying the law of those states consistently dismiss unjust enrichment claims (including slack-fill cases),[56] since the same underlying conduct would constitute a claim under the state's consumer protection statute.[57] A court applying Washington (Appreciation Class) law would probably reach the same result.[58] In other states, such as Connecticut and Illinois (both in the Restatement Class), the requirement appears to have been interpreted as not barring an unjust enrichment claim for damages.[59] Finally, in

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[52] *See* *In re Gen. Motors LLC Ignition Switch Litig., 339 F. Supp. 3d 262, 333 (S.D.N.Y. 2018)* (Connecticut); *Porter v. Hu, 116 Haw. 42, 169 P.3d 994, 1008 (Haw. Ct. App. 2007)* (Hawaii); *Mosebach v. Blythe, 282 N.W.2d 755, 761 (Iowa Ct. App. 1979)* (Iowa); *Corsello v. Verizon New York, Inc., 18 N.Y.3d 777, 967 N.E.2d 1177, 1185, 944 N.Y.S.2d 732 (N.Y. 2012)* (New York); *Mountain State Coll. v. Holsinger, 230 W. Va. 678, 742 S.E.2d 94, 103 (W. Va. 2013)* (West Virginia).

[53] See *Thompson v. Bayer Corp., 2009 U.S. Dist. LEXIS 15190, 2009 WL 362982, at *6*.

[54] *See* *Batman v. Deutsch, 423 P.3d 1062 (Table), 2018 WL 4038983, at *8 (Kan. Ct. App. 2018)* (Kansas); *Reed v. Zipcar, Inc., 883 F. Supp. 2d 329, 334 (D. Mass. 2012)* (Massachusetts); *EllisDon Constr., Inc. v. Clemson Univ., 391 S.C. 552, 707 S.E.2d 399, 401 (S.C. 2011))* (South Carolina); *VCS, Inc. v. La Salle Dev., LLC, 2012 UT 89, 293 P.3d 290, 299-300 (Utah 2012)* (Utah); *Firey v. Orozco, No. 33232-2-III, 2015 Wash. App. LEXIS 2341, 2015 WL 5893664, at *8, 190 Wash. App. 1025 (Wash. Ct. App. 2015)* (Washington).

[55] See *S. Cty. Post & Beam, Inc. v. McMahon, 116 A.3d 204, 213 (R.I. 2015)*.

[56] *See* *Alce, 2018 U.S. Dist. LEXIS 54009, 2018 WL 1737750, at *11-12* (dismissing unjust enrichment claim based on alleged slack-fill even though consumer protection claim dismissed for failure to plausibly allege that packaging could be misleading); *Bautista, 223 F. Supp. 3d at 193-94*; *Izquierdo, 2016 U.S. Dist. LEXIS 149795, 2016 WL 6459832, at *9-10*.

[57] *See, e.g.,* *Samiento v. World Yacht Inc., 10 N.Y.3d 70, 883 N.E.2d 990, 996, 854 N.Y.S.2d 83 (N.Y. 2008)*; *O'Hara v. Diageo-Guinness, USA, Inc., 306 F. Supp. 3d 441, 466 (D. Mass. 2018)* ("claims for misrepresentation and violations of [the Massachusetts consumer protection statute] provide available remedies, even though some of them must be dismissed").

[58] *See* *In re Santa Fe Natural Tobacco Co. Mktg. & Sales Practices & Prods. Liab. Litig., 288 F. Supp. 3d 1087, 1264 (D.N.M. 2017)* ("The Court concludes that, if faced with this case, the Supreme Court of Washington would similarly decide that the [Washington Consumer Protection Act's] availability precludes unjust-enrichment relief . . . the Plaintiffs have a statutory remedy available that provides them identical legal and equitable relief."); *see also* *Firey, 2015 Wash. App. LEXIS 2341, 2015 WL 5893664, at *8* ("fact that [the plaintiff] cannot prove her breach of contract claim does not permit her to raise unjust enrichment").

Hawaii, Iowa, and West Virginia (Restatement Class), and in Kansas, South Carolina and Utah (Appreciation Class), it is difficult to predict if an unjust enrichment claim would be barred in a case similar to this one.[60]

Given the variations among states as to whether there is a "no adequate remedy at law" requirement, **[**65]** and if such a requirement exists, the variations as to its scope, the Court concludes that plaintiffs have not met their burden to show that the "no adequate remedy at law" requirement is not a material variation.

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For the above reasons, the Court concludes that plaintiffs have failed to establish **[*235]** that there are no material variations in unjust enrichment law in the jurisdictions within each proposed class and, accordingly, it will not certify the proposed multi-state unjust enrichment classes.[61]

III. SINGLE-STATE CLASSES

Having concluded that none of the proposed multi-state classes should be certified, the Court turns to plaintiffs' alternative request to certify single-state classes. Plaintiffs' motion, as modified, seeks certification of four single-state consumer protection classes and seven single-state unjust enrichment classes. Each class would consist of purchasers who resided in the state and would bring claims under the consumer protection statute and/or the common law of unjust enrichment in that state, with only the Illinois classes bringing claims against Wal-Mart.

As the Court did not need to analyze the *Rule 23(a)* requirements with respect to the multi-state classes, it will **[**66]** consider those requirements now, along with the implied requirement of ascertainability, and then turn to the *Rule 23(b)(3)* requirements of predominance and superiority. As noted, ***HN18***[] plaintiffs bear the burden of proving that the *Rule 23(a)* requirements are met and showing that *Rule 23(b)(3)* is "satisfjied] through evidentiary proof." *Comcast, 569 U.S. at 33*. And, because this is an MDL, the D.C. Circuit's interpretations of *Rule 23* provide the controlling law, but where the D.C. Circuit has not addressed an issue, and there is a divergence among the circuits, this Court must apply the interpretation of *Rule 23* it finds most persuasive. (*See* *supra pp. 31-32* & n.43.)

A. Numerosity (*Rule 23(a)(1)*)

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[59] *See* *In re Gen. Motors, 339 F. Supp. 3d at 335* ("an adequate legal remedy does not bar a damages claim for unjust enrichment under Connecticut law"); *In re Aqua Dots Prods. Liab. Litig., 270 F.R.D. 377, 386 (N.D. Ill. 2010)* (under Illinois law, "restitution, *i.e.*, money damages under an unjust enrichment theory, *is* a legal remedy").

[60] *See* *Porter, 169 P.3d at 1008* (requirement does not bar an unjust enrichment claim that is founded on the same wrongful conduct as a tort claim if "the remedies sought are sufficiently distinct . . . to exclude th[e] case from the realm of 'double recovery' situations"); *Mosebach v. Blythe, 282 N.W.2d 755, 761 (Iowa Ct. App. 1979)* ("[e]quity generally will not provide relief where an adequate remedy at law existed and defendant was denied that relief for appropriate legal reasons"); *Mountain State Coll., 742 S.E.2d 94 (W. Va. 2013)* ("[a] court of equity is without jurisdiction to entertain a suit" where there is a "plain, adequate and complete" remedy at law, whether the plaintiff is guaranteed success); *Batman, 423 P.3d 1062, 2018 WL 4038983, at *8* ("a claim must first be made against the one who violated a duty, and a remedy at law must be unavailable before equitable relief is allowed"); *EllisDon Constr, 707 S.E.2d at 401* ("A party failing to fulfill the requirements of its legal remedy cannot later come to the courts complaining of hardship, seeking an equitable remedy."); *VCS, Inc., 293 P.3d at 299-300* ("A party invoking equity is generally required to first exhaust any legal remedies available . . . because equitable remedies are secondary gap-fillers.").

[61] Wal-Mart has also argued that no multi-state classes should be certified to bring claims again Wal-Mart because the proposed class representative from Illinois (Liberov) lacks standing to bring claims on behalf of the residents of other states under those other states' laws, even if the states have materially identical legal standards. (*See* 7/10/18 Tr. at 44; Wal-Mart's Opp. at 2.) According to Wal-Mart, a class representative from one state cannot suffer the necessary injury to represent a plaintiff from another state because each state defines "what the injury is." (7/10/18 Tr. at 45.) Given the Court's conclusion that the multi-state classes founder on the requirement of predominance, this argument is moot.

HN19[] *Rule 23(a)(1)* requires that the proposed class be "so numerous that joinder of all members is impracticable." *Fed. R. Civ. P. 23(a)(1)*. Impracticable means "difficult or inconvenient" rather than impossible. *Coleman v. District of Columbia, 306 F.R.D. 68, 76 (D.D.C. 2015)*. "The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *Gen. Tel. Co. v. Equal Employment Opportunity Comm'n, 446 U.S. 318, 330, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980)*; *see also Council of & for the Blind v. Regan, 709 F.2d 1521, 1544, 1543 n.48, 228 U.S. App. D.C. 295 (D.C. Cir. 1983)* ("Although the absolute number of class members is not the sole determining factor, joinder will usually be impracticable when the class is large.") Plaintiffs must provide some evidence that a class is numerous, but courts may draw "reasonable inferences from the facts presented to find the requisite **[**67]** numerosity." *Coleman, 306 F.R.D. at 76*. As a rule of thumb, a class of over 40 members satisfies the numerosity requirement. *See, e.g., id.*[62]

[*236] Here, it is undisputed that there were far more than 40 purchasers of Slack-Filled Pepper Products in each potential class. (*See* Levy Rep., Tables 3, 5, 6.) Accordingly, the Court finds that each proposed single-state class satisfies the numerosity requirement.

B. Commonality (*Rule 23(a)(2)*)

HN20[] The requirement of "commonality" is satisfied when there are "questions of law or fact common to the class." *Fed. R. Civ. P. 23(a)(2)*. "If the class members" claims involve no common question of law or fact, there will be 'no cause to believe that all their claims can productively be litigated at once.'" *J.D. v. Azar, 925 F.3d 1291, 1321, 2019 U.S. App. LEXIS 17900 (D.C. Cir. 2019)* (quoting *Wal-Mart, 564 U.S. at 350*)). As explained by the Supreme Court, "even a single common question will do." *Wal-Mart, 564 U.S. at 359*; *see J.D.*, 925 F.3d at 1321 ("The presence of a single such common question can suffice to satisfy *Rule 23(a)(2)*."). But the "common contention" "must be of such a nature that it is capable of classwide resolution—which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart, 564 U.S. at 350*. "What matters to class certification . . . is not the raising of common questions—even in droves—but, **[**68]** rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Id.*

Plaintiffs have identified several common questions that satisfy the commonality requirement of *Rule 23(a)*. First, whether the Slack-Filled Pepper Products contained nonfunctional slack-fill is a common question of fact. (*See* 2d Am. Compl. ¶¶ 116, 127; *see also, e.g., Hendricks v. Starkist Co, No. 13-cv-00729, 2015 U.S. Dist. LEXIS 96390, 2015 WL 4498083, at *3 (N.D. Cal. July 23, 2015)* (commonality **[*237]** satisfied by common question of whether cans of tuna fish were underfilled). Defendants argue this is not a "common question" because plaintiffs may suffer a failure of proof. (*See* McCormick's Opp. at 16 (citing Hester Decl. ¶ 11, which states that all of the Slack-Filled Pepper Products were "overfill[ed]" if necessary to meet a minimum 80% fill level).)[63] But ***HN21***[] to satisfy the requirement of commonality, plaintiffs need not show that a common question will be answered in their favor. *See Hilsley v. Ocean Spray Cranberries, Inc., No. 17-cv-2335, 2018 U.S. Dist. LEXIS 202679, 2018 WL 6300479, at *5 (S.D. Cal. Nov. 29, 2018)* (it "requires too much of the plaintiff by demanding a common contention that 'will be answered, on the merits in favor of the class' instead of simply showing there is a 'common contention capable of classwide resolution'" (quoting **[**69]** *Alcantar v. Hobart Serv., 800 F.3d 1047, 1053 (9th Cir. 2015)))*. Rather, they need only show that the common question is capable of generating a "common answer" even if that answer defeats their claim.

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[62] The D.C. Circuit has not yet spoken on this issue, *see Hoyte v. District of Columbia, 325 F.R.D. 485, 490 (D.D.C. 2017)*, but other circuits have and apply a similar standard. *See Robidoux v. Celani, 987 F.2d 931, 936 (2d Cir. 1993)*; *Marcus v. BMW of North America, LLC, 687 F.3d 583, 595 (3d Cir. 2012)*; ***Harik v. Cal. Teachers Ass'n, 326 F.3d 1042, 1051 (9th Cir. 2003)***.

[63] Defendants' related argument that there is no evidence that the Slack-Filled Pepper Products contained nonfunctional slack-fill is addressed as part of the analysis of predominance. (*See infra* Section III.F.1.b.)

A second common question is whether the packaging of the Slack-Filled Pepper Products — to which all consumers were uniformly exposed — was deceptive or misleading. (*See* 2d Am. Compl. ¶¶ 119, 127.) As numerous courts have recognized, ***HN22***[] "a claim concerning alleged misrepresentations on packaging to which all consumers were exposed is sufficient to satisfy the commonality requirement because it raises the common question of whether the packaging would mislead a reasonable consumer." *Broomfield v. Craft Brew Alliance, Inc., No. 17-cv-01027, 2018 U.S. Dist. LEXIS 177812, 2018 WL 4952519, at *5 (N.D. Cal. Sept. 25, 2018)* (commonality satisfied by common question of whether representations on Kona Beer packaging would have deceived a reasonable consumer into believing beer was brewed in Hawaii).[64]

Both questions identified above are central to the validity of each class member's consumer protection and/or unjust enrichment claim and will drive the resolution of this litigation. Indeed, as discussed in the analysis of predominance, if plaintiffs do not prevail on either question, their claims will fail. (*See infra* ***[**70]*** Section III.F.1.a & b.) Accordingly, the Court finds that each proposed single-state class satisfies the commonality requirement.

C. Typicality (*Rule 23(a)(3)*)

HN23[] *Rule 23(a)(3)* requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class[.]" *Fed. R. Civ. P. 23(a)(3)*. "Typicality differs from commonality in that typicality concerns the relationship between the representative's individual claims and the class's claims rather than the relatedness of the entire class's claims." *J.D.*, 925 F.3d at 1322. "Yet they '[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical.'" *Id.* (quoting *Gen. Tel. Co. v. Falcon, 457 U.S. 147, 157 n.13, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982))*. The purpose of the typicality requirement is "to assess whether the action can be efficiently maintained as a class [action] and whether the named plaintiffs have incentives that align with those of the absent class members so as to assure that the absentees' interests will be fairly represented." *Kifafi v. Hilton Hotels Ret. Plan, 189 F.R.D. 174, 177 (D.D.C. 1999)*.

HN24[] The typicality requirement is "liberally construed." *In re Vitamins Antitrust Litig., 209 F.R.D. 251, 260 (D.D.C. 2002)*. "[T]o destroy typicality, a distinction must differentiate the '*claims or defenses*' of the representatives from those of the class." *J.D.*, 925 F.3d at 1322 (quoting *Fed. R. Civ. P. 23(a)(3)*). "As a result, typicality is ordinarily met 'if the claims **[**71]** or defenses of the representatives and the members of the class stem from a single event or a unitary course of conduct, or if they are based on the same legal or remedial theory.'" *Id.* (quoting 7A Fed. Prac. & Proc. Civ. § 1764); *see also* *Wal-Mart, 564 U.S. at 348-49* (a class representative must "possess the same interest and suffer the same injury as the [putative] class members"); *In re Rail Freight Fuel Surcharge Antitrust Litig., 292 F. Supp. 3d 14, 94 (D.D.C. 2017)* (typicality "is satisfied if each class member's claim arises from the same course of events that led to the claims of the representative parties and each class member makes similar legal arguments to prove the defendant's liability").

Plaintiffs initially proposed that all twelve named plaintiffs from the Second Amended Complaint be selected as class representatives — with each plaintiff acting as a representative for any proposed class **[*238]** of which he or she was a member. According to plaintiffs' opening brief, the named plaintiffs' claims and experiences were typical of the class because (1) they all "allege common wrongdoing by [d]efendants directed toward all class members," specifically "that the 'Black Pepper Net Weight Reduction' project . . . covertly raised prices to every single [p]laintiff and [c]lass member by decreasing the amount **[**72]** of pepper in their non-transparent tins and grinders"; (2) they

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[64] *See also, e.g., In re NJOY, Inc. Consumer Class Action Litig., 120 F. Supp. 3d 1050, 1096-97 (C.D. Cal. 2015)* ("There is no question that all class members were exposed to the product packaging; this suffices to show commonality."); *Mednick v. Precor, Inc., 320 F.R.D. 140, 151 (N.D. Ill. 2017)* ("Courts routinely find that whether a product packaging, seen by all purchasers of the product, is misleading is an issue that satisfies commonality."); *White II, 2018 U.S. Dist. LEXIS 132466, 2018 WL 3748405, at *4* ("The question of whether the slack-fill in [defendant's] candy packaging violates the [Missouri consumer protection statute] will be susceptible to a common answer."); *Randolph v. J.M. Smucker Co., 303 F.R.D. 679, 693 (S.D. Fla. 2014)* ("[W]hether the 'All Natural' label is deceptive to an objective consumer is an issue common to all class members. Accordingly, the element of commonality is satisfied.").

were all "victims" of defendants' deception because they "all purchased pepper products that contained less black pepper than such products previously had contained, even though the size of the package remained the same"; (3) they all "believed—at the time of their purchase—that they were purchasing a product that was full, rather than one that contained as much as 25% nonfunctional slack-fill"; and (4) that it did not matter that "they (and the absent class members) may have purchased different brands (e.g. McCormick vs. private label), varieties (e.g. ground vs. whole pepper), and sizes (e.g. 1.5 oz, 2 oz, 6 oz) of pepper" because their claims still arise from same course of conduct and rest on the same legal theories. (Pls.' Mem. at 11, 23-24.) Although defendants do not dispute any of plaintiffs' affirmative contentions, they persist in arguing that typicality is not satisfied.

Defendants initially argued that the deposition testimony of eight of the twelve proposed class representatives (Fernandez (Connecticut), Jones (District of Columbia), Pellitteri (Florida), Bittle (Illinois), Theis (Illinois), Robinson (Maryland), **[**73]** Grindel (Missouri), and Gerstnecker (Pennsylvania)) revealed that they were not typical because they did not suffer the "same injury" as putative class members. (*See* Defs. Opp. at 17 n.23, 20-21.) Specifically, defendants argued that the testimony of these proposed class representatives "powerfully demonstrates that, for many consumers who purchase McCormick black pepper, they do so for reasons quite apart from the price or fill level." (McCormick's Opp. at 22; *see also* 7/10/18 Tr. at 66 (statement of defense counsel that "majority of [plaintiffs] testified they basically would have made the same purchase decision anyway because they like McCormick pepper, they've always bought it, their grandmother bought it, the husband likes the way it's — the granulation of it or whatever the reason was, they were perfectly happy to keep on buying it").)[65] According to defendants, this testimony is inconsistent with the injury alleged in the complaint — that plaintiffs "would not have paid for [d]efendants' black pepper had they known that the containers were under-filled" (2d Am. Compl. ¶ 122) — and thus, these proposed class representatives are not typical.

Plaintiffs did not respond to this argument in their reply brief. **[**74]** When asked about it during the first motions hearing, plaintiffs' counsel told the Court that they did not believe that plaintiffs' deposition testimony, viewed in its entirety and leaving any credibility determinations to the trier of fact, was inconsistent with paragraph 122.[66] (*See* 7/10/18 Tr. at 29-31, 35-36.) They faulted defendants for "selectively" choosing quotes to support their characterizations of plaintiffs' testimony. (*See* 7/10/18 Tr. at 30.) As a fallback, plaintiffs argued that if the Court were to conclude that one or more of the challenged plaintiffs **[*239]** were "atypical," it would not matter as long as there remained at least one viable representative per class. (*See* 7/10/18 Tr. at 32, 36, 37.) Finally, plaintiffs proffered that if a proposed class was left without a viable class representative, they could, if permitted by the Court , easily substitute a new plaintiff. (*See* 7/10/18 Tr. at 40.)

In response to the Court's request that plaintiffs further address the typicality question as part of their supplemental briefing as to the consumer protection classes (*see* 9/18/18 Order at 1), plaintiffs abandoned their request that plaintiffs Bittle and Theis serve as class representatives **[**75]** for Illinois and withdrew their request to certify consumer protection classes in Connecticut and the District of Columbia, thereby rendering moot the issue of whether plaintiffs Fernandez and Jones would satisfy the typicality requirement for those classes. (Pls.' Supp. Br. at 12.) They also submitted additional deposition testimony excerpts from the six remaining proposed class representatives for the consumer protection classes (Esparza and Marsh (California), Pellitteri (Florida), Liberov and Vladimirskiy (Illinois), and Grindel (Missouri)), which they argue demonstrates that each would testify, consistent with ¶ 122, that "I bought this believing that it was a hundred percent full, and I wouldn't have bought it if I had known [that it was not]." (10/24/18 Tr. at 32.; Pls.' Supp. Br. at 5, 7, 10, 12.)

In response, defendants argue that the proposed class representatives for the four remaining consumer protection classes do not satisfy typicality for two reasons: (1) none can "testify of their own personal knowledge about the fill level of the tins they purchased"; and (2) Grindel and Pellitteri are "brand loyal and pay no attention to price." (Defs.' Supp. Br. at 1-2 & n.2.) Neither **[**76]** argument is persuasive.

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[65] Defendants also reference the testimony of a former named plaintiff, Anne Marron, but her "typicality" is not at issue. Her testimony, though, remains part of the record even though she voluntarily dismissed her lawsuit after her deposition.

[66] Plaintiffs' counsel told the Court that plaintiffs "stand by th[e] allegation[]" in ¶ 122. (7/10/18 Tr. at 30.)

Defendants' first point, while accurate, has no bearing on typicality. Plaintiffs have never suggested that they intend to prove that the Slack-Filled Pepper Products contained nonfunctional slack-fill through the testimony of individual consumers, so the fact that the proposed class representatives cannot testify to actual fill levels does not render them atypical. In addition, the reason that plaintiffs cannot offer such testimony is not their fault; rather, defendants' conduct made it impossible for plaintiffs to see the actual fill line. Finally, and most importantly, the proposed class representatives are bringing the same claims, arising out of the same events, and pursuant to the same legal theories, as class members, which is the critical inquiry for typicality.

Defendants' second point is undercut by plaintiffs' submission of additional deposition testimony for Grindel and Pellitteri. While both testified that they are brand loyal, and in the past they paid little attention to price, they also testified that they would consider whether a pepper product contains nonfunctional slack-fill to be a material fact in their purchasing decisions. For example, **[**77]** Pellitteri answered "yes" when asked if he "takes into account anything like the packaging of the product in making your purchase decision for pepper." (Pellitteri Dep. at 47.) He then explained that what he takes into account about the packaging is that "[i]t's just the same size can I've always bought." (*Id.*) He also testified that his complaint about the new reduced weights was that he was "being deceived"; he was "spending money [but] wasn't getting a full tin." (*Id.* at 21.) Finally, he was asked "[w]ould you have still bought the McCormick brand pepper" if McCormick "had simply raised the price by 25 percent," to which he responded "[i]t could sway me one way or the other." (*Id.* at 46.) Grindel testified that she would purchase McCormick pepper again "[o]nly if they change the label" to "make people **[*240]** aware that they changed the weight without changing the size of the can and somehow make restitution to all those people who have been duped into buying less pepper in the same size can." (Grindel Dep. at 16, 19.) Given that a consumer could be brand loyal and pay little attention to price, but also consider nonfunctional slack-fill to be a material fact, the Court finds that the testimony of these **[**78]** two consumers does not conflict with plaintiffs' theory of liability.

Accordingly, the Court finds that the six proposed class representatives for the four single-state consumer protection classes satisfy the typicality requirement.[67]

D. Adequacy (*Rule 23(a)(4)*)

HN25[] *Rule 23(a)(4)* requires plaintiffs to show that "the representative parties will fairly and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)(4)*. "The adequacy requirement aims to ensure that absent class members will not be bound by the outcome of a suit in which they were not competently and fairly represented." *J.D.*, 925 F.3d at 1312. "Two criteria for determining the adequacy of representation are generally recognized: (1) the named representative must not have antagonistic or conflicting interests with the unnamed members of the class, and (2) the representative must appear able to vigorously prosecute the interests of the class through qualified counsel." *Nat'l Ass'n of Regional Med. Programs, Inc. v. Mathews, 551 F.2d 340, 345, 179 U.S. App. D.C. 154 (D.C. Cir. 1976)*; *see also J.D.*, 925 F.3d at 1312. "Among the many factors governing the district court's decision that the [class members] are adequately represented are the quality of class counsel, any disparity in interest between class representatives and members of a would-be subclass, communication between class counsel and the class, and the overall **[**79]** context of the litigation." *Twelve John Does v. District of Columbia, 117 F.3d 571, 575, 326 U.S. App. D.C. 17 (D.C. Cir. 1997)*.

Plaintiffs argue that these requirements have been satisfied. First, they note that "plaintiffs are members of the class(es) they seek to represent": each resides in the state he or she seeks to represent and purchased a Slack-

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[67] As for the proposed single-state unjust enrichment classes, defendants challenge the typicality of seven of the proposed class representatives: Fernandez (Connecticut), Jones (District of Columbia), Bittle and Theis (Illinois), Robinson (Maryland), Grindel (Missouri), and Gerstnecker (Pennsylvania). (*See* McCormick's Opp. at 20-21.) Plaintiffs are presumably no longer seeking appointment of Bittle and Theis given that they withdrew their request to have them selected as class representatives for the Illinois consumer protection class, and the Court has determined that Grindel satisfies typicality. As for the others, there is no need to decide whether defendants' challenges to typicality have merit because, as explained *infra*, the unjust enrichment classes they propose to represent will not be certified for other reasons.

Filled Pepper Product for personal or household use. (Pls.' Mem. at 25 (citing 2d Am. Compl. ¶¶ 10-21).) Next, they contend that "[t]here are no conflicts of any kind between [the proposed representatives'] interests and the interests of the [c]lasses" because the representatives, like class members, "have an interest in obtaining compensation from [d]efendants for the unfair, deceptive, and misleading conduct of under-filling their pepper products" and because "[p]laintiffs' claims can only be successful if the claims of all [c]lass members are successful. (*Id.*) They also maintain that "the proposed representatives . . . have demonstrated their commitment to pursuing these claims on behalf of absent class members" because each "has responded to written discovery requests . . . [and] sat for a deposition." (*Id.*)[68]

[*241] Defendants do not challenge any of plaintiffs' affirmative assertions, which the Court finds to be supported by the **[**80]** record. Indeed, in their initial briefing defendants did not address adequacy. In their supplemental filing, they merely asserted that the proposed class representatives for the single-state consumer protection classes are not adequate for the same reasons they are not typical. (*See* Defs.' Supp. Br. at 1-2.) These arguments, however, have already been rejected by the Court. (*See supra* Section III.C.)

Accordingly, the Court conclusdes that the adequacy requirement is satisfied for all the proposed single-state classes.

E. Ascertainability

HN26[] *Rule 23* does not expressly require that a class be "ascertainable," and the D.C. Circuit "has not addressed whether *Rule 23* contains an ascertainability requirement for class certification." *J.D.*, 925 F.3d at 1320. Nonetheless, defendants argue that the proposed classes fail to satisfy the requirement of "ascertainability," which they claim requires that the class be defined by "objective criteria" and that it be "administratively feasible" for the court to determine whether a particular individual is a member. (McCormick's Opp. at 7.)

Most federal circuits (unlike the D.C. Circuit) have held that "ascertainability" is an implied requirement under *Rule 23*. *See* *Sandusky Wellness Ctr., LLC v. Medtox Scientific, Inc., 821 F.3d 992, 995 (8th Cir. 2016)* (citing cases from First, Second, Third, Fourth, Fifth, **[**81]** Sixth, Seventh, Ninth and Eleventh Circuits). However, the circuits "diverge" as to the meaning of ascertainability. *Id.* ***HN27***[] As a baseline, courts generally agree that ascertainability means that a class definition must render potential class members identifiable according to objective criteria. *See, e.g.,* *Mullins v. Direct Digital, LLC, 795 F.3d 654, 657 (7th Cir. 2015)* ("[A] class must be defined clearly and . . . by objective criteria rather than by, for example, a class member's state of mind."); *In re Petrobras Sec., 862 F.3d 250, 257 (2d Cir. 2017)* (class should be "defined using objective criteria that establish a membership with definite boundaries"); 1 Newberg on Class Actions § 3:3 ("All courts essentially focus on the question of whether the class can be ascertained by objective criteria."). The Third Circuit has added the additional requirement that "[t]he method of determining whether someone is in the class must be administratively feasible," *Carrera v. Bayer Corp., 727 F.3d 300, 307 (3d Cir. 2013))*,[69] while the Seventh and Ninth Circuits have expressly rejected that interpretation.[70]

[68] Plaintiffs also assert that "[p]laintiffs' Interim Co-Lead Counsel are qualified to lead a certified class." (Pls.' Mem. at 25.) The adequacy of counsel is addressed *infra* Section III.H.

[69] The Eleventh Circuit has also endorsed administrative feasibility in an unpublished opinion. *See* *Karhu v. Vital Pharms., Inc., 621 Fed. Appx. 945, 950 (11th Cir. 2015)* ("[A] plaintiff establishes *Rule 23*'s implicit ascertainability requirement by proposing an administratively feasible method by which class members can be identified."). But the unpublished decision in *Karhu* is not "binding precedent," *see* *U.S. Ct. of App. 11th Cir. R. 36-2*, and it appears to conflict with published Eleventh Circuit decisions approving the certification of classes that raise the same type of administrative feasibility issues. *See, e.g.,* *Fitzpatrick, 635 F.3d at 1283* (approving class certification subject to the district court on remand defining the class to include all purchasers of YoPlus yogurt during the relevant time period).

Absent any controlling precedent in the D.C. Circuit, the first question for the **[*242]** Court is which ascertainability test should be applied. *See In re Korean Air Lines Disaster, 829 F.2d at 1176*. Although only the Seventh and Ninth Circuits have expressly rejected imposition of an administrative feasibility **[**82]** requirement, often referred to as "heightened ascertainability," the Sixth and Eighth Circuits have done so by implication,[71] and the remaining circuits have not clearly adopted a position.[72]

The transferor courts for the majority of the cases in this MDL (13) are in circuits that have not adopted "administrative feasibility" as part of ascertainability.[73] *See In re Korean Air Lines Disaster, 829 F.2d at 1176* ("the law of a transferor forum on a federal question . . . merits close consideration"). Moreover, ***HN28***[] the reasoning of those courts that have rejected this requirement is persuasive. As those courts have noted, "[n]othing in *Rule 23* mentions or implies this heightened requirement." *Mullins v. Direct Digital, 795 F.3d at 658*. In addition, such a requirement would "skew[] the balance that district courts must strike when deciding whether to certify classes," *id.*, and would likely be the death-knell to consumer protection class actions involving low-cost products. *See id. at 668* ("class certification provides the only meaningful possibility for bona fide class members to recover anything at all"); *Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1129 (9th Cir. 2017)* ("[L]ow-value consumer class actions . . . typically involve low-cost consumer products and, as a result, recoveries too small to incentivize individual litigation.").[74]

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[70] *See Mullins v. Direct Digital, 795 F.3d at 662* ("Nothing in *Rule 23* mentions or implies this heightened requirement under *Rule 23(b)*."); *Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1123 (9th Cir. 2017)* ("A separate administrative feasibility prerequisite to class certification is not compatible with the language of *Rule 23*.").

[71] *Sandusky Wellness Ctr., LLC v. Medtox Scientific, Inc., 821 F.3d 992, 995 (8th Cir. 2016)* (ascertainability is not a separate preliminary requirement but part of a "rigorous analysis of the *Rule 23* requirements"); *see Rikos v. P&G, 799 F.3d 497, 525 (6th Cir. 2015)* (explaining that for "a class to be sufficiently defined, the court must be able to resolve the question of whether class members are included or excluded from the class by reference to objective criteria").

[72] *Compare In re Petrobras Sec., 862 F.3d at 264 (2d Cir. 2017)* (rejecting "freestanding administrative feasibility requirement" as a prerequisite to class certification) *with Brecher v. Republic of Argentina, 806 F.3d 22, 24 (2d Cir. 2015)* ("the touchstone of ascertainability is whether the class is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member."); *see also EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014)* (recognizing "an implicit threshold requirement that the members of a proposed class be readily identifiable . . . in reference to objective criteria"); *John v. Nat'l Sec Fire & Cas. Co., 501 F.3d 443, 445 (5th Cir. 2007)* ("The existence of an ascertainable class of persons to be represented by the proposed class representative is an implied prerequisite of [*Rule 23*].").

[73] Eight cases originated in California, Illinois or Nevada (Seventh and Ninth Circuits); one case came from Missouri (Eighth Circuit); one case came from New York (Second Circuit); and three cases were filed in the District of Columbia. The two remaining cases came from Pennsylvania (Third Circuit) and Florida (Eleventh Circuit). However, plaintiffs are not seeking to certify a consumer protection class in Pennsylvania and the unjust enrichment class will not be certified for other reasons. In addition, as noted, the Eleventh Circuit has only endorsed the administrative feasibility test in an unpublished opinion, *see Karhu, 621 Fed. App'x at 950*, although several district courts in Florida have followed that decision. *See,* ***[**83]*** *e.g., Randolph, 303 F.R.D. at 684-85* (putative class not ascertainable as plaintiff had not offered feasible mechanism for identifying purchasers of oils containing "All Natural" label).However, under the D.C. Circuit's opinion in *In re Korean Air Lines Disaster*, this Court must, in the case of a circuit split, only apply one interpretation of *Rule 23*, and where there is no D.C. Circuit precedent on point, "the transferee court [should] be free to decide a federal claim in the manner it views as correct without deferring to the interpretation of the transferor circuit." *829 F.3d at 1174*; *see also supra pp. 30-32* & n.43.

[74] Part of the Third Circuit's justification for imposing a heightened ascertainability requirement was its conclusion that defendants "must be able to challenge class membership" and that absent class members' claims should be protected from dilution "by fraudulent or inaccurate claims." *Carrera, 727 F.3d at 309-10*. But, as the Seventh and Ninth Circuits have pointed out, these issues do not arise in a case (like this one) where the amount of damages is the same for each unit sold and liability can be determined on an aggregate basis by multiplying that amount by the number of units sold during the class period. *See Briseno, 844 F.3d at 1132*; *Mullins v. Direct Digital, 795 F.3d at 670*. Under those circumstances, "the identity of particular class members does not implicate the defendant's due process interest . . . because the addition or subtraction of individual class

[*243] Accordingly, plaintiffs need only establish that the proposed classes are defined by "objective criteria." Plaintiffs' proposed class definitions satisfy this requirement: each proposed class includes residents of a particular state who purchased a Slack-Filled Pepper Product, and the Slack-Filled Pepper Products are identified by brand, container size, type of pepper, and a unique SKU number. The Court therefore finds that the proposed single-state classes satisfy ascertainability.

F. Predominance (*Rule 23(b)(3)*)

HN29[] To authorize a class action under *Rule 23(b)(3)*, the court must "find[] that the questions of law or fact common to class members predominate over any questions affecting only individual members." *Fed. R. Civ. P. 23(b)(3)*.

HN30[] *Rule 23(b)(3)*'s predominance requirement is "more demanding" than the commonality requirement of *Rule 23(a)*. *See* *Comcast, 569 U.S. at 34*. It "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," *Amchem, 521 U.S. at 623*, by "ask[ing] whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045, 194 L. Ed. 2d 124 (2016)*. Thus, the predominance inquiry

> calls upon courts to give careful scrutiny to the relation **[**84]** between common and individual questions in a case. An individual question is one where "members of a proposed class will need to present evidence that varies from member to member," while a common question is one where "the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof."

Id. (quoting 2 Newberg on Class Actions § 4:50 at 196-97 (5th ed. 2012)). "When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under *Rule 23(b)(3)* even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to individual class members . . . ." *Id.*

HN31[] "In determining whether class or individual issues predominate in a putative class action suit, [courts] must take into account the claims, defenses, relevant facts, and applicable substantive law, to assess the degree to which resolution of the classwide issues will further each individual class member's claim against the defendant." *Klay, 382 F.3d at 1254*; *see also* *In re Tropicana Orange Juice Mktg. & Sales Practices Litig., No. 2:11-cv-07382, 2019 U.S. Dist. LEXIS 102566, 2019 WL 2521958, at *6 (D.N.J. June 18, 2019)* ("The Court must examine **[**85]** through the prism of *Rule 23(b)(3)* the elements of each of the causes of action for certification and ask whether proof of the essential elements require individual treatment."). But ultimately, the predominance standard **[*244]** is a "pragmatic" one. *McKinney v. U.S. Postal Serv., 292 F.R.D. 62, 65 (D.D.C. 2013)*; *see also* *In re Vitamins, 209 F.R.D. at 262* ("There is no definitive test for determining whether common issues predominate . . . ."); *see also* *Butler v. Sears, Roebuck & Co., 727 F.3d 796, 801 (7th Cir. 2013)* ("[P]redominance requires a qualitative assessment . . . ; it is not bean counting.").

HN32[] Plaintiffs bear the burden of satisfying *Rule 23(b)(3)* "through evidentiary proof." *Comcast, 569 U.S. at 33* (quoting *Wal-Mart, 564 U.S. at 350*), which includes "establish[ing] that damages are capable of measurement on a classwide basis." *Comcast, 569 U.S. at 35*. With the application of only one state's law, it is undisputed that any questions of law are common, so the focus of the predominance analysis for the single-state classes is on questions of fact. The Court will first address the four single-state consumer protection classes, as to which it finds that in three of the four states, plaintiffs have sufficient evidentiary proof to satisfy predominance. It will then turn to the seven single-state unjust enrichment classes, finding that each fails to satisfy predominance.

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members affects neither the defendant's liability nor the total amount of damages it owes to the class." *Briseno, 844 F.3d at 1132* (quoting *Mullins v. Direct Digital, 795 F.3d at 670*). In addition, the amount of damages per unit is so small as to discourage fraudulent claims.

1. Single-State Consumer Protection Classes

Plaintiffs' single-state consumer **[**86]** protection classes seek to bring claims under the following state consumer protection statutes: (1) the *California Consumer Legal Remedies Act, Cal. Civ. Code § 1770* ("CLRA"), and the California Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200* ("UCL"); (2) the *Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Florida Stat. § 501.201, et seq.*; (3) the *Illinois Consumer Fraud and Deceptive Practices Act ("ICFA"), 815 Ill. Comp. Stat. Ann. § 505/1, et seq.*; and (4) the *Missouri Merchandising Practices Act ("MMPA"), Mo. Ann.. Stat. § 407.010, et seq.*

To decide whether plaintiffs have proven predominance for each proposed class, the Court will first consider four issues that are common to all four states, and it will then analyze the state-specific differences.

a. Deception

HN33[] Each state's consumer protection law requires proof of an unfair or deceptive act.[75] Although the states vary in how they define deception, proof of deception in each is judged by an objective, reasonable consumer standard[76] and can be satisfied **[*245]** in each state without any individualized proof of reliance.[77] In addition, the alleged deception here is subject to common proof. Most importantly, it is undisputed that the purchasers of the Slack-Filled Pepper Products were uniformly exposed to the same alleged misrepresentation — pepper containers

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[75] In California, the CLRA prohibits "unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer[.]" ***Cal. Civ. Code § 1770(a)***. The UCL prohibits "unfair competition," which includes "any unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*. In Florida, the FDUTPA prohibits "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." *Fla. Stat. Ann. § 501.204(1)*. In Illinois, the ICFA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact . . . in the conduct of any trade or commerce." *815 Ill. Comp. Stat. Ann. § 505/2*. In Missouri, the MMPA declares unlawful the use of "any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise." *Mo. Ann. Stat. § 407.020*.

[76] In the four states, claims of deceptive conduct are governed by the objective, "reasonable consumer" test. *See* *Hadley v. Kellogg Sales Co., 324 F. Supp. 3d 1084, 1116 (N.D. Cal. 2018)* (in California, a "[p]laintiff must 'show that members of the public are likely to be deceived,'" which requires "an objective showing of a probability that a 'significant portion' of the relevant consumers acting reasonably 'could be misled'" (quoting ***Ebner v. Fresh, Inc., 838 F.3d 958, 965 (9th Cir. 2016)))***; *PNR, Inc. v. Beacon Prop. Mgmt., Inc., 842 So. 2d 773, 777 (Fla. 2003)* (in Florida, a "deceptive act" is "a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment"); *Mednick v. Precor, Inc., 320 F.R.D. at 151* (in Illinois, a claim of deceptive packaging requires proof that "the packaging was likely to deceive a reasonable consumer" (quoting *Suchanek v. Sturm Foods, Inc., 764 F.3d 750, 757 (7th Cir. 2014)))*; *Webb v. Dr Pepper Snapple Grp., Inc.,, No. 4:17-cv-00624, 2018 U.S. Dist. LEXIS 71270, 2018 WL 1955422, at *3 (W.D. Mo. Apr. 25, 2018)* ("Whether the conduct alleged is deceptive under the MMPA is to be analyzed under the "reasonable consumer" standard." (quoting *Murphy v. Stonewall Kitchen, LLC, 503 S.W.3d 308, 312 (Mo. Ct. App. 2016)))*.

[77] *See, e.g.,* *Bradach v. Pharmavite, LLC, 735 F. App'x 251, 254 (9th Cir. 2018)* (unpublished) ("[C]lass members in CLRA and UCL actions are not required to prove their individual reliance on the allegedly misleading statements."); *Cold Stone Creamery, Inc. v. Lenora Foods I, LLC, 332 F. App'x 565, 567 (11th Cir. 2009)* ("the FDUTPA does not require a plaintiff to prove actual reliance on the alleged conduct") (unpublished); *Flynn v. FCA US LLC, 327 F.R.D. 206, 218-19 (S.D. Ill. 2018)* ("ICFA does not require proving reliance, only that a defendant intended that a consumer would rely on a deceptive or unfair practice"); *Hawkins v. Nestle U.S.A. Inc., 309 F. Supp. 3d 696, 702-03 (E.D. Mo. 2018)* ("A plaintiff need not even allege or prove reliance on an unlawful practice to state a claim under the [MMPA].")

that did not have visible **[**87]** fill lines and that allegedly contained nonfunctional slack-fill. There is also ample common evidence that the challenged action was deceptive. That evidence includes:

(1) the product packaging itself — the tin containers and the opaque labels both hid the fill levels from consumers at the time of purchase and ensured that the fill levels were not apparent even after the product was opened (*see* Fegan Decl. ¶¶ 62-64, 66-68, 81 (citing Pls.' Ex. 110), ¶ 82 (citing Pls.' Ex.. 143); Powerpoint at 4);

(2) McCormick's internal documents, which reflect a conscious decision to try to hide a price increase from consumers by reducing the net weight of the product without changing the container size (*see, e.g.*, Fegan Decl. ¶ 27 (citing Pls.' Ex. 105), ¶ 9 (citing Pls.' Ex. 107), ¶ 37 (citing Pls.' Ex. 113), ¶ 40 (citing Pls.' Ex. 115));

(3) federal and state laws and regulations that directly or indirectly deem nonfunctional slack-fill misleading or deceptive, *see* *21 C.F.R. § 100.100(a)* (nonfunctional slack-fill in opaque containers is "misleading")); *Cal. Bus. & Prof. Code § 12606.2(c)* (same); *Fla. Stat. Ann. § 500.11* (food is "misbranded . . . [i]f its container is so made, formed, or filled as to be misleading); *Mo. Ann. Stat. § 196.075* (same); *815 Ill. Comp. Stat. Ann. 510/2* (unfair or deceptive **[**88]** acts include "[r]epresenting that goods . . . have . . . quantities that they do not have"); *see also* *Hawkins v. Nestle U.S.A. Inc., 309 F. Supp. 3d 696, 703 (E.D. Mo. 2018)* ("Regardless of whether [p]laintiff may prove her MMPA claim by pointing to [a] violation [of the federal slack-fill regulation] . . . the existence of the Federal prohibition against slack-fill supports the reasonableness of a consumer's belief that the package of candy she purchases will not have 45% non-functional slack-fill."); and

(4) decisions on motions to dismiss by courts in California, Illinois and Missouri that recognize that a plausible allegation **[*246]** that a consumer product violates the federal prohibition on nonfunctional slack-fill in an opaque container states a claim for a deceptive act under that state's consumer protection statute, *see, e.g.,* *Kamal v. Eden Creamery, LLC, No. 18-cv-01298, 2019 U.S. Dist. LEXIS 107263, 2019 WL 2617041, at *14 (S.D. Cal. June 26, 2019)* (ice cream); *Escobar v. Just Born Inc., No. 17-cv-01826, 2017 U.S. Dist. LEXIS 186573, 2017 WL 5125740, at *14 (C.D. Cal. June 12, 2017)* (candy); *Stemm v. Tootsie Roll Indus., 374 F. Supp. 3d 734, 741-42 (N.D. Ill. 2019)*; *Hawkins, 309 F. Supp. 3d at 703* (candy); *Benson v. Fannie May Confections Brands, Inc., No. 17-cv-3519, 2018 U.S. Dist. LEXIS 32781, 2018 WL 1087639, at *5 (N.D. Ill. Feb. 28, 2018)* (candy).

For purposes of class certification, therefore, whether defendants' alleged conduct constituted a deceptive act under each state's consumer protection statute is a common question susceptible to common proof.

b. Existence of Nonfunctional [89] Slack-Fill**

Underlying plaintiffs' claim that defendants' alleged actions constituted deception under each state's consumer protection law is the common factual allegation that the Slack-Filled Pepper Products contained nonfunctional slack-fill. (*See* Powerpoint at 7-8.) Although this is a common question *capable* of classwide proof, *see infra* Section III.B, defendants argue that the evidence shows that plaintiffs will not be able to prove a "uniform reduction in fill " so individualized inquiries will be required to prove the existence of nonfunctional slack-fill for each class member. Defendants' argument suffers from two fatal flaws.

First, defendants assert that "there is zero common evidentiary support for plaintiffs' claims of a uniform reduction in fill." (McCormick's Opp.. at 18-19; *see also* 7/10/18 Tr. at 128 ("absolutely no evidence that anything was slack-filled").) But this contention is not supported by the record. To justify this assertion, defendants point out that: (1) none of the named plaintiffs observed the fill level of any black pepper product that he or she purchased; and (2) the "uncontroverted" Hester Declaration states that the fill levels of pepper containers after the weight reduction program was implemented **[**90]** varied but were still maintained at anywhere from 80% to 100% full. (*See* Hester Decl. ¶¶ 11-13.) However, the absence of a certain type of evidence (plaintiffs' testimony as to actual fill levels) or the existence of contrary evidence (the Hester Declaration) does not necessarily mean that there is "zero" evidentiary support for plaintiffs' allegation that the pepper products contained nonfunctional slack-fill. In addition, plaintiffs cannot be criticized for their inability to testify to actual fill levels since this inability is attributable to the success of defendants' deception. Nor should plaintiffs be faulted for the absence of any contemporaneous fill records that might have challenged the "uncontroverted" Hester Declaration since McCormick chose not to keep such records. (*See* 7/10/18 Tr. at 88.) More importantly, defendants ignore plaintiffs' affirmative evidence that the Slack-Filled Pepper Products contained non-functional slack-fill, including corporate records that document the adoption of the Net Weight Reduction Project; pictures showing visual fill differences between the old and new products; a reduced weight on the container; and corporate documents that reflect internal **[**91]** discussions about the deceptive nature of the inadequate fill levels. (*See* Powerpoint at 4; Pls.' Exs. 125, 130, 133, 140, 141, 143.)

Second, even if plaintiffs may not be able to prove a "uniform reduction in fill," a failure of proof will not mean that individualized inquiries would be required. Plaintiffs' theory of liability is that McCormick's decision to reduce the net weight in **[*247]** certain lines of pepper products (identified by UPC codes) resulted in those products having reduced fill levels by approximately the same percentage as the weight reductions. All class members' claims rest on this common contention. If they are unable to prove this allegation, then their claims will fail. Thus, whether plaintiffs will be able to prove the existence of nonfunctional slack-fill is solely a merits issue and has no relevance to class certification. *See, e.g., Hilsley, 2018 U.S. Dist. LEXIS 202679, 2018 WL 6300479, at *5* ("On class certification, the Court does not resolve issues of disputed facts."); *Alcantar, 800 F.3d at 1053* ("We conclude that the district court erred in denying class certification because it evaluated the merits rather than focusing on whether the questions presented—meritorious or not—were common to the class.").

Accordingly, the Court finds that whether there was nonfunctional **[**92]** slack-fill in the Slack-Filled Pepper Products is a common question for purposes of *Rule 23(b)(3)*.

C. Damages

In *Comcast*, the Supreme Court held that ***HN34***[] in order to prove predominance plaintiffs have to "establish[] that damages are capable of measurement on a classwide basis." *569 U.S. at 35*. "Calculations need not be exact, but . . . any model supporting a plaintiff's damages case must be consistent with its liability case." *Id.* The Court explained that it was imposing this burden on plaintiffs because otherwise "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Id.*

Plaintiffs' theory of liability is straightforward — consumers were deceived into paying for a "full" container of pepper when in fact they received a container with nonfunctional slack-fill. They submitted an expert report from Dr. Armando Levy to demonstrate that two theories of injury/damages could be calculated on a classwide basis: "out-of-pocket loss" and "benefit of the bargain." (Levy Rep. ¶¶ 10-11.) Levy concludes that under either theory damages can be estimated as the value of the missing black pepper (the "overcharge"). (Levy Rep. ¶¶ 13, 32.) He then proposes that the overcharge could **[**93]** be calculated taking the percentage reduction in weight (e.g., 25% for the 4-ounce container that became a 3-ounce container) and multiplying that by the average price of the product. (Levy Rep. ¶ 32.) The damages for each product code could then be calculated by multiplying the overcharge by the number of units sold, and the total damages would be the sum of those damages for each product code. (Levy Rep. ¶ 33.)

Defendants object to Dr. Levy's proposed method of calculating damages on several grounds and have moved to exclude his report and opinions. None of their arguments is persuasive.

First, defendants object to Dr. Levy's use of net weight because plaintiffs' theory of liability is based on an alleged reduction in volume. But using a weight reduction as a proxy for volume reduction is consistent with plaintiffs' theory of liability — that the weight reduction resulted in a comparable volume reduction. In fact, defendants' contention that it had to overfill its products in order to maintain its self-imposed minimum fill level, even if that exceeded the net weight represented on the package, is consistent with that theory.

Defendants also argue that plaintiffs have not provided any **[**94]** methodology for determining individual damages. (*See* McCormick's Opp. at 25 ("To determine what amount any purchaser might claim, one would have to know which specific product(s) the individual purchased, how many of each and at what price(s).")). But ***HN35***[] plaintiffs "[a]t the class certification stage . . . are not required to prove damages by calculating specific damages figures **[*248]** for each member of the class, but rather they must show that a reliable method is available to prove damages on a classwide basis." In re Wellbutrin XL Antitrust Litig., 282 F.R.D. 126, 144 (E.D. Pa. 2011); *see also* Louisiana Wholesale Drug Co., Inc. v. Pfizer, Inc. (In re Neurontin Antitrust Litig.), No. 02-1390, 2011 U.S. Dist. LEXIS 7453, 2011 WL 286118, at *9 (D.N.J. Jan. 25, 2011) (plaintiffs "need only show that a viable method is available to prove damages on a class-wide basis"); Kleen Prods. LLC v. Int'l Paper Co., 831 F.3d 919, 929 (7th Cir. 2016) ("[A]t the class certification stage, plaintiffs are not obliged to drill down and estimate each individual class member's damages."). "The mere fact that damage awards will ultimately require individualized fact determinations is insufficient by itself to preclude class certification." Hoyte v. District of Columbia, 325 F.R.D. 485, 494 (D.D.C. 2017) (quoting McCarthy v. Kleindienst, 741 F.2d 1406, 1415, 239 U.S. App. D.C. 247 (D.C. Cir. 1984)).

While it may well be a challenge to figure out how to identify class members and to allocate damages among them, plaintiffs have met their burden at the class certification stage to prove that damages are calculable on a classwide basis.

d. Extrinsic Evidence of Consumer Perceptions and Behavior

[95]** According to defendants, plaintiffs cannot satisfy the predominance requirement because "common evidence such as empirical research, surveys, studies or expert testimony demonstrating consumer perceptions is required" in order for plaintiffs to prove "materiality/causation/injury" on a classwide basis. (Defs.' Supp. Br. at 9.)

Typically, plaintiffs do rely on such extrinsic evidence at the class certification stage. *See, e.g.,* Farar v. Bayer AG, No. 14-cv-04601, 2017 U.S. Dist. LEXIS 193729, 2017 WL 5952876, at *12 (N.D. Cal. Nov. 15, 2017) (plaintiffs proffered market research to show that claims that multivitamins are good for heart health, immunity, and physical energy are material); Suchanek v. Sturm Foods, Inc., 764 F.3d 750, 752 (7th Cir. 2014) (plaintiffs proffered marketing studies, expert surveys, and focus-group testing to show that whether the coffee in coffee pods for the Keurig coffee machine is instant or ground is material); In re ConAgra Foods, Inc., 90 F. Supp. 3d 919, 1018 (C.D. Cal. 2015) (plaintiffs proffered third-party surveys and market research to support their contention that the "100% Natural" label on Wesson Oils is material), *aff'd sub nom.* Briseno v. ConAgra Foods, Inc., 844 F.3d 1121 (9th Cir. 2017) *and* 674 F. App'x 654 (9th Cir. 2017); Kumar v. Salov N. Am. Corp., No. 14-cv-2411, 2016 U.S. Dist. LEXIS 92374, 2016 WL 3844334, at *8 (N.D. Cal. July 15, 2016) (plaintiffs proffered market research and expert testimony to prove that the representation that olive oil was "Imported from Italy" is material); Hadley v. Kellogg Sales Co., 324 F. Supp. 3d 1084, 1115 (N.D. Cal. 2018) (plaintiff proffered market **[**96]** research and expert testimony of a marketing expert to show that health benefit claims on cereal products are material).

Plaintiffs concede they do not have this type of evidence. (*See* 10/24/18 Tr. at 73 ("[W]e made the strategic decision . . . not to do a consumer survey. . . . [O]bviously this Court would find it helpful, and I recognize that.").) But they argue that such evidence is not required because they have other evidence of materiality, specifically the "slack-fill regulations [which] demonstrate that a reasonable consumer would consider whether a product contains nonfunctional slack-fill to be material" and "[d]efendants' documents show[ing] that price is material to pepper consumers." (Pls.' McCormick Reply at 8-9; *see also* Pls.' Supp. Resp. at 5-6 ("[d]efendants' documents . . . demonstrate how reasonable consumers interact with and make decisions about the products at issue"); *id.* at 8-10 ("the regulations prohibiting such packaging demonstrate the misleading nature and materiality of the same"); **[*249]** 10/24/18 Tr. at 73 (plaintiffs "made the decision to submit the record as it is" "given that we had the regulation and we had defendant's documents" as evidence of materiality).)

Plaintiffs' **[**97]** evidence of materiality is, at best, meager. While the regulatory prohibition of nonfunctional slack-fill is expressly tied to deceptiveness, its evidentiary value for proving materiality is less clear. *Compare* Kumar, 2016 U.S. Dist. LEXIS 92374, 2016 WL 3844334, at *8 (prohibition on misrepresenting a good's country of origin is evidence of materiality) *with* Victor v. R.C. Bigelow, Inc., No. 13-cv-02976, 2014 U.S. Dist. LEXIS 34550, 2014 WL 1028881, at *17 (N.D. Cal. Mar. 14, 2014) ("what a reasonable consumer expects . . . may have absolutely no relation to FDA regulations").

As for McCormick's corporate documents. plaintiffs rely on fewer than a dozen internal company communications. (*See* Powerpoint at 25-29 (citing Pls.' Exs. 113, 133, 139, 142); Pls.' Supp. Resp. at 5-6 (citing Fegan Decl. ¶¶ 25, 27, 37, 38, 78-79, 82 (relying on Pls.' Exs. 104, 105, 106, 112, 113, 142, and 143)).) Several show that McCormick employees thought that raising shelf prices was not a viable option so they came up with the alternative plan of reducing fill.[78] The documents also show that McCormick employees were concerned that consumers might react negatively if they realized that the weight reduction was a "price increase in disguise."[79] Other documents show that McCormick wanted to hide this effective price increase from consumers by keeping the same container **[**98]** sizes with no visible fill lines,[80] and that it took an additional step to avoid discovery by enlisting the private-labels, including Wal-Mart, to make the same changes.[81] Finally, the **[*250]** documents show that in May 2015, a Wal-Mart employee opined that the reduced-weight products had "too much air space."[82]

Plaintiffs argue that "the corporate strategies reflected in [d]efendants' documents, which are based on their own research and experience, demonstrate how reasonable consumers interact with and make decisions about the products at issue." (Pls.' Supp. Resp. at 5-6) *see also* 10/24/18 Tr. at 26 (documents "reflect[] [McCormick's] consumer marketing and brand teams that do exactly that type of research [and] that are discussing what they believe consumers will do based on their experience").) Contrary to plaintiffs' insinuations, there is no reference in the documents to research or studies of consumer perceptions or behavior. Rather, we only learn that McCormick employees were concerned about fill levels, price and deception, arguably because they believed consumers would find those to be material considerations.

Unlike the "internal documents" that other courts have relied **[**99]** upon in finding plaintiffs' evidence of materiality to be sufficient, these documents do not include or reflect actual market research or consumer surveys. *See, e.g.,* Kumar, 2016 U.S. Dist. LEXIS 92374, 2016 WL 3844334, at *8 (internal documents included defendant's "own market research evidence, along with other industry research, to show that Italian origin is important to consumers'

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[78] *See, e.g.*, Fegan Decl. ¶¶ 27, 38 (citing Pls.' Ex. 106 (Agenda/Meeting Minutes from an internal McCormick meeting, dated June 30, 2014, stating "Extensive discussion as prep mode for ELT [Executive Leadership Team] on 7/1. If we don't do this, we must take a price increase-not an acceptable solution.")); Fegan Decl. ¶ 38 (citing Pls.' Ex. 112 (internal McCormick emails, dated from September 16 to 22, 2014, which reflect that McCormick concluded that the only option for offsetting the commodity price increases without increasing the absolute price of their products was a reduction in fill)).

[79] *See* Fegan Decl. ¶ 39 (quoting Pls.' Ex. 112 (internal McCormick email expressing concern "that such price increases in disguise (ie weight reduction for same price) are just as challenging as RSP [retail sales price] increases")).

[80] *See* Fegan Decl. ¶ 78 (citing Pls.' Ex. 142 (slide from an internal McCormick presentation in November 2014, which shows that one of the reasons why McCormick is "not reducing the can dimensions to adjust for non-functional slack fill after the net weight reduction" is to "minimize[] visible change to consumers")); Fegan Decl. ¶ 82 (quoting Pls.' Ex. 143 (internal McCormick emails, dated November 3, 2014, regarding labeling recommendations, which include one employee's statement that "Our primary concern with the label will be the consumer's ability to see the product (specifically the visual fill line). It would be our preference to mitigate this risk as much as possible, especially with all of the changes that will be occurring related to the net weight reduction project.")).

[81] *See* Fegan Decl. ¶ 37 (citing Pls.' Ex. 113 (internal McCormick emails, dated June 9, 2014, discussing the proposed "net weight reduction" project with one McCormick employee writing that a unilateral reduction might be "deceptive and could very well back fire on us[,]" since McCormick's private label customers would likely "advertise '10% more vs [McCormick]'" and thus "point[] this deception out to our loyal branded customer")); Powerpoint at 26 (quoting Pls.' Ex. 133 (internal McCormick emails, dated October 28, 2014, noting that one of the private label brands "believes we are headed for a pepper sales disaster and a consumer nightmare resulting from the 'same package, 25% less weight' strategy. They are basing this on first hand experiences from other weight reductions in other product lines as well as the consumer complaints that came with those changes at retail. They think by using the same package we look like we are trying to pull a fast one. They asked why we didn't consider a combination of weight reduction+ price increase to mitigate the huge weight % reduction." The response: "When I see the words 'disaster' and 'nightmare' being communicated related to our number one initiative, I'm not feeling too great.")).

[82] Powerpoint at 29 (quoting Pls.' Ex. 139 (email from a Wal-Mart executive to McCormick asking, "Do you have another size can, we think we want to move GV [Great Value], too much air space.")).

olive oil purchasing decisions"); Farar, 2017 U.S. Dist. LEXIS 193729, 2017 WL 5952876, at *12 (internal documents included results of extensive market research showing "that defendants thoroughly investigated the types of health claims most effective to various types of consumers in order to shape their brand marketing and strategy, and these claims included heart health, immunity, and physical energy claims"); Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc., 326 F.R.D. 592, 613-14 (N.D. Cal. 2018) (internal documents revealed that the purpose of the "Made from Real Ginger" claim was to make people believe that Canada Dry Ginger Ale offers the health benefits of real ginger, that the "Real Ginger" marketing program was working to increase sales volume, and that a consumer survey showed that 25% of consumers who drink Canada Dry gave their reason for drinking it as "*Canada Dry is made with real ginger*"); Martin v. Monsanto Co., No. 16-cv-2168, 2017 U.S. Dist. LEXIS 135351, 2017 WL 1115167, at *7 (C.D. Cal. Mar. 24, 2017) (internal documents showed that Monsanto considered the claim **[**100]** that concentrated weed killer would result in 23 gallons of product to be a "key claim[ ]" and included "results of a 3,000 person consumer research study" and "a series of focus groups"); Mullins v. Premier Nutrition Corp., No. 13-cv-01271, 2016 U.S. Dist. LEXIS 51140, 2016 WL 1535057, at *3 (N.D. Cal. Apr. 15, 2016) (internal documents included defendant's own "[m]arketing research suggest[ing] the overwhelming majority of [the product's] users purchased the product to obtain [the represented health] benefits" that plaintiffs were challenging).

Indeed, some courts have found that evidence of a defendant's opinion as to materiality is not an adequate substitute for extrinsic evidence. *See, e.g.,* In re 5-Hour Energy Mktg. & Sales Practices Litig., No. 13-ml-2438, 2017 U.S. Dist. LEXIS 220969, 2017 WL 2559615, at *7 (C.D. Cal. June 7, 2017) (testimony of **[*251]** defendant's former marketing director was insufficient because it "addresse[d] only how [defendant] perceived its own branding techniques, and not how consumers reacted to the product name or the alleged misstatements on the [product's] label"); Cormier v. Carrier Corp., No. 2:18-cv-07030, 2019 U.S. Dist. LEXIS 53222, 2019 WL 1398903, at *13 (C.D. Cal. Mar. 25, 2019) (rejecting plaintiffs' argument that "materiality can be proven on a classwide basis because . . . [the defendant] itself believed that the alleged defect was material" on the ground that "the materiality **[**101]** analysis focuses on whether a reasonable *consumer*-not [the defendant]-would have considered information about the alleged defect to be important in their decision to purchase").

Given the relatively limited showing of materiality, the Court must confront the question whether plaintiffs' evidence of materiality is enough for class certification in each of the four states. This question is not susceptible to a uniform answer; nor are there many cases to guide the Court in its search for an answer. In addition, in at least two of the states, there is arguably tension between two Supreme Court cases, *Amgen* and *Comcast*, which bear on this subject. In *Amgen*, the Court considered whether plaintiffs in a securities fraud case had to proffer evidence of materiality to prove predominance. The Court held that they did not because (1) for purposes of Rule 23(b)(3), "materiality" was necessarily a "common question" because it was judged by an "objective standard," Amgen, 568 U.S. at 467 ("because [t]he question of materiality . . . is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor, materiality can be proved through evidence common to the class"); and (2) "a failure of proof **[**102]** on the issue of materiality would end the case for one and for all," id. at 468. Thus, the Court concluded that "[a]s to materiality, therefore, the class is entirely cohesive: It will prevail or fail in unison. In no event will the individual circumstances of particular class members bear on the inquiry." Id. at 460. In reaching its decision, the Court emphasized that ***HN36***[] to gain certification under Rule 23(b)(3), plaintiffs need not establish that they will "win the fray" because "the office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently.'" *Id.*

A month later, the Supreme Court emphasized that ***HN37***[] a party seeking class certification "must . . . satisfy [Rule 23(b)(3)] through evidentiary proof." Comcast, 569 U.S. at 33. But, in *Comcast*, the Court only addressed the scope of plaintiffs' evidentiary burden with respect to damages.

Only a few courts have grappled with the question of what "evidentiary proof" is needed to satisfy Rule 23(b)(3). As discussed more extensively *infra*, several recent California cases, including a decision by the Ninth Circuit, have held that in light of the objective standard for materiality under California law, extrinsic evidence **[**103]** of materiality is not required. *See* Bradach v. Pharmavite, LLC, 735 F. App'x 251, 254 (9th Cir. 2018) (unpublished);

Hadley, 324 F. Supp. 3d at 1115.[83] But the Seventh Circuit's decision in *Suchanek* and several subsequent district court cases in Illinois strongly suggest that even when materiality is judged by an **[*252]** objective standard, extrinsic evidence of materiality may be necessary for class certification of a consumer protection claim where there may be several explanations for consumers' behavior and motivations. *See* *Suchanek, 764 F.3d at 760-61*; *Langendorf v. Skinnygirl Cocktails, LLC, 306 F.R.D. 574, 582-83 (N.D. Ill. 2014)*; *Clark v. Bumbo Int'l Trust, No. 15-cv-2725, 2017 U.S. Dist. LEXIS 137607, 2017 WL 3704825, at *6-8 (N.D. Ill. Aug. 28, 2017)*. In contrast, courts in Florida and Missouri have not addressed the issue.

Given the above, the Court cannot accept defendants' argument that plaintiffs *must* proffer extrinsic evidence of materiality/causation/injury across-the-board in order to prove predominance under *Rule 23*, irrespective of the product involved, the type of deception, the elements of the relevant state consumer protection statute, and the state court decisions interpreting those statutes. Thus, the Court will revisit this issue in the context of its analysis of each state's consumer protection statute.

a. California Consumer Protection Class

Given California federal and state case law, the Court concludes that a class can **[**104]** be certified under the California consumer protection statutes.

HN38[] To prevail on a claim under the CLRA, plaintiffs must prove a deceptive act, causation of injury and reliance on the deceptive practice. *See* *Hilsley, 2018 U.S. Dist. LEXIS 202679, 2018 WL 6300479, at *11*. However, in a class action "[c]ausation, on a classwide basis, may be established by materiality," and "if . . . material misrepresentations have been made to the entire class, an inference of reliance arises as to the class." *In re Vioxx Class Cases, 180 Cal. App. 4th 116, 103 Cal. Rptr. 3d 83, 95 (Cal. Ct. App. 2009)*. The Court has already concluded that whether defendants committed a deceptive act is a common question. It is also undisputed that the alleged misrepresentation was made to the entire class, allowing for an inference of reliance as to the class if the deception was "material." The only outstanding issue, and the focus of the parties' dispute, is whether plaintiffs have proven that "materiality" is a common question susceptible to common proof.

To prove materiality, a plaintiff must establish that "a reasonable [person] would attach importance to [the misrepresentation's] existence or nonexistence in determining his choice of action." *Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 120 Cal. Rptr. 3d 741, 246 P.3d 877, 892 (Cal. 2011)*; *In re Tobacco II Cases, 46 Cal. 4th 298, 93 Cal. Rptr. 3d 559, 207 P.3d 20, 39 (Cal. 2009)*; *see also* *Racies v. Quincy Bioscience, LLC, No. 15-cv-00292, 2017 U.S. Dist. LEXIS 206807, 2017 WL 6418910, at *3 (N.D. Cal. Dec. 15, 2017)* ("California's consumer protection laws evaluate materiality **[**105]** under a reasonable person standard, not on an individualized basis.").[84] Thus, materiality is judged by an objective "reasonable person" standard.

Since the Supreme Court's decision in *Amgen*, ***HN40***[] a growing number of cases in California have concluded that when a case "presents specific alleged misrepresentations common to the class," materiality is necessarily a common question for purposes of *Rule 23(b)(3)* because it is judged by an objective "reasonable person" standard and, therefore, *no* evidence of materiality is necessary for purposes of class certification. *Werdebaugh v. Blue Diamond* ***[*253]*** *Growers, No. 12-cv-2724, 2014 U.S. Dist. LEXIS 71575, 2014 WL 2191901, at *14(N.D. Cal. May*

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[83] *See also* *Hilsley, 2018 U.S. Dist. LEXIS 202679, 2018 WL 6300479, at *11*; *Broomfield, 2018 U.S. Dist. LEXIS 177812, 2018 WL 4952519, at *11*; *In re Arris Cable Modem Consumer Litig., 327 F.R.D. 334, 364-66 (N.D. Cal. 2018)*; *Lewert v. Boiron, Inc., No. 2:11-cv-10803, 2014 U.S. Dist. LEXIS 199486, 2014 WL 12626335, at *6 (C.D. Cal. Nov. 5, 2014)*; *Escobar, 2019 WL 2619636, at *2*.

[84] ***HN39***[] Causation is also a required element under the UCL. *See* *Kwikset, 246 P.3d at 887*. However, to establish causation in a class action, only the class representatives must establish reliance on the alleged misrepresentation, unnamed class members need not. *In re Tobacco II Cases, 207 P.3d at 35* (class "relief under the UCL is available without individualized proof of deception, reliance and injury").

23, 2014); *see also, e.g.*, Hadley, 324 F. Supp. 3d at 1115 ("because deception and materiality are objective questions, they are 'common question[s] for purposes of Rule 23(b)(3)'" (quoting Amgen, 568 U.S. at 467)).[85] The Ninth Circuit has also held that CLRA claims are "ideal for class certification because they will not require the court to investigate class members' individual interaction with the product." Bradach, 735 F. App'x at 254-55 (quoting Tait v. BSH Home Appliances Corp., 289 F.R.D. 466, 480 (C.D. Cal. 2012)). The court in *Bradach* then proceeded to summarily reverse the district court's finding that plaintiffs had failed to provide sufficient evidence of materiality to prove predominance on the ground that "the district court's conclusion that it would **[**106]** need to inquire into the motives of each individual class member was premised on an error of law." Id. at 255; *see also* Escobar, 2019 WL 2619636, at *2 (C.D. Cal. Mar. 25, 2019) (relying on *Bradach* to certify a class to bring slack-fill claims under California law without any discussion of the evidence or the need for evidentiary proof). In *Hadley*, Judge Koh explained:

> [B]ecause deception and materiality under the [] CLRA[] and UCL are objective questions, they are ideal for class certification because they will not require the court to investigate class members' individual interaction with the [challenged] product[s]. . . . As a result, "[t]here is no risk whatever that a failure of proof on the common question[s] of [deception and] materiality will result in individual questions predominating. Instead, the failure of proof on the element[s] of [deception and] materiality would end the case for one and for all; no claim would remain in which individual . . . issues could potentially predominate."

[*254] 324 F. Supp. 3d at 1115-16 (quoting Amgen, 568 U.S. at 467-68) (internal citations omitted).

Despite the California cases that apply *Amgen* to the element of materiality under California law and the Ninth Circuit's decision in *Bradach*, defendants insist that plaintiffs **[**107]** are required to proffer "sufficient" evidence of materiality at class certification and that evidence must include extrinsic evidence such as consumer surveys, market research or expert testimony. (Defs.' Supp. Br. at 9.) To support this argument, defendants cite several California cases where courts have required extrinsic evidence of materiality. (*See* Defs.' Supp. Br. at 3-4, 9 (citing In re 5-Hour Energy, 2017 U.S. Dist. LEXIS 220969, 2017 WL 2559615, at *8 ("Absent a consumer survey or other market research to indicate how consumer reacted to the [challenged] statements, and how they valued these statements compared to other attributes of the product and the [relevant] market generally, [p]laintiffs have not offered sufficient evidence of materiality across the class."); Kosta v. Del Monte Foods, Inc., 308 F.R.D. 217, 224-25, 230 (N.D. Cal. 2015) (evidence of materiality required and the plaintiff's evidence was insufficient where expert's "fill-in-the-blanks" opinion was too generic to constitute a "method of classwide proof to show that a 'reasonable consumer' would find the challenged statements deceptive and material to their purchasing decision"); Jones v.

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[85] *See also* Lewert v. Boiron, 2014 U.S. Dist. LEXIS 199486, 2014 WL 12626335, at *6 ("Materiality is an objective inquiry, determinable on a classwide basis."); Mullins v. Premier Nutrition, 2016 U.S. Dist. LEXIS 51140, 2016 WL 1535057, at *5 ("As a general rule, materiality may be established by common proof '[b]ecause materiality is judged according to an objective standard,' and so '[t]he alleged misrepresentations and omissions, whether material or immaterial, would be so equally for all [consumers] composing the class.'" (quoting Amgen, 568 U.S. at 459)); *id.* ("question of materiality remains a common one" even where marketing surveys arguably "showed that whether a statement is material varies from consumer to consumer"; defendant was free to make that argument at trial); Fitzhenry-Russell, 326 F.R.D. at 613 ("As a general rule, materiality may be established by common proof '[b]ecause materiality is judged according to an objective standard,' and so '[t]he alleged misrepresentations and omissions, whether material or immaterial, would be so equally for all [consumers] composing the class.'" (quoting Amgen, 568 U.S. at 459)); Broomfield, 2018 U.S. Dist. LEXIS 177812, 2018 WL 4952519, at *11 ("Though both [p]laintiffs and [d]efendants spend most of their time disagreeing as to whether [the expert's] declaration sufficiently proves materiality, the question at this stage is not whether [p]laintiffs have successfully proven materiality, but rather whether the materiality inquiry is a common question susceptible to common proof that helps to establish predominance. . . . Because materiality is an objective question based on the reasonable consumer, it is common to the class and 'ideal for certification.'" (quoting Amgen, 568 U.S. at 481)); Schneider v. Chipotle Mexican Grill, Inc., 328 F.R.D. 520, 539-40 (N.D. Cal. 2018) ("In cases alleging misrepresentation, 'common issues predominate when plaintiffs are exposed to [a] common set of representations about a product.'" (quoting Butler v. Porsche Cars N. Am., Inc., No. 16-cv-2042, 2017 U.S. Dist. LEXIS 59952, 2017 WL 1398316, at *10 (N.D. Cal. Apr. 19, 2017)); Hilsley, 2018 U.S. Dist. LEXIS 202679, 2018 WL 6300479, at *11 (observing that defendants correctly "d[id] not challenge [p]laintiff's predominance argument" as "causes of action requiring an objective test make such claims amenable to class actions").

ConAgra Foods, Inc., No. 12-cv-01633, 2014 U.S. Dist. LEXIS 81292, 2014 WL 2702726, at *15 (N.D. Cal. June 13, 2014) (evidence of materiality insufficient because plaintiffs provided only the conclusory declaration of an expert who stated that "reasonable **[**108]** consumers would rely on [the] label to identify products that are natural" but "did not explain *how* the challenged statements, together or alone, were a factor in any consumer's purchasing decisions"); Townsend v. Monster Beverage Corp., 303 F. Supp. 3d 1010, 1044 (C.D. Cal. 2018) (expert report presenting survey evidence was insufficient evidence of materiality where surveys "d[id] not provide insight into consumer purchasing decisions").

For several reasons, these cases do not help defendants. First, the underlying facts and claims are distinguishable from the present case. All the above cases involved allegations that statements on a product's packaging were misleading, not that the packaging itself was misleading. As a result, there could be (and were) disputes about the meaning of the alleged misrepresentation. For example, in *In re 5-Hour Energy*, the court concluded that plaintiffs had not shown that materiality was susceptible to common proof in part because "plaintiffs fail[ed] to establish a controlling definition for a key term in an alleged misstatement." 2017 U.S. Dist. LEXIS 220969, 2017 WL 2559615, at *8 ("the meaning of the term 'energy' [was] disputed," and plaintiffs "ha[d] offered no evidence of a common definition of 'energy' among a substantial number of consumers"); *see also* Jones v. ConAgra, 2014 U.S. Dist. LEXIS 81292, 2014 WL 2702726, at *15-16 (no clear meaning **[**109]** to claim of "100% Natural"). Here, no such questions of interpretation are present. *See* Alvarez v. NBTY, Inc., No. 17-cv-00567, 331 F.R.D. 416, 2019 U.S. Dist. LEXIS 87420, 2019 WL 2223929, at *5 (S.D. Cal. May 22, 2019) (finding that these and other cases requiring survey evidence were distinguishable because in those cases the "allegedly false word ha[d] no fixed meaning").

In addition, in several cases there were disputes about whether there was classwide exposure to the alleged deception. For example, in *Kosta*, "the variations [we]re so great that at least half the challenged products would not evidence the violations alleged, either because they did not appear on the products or because the [challenged statements] were truthful." Kosta, 308 F.R.D. at 229. As a result, the court found that there was "no cohesion among the members because they were **[*255]** exposed to quite disparate information." *Id.* (quoting Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1020 (9th Cir. 2011)). Here, though, the meaning of the alleged deception and the uniformity of exposure are undisputed.

Second, all of these cases were decided before ***HN41***[] the Ninth Circuit's decision in Bradach, which holds (albeit in an unpublished opinion) that it is an error of law for courts at class certification to require extrinsic evidence of materiality to prove predominance.

Third, neither Rule 23 nor California law requires **[**110]** plaintiffs to proffer a certain type of evidence at class certification. There is nothing in the Supreme Court's decisions in Comcast, Amgen, or Tyson to suggest that "evidentiary proof" of predominance must take a certain form. In addition, the Court is disinclined to interpret Rule 23 as requiring plaintiffs to proffer a particular type of evidence when such evidence is not required under state law for plaintiffs to prevail on the merits of their claims. *See* Brockey v. Moore, 107 Cal. App. 4th 86, 131 Cal. Rptr. 2d 746, 756 (Cal. Ct. App. 2003) (rejecting argument that "anecdotal" evidence is necessarily insufficient under California law to prove that a statement is misleading); *see also* Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1026 (9th Cir. 2008) ("surveys and expert testimony regarding consumer assumptions and expectations may be offered but are not required; anecdotal evidence may suffice"); Hadley 324 F. Supp. 3d at 1115 ("California courts have explicitly 'reject[ed] the view that a plaintiff must produce' extrinsic evidence 'such as expert testimony or consumer surveys' in order 'to prevail on a claim that the public is likely to be misled by a representation.'" (quoting Colgan v. Leatherman Tool Grp., Inc., 135 Cal. App. 4th 663, 38 Cal. Rptr. 3d 36, 48 (Cal. Ct. App. 2006)); Mullins v. Premier Nutrition, 2016 U.S. Dist. LEXIS 51140, 2016 WL 1535057, at *5 ("The California Court of Appeal has expressly rejected the 'view that a plaintiff must produce a consumer survey or similar extrinsic evidence to prevail on a claim that the public is **[**111]** likely to be misled by a representation.'" (quoting Colgan, 38 Cal. Rptr. 3d at 48)).

Fourth, even though plaintiffs' deposition testimony indicates that not all purchasers would find the alleged deception to be material,[86] ***HN42***[] it is clear under California law that not only is materiality judged by an objective standard, but also materiality to a reasonable consumer does not mean it has to be material to every consumer. *See* *Fitzhenry-Russell, 326 F.R.D. at 613-14* (evidence that 25% of consumers cared about alleged misrepresentation was sufficient evidence of materiality for class certification). Also, more than one consideration can be material to a reasonable consumer. *See* *Hadley, 324 F. Supp. 3d at 1116-17* ("[U]nder California law, [p]laintiff is not required to prove that **[*256]** the challenged [] statements were 'the sole or even the predominant or decisive factor influencing' the class members' decisions to buy the challenged products." (quoting *In re Tobacco II Cases, 207 P.3d at 39*)). Thus, the court in *Hadley* rejected the argument that "predominance is not met in the instant case because the evidence 'shows that people buy [defendant's] products for reasons other than 'health [the challenged claim], such as taste, price, brand loyalty, nostalgia, and convenience." *Id. at 1116*. Rather, the court explained, a defendant's argument that "consumers **[**112]** have a variety of reasons for purchasing [the product]" is "a merits dispute as to materiality," and is therefore a dispute "that can be resolved classwide." *Id. at 1117*. The same analysis applies here.

Finally, ***HN43***[] under California law, "materiality is generally a question of fact unless the 'fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.'" *Steroid Hormone Prod. Cases, 181 Cal. App. 4th 145, 104 Cal. Rptr. 3d 329, 338-39 (Ct. App. 2010)*, *as modified on denial of reh'g* (Feb. 8, 2010) (quoting *Engalla v. Permanente Medical Grp., Inc., 15 Cal. 4th 951, 64 Cal. Rptr. 2d 843, 938 P.2d 903, 920 (Cal. 1997))*.

In sum, the Court concludes that in this case — where there is no inherent ambiguity as to the misrepresentation, no question as to the uniformity of exposure, and an objective, reasonable person standard applies — materiality is a common question for purposes of *Rule 23(b)(3)* and plaintiffs are not required to proffer extrinsic evidence such as a consumer survey, market research, or an expert opinion.

This conclusion is bolstered by the fact that California has expressly adopted verbatim the federal regulation (*21 C.F.R. 100.100(a)*) that prohibits nonfunctional slack-fill. *See* *Cal. Bus. & Prof. Code § 12606(c)*. Plaintiffs concede that ***HN44***[] such prohibitions are "not dispositive" of the issue of materiality (*see* 10/24/18 Tr. at 74), but federal and state courts **[**113]** in California have concluded that laws prohibiting certain conduct can be evidence of materiality. *See, e.g.,* *Kwikset, 246 P.3d at 890* ("by specifically outlawing deceptive and fraudulent 'Made in America' representations," the "Legislature has recognized the materiality of this representation"); *Kumar, 2016 U.S. Dist. LEXIS 92374, 2016 WL 3844334, at *8* (same); *Hinojos v. Kohl's Corp., 718 F.3d 1098, 1107 (9th Cir. 2013)* ("the legislature's decision to prohibit a particular misleading advertising practice is evidence that the legislature has deemed that the practice constitutes a 'material' misrepresentation, and courts must defer to that determination"); *but see* *Victor, 2014 U.S. Dist. LEXIS 34550, 2014 WL 1028881, at *17* ("the ultimate question in UCL [and] CLRA fraud claims is what a reasonable consumer expects, which may have absolutely no relation to FDA regulations").

Accordingly, the Court finds that the California consumer protection class satisfies the predominance requirement of *Rule 23(b)(3)*.

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[86] While the six class representatives of the four consumer protection states testified that they would consider fill level to be a material factor in their purchasing decision (Esparza Dep. at 45; Marsh Dep. at 17, 35-36; Pellitteri Dep. at 21, 46; Grindel Dep. at 16, 19; Vladimirsky Dep. at 12, 25; Liberov Dep. at 16; *see also supra* Section III.C (analysis of typicality)), other deponents attributed their purchasing decisions to brand loyalty, including the plaintiffs who were withdrawn as Illinois class representatives (*see* Bittle Dep. at 27 ("I just grab the McCormick"); Theis Dep. at 21 (buys McCormick spices and will continue to buy because "McCormick is a good name. It's a good brand, and my mother used to use McCormick."), the plaintiff from Connecticut (*see* Fernandez Dep. at 25-26 ("we've just always bought McCormick, so it's kind of out of habit"), and the plaintiff from New Jersey who voluntarily dismissed her suit prior to the filing of the motion for class certification (*see* Marron Dep. at 16 ("Q. Is it fair to say you just grabbed the McCormick tin? A. Yes.")).

b. Illinois Consumer Protection Class

For the Illinois consumer protection class, plaintiffs have not shown that common questions predominate.

HN45[] To recover damages under the ICFA, a plaintiff must prove "(1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in a course of conduct involving trade or **[**114]** commerce, and (4) actual damage to the plaintiff that is (5) a result of the deception." *De Bouse, 922 N.E.2d at 313*. "That the plaintiff must prove that actual damages were suffered 'as a result' of the deceptive act imposes an obligation on the plaintiff to prove the **[*257]** deceptive act proximately caused any damages." *Id.* In addition, "[t]o be actionable under the ICFA, a representation must be 'material,' which is established by applying an objective standard." *Clark v. Bumbo, 2017 U.S. Dist. LEXIS 137607, 2017 WL 3704825, at *5* (quoting *Connick v. Suzuki Motor Co., 174 Ill. 2d 482, 675 N.E.2d 584, 595, 221 Ill. Dec. 389 (Ill. 1996))*. "A material fact exists where a buyer would have acted differently knowing the information, or if it concerned the type of information upon which a buyer would be expected to rely in making a decision whether to purchase." *Connick, 675 N.E.2d at 595*; *see also* *Lateef v. Pharmavite LLC, No. 12-cv-5611, 2013 U.S. Dist. LEXIS 51457, 2013 WL 1499029, at *3 (N.D. Ill. Apr. 10, 2013)* ("A representation of fact is material if a reasonable person could be expected to rely on a statement or omission in deciding to enter into a transaction.").

With the exception of proving deception, the elements of a claim under the ICFA are different than those required under the California statutes. ***HN46***[] Although "materiality is judged on an objective, reasonable person standard," *Mednick, No. 14-cv-3624, 2017 U.S. Dist. LEXIS 92629, 2017 WL 2619139, at *8 (N.D. Ill. June 16, 2017)*, "proximate causation" and "actual damages" are individualized inquiries, **[**115]** *Pella Corp. v. Saltzman, 606 F.3d 391, 394 (7th Cir. 2010)*, and require proof "that the plaintiff was deceived in some manner and damaged by the deception." *Oshana v. Coca-Cola Co., 472 F.3d 506, 513-14 (7th Cir. 2006)*; *see also* *Avery, 835 N.E.2d at 861* ("it is not possible for a plaintiff to establish proximate causation unless the plaintiff can show that he or she was, 'in some manner, deceived' by the misrepresentation" (quoting *Oliveira v. Amoco Oil Co., 201 Ill. 2d 134, 776 N.E.2d 151, 164, 267 Ill. Dec. 14 (Ill. 2002)))*. As such, "absent proof as to why a particular plaintiff purchased a particular [product], [plaintiff] cannot establish that the defendants' conduct caused him or her to make that purchase." *See* *Siegel v. Shell Oil Co., 612 F.3d 932, 936 (7th Cir. 2010)*. In addition, in a class action in Illinois plaintiffs must prove proximate causation and actual damages as to each class member. *See* *Clark v. Experian Info. Solutions, Inc., 256 Fed. App'x 818, 822 (7th Cir. 2007)* ("Illinois law requires a finding of proximate causation under ICFA, and does not provide for such causation to be inferred."); *Walsh Chiropractic, Ltd. v. Stratacare, Inc., No. 09-cv-1061, 2011 U.S. Dist. LEXIS 103998, 2011 WL 4336727, at *9 (S.D. Ill. Sept. 14, 2011)* ("[C]ausation cannot be inferred; each member of the class must prove that the misrepresentation deceived them."); *Barbara's Sales, Inc. v. Intel Corp., 227 Ill. 2d 45, 879 N.E.2d 910, 927, 316 Ill. Dec. 522 (Ill. 2007)* ("plaintiffs must prove that each and every consumer who seeks redress actually saw and was deceived by the statements in question). By comparison, in California, the reasons for individual purchasing decisions are irrelevant at the class certification stage.

But it has **[**116]** been recognized by the Seventh Circuit that ***HN47***[] the mere presence of individualized issues does not require denial of certification of an ICFA class. *See* *Suchanek, 764 F.3d at 759* ("error of law" to find "that individual issues necessarily predominate in cases requiring individual subjective inquiries into causality"); *see also* *Pella Corp, 606 F.3d at 394* ("Proximate cause . . . is necessarily an individual issue and the need for individual proof alone does not necessarily preclude class certification."); *In re IKO Roofing Shingle Prods. Liab. Litig.,757 F.3d 599, 601-04 (7th Cir. 2014)* (reaffirming *Pella* and remanding for reconsideration of class certification despite the existence of potential individualized questions of causation); *see also* *Tyson Foods, 136 S. Ct. at 1045 (2016)* (predominance inquiry "calls upon courts to give careful scrutiny to the relation **[*258]** between common and individual questions in a case"). Accordingly, the Court must decide whether the plaintiffs have shown that common issues will predominate despite the need under Illinois law for individualized inquiries into proximate causation and damages.

Given the evidence and the fact that under Illinois law individual consumer reactions to the deception are of importance, the Court is not persuaded that this class is "sufficiently cohesive to warrant adjudication by representation." Amchem, 521 U.S. at 623. In California, **[**117]** the Court found the class to be cohesive despite plaintiffs' divergent testimony about their purchasing decisions because for purposes of a class action under California law, plaintiffs did not need to prove anything about the individual class members' purchasing decision in order to prove liability. ***HN48***[] Under the ICFA, at class certification it is necessary to proffer common evidentiary proof as to the reasons behind class member's purchasing decisions if the issues of proximate causation and actual damages are not straightforward. Yet, that is precisely the evidence that is lacking in this case.

As previously noted, there is no classwide evidence of materiality in the form of a consumer survey, market research or an expert opinion. ***HN49***[] While not necessarily required in every case, such evidence has played an important role in Illinois in establishing the cohesiveness of a proposed class. *See* Suchanek, 764 F.3d at 760-61 (suggesting that one way for plaintiffs to meet their burden to show that "class allegations are 'satisf[ied] through evidentiary proof'" would be through "survey or other evidence suggesting the relevant common traits of the class members [or] expert testimony supporting the classwide allegations" **[**118]** (quoting Comcast, 569 U.S. at 33)). Second, the only evidence of actual consumer reaction comes from plaintiffs' testimony which, as set forth above, *see supra* note 86, demonstrates differing motivations for consumers' purchasing decision. Therefore, this is not a case where the nature of the deception means that the only possible reason for the consumers' decision to purchase the product is the deception. *Cf.* Suchanek, No. 11-cv-565, 2018 U.S. Dist. LEXIS 213658, 2018 WL 6617106, at *12-13 (S.D. Ill. July 3, 2018) (evidence showed that the "the only logical reason for [p]laintiffs' behavior is that they purchased [the product] as a result of the deception"). Indeed, of the four plaintiffs who were originally proposed as class representatives for Illinois, two testified that the existence of nonfunctional slack-fill would *not* factor into their purchasing decision. (*See* Bittle Dep. at 13-14, 18-19, 25-27; Theis Dep. at 20-21, 28-29, 31.) Although plaintiffs have withdrawn their names as proposed class representatives, their testimony is still relevant evidence. Considering their testimony, and the similar testimony of several of the other plaintiffs who were deposed, it is arguable that "more than a few" class members did not suffer a compensable injury under Illinois law.[87]

For all of the above reasons, the present case is very different from Suchanek, a deceptive packaging case where a class was certified to bring claims under the ICFA. The defendant in *Suchanek* marketed and sold single-cup coffee pods for use with Keurig-brand coffee machines. But unlike Keurig-brand pods, which utilized a **[*259]** patented filter system to deliver "ground coffee," the defendant's product contained almost exclusively instant coffee, a difference that went to the very essence of the product being sold. Indeed, the class certification record included extensive evidence that the defendants intended to and succeeded in deceiving consumers into believing they were purchasing ground coffee[88] and, importantly, that consumers would not have purchased the defendant's pods had they known it was instant coffee. Suchanek, 764 F.3d at 758 ("The plaintiffs proffered evidence to show the overwhelmingly negative response to the [defendant's] product, the flood of complaints that followed the introduction of [the defendant's product], and numerous surveys that shed light on the preferences of Keurig users for premium (freshly brewed) coffee."). In light of this evidentiary record, the district **[**120]** court on remand granted class certification, observing that causation was likely to be defeated only as to "a few" class members. Suchanek, 311 F.R.D. 239, 259 (S.D. Ill. 2015); *see also* Suchanek, 764 F.3d at 758 ("From the record amassed for the class certification decision, it is apparent that this is not a case where few, if any, of the putative class members share the named representative's grievance against the defendant. If it were, things would be different.").

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[87] This conclusion is reinforced by the substantial possibility that more than a few class members already knew about the alleged nonfunctional slack-fill at the time of purchase given the publicity starting in June 2015 in the *Wall Street* ***[**119]*** *Journal* and the *Minneapolis Star Tribune*. These class members were not "actually deceived" and thus cannot recover under Illinois law.

[88] For example, the defendant's consultant warned it against using the term "instant coffee"; "[n]umerous expert surveys in the record concluded that few consumers understood the true nature of [defendants'] product"; the defendant conducted "focus-group testing to determine whether participants would notice anything amiss about [its product]"; one expert opined that as the product was "three to four times more expensive than the typical instant coffee that may be spooned into a cup of hot water," "only a very 'price insensitive' consumer, or one who was misled, would use a $100 brewer [*i.e.*, the Keurig machine] to heat water to make instant coffee." Suchanek, 764 F.3d at 753-54.

By contrast, in this case there is no extrinsic evidence that illuminates consumer preferences in terms of Slack-Filled Pepper Products. On the contrary, while the deception here involved misleading packaging, as was the case in *Suchanek*, the deposition testimony of half of the plaintiffs indicates that they would have still bought the Slack-Filled Pepper Products even if they knew about the deception. Unlike the coffee pods, the McCormick consumer still received the product they intended to buy and any deception did not render the product effectively worthless. *Suchanek, 2018 U.S. Dist. LEXIS 213658, 2018 WL 6617106, at *11*. Moreover, plaintiffs failed to proffer any extrinsic evidence to support an inference that there existed common proof that the putative class members shared the two proposed class representatives' complaints about the Slack-Filled **[**121]** Pepper Products. Therefore, unlike *Suchanek*, the issue of class certification cannot be solved by reference to the "commonsensical notion that people generally won't pay something for nothing," and, as a result, "the issues of proximate cause [will not] be relatively simple to resolve on a classwide basis." *Id.*

Much closer to the present case is the record in *Langendorf, 306 F.R.D. at 584*, where the court found the plaintiff had failed to prove predominance. In *Langendorf*, the plaintiff sought to certify a class of purchasers of a pre-mixed alcoholic beverage, claiming that the defendant had fraudulently labeled and marketed the product as "all natural" even though it contained the non-natural preservative sodium benzoate. The court found that plaintiff "failed to carry her burden to show that common issues predominate" because she "produced *no* evidence to show that causation will be defeated only as to 'a few' class members; in other words, she has not demonstrated the materiality of the 'all natural' text" to all class members. *Id. at 583*. **[*260]** The court noted that "such a showing could have been attempted through survey evidence," but that the plaintiff had "submitted no evidence, survey or otherwise, to show what portion **[**122]** of purchasers likely relied on the 'all natural' text, or the degree to which the label 'all natural' had a tendency to influence the decision to purchase the product." *Id.*

Similarly, in *Clark v. Bumbo*, , the court found the plaintiff had failed to prove predominance because she "d[id] not submit any evidence to show that the [alleged misrepresentation] was material to any portion of [the product's] purchasers and thus caused them to suffer damages" while the defendant submitted evidence showing that other purchasers had purchased the product for a variety of other reasons. *2017 U.S. Dist. LEXIS 137607, 2017 WL 3704825, at *7*.

The limited evidence here shows that consumers of black pepper, like the consumers in *Skinnygirl* and *Bumbo* (and unlike the consumers in *Suchanek*), are not necessarily a cohesive group when it comes to the reasons for purchasing the product at issue. ***HN50***[] In a state such as Illinois, where the individual reasons for purchasing a product are relevant under the consumer protection statute, there needs to be evidence of classwide materiality so that a court can have confidence that class members share plaintiffs' grievance and that the individualized inquiries necessary to prove causation and injury will be relatively simple **[**123]** and straightforward. Where such evidence is lacking, a court must decide, based on the nature of plaintiffs' claim and evidence before it, whether such individualized inquiries predominate.

In this case, plaintiffs could have attempted to obtain classwide evidence of materiality but they opted not to do so. In the absence of this evidence, the Court concludes that plaintiffs have failed to establish that individualized inquiries into causation and injury will not predominate over the common issues.

As a finding of predominance is essential to class certification, the Court will not certify the proposed Illinois consumer protection class.

c. Florida Consumer Protection Class

For the Florida consumer protection class, plaintiffs have shown that common questions predominate.

HN51[] To prevail on a claim for damages under FDUTPA, a plaintiff must prove "(1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." *City First Mortg. Corp. v. Barton, 988 So. 2d 82, 86 (Fla. Dist. Ct. App. 2008)* (quoting *Rollins, Inc. v. Butland, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006))*; *see also* *Carriuolo v. Gen. Motors Co., 823 F.3d 977, 983 (11th Cir. 2016)*. "A party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue." *Davis v. Powertel, Inc., 776 So. 2d 971, 973 (Fla. Dist. Ct. App. 2000)*. As the Court has already concluded that whether there was a deceptive act is a common question, *see supra* Section III.F.1.a, **[**124]** only the elements of causation and actual damages remain to be addressed.

Importantly, ***HN52***[] in Florida both are judged by objective standards. To prove causation, "a plaintiff must simply prove that an objectively reasonable person would have been deceived." *Fitzpatrick, 635 F.3d at 1283*. "The mental state of each class member is irrelevant." *Carriuolo, 823 F.3d at 985*; *see also* *State Farm Mut. Auto. Ins. Co. v. Performance Orthapaedics & Neurosurgery, LLC, 315 F. Supp. 3d 1291, 1310 (S.D. Fla. 2018)* ("[plaintiff's] knowledge has no bearing on the FDUTPA claim"). "Actual damages" are incurred if the plaintiff does not receive the "benefit of the bargain," which is **[*261]** measured according to "'the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties.'" *Carriuolo, 823 F.3d at 986* (quoting *Rollins, Inc. v. Heller, 454 So. 2d 580, 585 (Fla. Dist. Ct. App. 1984))*; *State Farm, 315 F. Supp. 3d 1291, 1310 (S.D. Fla. 2018)* ("[A] plaintiff must prove the gap in value between what was promised and what was delivered.").

Defendants offer two related arguments against a finding of predominance for the Florida class.

First, they argue that plaintiffs have failed to prove predominance because they lack classwide evidentiary proof of causation, such as a survey, market research, or an expert. (Defs.' Supp. Br. at 6 (under FDUTPA "whether a reasonable consumer would have been **[**125]** deceived is assessed by evidentiary proof").)

There is no Florida case that has expressly confronted the question of whether plaintiffs bringing claims under FDUTPA have an evidentiary burden with respect to proving causation at the class certification stage. However, the Supreme Court's holding in *Amgen*, and the California cases applying that holding to the element of materiality under California law, suggest that ***HN53***[] causation under the FDUTPA is a "common question" for purposes of *Rule 23(b)(3)*. It is judged by an objective, reasonable person standard and a failure of proof on that element will lead to the failure of all claims. Notably, causation under the FDUTPA does not even require proof of materiality to the reasonable consumer; it only requires proof that a reasonable consumer would have been deceived. In addition, state courts, applying a similar standard, have concluded that "[i]ssues pertaining to the proof of the alleged deceptive practice and issues relating to causation and damages will be common to all members of the class." *Davis, 776 So. 2d at 975*. And, there is a long line of similar cases involving allegedly deceptive marketing of a consumer good where courts have certified FDUTPA classes without any evidentiary **[**126]** proof of causation. *See, e.g.,* *Carriuolo, 823 F.3d at 985* (predominance finding upheld in case alleging that defendant put an inaccurate sticker on cars); *Fitzpatrick, 635 F.3d at 1282-83* (predominance finding upheld in case claiming that defendant misrepresented the digestive health benefits of a yogurt product); *Hasemann v. Gerber Prods. Co., No. 15-cv-2995, 331 F.R.D. 239, 2019 U.S. Dist. LEXIS 57311, 2019 WL 1434263, at *30-31 (E.D.N.Y. Mar. 31, 2019)* (predominance met under FDUTPA in case alleging that defendant misrepresented infant formula as reducing the risk that infants would develop allergies); *Nelson v. Mead Johnson Nutrition Co., 270 F.R.D. 689, 696-98 (S.D. Fla. 2010)* ("[I]ndividual class members may establish a FDUTPA claim by submitting identical proof that [d]efendant's representations about [infant formula] would deceive an objective reasonable consumer.").

The cases cited by defendants, *Randolph v. J.M. Smucker Co., 303 F.R.D. 679 (S.D. Fla. 2014)* and *Pop's Pancakes, Inc. v. NuCO2, Inc., 251 F.R.D. 677 (S.D. Fla. 2008)*, do not undercut this conclusion. In both cases, unlike the present case, "different representations were made to different class members." *See* *Bowe v. Pub. Storage, 318 F.R.D. 160, 182 (S.D. Fla. 2015)*. Under those circumstances, even though causation is judged by an "objective" test, it is not a "common question" in the sense that no single causation question would apply to the entire class. *See also* *Miami Auto. Retail, Inc. v. Baldwin, 97 So. 3d 846, 856 (Fla. Dist. Ct. App. 2012)* (causation not a common question where plaintiff had not proven that each class member received the same misrepresentation); *Rollins v. Butland, 951 So. 2d at 872-73* **[*262]** ("class-wide **[**127]** proof of causation is impossible" where plaintiffs claimed defendants were "guilty of no less than fourteen separate deceptive acts and unfair practices"); *Perisic v. Ashley Furniture Indus., No. 8:16-cv-3255, 2018 U.S. Dist. LEXIS 118337, 2018 WL 3391359, at *3 (M.D. Fla. June 27, 2018)* (no predominance where "evidence . . . fails to demonstrate a systematic or uniform marketing scheme" because "examining the merits of each potential class member's claim is needed to determine whether each is the victim of a deceptive act or unfair trade practice"); *Hummel v. Tamko Bldg. Prods., 303 F. Supp. 3d 1288, 1300 (M.D. Fla. 2017)* (predominance requirement not met "because the nature of the case will require the Court to conduct an inquiry into what, if any, misrepresentations were made to each individual class member."). In other words, ***HN54***[] if a putative class has not all been exposed to the same representations, it is not possible to determine on a classwide basis whether an objectively reasonable consumer would have been deceived. No such issue arises in the present case where purchasers were uniformly exposed to the same opaque, allegedly deceptively-filled containers.

Defendants' second argument is that causation is not subject to common proof because plaintiffs "fail to take into account purchasers who knew the weight had changed **[**128]** and those who, like most of the named Plaintiffs, did not care and would have purchased the pepper anyway." (Defs.' Supp. Resp. at 8.) Such evidence is, however, simply irrelevant to plaintiffs' FDUTPA claims. *See* *Carriuolo, 823 F.3d at 985*; *State Farm, 315 F. Supp. 3d at 1310*.

Accordingly, the Court finds that plaintiffs have met their burden to prove that common questions will predominate for their FDUTPA claims.

d. Missouri Consumer Protection Class

For the Missouri consumer protection class, plaintiffs have shown that common questions predominate.

HN55[] "To prevail on a claim under the MMPA, a plaintiff must plead and prove he or she (1) purchased merchandise (which includes services) from defendants; (2) for personal, family or household purposes; and (3) suffered an ascertainable loss of money or property; (4) as a result of an act declared unlawful under the Merchandising Practices Act." *Murphy v. Stonewall Kitchen, LLC, 503 S.W.3d 308, 311 (Mo. Ct. App. 2016)*. As the Court has already concluded that whether there was an unlawful act is a common question (*see supra* Section III.F.1.a), only the elements of causation and ascertainable loss remain to be addressed.

HN56[] Causation under the MMPA requires a showing that the unlawful practice caused the loss, but "the statute does not require that the purchase be caused by the unlawful **[**129]** practice." *Plubell v. Merck & Co., 289 S.W.3d 707, 714 (Mo. Ct. App. 2009)*; *see also* *Murphy, 503 S.W.3d at 313*; *Hawkins, 309 F. Supp. 3d at 706*; *White v. Just Born, Inc., No. 2:17-cv-04025, 2017 U.S. Dist. LEXIS 114305, 2017 WL 3130333, at *9 (W.D. Mo. July 21, 2017)* ("*White I*"); *Bratton v. Hershey Co., No. 2:16-cv-4322, 2017 U.S. Dist. LEXIS 74508, 2017 WL 2126864, at *8 (W.D. Mo. May 16, 2017)* ("*Bratton I*"). Thus, "class members are not individually required to show what they would or would not have done had the product not been misrepresented and the risks known." *Plubell, 289 S.W.3d at 714*.

HN57[] As for the element of ascertainable loss, "Missouri courts apply the 'benefit of the bargain' rule when determining if a plaintiff has suffered an ascertainable loss under the MMPA." *George v. Omega Flex, Inc., No. 2:17-cv-3114, 2018 U.S. Dist. LEXIS 123354, 2018 WL 3559184, at *3 (W.D. Mo. July 24,* ***[*263]*** *2018)* (quoting *Polk v. KV Pharm. Co., No. 4:09-cv-00588, 2011 U.S. Dist. LEXIS 144313, 2011 WL 6257466, at *5 (E.D. Mo. Dec. 15, 2011))*; *see* *Hawkins, 309 F. Supp. 3d at 706*; *White I, 2017 U.S. Dist. LEXIS 114305, 2017 WL 3130333, at *9*; *Bratton I, 2017 U.S. Dist. LEXIS 74508, 2017 WL 2126864, at *8*. The benefit-of-the-bargain rule under Missouri law "compares the actual value of the item to the value of the item if it had been as represented at the time of the transaction." *Murphy, 503 S.W.3d at 313*; *Plubell, 289 S.W.3d at 715*; *see also* *Thompson v. Allergan USA, Inc., 993 F. Supp. 2d 1007 (E.D. Mo. 2014)* ("benefit of the bargain rule" awards a prevailing party "the difference between the value of the product as represented and the actual value of the product as received"); *Hawkins, 309 F. Supp. 3d at 706*; *White I, 2017 U.S. Dist. LEXIS 114305, 2017 WL 3130333, at *9*; *Bratton I, 2017 U.S. Dist. LEXIS 74508, 2017 WL 2126864, at *8*.

Given plaintiffs' theory of liability, both causation and ascertainable loss are common questions for purposes of *Rule 23(b)(3)*. Plaintiffs' MMPA claim is that defendants' unlawful act (deceptively underfilling the Slack-Filled Pepper Products) caused **[**130]** an ascertainable loss because the value of the pepper received by all purchasers was less than the value of the pepper as represented by the container size. Plaintiffs' theory of liability plainly states a claim under the MMPA, *see, e.g.,* *White I, 2017 U.S. Dist. LEXIS 114305, 2017 WL 3130333, at *1* ; *Hawkins, 309 F. Supp. 3d at 701-06*; *Bratton I, 2017 U.S. Dist. LEXIS 74508, 2017 WL 2126864, at *2-8*, and all elements of this theory of liability are subject to common proof, so no individualized inquiries will be necessary in order for plaintiffs to prove their claims.

Defendants interpret the MMPA differently. They argue that individualized inquiries will be required to prove causation and ascertainable loss because "a plaintiff who did not care about an alleged MMPA violation, or who knew about the violation and purchased the products anyway, has not been injured under the MMPA." (Defs.' Supp. Br. at 8.) Their position is supported by a Missouri federal court's recent decision in *White v. Just Born*, where the court reached the same conclusion and thus found that common questions did not predominate for a MMPA claim alleging nonfunctional slack-fill in boxes of candy. *See* *White, No. 2:17-cv-04025, 2018 U.S. Dist. LEXIS 132466, 2018 WL 3748405, at *3 (W.D. Mo. Aug. 7, 2018)* ("*White II*"). But the case relied on by the court in *White II* — the Missouri Supreme Court's decision in *State ex rel. Coca-Cola Co. v. Nixon, 249 S.W.3d 855, 862 (Mo. Banc. 2008)* — does not, upon closer examination, support **[**131]** the court's conclusion.

In *Nixon*, the plaintiff claimed that "she and many other consumers would not have purchased fountain Diet Coke if they had known it contained saccharin" and that "the deception, itself, resulted in irreparable harm." *249 S.W.3d at 859*. After the lower state court certified a class of all purchasers of fountain Diet Coke during a specified time period, the Supreme Court of Missouri reversed, finding that the proposed class was impermissibly overbroad because it "undoubtedly includes an extremely large number of uninjured class members, that is, those who did not care if the Diet Coke they purchased contained saccharin." *Id. at 862*. The court noted that plaintiff's "own expert witness indicated that only twenty percent of those who currently consume fountain Diet Coke would not continue to do so if they knew it contained saccharin," which meant that "eighty percent of the putative class suffered no injury." *Id.* However, *Nixon* did not hold that in every MMPA case there would not be an injury if the plaintiff "did not care" about the alleged MMPA violation. To the contrary, it emphasized that the "alleged injury was based on a subjective preference against saccharin," such that a consumer **[**132]** who did not share that preference could not have been injured, **[*264]** but that the outcome could be different in a case which alleged an "economic injury that was based on an objective characteristic," such that individual preferences were irrelevant. *Id. at 863*. Importantly, it distinguished *Craft*, a decision by the Missouri Court of Appeals approving the certification of a class of purchasers of "light" cigarettes who "thought they had purchased 'light' cigarettes, but the cigarettes they received had the characteristics of regular cigarettes." *Id.* (citing *Craft v. Philip Morris Cos., 190 S.W.3d 368, 387 (Mo. Ct. App. 2005))*. In *Craft*, the alleged injury was that plaintiffs "failed to receive the qualities and economic value of a low tar, low nicotine cigarette." *Nixon, 249 S.W. 3d at 863*; *see also* *Hope v. Nissan N.A., Inc., 353 S.W.3d 68, 80 (Mo. Ct. App. 2011)* (observing that a case like *Nixon* where the basis of the injury was a subjective consumer preference is on a different footing from a case where the alleged injury is diminished economic value of the product received by every purchaser, such as a car with a latent dashboard bubbling defect); *Plubell, 289 S.W.3d at 715*; (plaintiffs' theory that medication with undisclosed safety risks was worth less than it cost was subject to common proof).

The current case is similar to the *Craft, Hope* and *Plubell* cases. Plaintiffs' claim **[**133]** is that they thought they were purchasing a certain amount of pepper based on the container size but that they instead received less pepper. The alleged injury is the difference in value of the pepper as represented and the value of the pepper as received. Thus, they have alleged an economic injury based on an objective characteristic, not an injury that is dependent on class members' subjective preferences. Under plaintiffs' theory of causation and ascertainable loss, every purchaser would have suffered the same loss irrespective of their motivations for purchasing the Slack-Filled Pepper Product. Thus, this is a case where "class members are not individually required to show what they would or would not have done had the product not been misrepresented and the risks known." *Plubell, 289 S.W.3d at 714*. Under such circumstances, the elements of causation and ascertainable loss are subject to common proof and are thus "common questions" for purposes of analyzing predominance.

Accordingly, the Court concludes that common questions predominate for the proposed Missouri consumer protection class.

2. Single-State Unjust Enrichment Classes

Plaintiffs argue that the single-state unjust enrichment classes satisfy predominance **[**134]** because no individualized inquiries will be required to resolve their unjust enrichment claims. Rather, they assert, the answer to the question of "whether it would be unjust for [d]efendants to retain the benefits of the 'Black Pepper Net Weight Reduction' project" depends "solely" on defendants' conduct. (*See* Pls.' Mem. at 35; 7/10/18 Tr. at 114 ("[I]n the context of consideration of whether the retention of the benefit is unjust. That looks solely at the defendants.").)

But ***HN58***[] in none of the seven single states does an unjust enrichment claim depend "solely" on defendant's conduct. To the contrary, each state's unjust enrichment law requires consideration of both plaintiff's and defendant's conduct, as well as the factual context. In California, for example, "[t]he elements for a claim of unjust enrichment are receipt of a benefit and unjust retention of the benefit *at the expense of another*." *Lyles v. Sangadeo-Patel, 225 Cal. App. 4th 759, 171 Cal. Rptr. 3d 34, 40 (Cal. Ct. App. 2014)* (emphasis added). "Even when a person has received a benefit from another, he is required to make restitution only if the circumstances of its receipt or retention are such that, *as between the two* ***[*265]*** *persons*, it is unjust for him to retain it." *Ghirardo v. Antonioli, 14 Cal. 4th 39, 57 Cal. Rptr. 2d 687, 924 P.2d 996, 1003 (Cal. 1996)* (emphasis added). Under Connecticut law, "[p]laintiffs **[**135]** seeking recovery for unjust enrichment must prove (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) *that the failure of payment was to the plaintiffs' detriment*." *Hartford Whalers Hockey Club v. Uniroyal Goodrich Tire Co., 231 Conn. 276, 649 A.2d 518, 522 (Conn. 1994)*; *see also* *id. at 521* ("With no other test than what, under a given set of circumstances, is just or unjust, equitable or inequitable, conscionable or unconscionable, *it becomes necessary in any case where the benefit of the doctrine is claimed, to examine the circumstances and the conduct of the parties* and apply this standard." (emphasis added)). In the District of Columbia, "every unjust enrichment case is factually unique . . . [and] *must be determined by the nature of the dealings between the recipient of the benefit and the party seeking restitution, and those dealings will necessarily vary from one case to the next*." *4934, Inc. v. District of Columbia Dep't of Emp't Servs., 605 A.2d 50, 56 (D.C. 1992)* (emphasis added). In Illinois, "[t]o state a cause of action based on a theory of unjust enrichment, a plaintiff must allege that the defendant has unjustly retained a benefit *to the plaintiff's detriment*, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience." *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc., 131 Ill. 2d 145, 545 N.E.2d 672, 679, 137 Ill. Dec. 19 (1989)* (emphasis **[**136]** added). In Maryland, a person is not unjustly enriched unless "the circumstances of the receipt of the benefit are such *as between the two* that to retain it would be unjust." *First Nat'l Bank of Md. v. Shpritz, 63 Md. App. 623, 493 A.2d 410, 419 (Md. Ct. Spec. App. 1985)* (emphasis added). In Missouri, "there can be no unjust enrichment *if the parties receive what they intended to obtain*." *Am. Std. Ins. Co, 103 S.W.3d at 293* (emphasis added). Finally, in Pennsylvania, "[w]hether the doctrine [of unjust enrichment] applies depends on the *unique factual circumstances* of each case." *Styer v. Hugo, 422 Pa. Super. 262, 619 A.2d 347, 350 (Pa. Super. Ct. 1993)*, *aff'd*, *535 Pa. 610, 637 A.2d 276 (Pa. 1994)* (emphasis added).

Thus, ***HN59***[] when confronted by motions for class certification of unjust enrichment claims under the laws of the states at issue, courts have denied such motions, concluding that the need for individualized inquiries into purchasers' knowledge and motivations precluded a finding of predominance. For example, in *In re Tropicana Orange Juice Mktg. & Sales Practices Litig.*, the court concluded that the California unjust enrichment claim was unsuited to class-wide proof because "the record reflects that purchasers bought [the product] for a variety of reasons" and "many purchasers indisputably received the benefits that they sought from their purchases." *In re: Tropicana Orange Juice Mktg. & Sales Practices Litig., 2018 U.S. Dist. LEXIS 9797, 2018 WL 497071, at *5 (D.N.J. Jan. 22, 2018)*.

Similarly, in *In re Dial Complete Mktg. & Sales Practices Litig.* ***[**137]*** , the court concluded that California, Illinois and Missouri unjust enrichment claims were not subject to common proof "[g]iven the necessity for individualized inquiries into motivations and purchasing decisions" to prove unjust enrichment. *In re Dial, 312 F.R.D. 36, 63, 67, 70 (D.N.H. 2015)*. The court explained that "the problem [was] largely a function of how plaintiffs ha[d] defined the class" because "[p]laintiffs ha[d] defined the purported class in such a way that, by definition, it include[d] consumers with a variety of motivations for purchasing [the product]." *Id. at 62, 66*. As a result, the "the purported class would include, for example, consumers who would not have acted **[*266]** any differently had they known that Dial Complete was not more effective than ordinary hand soap," and "[t]hus, a class member's right to recover for unjust enrichment would necessarily require individualized inquiry into the equities." *Id. at 67*.

In *Lipton v. Chattem, Inc.*, an Illinois district court concluded that plaintiffs challenging the presence of hexavalent chromium in a diet product (Dexatrim) could not prove their unjust enrichment claim under Illinois law on a classwide basis because "[t]he proposed class include[d] individuals who: (1) were unaware of the presence **[**138]** of hexavalent chromium in Dexatrim and who would not have purchased the product had they been so aware; (2) were unaware of the presence of hexavalent chromium but may have still purchased the product had they been so aware; and (3) were aware of the presence of hexavalent chromium and purchased the product anyway." *Lipton, 289 F.R.D. 456, 462 (N.D. Ill. 2013)*. The court explained that "[t]hese differences among the proposed class require that the key liability issues-whether a given class member was deceived by [defendant's] labeling of Dexatrim and whether she suffered damages as a result-can be resolved only on an individual basis." *Id.*

Finally, applying Missouri law in *In re BPA*, the court concluded that plaintiffs' unjust enrichment claim would require "individual inquiry [into] whether [p]laintiffs purchased [d]efendants' products because they thought the products were BPA-free or were manufactured with substances about which there was no scientific controversy." *In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig., No. 08-md-1967, 2011 U.S. Dist. LEXIS 150015, 2011 WL 6740338, at *6 n.11 (W.D. Mo. Dec. 22, 2011)*.

In each of the above cases, the proposed classes were defined as *all* purchasers (within the state) of a certain consumer product, and each proposed class included purchasers with varying degrees of knowledge and differing motivations. **[**139]** Similarly, plaintiffs here have proposed classes that include all the purchasers of Slack-Filled Pepper Products within each state, and the record suggests that class members could have had widely varying reasons for making their individual purchasing decisions. In addition, the variations among class members are relevant to the viability of each class member's unjust enrichment claim. For example, it would be relevant whether a purchaser knew about the alleged nonfunctional slack-fill before the purchase was made — certainly a possibility since the first newspaper articles and lawsuits occurred in June 2015, almost 9 months before the products were no longer on store shelves. It would also be relevant if a purchaser would not have cared about any resulting change in fill level even if he or she had not known about the weight reduction. Whether it would be unjust for McCormick to retain the money of a purchaser who was unaware of the deception and would not have bought the product had she known about the nonfunctional slack-fill is a different question than whether it would be unjust for McCormick to retain money from a purchaser who knew about the nonfunctional slack-fill prior to **[**140]** purchase or who did not know but would have bought the product even if he had known because the purchasing decision was entirely driven by other considerations. Because individualized inquiries would be required to determine which class members had viable unjust enrichment claims, the Court is not persuaded that the proposed single-state unjust enrichment classes are sufficiently cohesive to warrant a finding of predominance.

Accordingly, the Court finds that plaintiffs have not met the predominance requirement for the single-state unjust enrichment classes.

[*267] G. Superiority (*Rule 23(b)(3)*)

HN60[] The superiority requirement asks whether a "class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*. It aims to "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem, 521 U.S. at 615* (quoting *Fed. R. Civ. P. 23* adv. comm. n. to 1966 amend.). The "matters pertinent" to a finding of superiority include: "(A) the class members' interests in individually controlling the prosecution . . . of separate actions; (B) the extent and nature of any litigation **[**141]** concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." *Fed. R. Civ. P. 23(b)(3)*.

Despite the potential difficulties of identifying class members, a class action is superior to any other method for adjudicating this controversy. The most important factor is that given the small dollar value of retail black pepper purchases and the correspondingly low dollar value of any individual recovery, a class action will "enable[] 'vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" 2 Newberg on Class Actions § 4:65 (quoting *Amchem, 521 U.S. at 617*). As the Eleventh Circuit Court of Appeals has explained:

> ***HN61***[] [C] lass actions often involve an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit. The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually. . . . This consideration supports class certification in cases where the total amount sought by **[**142]** each individual plaintiff is small in absolute terms. . . . It also applies in situations where, as here, the amounts in controversy would make it unlikely that most of the plaintiffs, or attorneys working on a contingency fee basis, would be willing to pursue the claims individually.

Klay, 382 F.3d at 1270-71; *Briseno v. ConAgra Foods, Inc., 674 F. App'x 654, 657 (9th Cir. 2017)* ("[T]he benefits of the class mechanism are best realized in cases like this, where the likely recovery is too small to incentivize individual lawsuits, and the realistic alternative to class litigation will be no adjudication at all."); *Amchem, 521 U.S. at 617* ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.").

While manageability is a concern, defendants' contention that the manageability issues in this case are "insurmountable" assumes that a heightened ascertainability standard applies. But, for the reasons discussed *supra* Section III.E, the Court is not applying that requirement. In addition, ***HN62***[] "manageability is only one of the elements that goes into the balance to determine the superiority of a class action in a particular case. Other factors must also be considered, **[**143]** as must the purposes of *Rule 23*, including: conserving time, effort, and expense; providing a forum for small claimants; and deterring illegal activities." *McKinney, 292 F.R.D. at 66 (D.D.C. 2013)*.

Here, manageability concerns do not outweigh the other factors that must also be considered. Accordingly, the Court finds that the superiority requirement is **[*268]** satisfied for the California, Florida and Missouri consumer protection classes.

H. Appointment of Class Counsel (*Rule 23(g)*)

HN63[] *Rule 23(g)* requires that "a court that certifies a class must appoint class counsel." *Fed. R. Civ. P. 23(g)(1)*. In appointing class counsel, this Court "must consider" four factors: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." *Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv)*. Moreover, the Court may also "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." *Fed. R. Civ. P. 23(g)(1)(B)*.

Plaintiffs request "that the Court appoint Elizabeth A. Fegan of Hagens Berman Sobol Shapiro LLP and Scott A. Kamber of KamberLaw as **[**144]** Co-Lead Class Counsel as [they] have and will continue to 'fairly and adequately represent the interests of the class.'" (*See* Class Cert. Mot. at 4-5 (quoting *Fed. R. Civ. P. 23(g)(4)*).) In support of their request, they stated the following:

> Plaintiffs' counsel has performed substantial work to date litigating claims against Defendants. Plaintiffs' counsel has invested thousands of hours prosecuting claims on behalf of the class members, defeating Defendants' motions to dismiss and aggressively pursuing class discovery. Moreover, Plaintiffs' counsel possesses extensive experience in prosecuting complex class actions, including in consumer class actions like this. See Firm Resume of Hagens Berman Sobol Shapiro LLP (Ex. 33); Firm Resume of KamberLaw LLC (Ex. 34). And, as evidenced by the fact that they have already devoted substantial time and effort to the prosecution

> of this proceeding, there can be no doubt that Plaintiffs' counsel will continue to devote the necessary resources necessary to representing the Class following appointment as Class Counsel.

(Pls.' Mem. at 44.) Defendants have wisely raised no objection to the above statements, since proposed Class Counsel have demonstrated their extensive experience **[**145]** and fulsome abilities over the last few years in their role as Interim Co-Lead Counsel. However, since the time of plaintiffs' request, Ms. Fegan has notified the Court that she is no longer associated with the law firm of Hagens, Berman. Ms. Fegan's notice indicates that she will continue to represent Plaintiffs as Interim Co-Lead Counsel, but it does not address the issue of Class Counsel or provide any information about her new law firm or whether her change in firms will affect her ability to act as Class Counsel. As her former law firm's expertise in class actions was part of the Court's consideration when it appointed her as Interim Co-Lead Counsel, the Court will defer the appointment of Class Counsel until the upcoming status conference so the Court can ascertain Ms. Fegan's status.

CONCLUSION

For the reasons stated above, plaintiffs' motion for class certification is granted in part and denied in part, and defendants' motion to exclude plaintiffs' expert is denied. The Court will not certify plaintiffs' proposed multi-state classes, any of the proposed single-state unjust enrichment classes, or a consumer protection class in Illinois, but it will certify consumer protection **[**146]** classes in California, Florida, and Missouri.

[*269] A separate Order, ECF No. 213, accompanies this Memorandum Opinion.

/s/ Ellen S. Huvelle

ELLEN S. HUVELLE

United States District Judge

Date: July 10, 2019

ORDER

For the reasons stated in the accompanying Memorandum Opinion (ECF No. 212), it is hereby

ORDERED that defendants' Joint Motion to Exclude Report and Opinions of Dr. Armando Levy (ECF No. 164) is **DENIED**; it is further

ORDERED that plaintiffs' Motion for Class Certification (ECF No. 156) is **GRANTED IN PART AND DENIED IN PART** as follows:

(1) the motion is **DENIED** with respect to plaintiffs' motion to certify a Consumer Protection Multi-State Class, an Unjust Enrichment (Restatement) Multi-State Class, and an Unjust Enrichment (Appreciation) Multi-State Class;

(2) the motion is **DENIED** with respect to plaintiffs' motion to certify single-state unjust enrichment classes for California, Connecticut, the District of Columbia, Illinois, Maryland, Missouri, and Pennsylvania and to certify a single-state consumer protection class for Illinois; and

(3) the motion is **GRANTED** with respect to plaintiffs' motion to certify single-state consumer protection classes for California, Florida, and Missouri, hereinafter **[**147]** the California Consumer Protection Class, the Florida Consumer Protection Class, and the Missouri Consumer Protection Class.

It is further **ORDERED** that:

(1) The California Consumer Protection Class is defined as "All persons residing in California who purchased Slack-Filled Pepper Products[1] for their personal or household use." The class is certified to bring claims against defendant McCormick under the *California Consumer Legal Remedies Act (CLRA), Cal. Civ. Code § 1770*, and the California Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200*. Plaintiffs Deborah Esparza and Holly Marsh are appointed as Class Representatives.

(2) The Florida Consumer Protection Class is defined as "All persons residing in Florida who purchased Slack-Filled Pepper Products for their personal or household use." The class is certified to bring claims against defendant McCormick under the *Florida Deceptive and Unfair Trade Practices Act (FDUTPA), Florida Stat. § 501.201, et seq.* Plaintiff Carmen Pellitteri is appointed as the Class Representative.

(3) The Missouri Consumer Protection Class is defined as "All persons residing in Missouri who purchased Slack-Filled Pepper Products for their personal or household use." The class is certified to bring claims against defendant McCormick **[**148]** under the *Missouri Merchandising Practices Act (MMPA), Mo. Rev. Stat. § 407.010, et seq.* Plaintiff Catherine Grindel is appointed as the Class Representative.

Excluded from the above classes are (i) Defendants, (ii) any entity in which any Defendant has a controlling interest or which has a controlling interest in Defendants, and (iii) the Court and its staff.

It is further

ORDERED that the appointment of Class Counsel will be addressed at the next Status Conference; it is further

ORDERED that a status conference is set for **Monday, August 19, 2019, at 2:00 p.m**. in Courtroom 23A; and it is further

ORDERED that the parties shall confer and file by no later than **Wednesday, August 7, 2019**, a joint proposal for further proceedings, including an identification of all cases that can be remanded to the transferor court.

/s/ Ellen S. Huvelle

ELLEN S. HUVELLE

United States District Judge

Date: July 10, 2019

End of Document

[1] The term "Slack-Filled Pepper Products" is defined in the Court's Memorandum Opinion filed this same date.

Linde, LLC v. Valley Protein, LLC

United States District Court for the Eastern District of California

July 11, 2019, Decided; July 11, 2019, Filed

No. 1:16-cv-00527-DAD-EPG

Reporter
2019 U.S. Dist. LEXIS 115730 *; 2019 WL 3035551

LINDE, LLC, Plaintiff, v. VALLEY PROTEIN, LLC, Defendant.VALLEY PROTEIN, LLC, Counter-claimant, v. LINDE, LLC, Counter-defendant.

Prior History: Linde, LLC v. Valley Protein, LLC, 2019 U.S. Dist. LEXIS 10174 (E.D. Cal., Jan. 19, 2019)

Core Terms

summary judgment, fair dealing, counter-claim, parties, term sheet, prong, breach of contract claim, summary judgment motion, cause of action, breach of contract, Freezer, damages, good faith, fraudulent, economic loss rule, claim for breach, misrepresentations, declaration, unfair, implied covenant of good faith, choice-of-law, rescission, courts, statute of limitations, allegations, negligent misrepresentation, rescind, account stated, terms, injunctive relief

Counsel: **[*1]** For Linde, LLC, Plaintiff, Counter Defendant: Adam Scott Hamburg, LEAD ATTORNEY, McGlinchey Stafford, Irvine, CA; Christopher A. Bottcher , PHV, LEAD ATTORNEY, PRO HAC VICE, McGlinchey Stafford, Birmingham, AL; Evan B Sorensen, McGlinchey Staffprd, Irvine, CA.

For Valley Protein, LLC, Defendant, Counter Claimant: Russell K Ryan, LEAD ATTORNEY, Motschiedler, Michaelides, Wishon, Brewer & Ryan, LLP, Fresno, CA.

Judges: Dale A. Drozd, UNITED STATES DISTRICT JUDGE.

Opinion by: Dale A. Drozd

Opinion

ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Doc. No. 52)

This matter is before the court on plaintiff and counter-defendant Linde, LLC's ("Linde") motion for summary judgment, or in the alternative for partial summary judgment, filed on August 7, 2018. (Doc. No. 52.) Defendant and counter-claimant Valley Protein, LLC ("Valley Protein") filed an opposition on September 4, 2018. (Doc. No. 53.) Linde filed its reply on September 11, 2018. (Doc. No. 58.) On September 18, 2018, the court held a hearing on the motion at which attorney Adam Scott Hamburg appeared for Linde, and attorney Russell K. Ryan appeared for Valley Protein. Having considered the parties' briefing and heard from counsel, the court will grant **[*2]** Linde's motion for summary judgment in part.

BACKGROUND

The facts of this case are as follows, and are undisputed except where noted. On January 27, 2011, Linde and Valley Protein entered into a Product Supply Agreement (the "2011 Agreement"), in which Valley Protein agreed to purchase from Linde its requirements for CO_2 for its meat processing plant located at 1828 E. Hedges Avenue, Fresno, CA 93703 (the "Plant"). (Doc. No. 52-5 ("UMF") at ¶ 1.) The 2011 Agreement also contained an Application Equipment, Ancillary Equipment, and Services Term Sheet, wherein Valley Protein agreed to lease a Cryoline (Cryowave) Tunnel 48-30 (the "2011 Freezer") from Linde (the "2011 Rental Agreement"). (*Id.* at ¶ 2.) In addition, the 2011 Agreement contained an Application Equipment, Ancillary Equipment, and Services Rider (the "2011 Equipment Rider"), which provided that Valley Protein was obligated to keep the 2011 Freezer clean at all times, and to "maintain the [2011 Freezer] in a good and fully functional condition, in accordance with any written instructions provided by Linde." (*Id.*) Further, the 2011 Equipment Rider stated that Valley Protein "is solely responsible for determining the suitability, **[*3]** compatibility, and use of the [2011 Freezer]." (*Id.*)

By early 2012, Valley Protein realized that it was not meeting its target conversion rates using the 2011 Freezer.[1] (*Id.* at ¶ 6.) In addition, by October 1, 2012, Valley Protein's production increased due to additional business it acquired, and there is some evidence that it was unable to fully meet this increased demand due to the 2011 Freezer malfunctioning. (*Id.* at ¶ 7; Doc. No. 54 ("DMF") at ¶ 7.) Although it is undisputed that Valley Protein did not lose customers as a result of these malfunctions, Valley Protein contends that "it did lose business." (DMF at ¶ 7.) In September 2014, Valley Protein was awarded a new contract with Safeway, because of which it sought ways to improve and expand its freezing operations. (UMF at ¶ 8.) To that end, Valley Protein's president Robert Coyle contacted Michael Iannelli, a sales manager employed by Linde, to inquire whether Linde possessed any newer technology or equipment that would permit Valley Protein to increase its production rate and reduce its CO_2 consumption. (Doc. No. 52-1 ("Iannelli Decl.") at ¶ 9; Doc. No. 52-2 at 17-18.) On September 4, 2014, Linde engineer Amanda Guzman contacted **[*4]** Coyle with a questionnaire to enable Linde to identify the appropriate equipment that would suit Valley Protein's needs. (UMF at ¶ 9; Iannelli Decl. at ¶ 11; Doc. No. 52-2 at 20-21.) On September 29, 2014, Coyle returned this questionnaire to Ms. Guzman. (Iannelli Decl. at ¶ 12; Doc. No. 52-2 at 23-31.) According to the questionnaire, Coyle represented to Linde that the "desired production rate" was 3,500 pounds of poultry per hour. (Iannelli Decl. at ¶ 12; Doc. No. 52-2 at 25-31).

There is some lack of clarity about what occurred next. Iannelli stated his understanding that Valley Protein originally requested the ability to process 3,500 pounds of poultry per hour, as indicated in the questionnaire, but "ultimately ended up" increasing that requirement to 5,000 pounds of poultry per hour. (Doc. No. 57-2 at 12.) In addition, Coyle stated that in October 2014, he received assurances from Ms. Guzman, one of Linde's engineers, that Linde's new equipment would process 5,000 pounds of poultry per hour. (Doc. No. 56 ("Coyle Decl.") at ¶ 9.) However, there does not appear to be any evidence that Valley Protein conveyed to Linde that the capability to process 5,000 pounds of poultry per hour **[*5]** was a *requirement* in October 2014: Coyle stated that information was not conveyed to Linde until at least November 5. (Doc. No. 52-4 at 19.) In addition, Iannelli stated that he was unaware of this 5,000-pound requirement as of September or October, implying that he was made aware of it only later. (Doc. No. 57-2 at 12.)

Effective November 1, 2014, Linde and Valley Protein entered into a new agreement, referred to as the "2014 Agreement."[2] (UMF at ¶ 11.) The 2014 Agreement included the Product Supply Agreement, which contained the following provisions relevant to this action:

> 9. **Warranty, Sole Remedies, and Limitation of Damages**.
> . . .

---

[1] The court understands "target conversion rate" to refer to the freezer's efficiency, specifically the amount of CO_2 that was needed to operate it.

[2] For ease of reference, this order will refer collectively to all agreements entered into on November 1, 2014 as "the 2014 Agreement." However, as the court's analysis below reflects, the "agreement" is in fact composed of multiple separate contracts.

(e) Statute of Limitations. A Party must commence an action for a breach of contract within one year after the action has accrued.

. . .

15. General Provisions.

. . .

(b) Entire Agreement. Each Term Sheet, in conjunction with the terms specified in this document and the related Riders: (1) constitutes a separate contract between the Parties; (2) constitutes all of the terms of the contract between the Parties regarding its subject matter; and (3) supersedes and terminates all previous agreements between the Parties regarding this agreement's subject matter. Any **[*6]** term contained in a delivery document used by Linde, or a purchase order, confirmation, or acknowledgement used by Valley Protein, that conflicts with, is different from, or is additional to, the terms of this agreement is not part of the contract between the parties.

(UMF at ¶ 11; Doc. No. 52-2 at 35, 37-38.) In addition, the 2014 Agreement included an Application Equipment, Ancillary Equipment and Services Term Sheet and accompanying Rider (the "2014 Rental Agreement"), wherein Valley Protein agreed to lease a Spiral Freezer 20-175S from Linde (UMF at ¶ 13; Doc. No. 52-2 at 45-55.) The 2014 Agreement also contained a Bulk Term Sheet and Rider, pursuant to which Valley Protein agreed to purchase its CO_2 gas requirements exclusively from Linde. (UMF at ¶ 12; Doc. No. 52-2 at 40-44.) The Bulk Term Sheet also authorized Linde to charge Valley Protein a fuel surcharge for the delivery of the CO_2 gas. (UMF at ¶ 12; Doc. No. 52-2 at 43.)

According to the Coyle Declaration, a few weeks after the 2014 Agreement was executed, Iannelli contacted Coyle and advised him the equipment that served as the core of the 2014 Agreement had been "mis-engineered," and was only capable of processing less **[*7]** than 2,000 pounds of poultry per hour. (Coyle Decl. at ¶ 12.) Iannelli acknowledged that the new equipment was insufficient to meet Valley Protein's needs and asked for a "do-over," agreeing to release Valley Protein from the 2014 Agreement. (*Id.*; Doc. No. 57-2 at 30-31.) According to Coyle, having equipment sufficient to meet its poultry production requirements "was an absolutely essential requirement and the primary and perhaps sole reason Valley Protein entered in the 2014 Agreement." (Coyle Decl. at ¶ 12.) Linde does not appear to contest this version of events.

On December 1, 2014, Coyle sent an email to Iannelli, which stated in relevant part that Valley Protein would "like to rescind the contract we signed previously requesting an extension of the contract date and the new equipment, the [2014 Freezer.]" (UMF at ¶ 14; Iannelli Decl. at ¶ 16; Doc. No. 52-2 at 57.) Iannelli responded by email the same day, agreeing to let Valley Protein rescind the 2014 Rental Agreement, but declining to accept Valley Protein's request to rescind the 2014 Agreement as a whole. (UMF at ¶ 15; Iannelli Decl. at ¶ 17.) On December 12, 2014, Valley Protein entered into an Equipment Lease Agreement with **[*8]** Linde's competitor, Air Liquide, for a Spiral Freezer Model MB1-30-0550-09. (UMF at ¶ 17.) Concurrently, Valley Protein also executed a Product Supply Agreement with Air Liquide to obtain CO_2 from Air Liquide, despite Iannelli's email to Coyle notifying him that "Linde does not accept [Valley Protein's] request to rescind the contract renewal of the CO_2 agreement." (*Id.*; Doc. No. 52-2 at 57.) On January 25, 2015, Coyle sent a Termination Notice to Iannelli, wherein Coyle notified Linde that Valley Protein would not be renewing the 2011 Product Supply Agreement. (UMF at ¶ 18; Iannelli Decl. at ¶ 18; Doc. No. 52-2 at 59-60.) In response to Coyle's email, Iannelli again advised Coyle that Linde and Valley Protein had a valid supply agreement for CO_2 that was renewed in November 2014, and that according to the terms of that agreement, Valley Protein was obligated to obtain its CO_2 from Linde for the term of five years after that date. (UMF at ¶ 19; Iannelli Decl. at ¶¶ 19-20; Doc. No. 52-2 at 59-60.) On February 1, 2016, Valley Protein notified Linde that it would no longer be purchasing its CO_2 from Linde. (UMF at ¶ 20; Iannelli Decl. at ¶ 22; Doc. No. 52-2 at 64.)

In addition to moving **[*9]** for summary judgment as to its own claims, Linde also moves for summary judgment in its favor as to Valley Protein's counter-claims for breach of contract, breach of the covenant of good faith and fair dealing, intentional misrepresentation, negligent misrepresentation, and unfair competition. These allegations center primarily on alleged malfunctioning of the 2011 Freezer. (*See* Doc. No. 29 at ¶¶ 11-15.) In addition to those allegations, Valley Protein alleges that between mid-2014 and the beginning of 2016, Linde obtained the CO_2 delivered to the Plant from its competitor's plant in Pixley, California, as opposed to Richmond, California. (UMF at ¶

22.) Linde admits that it sometimes improperly billed Valley Protein a surcharge that was based on the transportation of the gas from Richmond to the Plant. (*Id.*) Valley Protein characterizes this as a breach of the 2011 Agreement (*See* Doc. No. 53 at 11), while Linde contends that it was "merely an oversight," and that Linde subsequently reimbursed Valley Protein for any unwarranted transportation surcharges. (Doc. No. 52 at 17-18.)

As a result of what Linde contends was Valley Protein's breach of the 2014 Agreement, Linde asserts damages **[*10]** in the form of lost profits totaling $963,084.00. (UMF at ¶ 23.) Linde also asserts that at the time Valley Protein breached the 2014 Agreement, Valley Protein had a past due balance for CO_2 totaling $38,963.89, and that this amount remains unpaid. (*Id.* at ¶ 24.)

LEGAL STANDARD

Summary judgment is appropriate when the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*.

In summary judgment practice, the moving party "initially bears the burden of proving the absence of a genuine issue of material fact." *In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010)* (citing *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986))*. The moving party may accomplish this by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or by showing that such materials "do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Fed. R. Civ. P. 56(c)(1)(A)*, *(B)*. When the non-moving party bears the burden of proof at trial, as plaintiff does here, "the moving **[*11]** party need only prove that there is an absence of evidence to support the non-moving party's case." *Oracle Corp., 627 F.3d at 387* (citing *Celotex, 477 U.S. at 325*); *see also* *Fed. R. Civ. P. 56(c)(1)(B)*. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *See* *Celotex, 477 U.S. at 322*. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id. at 322-23*. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment . . . is satisfied." *Id. at 323*.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *See* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits or admissible discovery material **[*12]** in support of its contention that the dispute exists. *See* *Fed. R. Civ. P. 56(c)(1)*; *Matsushita, 475 U.S. at 586 n.11*; *Orr v. Bank of Am., NT & SA, 285 F.3d 764, 773 (9th Cir. 2002)* ("A trial court can only consider admissible evidence in ruling on a motion for summary judgment."). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *see* *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987)*, and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the non-moving party, *see* *Anderson, 477 U.S. at 250*; *Wool v. Tandem Computers Inc., 818 F.2d 1433, 1436 (9th Cir. 1987)*.

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., 809 F.2d at 631*. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" *Matsushita, 475 U.S. at 587* (citations omitted).

"In evaluating the evidence to determine whether there is a genuine issue of fact," the court draws "all inferences supported by the evidence in favor of the non-moving party." *Walls v. Cent. Contra Costa Cty. Transit Auth., 653 F.3d 963, 966 (9th Cir. 2011)*. It is the opposing party's obligation to produce a factual predicate **[*13]** from which the inference may be drawn. *See* *Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985)*, *aff'd*, *810 F.2d 898, 902 (9th Cir. 1987)*. Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita, 475 U.S. at 587* (citation omitted).

"'When as is the case here, the moving party is a plaintiff, he or she must adduce admissible evidence on all matters as to which he or she bears the burden of proof.'" *Grimmway Enters., Inc. v. PIC Fresh Glob., Inc., 548 F. Supp. 2d 840, 845 (E.D. Cal. 2008)* (quoting *Zands v. Nelson, 797 F. Supp. 805, 808 (S.D. Cal. 1992)*); *see also* *S. Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885, 888 (9th Cir. 2003)* (noting that because plaintiffs are "the party with the burden of persuasion at trial, the Gas Company must establish 'beyond controversy every essential element of its' *Contract Clause* claim." (quoting William W. Schwarzer, et al., *California Practice Guide: Federal Civil Procedure Before Trial* § 14:124-127 (2001))).

DISCUSSION

As noted above, Linde moves for summary judgment on all of its causes of action: breach of contract, breach of the implied covenant of good faith and fair dealing, account stated, and goods and services rendered. (Doc. No. 52 at 2-3.) In addition, Linde also moves for summary judgment in its favor on Valley Protein's counter-claims **[*14]** for breach of contract, breach of the covenant of good faith and fair dealing, intentional misrepresentation, negligent misrepresentation and unfair competition, respectively.

A. Choice of Law

Before turning to the individual claims at issue, the court first addresses the parties' choice-of-law dispute. Linde filed its motion for summary judgment under California law. (*See generally* Doc. No. 52.) However, in its opposition, Valley Protein points out that both the 2011 Agreement and the 2014 Agreement specifically provide that New Jersey law "governs all matters pertaining to the validity, construction, and effect" of the Agreements. (Doc. No. 53 at 16-17.) Linde disputes whether New Jersey law applies, but nonetheless devotes much of its reply to rearguing its motion under New Jersey law. (Doc. No. 58 at 6, 8-17.)

District courts sitting in diversity apply the substantive law of the state in which they sit. *Mason & Dixon Intermodal, Inc. v. Lapmaster Int'l LLC, 632 F.3d 1056, 1060 (9th Cir. 2011)*. In such circumstances, district courts look to the law of the forum state when making choice of law determinations. *Hoffman v. Citibank (S. Dakota), N.A., 546 F.3d 1078, 1082 (9th Cir. 2008)*. In making these determinations, the California Supreme Court has adopted the approach outlined in *§ 187(2) of the Restatement (Second) of Conflict of Laws*. *See* *Nedlloyd Lines B.V. v. Superior Court, 3 Cal. 4th 459, 464-66, 11 Cal. Rptr. 2d 330, 834 P.2d 1148 (1992)*. Under this rubric, courts are instructed to first determine **[*15]** whether (1) the chosen state has a substantial relationship to the parties or their transaction, or (2) there is any other reasonable basis for the parties' choice of law. *Id. at 466*. If neither of these tests is met, the inquiry ends, and the court need not enforce the parties' choice of law. *Id.* However, if one of these tests is satisfied, the court must next determine whether the chosen state's law is contrary to a fundamental policy of California. *Id.* If there is no such conflict, the court enforces the parties' choice of law. If there is a conflict, the court must determine whether California has a "materially greater interest than the chosen state in the determination of the particular issue." *Id.* If California's interest is materially greater, California law applies despite the choice of law provision. *Id.* The burden of demonstrating the existence of a fundamental policy of California rests with the party opposing application of the choice of law provision, as does the burden of demonstrating that California has a materially greater interest in the outcome of the case than the chosen state. *Wash. Mut. Bank, FA v. Superior Court, 24 Cal. 4th 906, 917, 103 Cal. Rptr. 2d 320, 15 P.3d 1071 (2001)*.

New Jersey plainly has a substantial relationship to the parties. As alleged in Linde's complaint, **[*16]** Linde is a limited liability company organized under the laws of Delaware with its principal place of business in New Jersey. (Doc. No. 1 at ¶ 1.) Accordingly, for purposes of diversity jurisdiction, Linde is a citizen of New Jersey. (*Id.*) This is sufficient to establish a substantial relationship between the chosen state and the parties. *See* *Restatement (Second) of Conflict of Laws § 187 cmt. f* (Am. Law. Inst. 1971) (finding a substantial relationship where "one of the parties is domiciled or has his principal place of business" in the chosen state).

Next, the court must determine whether the chosen state's law is contrary to a fundamental policy of California. Neither party has identified any differences between California and New Jersey law that are relevant to this action, and the court is unaware of any "fundamental policies" of California that are implicated by the facts of this case. The burden on this point rests with Linde as the party seeking to apply California law notwithstanding the parties' choice of law provision. *See* *Wash. Mut. Bank, 24 Cal. 4th at 917*. Because Linde has failed to carry that burden, this court will apply New Jersey law in addressing the breach of contract claims.

However, to say that New Jersey law applies to the breach of contract claims **[*17]** is not to say that New Jersey law also applies to the remaining claims in this action. On the contrary, courts routinely recognize that a valid choice-of-law provision contained in a contract does not necessarily govern the entire relationship between the parties. "The question of whether [the choice-of-law] clause is ambiguous as to its scope . . . is a question of contract interpretation that in the normal course should be determined pursuant to [the selected forum's law.]" *Nedlloyd Lines, 3 Cal. 4th at 469 n.7*; *see also* *Cannon v. Wells Fargo Bank N.A., 917 F. Supp. 2d 1025, 1051 (N.D. Cal. 2013)* (examining Florida law, the law specified in the choice-of-law provision, to determine whether a contractual choice-of-law provision covers related tort claims). The court will therefore consult New Jersey law to determine the breadth of the choice-of-law provisions here.

The parties have provided no briefing on this issue—indeed, plaintiff Linde did not recognize the existence of a choice-of-law issue in seeking summary judgment under California law despite the existence of the New Jersey choice-of-law provision. However, the court's research has revealed some, albeit limited, authority addressing how New Jersey law would apply to the provision at issue here. After conducting a thorough survey of the **[*18]** relevant law, a New Jersey district court recently concluded that "New Jersey principles of statutory construction would counsel a narrow reading of the choice-of-law provision [at issue]." *Portillo v. Nat'l Freight, Inc., 323 F. Supp. 3d 646, 655 (D.N.J. 2018)*. In *Portillo*, the choice-of-law provision stated that the agreement "shall be interpreted in accordance with, and governed by, the laws of the United States and, of the State of New Jersey." *Id. at 648*. The court noted that the phrase "governed by" could be interpreted to encompass more than the breach of contract claim, and that some courts have construed it in that manner. *See, e.g.,* *Nat'l Seating & Mobility, Inc. v. Parry, No. C 10-02782 JSW, 2012 U.S. Dist. LEXIS 98384, 2012 WL 2911923, at *2 (N.D. Cal. July 16, 2012)* (finding that a choice-of-law provision stating that the agreement would be "governed by and construed in accordance" with Tennessee law was "broad enough to encompass the breach of contract, the tort claims, and the UCL claim"). Nonetheless, the district court in *Portillo* concluded that New Jersey law did not sweep so broadly and the court is persuaded by that analysis of this issue. *See* *Portillo, 323 F. Supp. 3d at 655-58*.

Applying New Jersey's rules governing the scope of choice-of-law provisions here, the court concludes that the provision in this case extends only to the parties' breach of contract claims. **[*19]** By their terms, the choice-of-law provisions at issue here apply to matters "pertaining to the validity, construction, and effect of [the agreements.]" (Doc. No. 52-2 at 7, 38.) Compared with other choice-of-law provisions which courts have been called upon to consider, this language is quite narrow. *See, e.g.,* *Country Visions, Inc. v. MidSouth LLC, No. 2:15-cv-01740-TLN-CKD, 2016 U.S. Dist. LEXIS 54424, 2016 WL 1614585, at *2 (E.D. Cal. Apr. 22, 2016)* ("Both parties agree to submit to exclusive jurisdiction in California and further agree that *any cause of action arising under this Agreement* shall be brought in an appropriate federal or state court located in California.") (emphasis added); *Brigham Young Univ. v. Pfizer, Inc., No. 2:06-CV-890 TS, 2012 U.S. Dist. LEXIS 37086, 2012 WL 918744, at *1 (D. Utah Mar. 16, 2012)* ("The validity, interpretation and performance of this Agreement *and any dispute connected herewith* shall be governed and construed in accordance with the laws of the State of Missouri.") (emphasis added); *Van Gundy v. P.T. Freeport Indonesia, 50 F. Supp. 2d 993, 994 (D. Mont. 1999)* ("Included in the offer was a choice of law provision which stated that *all disputes arising out of the employment relationship* would be governed by Louisiana law.") (emphasis added). As the court interprets the choice-of-law provisions here, they are cabined solely to the contracts **[*20]** themselves, and do not indicate that resolution of any other disputes will be "governed by" New Jersey law. *See* *Bd. of Educ. of Twp. of Cherry Hill v. Human Res. Microsystems, Inc., No. CIV. 09-5766 JBS/JS, 2010 U.S. Dist. LEXIS 102293, 2010 WL 3882498, at *4 (D.N.J. Sept. 28, 2010)* ("Generally, when a choice-of-law provision is intended to apply not only to interpretation and enforcement of the contract but also to any claims related to the contract, the language used is broader."). Thus, although it may ultimately make little difference in the final analysis and resolution of the issues before it, the court will apply New Jersey law only to the breach of contract claims and will apply California law to the parties' remaining claims.

B. Linde's Breach of Contract Claim

Linde first seeks summary judgment on its breach of contract claim as it relates to the 2014 Agreement. To prevail on a breach of contract claim, a party must prove (1) the existence of a valid contract between the parties, (2) the opposing party's failure to perform a defined obligation under the contract, and (3) that the breach caused the claimant to sustain damages. *EnviroFinance Grp. v. Envtl. Barrier Co., 440 N.J. Super. 325, 113 A.3d 775, 787 (N.J. App. Div. 2015)*. Linde contends that these elements are all satisfied here as a matter of law. As for the existence of a valid contract, the 2014 Agreement **[*21]** was executed on November 1, 2014. (UMF at ¶ 11.) Under the terms of the 2014 Agreement, Valley Protein was required to purchase all of its CO_2 exclusively from Linde for five years, but instead began purchasing CO_2 from Linde's competitor, Air Liquide. (*Id.* at ¶¶ 12, 17.) The failure to purchase CO_2 from Linde led directly to Linde's lost sales volume, causing the damages it now seeks to recover. (*Id.* at ¶ 23.)

Valley Protein does not directly challenge these contentions in its opposition but rather asserts that it is entitled to rescission of the contract. Rescission is a remedy founded on "considerations of equity," the object of which is to "restore the parties to the *status quo ante* and prevent the party who is responsible for the misrepresentation from gaining a benefit." *Rutgers Cas. Ins. v. LaCroix, 194 N.J. 515, 946 A.2d 1027, 1034-35 (N.J. 2008)*. In support of this argument, Valley Protein contends that Linde's representations about the production capacity of its equipment amounted to an equitable fraud, providing the basis for rescission of the contract. Under New Jersey law, "equitable fraud provides a basis for a party to rescind a contract." *First Am. Title Ins. v. Lawson, 177 N.J. 125, 827 A.2d 230, 237 (N.J. 2003)* (citing *Jewish Ctr. of Sussex Cty. v. Whale, 86 N.J. 619, 432 A.2d 521 (N.J. 1981))*. "'In general, equitable fraud requires proof of (1) a material misrepresentation of a presently **[*22]** existing or past fact; (2) the maker's intent that the other party rely on it; and (3) detrimental reliance by the other party.'" *Id.* (quoting *Liebling v. Garden State Indem., 337 N.J. Super. 447, 767 A.2d 515, 518 (N.J. App. Div. 2001))*. Rescission voids the contact, meaning that it is considered "null from the beginning" and treated as if it does not exist. *Id.*

The parties agree that a rescission occurred as to at least some portion of the 2014 Agreement, as evidenced by Iannelli's email to Coyle agreeing to Valley Protein rescinding the agreement to rent the 2014 Freezer. (UMF at ¶ 15; Iannelli Decl. at ¶ 17; Doc. No. 52-2 at 57.) Iannelli confirmed this rescission at his deposition. (Doc. No. 57-2 at 34.) The parties' dispute centers on the scope of that rescission—namely, whether that rescission was effective only as to the rental of the 2014 Freezer, or whether it amounted to a rescission of the entire 2014 Agreement. Linde contends that the rescission was only with respect to the rental of the 2014 Freezer, while Valley Protein argues that this rescission nullified the parties' entire 2014 Agreement. If the entire 2014 Agreement was nullified as Valley Protein suggests, it was free to purchase its CO_2 from sources other than Linde.

As stated above, the 2014 Agreement was **[*23]** comprised of several components: The Product Supply Agreement, the Bulk Rider, the Bulk Term Sheet, the Application Equipment, Ancillary Equipment, and Services Rider, and the Application Equipment, Ancillary Equipment, and Services Term Sheet. (Doc. No. 52-2 at 33-55.) The 2014 Freezer was rented to Valley Protein pursuant to the Application Equipment, Ancillary Equipment, and Services Rider and Term Sheet and Rider, whereas Valley Protein's agreement to purchase its CO_2 requirements was contained in the Bulk Rider and Term Sheet. (*See id.*) The Product Supply Agreement specifies that "Each Term Sheet, in conjunction with the terms specified in this document and the related Riders . . . constitutes a separate contract between the parties." (UMF at ¶ 11; Doc. No. 52-2 at 38.) Linde therefore contends that although it agreed to rescind the Application Equipment, Ancillary Equipment, and Services Rider and Term Sheet, it did not rescind the Bulk Term Sheet and Rider. If the Bulk Term Sheet and Rider remained in force, as Linde argues, Valley Protein remained obligated to purchase its CO_2 requirements from Linde.

Valley Protein contests this conclusion, arguing that all of the agreements **[*24]** constituted a single contract. (*See* Doc. No. 53 at 18-19.) As evidence of this, Valley Protein points to Iannelli's deposition, in which Iannelli testified that he understood all three documents "to be integrated and [to] form essentially the application equipment, ancillary equipment and services term sheet." (Doc. No. 57-2 at 19.) In addition, Iannelli also acknowledged at deposition that Linde did not offer rental of the 2014 Freezer separate and apart from the CO2, but that they were offered only as a package. (*Id.* at 14-15.) Iannelli further understood that the only reason Valley Protein entered into the agreement to purchase CO_2 was because Valley Protein was interested in renting the 2014 Freezer. (*Id.* at 27-28.) Relying on this testimony, Valley Protein contends that all of the agreements signed by the parties in 2014 were a single contract.

The court must resolve the question of whether the various agreements constituted multiple contracts or were instead just one contract. *See* *Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 783 A.2d 731, 740 (N.J. App. Div. 2001)* ("The interpretation of the terms of a contract are decided by the court as a matter of law unless the meaning is both unclear and dependent on conflicting testimony."); *Great Atl. & Pac. Tea Co. v. Checchio, 335 N.J. Super. 495, 762 A.2d 1057, 1061 (N.J. App. Div. 2000)* ("The construction of a written contract is usually **[*25]** a legal question for the court, but where there is uncertainty, ambiguity or the need for parol evidence in aid of interpretation, then the doubtful provision should be left to the jury."). In interpreting the terms of a contact, courts "should give contractual terms their plain and ordinary meaning unless specialized language is used peculiar to a particular trade, profession, or industry." *Kieffer v. Best Buy, 205 N.J. 213, 14 A.3d 737, 743 (N.J. 2011)* (internal quotation marks and citations omitted). A contract provision is ambiguous "if the terms of the contract are susceptible to at least two reasonable alternative interpretations," *Schor v. FMS Financial Corp., 357 N.J. Super. 185, 814 A.2d 1108, 1112 (N.J. App. Div. 2002)* (brackets omitted) (quoting *Nester v. O'Donnell, 301 N.J. Super. 198, 693 A.2d 1214, 1220 (N.J. App. Div. 1997))*, but "a court should not torture the language of a contract to create ambiguity." *Nester, 693 A.2d at 1220*; *see also* *Kieffer, 14 A.3d at 743* (noting that it is not the court's task "to rewrite a contract for the parties better than or different from the one they wrote for themselves"). However, "[e]ven when the contract on its face is free from ambiguity, evidence of the situation of the parties and the surrounding circumstances and conditions is admissible in aid of interpretation." *Great Atl. & Pac. Tea Co., 762 A.2d at 1061*.

As the court interprets the language at issue here, the agreement for Linde to provide Valley Protein with CO_2 and the agreement for Linde to rent **[*26]** the 2014 Freezer to Valley Protein were not merely separate transactions within the same contract. Instead, according to the plain language of the Product Supply Agreement, they constituted separate contracts altogether. (*See* Doc. No. 52-2 at 38) ("Each Term Sheet, in conjunction with the terms specified in this document and the related Riders . . . *constitutes a separate contract* between the parties.") (emphasis added). In the court's view this clear language is susceptible of only one reasonable interpretation—namely, that the Application Equipment, Ancillary Equipment, and Services Rider and Term Sheet was an entirely separate contract from the Bulk Rider and Term Sheet. Although the parties devote some of their briefing to the issue of whether the 2014 Agreement was partially rescinded, partial rescission does not apply where, as here, the 2014 Agreement was composed of multiple, distinct contracts.[3] Partial rescission is available only with respect to different transactions *within the same contract. See* *Bonnco Petrol, 560 A.2d at 662*. The fact that Linde and Valley Protein agreed to rescind one contract could not and did not effectuate a rescission of an entirely separate contract.

[3] Partial rescission of a contract is disfavored under New Jersey law. *See* *County of Morris v. Fauver, 153 N.J. 80, 707 A.2d 958, 966 (N.J. 1998)* ("As a general rule, rescission 'must be exercised in toto and is to be applied to the contract in its entirety with the result that what has been done is wholly undone and no contract provisions remain in force to bind either of the parties'") (quoting *Merickel v. Erickson Stores Corp., 255 Minn. 12, 95 N.W.2d 303, 306 (Minn. 1959))*. "Only where a contract is severable into different transactions may one of those separate transactions be avoided." *Id.; see also* *Bonnco Petrol, Inc. v. Epstein, 115 N.J. 599, 560 A.2d 655, 662 (N.J. 1989)*.

The court **[*27]** acknowledges that portions of Iannelli's deposition testimony arguably evince a contrary understanding of these agreements. It is also relevant that, as Iannelli testified, it was "standard practice in the industry" to rent freezing equipment and purchase CO_2 or nitrogen from the same company. (Doc. No. 57-2 at 28.) However, such extrinsic statements may be considered only to "aid in interpretation," and may not be considered "for the purpose of changing the writing." *Great Atl. & Pac. Tea Co., 762 A.2d at 1061*. Here, the written agreement of the parties itself is clear: although entered into at the same time and between the same parties, the Application Equipment, Ancillary Equipment, and Services Rider and Term Sheet was a separate contract from the Bulk Rider and Term Sheet.

Because the Bulk Rider and Term Sheet were not rescinded, Valley Protein remained under a contractual obligation to purchase its CO_2 gas requirements from Linde unless it can establish some other basis to avoid that obligation. Valley Protein suggests that the doctrine of equitable fraud provides such a basis. (Doc. No. 53 at 17.) "'[E]quitable fraud requires proof of (1) a material misrepresentation of a presently existing or past fact; (2) the maker's **[*28]** intent that the other party rely on it; and (3) detrimental reliance by the other party.'" *First Am. Title Ins., 827 A.2d at 237* (quoting *Liebling, 767 A.2d at 518*). A review of the evidence before the court on summary judgment establishes that with respect to the Bulk Rider and Term Sheet, no reasonable juror could find the existence of an equitable fraud that would entitle Valley Protein to rescission of the Bulk Rider and Term Sheet. At deposition, Coyle testified that with respect to surcharges charged by Linde for the delivery of CO_2 gas to Valley Protein, no Linde employee ever made false or misleading statements regarding where the CO_2 gas was being delivered from. (Doc. No. 52-4 at 30:3-5.) Coyle also testified that any overcharging for delivery of CO_2 gas amounted only to an "honest mistake." (*Id.* at 31:3-5.) Based upon this testimony, the court finds no evidence supporting a claim of equitable fraud with respect to the Bulk Rider and Term Sheet. By failing to comply with the terms of the Bulk Rider and Term Sheet, Valley Protein breached that contract.

With respect to damages, Linde claims that as a result of this breach, it has suffered lost profits totaling $963,084.00. (UMF at ¶ 23.) In support of this claimed loss amount, Linde has **[*29]** submitted an exhibit prepared by Iannelli and attached to his Declaration. (Doc. No. 52-2 at 66-68.) Iannelli states that this projection provides an estimate of Linde's gross margins if Valley Protein had continued to purchase its CO_2 gas from Linde through 2018, as required under the Bulk Rider and Term Sheet. (Iannelli Decl. at ¶ 24.) Valley Protein objects to this evidence on the ground that Iannelli's projections lack foundation, are not based on personal knowledge, and amount to nothing more than speculation. (Doc. No. 55 at ¶ 8.)

"Under contract law, a party who breaches a contract is liable for all of the natural and probable consequences of the breach of that contract." *Pickett v. Lloyd's, 131 N.J. 457, 621 A.2d 445, 454 (N.J. 1993)*. "Lost profits are one measure of compensatory damages that may be recoverable in a breach of contract action, if they can be established with a reasonable degree of certainty." *RSB Lab. Servs., Inc. v. BSI, Corp., 368 N.J. Super. 540, 847 A.2d 599, 608 (N.J. App. Div. 2004)*. Notably, "[p]ast experience of an ongoing, successful business provides a reasonable basis for the computation of lost profits with a satisfactory degree of definiteness." *V.A.L. Floors, Inc. v. Westminster Cmtys., Inc., 355 N.J. Super. 416, 810 A.2d 625, 631 (N.J. App. Div. 2002)*. Accordingly, Valley Protein's objections to this evidence are overruled.

Iannelli's projections are neither speculative nor lacking in foundation; rather, they **[*30]** are extrapolations based on the prior dealings of the parties, which New Jersey courts have explicitly held to be a proper basis for calculating lost profits. *See* *Weiss v. Revenue Bldg. & Loan Ass'n, 116 N.J.L. 208, 182 A. 891, 893 (N.J. 1936)* ("[P]ast experience has demonstrated the success of the enterprise and provides a reasonably certain basis for the calculation of plaintiff's probable loss consequent upon the breach of the contract to lease."); *V.A.L. Floors, Inc., 810 A.2d at 631*. Nor do these calculations lack personal knowledge. Iannelli is a sales manager employed by Linde (Iannelli Decl. at ¶ 1) and would be expected to be intimately familiar with sales calculations. This is particularly so with respect to Linde's dealings with Valley Protein, since Iannelli was involved in forming the 2014 Agreement and has reviewed all of Linde's records pertaining to its contractual relationship with Valley Protein. (*Id.* at ¶¶ 2, 9-13.) Under these circumstances, the court finds that Iannelli's projections provide a "reasonable basis for the computation of lost profits." *V.A.L. Floors, Inc., 810 A.2d at 631*. Moreover, Valley Protein has not submitted any evidence of its own on summary judgment that would call these lost profit calculations into question.

Accordingly, the court will grant summary judgment in favor of Linde on Linde's **[*31]** breach of contract claim, both with respect to liability and damages.

C. Linde's Claim for Breach of Implied Covenant of Good Faith and Fair Dealing

Next, the court addresses Linde's motion for summary judgment with regard to its claim against Valley Protein for breach of the implied covenant of good faith and fair dealing.

"The [implied] covenant of good faith and fair dealing [is] implied by law in every contract." *Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 1369, 108 Cal. Rptr. 3d 682 (2010)*. "In order to establish a breach of the covenant of good faith and fair dealing, a plaintiff must show: (1) the parties entered into a contract; (2) the plaintiff fulfilled his obligations under the contract; (3) any conditions precedent to the defendant's performance occurred; (4) the defendant unfairly interfered with the plaintiff's rights to receive the benefits of the contract; and (5) the plaintiff was harmed by the defendant's conduct." *In re Yahoo! Inc. Customer Data Sec. Breach Litig., No. 16-MD-02752-LHK, 2017 U.S. Dist. LEXIS 140212, 2017 WL 3727318, at *48 (N.D. Cal. Aug. 30, 2017)*. Notably, to succeed on such a claim, it is not "necessary that the party's conduct be dishonest." *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc., 2 Cal. 4th 342, 373, 6 Cal. Rptr. 2d 467, 826 P.2d 710 (1992)*.

Linde's motion only briefly addresses whether it should be granted summary judgment on this claim. Linde's argument appears to be premised on the notion that summary **[*32]** judgment is proper because "[t]he elements of Linde's claim for breach of the implied covenant of good faith and fair dealing are identical to its breach of contract claim." (Doc. No. 52 at 23.) Thus, in Linde's view, because summary judgment in its favor is proper on its breach of contract claim for the reasons discussed above, it is also proper with respect to its claim of breach of the implied covenant of good faith and fair dealing. Linde's argument is not persuasive in this regard. To be sure, Linde is correct that under California law, "a breach of the implied covenant of good faith is a breach of the contract." *Carson v. Mercury Ins. Co., 210 Cal. App. 4th 409, 429, 148 Cal. Rptr. 3d 518 (2012)* (citing *Careau & Co. v. Sec. Pac. Bus. Credit, Inc., 222 Cal. App. 3d 1371, 1393, 272 Cal. Rptr. 387 (1990))*. The converse, however, is not necessarily true—that is, a breach of contract does not automatically give rise to liability for breach of the implied covenant of good faith and fair dealing. Indeed, the California Court of Appeal has clarified that while "breach [of the covenant of good faith and fair dealing] will always result in a breach of the contract, . . . a breach of a consensual (i.e., an express or implied-in-fact) contract term will not necessarily constitute a breach of the covenant." *Careau & Co., 222 Cal. App. 3d at 1393-94*. Because the court finds Linde's argument unpersuasive, and because **[*33]** Linde offers no other basis upon which to grant summary judgment on its claim for breach of the implied covenant of good faith and fair dealing, Linde's motion will be denied as to this claim.

D. Linde's Claim for Account Stated

Next, the court addresses Linde's motion for summary judgment on its account stated claim. "An account stated is an agreement, based on prior transactions between the parties, that all items of the account are true and that the balance struck is due and owing from one party to the other." *Trafton v. Youngblood, 69 Cal. 2d 17, 25, 69 Cal. Rptr. 568, 442 P.2d 648 (1968)*. "The essential elements of an account stated are: (1) previous transactions between the parties establishing the relationship of debtor and creditor; (2) an agreement between the parties, express or implied, on the amount due from the debtor to the creditor; (3) a promise by the debtor, express or implied, to pay the amount due." *Zinn v. Fred R. Bright Co., 271 Cal. App. 2d 597, 600, 76 Cal. Rptr. 663 (1969)*. As evidence of an account stated, Linde claims that between January 14, 2016 and February 4, 2016, Linde issued a total of twenty-two invoices to Valley Protein for CO_2 that was delivered to Valley Protein, totaling $38,963.89. (UMF at ¶ 24.)

As addressed above, under the terms of the 2014 Agreement, Valley Protein agreed to purchase its CO_2 gas **[*34]** requirements from Linde. (UMF at ¶ 12; Iannelli Decl. at ¶ 15.) Linde has submitted an invoice for each delivery, as well as its demand letter sent to Valley Protein requesting payment for those deliveries. (Doc. No. 52-2 at 70-71.)

Valley Protein does not appear to dispute that those deliveries occurred, nor does it dispute that it has not paid for the CO_2 gas delivered. Instead, Valley Protein's opposition to Linde's motion in this regard is limited to the argument that it was relieved of its obligation to pay by virtue of rescission of the 2014 Agreement. As discussed above, the court has rejected this argument. Finding no material issue of fact in dispute with respect to this claim, Linde's motion for summary judgment on its account stated claim will be granted in the amount of $38,963.89.

E. Goods and Services Rendered

Next, the court addresses Linde's cause of action for goods and services rendered. "A common count for Goods and Services Rendered 'is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness.'" *Ever Win Int'l Corp. v. Premier Accessory Grp., No. 2:15-CV-07208-RGK (JCx), 2016 U.S. Dist. LEXIS 195377, 2016 WL 11263125, at *4 (C.D. Cal. Sept. 22, 2016)* (quoting *McBride v. Boughton, 123 Cal. App. 4th 379, 394, 20 Cal. Rptr. 3d 115 (2004))*; *see also* *McBride, 123 Cal. App. 4th at 394* (noting that "[a] common count is **[*35]** not a specific cause of action"); *Martini E Ricci Iamino S.P.A.--Consortile Societa Agricola v. Trinity Fruit Sales Co., 30 F. Supp. 3d 954, 975 (E.D. Cal. 2014)* ("Under California law, 'common counts' are general pleadings that seek to recover money owed without necessarily specifying the nature of the claim."). "The only essential allegations of a common count are (1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment." *Farmers Ins. Exch. v. Zerin, 53 Cal. App. 4th 445, 460, 61 Cal. Rptr. 2d 707 (1997)*. Common counts are frequently coextensive with other causes of action pleaded in a complaint: "[w]hen a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." *McBride, 123 Cal. App. 4th at 394*.

Linde's complaint demonstrates that its common count claim is based on the same facts as its claim for account stated, namely that Linde delivered CO_2 and equipment to Valley Protein for which it has not been paid. (Doc. No. 1 at ¶ 31-34.) Once more, Valley Protein's only opposition to Linde's motion for summary judgment is based on its argument that the 2014 Agreement was rescinded. Because the court has already found that Linde is entitled to summary judgment on its claim for account stated, and because **[*36]** the common count claim is coextensive with it, the court will also grant Linde's motion for summary judgment as to the common count claim. However, in light of the court's award of $38,963.89 on Linde's account stated claim, the court finds that Linde will be fully compensated for Valley Protein's failure to pay for the CO_2 delivery. Any further award of damages would overcompensate Linde. Accordingly, while summary judgment for Linde will be granted as to this claim, no additional damages will be awarded with respect to it.

F. Valley Protein's Counter-claims for Breach of Contract

Next, the court addresses the counter-claim for breach of contract brought by Valley Protein in which Valley Protein contends that Linde breached the provisions of the 2011 and 2014 Agreements. As noted, Linde also moves for summary judgment in its favor on this claim brought by Valley Protein.[4]

As both parties acknowledge, the 2011 Agreement contained a provision requiring that "[a] Party must commence an action for a breach of contract within one year after the action has accrued." (UMF at ¶ 1.) The default statute of limitations for actions to enforce a breach of contract in New Jersey is six years from the **[*37]** time the cause of action accrued. *N.J. Stat. Ann. § 2A:14-1*. However, "[c]ontract provisions limiting the time parties may bring suit

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[4] The parties dispute whether the 2011 Agreement remained in force following execution of the 2014 Agreement. Linde contends that the 2014 Agreement amounts to a novation, which "substitutes a new contract and extinguishes the old one." *Wells Reit II-80 Park Plaza, LLC v. Dir., Div. of Taxation, 414 N.J. Super. 453, 25 N.J. Tax 537, 999 A.2d 489, 497 (N.J. App. Div. 2010)*. By contrast, Valley Protein argues that "the 2011 Agreement arguably remained in effect." (Doc. No. 53 at 9.) The court acknowledges this dispute but need not reach this issue since Linde's counter-claim for breach of contract may be disposed of on alternative grounds, as explained below.

have been held to be enforceable, if reasonable." Eagle Fire Prot. Corp. v. First Indem. of Am. Ins., 145 N.J. 345, 678 A.2d 699, 704 (N.J. 1996).

Multiple courts in New Jersey have found contract provisions imposing one-year limitations on breach of contract actions to be reasonable. *See, e.g., id.;* Weinroth v. N.J. Mfrs. Ass'n Fire Ins., 117 N.J.L. 436, 189 A. 73, 75 (N.J. 1937); A.J. Tenwood Assocs. v. Orange Senior Citizens Hous. Co., 200 N.J. Super. 515, 491 A.2d 1280, 1284 (N.J. App. Div. 1985). Valley Protein directs the court to one contrary case, but the court finds it to be readily distinguishable in light of the facts here. *See* Rodriguez v. Raymours Furniture Co., 225 N.J. 343, 138 A.3d 528 (N.J. 2016). In *Rodriguez*, an employment application contained a provision requiring the applicant, if hired, to bring any employment-related cause of action against the employer within six months of the challenged employment action and to waive any statute of limitations to the contrary. *Id. at 529-30*. An employee brought an action against his former employer, alleging a violation of New Jersey's Law Against Discrimination which claim was governed by a two-year statute of limitations. *Id. at 530*. In finding the application's six-month limitations period to be unreasonable, the New Jersey Supreme Court noted that the Law Against Discrimination "exists for the good of all the inhabitants of New Jersey," and therefore "concerns more than a purely private cause of action **[*38]** affecting only private interests." *Id. at 538*. Because of these competing public policy considerations, the Supreme Court declined to enforce the contractual limitation period. However, such considerations are absent here, and Valley Protein has offered no further argument as to how the holding in *Rodriguez* should compel the court to reject the limitations period agreed to by the parties under the circumstances of this case. Accordingly, the court finds that the one-year statute of limitations contained within the 2011 Agreement is reasonable and must be applied.

According to Valley Protein's counter-claim, Linde breached the 2011 Agreement by failing to provide Valley Protein with an adequate freezer, as it was required to do. (*See* Doc. No. 29 at ¶ 27.) However, the counter-claim indicates that Valley Protein became aware of that inadequacy no later than September of 2014. (*Id.* at ¶¶ 13-14 (stating that by 2014, the freezing equipment provided by Linde had become "inoperable").) By the terms of the 2011 Agreement, Valley Protein had until September of 2015 to bring causes of action based on a breach of a 2011 Agreement. *See* County of Morris, 707 A.2d at 972 (under New Jersey law, "a cause of action will not accrue until the **[*39]** injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action"). However, Valley Protein's claim for breach of contract was not brought until February 2017, far after the one-year limitations period had expired. (Doc. No. 29.)

The same logic holds true with respect to the 2014 Agreement. The evidence before the court on summary judgment establishes that Valley Protein was dissatisfied with the freezer provided by Linde under that Agreement no later than December 2014. (UMF at ¶ 14; Iannelli Decl. at ¶ 16; Doc. No. 52-2 at 57.) This dissatisfaction is what prompted Valley Protein to attempt to rescind that Agreement. Therefore, Valley Protein had until December 2015 to sue for breach of contract. Its counter-claim, brought in February 2017, falls far outside of that filing deadline.

Thus, even if Valley Protein is correct that the 2011 Agreement remained in force, its claim for breach of that contract is time-barred. The court will therefore grant summary judgment in favor of Linde on Valley Protein's counter-claims for breach of contract.

G. Valley Protein's Claim for Breach of the Implied Covenant [*40] of Good Faith and Fair Dealing

Next, the court addresses Valley Protein's counter-claim for breach of the implied covenant of good faith and fair dealing. The relevant California law governing this claim has already been discussed above. Valley Protein contends that Linde breached the covenant with respect to the 2011 Agreement by providing it with faulty equipment, and then by refusing to properly maintain that equipment. (Doc. No. 29 at ¶ 34.) Valley Protein also contends that Linde breached the covenant with respect to the 2014 Agreement by "failing to comply with its obligation to provide poultry-freezing equipment sufficient to meet Valley Protein's needs." (*Id.* at ¶ 35.) As with Valley Protein's claim for breach of contract, Linde argues that this cause of action is time-barred. (Doc. No. 52 at 29-30.)

California mandates a four-year statute of limitations for actions for breach of the implied covenant of good faith and fair dealing. *Frazier v. Metro. Life Ins., 169 Cal. App. 3d 90, 102, 214 Cal. Rptr. 883 (1985)* (citing *Cal. Civ. Proc. Code § 337*). Moreover, under normal circumstances, "plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute." *Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 187, 98 Cal. Rptr. 837, 491 P.2d 421 (1971)*. However, to avoid the often-harsh consequences of this rule, California courts also **[*41]** recognize the "discovery rule," under which the statute of limitations begins to run "when plaintiff either (1) actually discovered his injury and its negligent cause or (2) could have discovered injury and cause through the exercise of reasonable diligence." *April Enters., Inc. v. KTTV, 147 Cal. App. 3d 805, 826, 195 Cal. Rptr. 421 (1983)* (internal quotation marks omitted).

Here, having reviewed Valley Protein's counter-claim and the evidence before the court on summary judgment, the court concludes that the applicable statute of limitations bars some of Valley Protein's theories of recovery. As noted, in its counter-claim Valley Protein alleges breaches of the covenant of good faith and fair dealing with respect to both the 2011 and 2014 Agreements. Moreover, within those two agreements, Valley Protein advances multiple allegations which could potentially form the basis of a misrepresentation claim. (*See generally* Doc. No. 29 at 34-47.) For instance, with respect to the 2011 Agreement, Valley Protein asserts that Linde breached the covenant of good faith and fair dealing by "failing to supply Valley Protein with modern, reliable, and efficient poultry-freezing equipment and instead providing equipment that was unreliable, obsolete and often inoperable." (*Id.* at **[*42]** ¶ 34(a).) Valley Protein also alleges a breach of the covenant for "failing to maintain the poultry-freezing equipment as it was required to do pursuant to the terms of the 2011 Agreement." (*Id.* at ¶ 34(c).) Thus, as pled by Valley Protein, multiple theories of liability are contained within this cause of action.

The evidence before the court on summary judgment—which Valley Protein does not dispute (*see* Doc. No. 54 at 8)—demonstrates that Valley Protein President Robert Coyle was aware by early 2012 that the poultry-freezing equipment provided by Linde was not meeting its target CO_2 conversion rate. (Doc. No. 52-4 at 142:25, 143:1-5.) Applying California's discovery rule, the statute of limitations is tolled until that date. Nonetheless, because Valley Protein's counter-claim for breach of the covenant of good faith and fair dealing was not filed until February 2017, any recovery under this theory of liability is barred by the applicable four-year statute of limitations which expired by early 2016.

However, with respect to whether Valley Protein's remaining theories of liability on this claim remain viable, Linde has not pointed to any evidence presented on summary judgment demonstrating **[*43]** that those theories are time-barred as a matter of law. It is conceivable that other evidence may exist in the record demonstrating that these remaining theories of liability are also foreclosed by the applicable statute of limitations. However, Linde has not cited to any such evidence in its motion, and the court declines to comb through the record to find support for Linde's motion. *See* *Indep. Towers of Wash. v. Washington, 350 F.3d 925, 929 (9th Cir. 2003)* ("Our adversarial system relies on the advocates to inform the discussion and raise the issues to the court."). Accordingly, the court finds that Valley Protein's counter-claim for breach of the implied covenant of good faith and fair dealing is time-barred only as to Valley Protein's claim that Linde breached the implied covenant of good faith and fair dealing with respect to the issue of the CO_2 conversion rate.

Regardless of the theory of liability relied upon by Valley Protein, however, Valley Protein's claim for breach of the implied covenant of good faith and fair dealing fails for a separate reason. The California Supreme Court has held that where a claim for breach of the implied covenant of good faith and fair dealing is based upon the same breaches as those alleged in a breach of contract **[*44]** claim, the good faith and fair dealing claim fails as a matter of law. *Guz v. Bechtel Nat'l, Inc., 24 Cal. 4th 317, 327, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 (2000)* ("[W]here breach of an actual term is alleged, a separate implied covenant claim, based on the same breach, is superfluous."). Thus, district courts in California routinely dismiss claims for breach of the implied covenant of good faith and fair dealing where those allegations essentially repeat those already made in a breach of contract claim. *See, e.g.,* *Tryfonas v. Splunk, Inc., No. 17-CV-01420-HSG, 2018 U.S. Dist. LEXIS 11692, 2018 WL 534287, at *2 (N.D. Cal. Jan. 24, 2018)* (dismissing plaintiff's claim for breach of the covenant of good faith and fair dealing as duplicative because "[p]laintiff's claim . . . relies on the same acts as his claim for breach of contract"); *Tam v. Qualcomm, Inc., 300 F. Supp. 3d 1130, 1146 (S.D. Cal. 2018)* ("[A] plaintiff may bring both a breach of contract claim and a claim for breach of the implied covenant of good faith and fair dealing, but when both causes of action cite the same underlying breach, the implied covenant claim is superfluous."); *Landucci v. State Farm Ins., 65 F. Supp. 3d 694, 716 (N.D. Cal. 2014)* (citing the decision in *Guz* for the proposition that "although . . . a plaintiff may bring both a breach of contract claim and a claim for breach of the implied covenant of good faith and fair dealing, . . . when both causes of action cite the same underlying breach, the implied **[*45]** covenant cause of action will be superfluous with the contract cause of action").

A review of Valley Protein's counter-claim reveals that the claim for breach of the implied covenant of good faith and fair dealing is based on the same conduct as the breach of contract claim. In fact, the factual allegations contained within each cause of action are identical. (*Compare* Doc. No. 29 at ¶¶ 27, 30, *with id.* at ¶¶ 34-35.) Therefore, under California law, Valley Protein's claim for breach of the implied covenant of good faith and fair dealing must fail. The court accordingly will grant summary judgment in Linde's favor on Valley Protein's counter-claim for breach of the implied covenant of good faith and fair dealing.

H. Valley Protein's Claims for Intentional and Negligent Misrepresentation

The court next addresses Valley Protein's counter-claims for intentional and negligent misrepresentation, respectively. Linde argues that it is entitled to summary judgment on these claims since they are barred by the applicable statute of limitations and, alternatively, because Valley Protein cannot establish these claims as a matter of law. (Doc. No. 52 at 31-33.) Linde also argues that these claims are **[*46]** barred by the economic loss rule. (*Id.* at 33.)

To establish a claim for intentional misrepresentation a plaintiff must plead and prove: "(1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage." *Robinson Helicopter Co. v. Dana Corp., 34 Cal. 4th 979, 990, 22 Cal. Rptr. 3d 352, 102 P.3d 268 (2004)* (citing *Lazar v. Superior Court, 12 Cal. 4th 631, 638, 49 Cal. Rptr. 2d 377, 909 P.2d 981 (1996))*. Meanwhile, "[n]egligent misrepresentation is a form of deceit, the elements of which consist of (1) a misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) ignorance of the truth and justifiable reliance thereon by the party to whom the misrepresentation was directed, and (5) damages." *Fox v. Pollack, 181 Cal. App. 3d 954, 962, 226 Cal. Rptr. 532 (1986)*.

The court first turns to the Coyle Declaration, the evidence relied upon by Valley Protein in opposing summary judgment as to this claim. In that declaration, submitted under penalty of perjury, Coyle averred that "[a]t the time the 2011 Agreement was executed in January 2011, Linde's Vice President of Western Markets, Michael Beckman, represented that the equipment provided to Valley Protein by Linde was high quality, **[*47]** reliable, and efficient." (Coyle Decl. at ¶ 5.) The Coyle Declaration also states that during the course of the 2011 Agreement, Valley Protein discovered that the freezer provided by Linde was outdated, obsolete, and frequently inoperable. (*Id.* at ¶ 6.) In his declaration Coyle lists a variety of misrepresentations Linde made to Valley Protein, relating to the size and capabilities of the equipment, the age of the equipment, and how much CO_2 the equipment would use. (*Id.* at ¶ 8.) Coyle declares that these representations and promises induced Valley Protein to enter into the 2011 Agreement, and that absent those representations, Valley Protein would not have done so. (*Id.*) Linde acknowledges, at least implicitly, the Coyle Declaration would create a triable issue of fact as to whether Linde employees made material misrepresentations to Valley Protein. However, Linde argues that Coyle's declaration is self-serving and contradicted by his own deposition testimony, because of which the court should disregard it. (Doc. No. 58 at 15.)

At the outset, the court observes that many of the statements made in Coyle's declaration filed in opposition to summary judgment are markedly different from **[*48]** the testimony he gave at his deposition. Whereas his declaration attributed at least some of the misrepresentations to Linde employee Michael Beckman, Coyle at his deposition testified that he never had any conversations with Michael Beckman, and that in fact he was unfamiliar with any Linde employee with that name. (*Compare* Coyle Decl. at ¶ 5, *with* Doc. No. 52-4 at 6.) In addition, while Coyle's declaration lists numerous alleged misrepresentations by Linde employees that induced Valley Protein to enter into the 2011 Agreement, Coyle testified at his deposition that all such statements made by Linde employees were accurate at the time they were made to the best of his knowledge. (*Compare* Coyle Decl. at ¶¶ 5, 8, *with* Doc. No. 52-4 at 25.) Finally, when questioned at his deposition whether he believed any Linde employee had ever made any misleading statements to him regarding the equipment at issue, Coyle responded, "knowingly, no." (Doc. No. 52-4 at 26:5-7.)

"'The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony.'" *Van Asdale v. Int'l Game Tech., 577 F.3d 989, 998 (9th Cir. 2009)* (quoting *Kennedy v. Allied Mut. Ins., 952 F.2d 262, 266 (9th Cir. 1991))*. This rule, known as the sham affidavit rule, "prevents a party who **[*49]** has been examined at length on deposition from raising an issue of fact simply by submitting an affidavit contradicting his own prior testimony, which would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Yeager v. Bowlin, 693 F.3d 1076, 1080 (9th Cir. 2012)* (internal quotation marks and brackets omitted). As courts have acknowledged, this rule is at least somewhat in tension with normal procedures employed in connection with summary judgment motions, in which courts are prohibited from making credibility determinations or weighing conflicting evidence. *See* *Van Asdale, 577 F.3d at 998*. Accordingly, the sham affidavit rule is to be employed sparingly, and only when "the inconsistency between a party's deposition testimony and subsequent affidavit [is] clear and unambiguous." *Id. at 998-99*.

Here, the court finds that Coyle's declaration submitted in opposition to summary judgment cannot logically be reconciled with his deposition testimony. Coyle testified that Beckman was not involved at all with negotiations leading to the 2011 Agreement and that sworn testimony simply cannot be squared with Coyle's statement in his declaration that Beckman "represented that the equipment provided to Valley Protein by Linde was high quality, **[*50]** reliable, and efficient." (Coyle Decl. at ¶ 5.) Nor can the court credit the alleged misrepresentations leading up to the execution of the 2011 Agreement set forth in Coyle's declaration in light of his deposition testimony that all statements made by Linde employees were accurate at the time they were made. Because Coyle's deposition is clearly and unambiguously inconsistent with his later declaration submitted in support of the opposition to summary judgment, the court will disregard Coyle's declaration to the extent it is in conflict with his sworn deposition testimony.

Coyle's deposition testimony affirmatively establishes that, in his opinion, any false statements made to Valley Protein were not knowingly made by Linde employees. As noted, under California law, a party must establish "knowledge of falsity" in order to prevail on an intentional misrepresentation claim. *Robinson Helicopter Co., 34 Cal. 4th at 990*. Linde has thus satisfied its burden of "produc[ing] evidence negating an essential element of the nonmoving party's case." *See* *Nissan Fire & Marine Ins. v. Fritz Cos., 210 F.3d 1099, 1106 (9th Cir. 2000)*. The burden therefore shifts to Valley Protein to establish that a genuine issue of disputed fact actually does exist with respect to this claim. *See* *Matsushita, 475 U.S. at 586*. However, in opposing summary judgment **[*51]** on its intentional misrepresentation claim, Valley Protein has relied solely on Coyle's declaration to create a triable issue of fact. (Doc. No. 53 at 25-26.) As a sham affidavit, Coyle's declaration fails to establish the existence of a genuinely disputed factual issue with respect to the knowingness of the alleged misrepresentations. The undersigned therefore finds that summary judgment in favor of Linde is warranted as to Valley Protein's counter-claim for intentional misrepresentation.[5]

By contrast, a party need not prove that a false statement was "knowing" in order to prevail on a claim for negligent misrepresentation. *Small v. Fritz Cos., 30 Cal. 4th 167, 173, 132 Cal. Rptr. 2d 490, 65 P.3d 1255 (2003)* ("The tort of negligent misrepresentation does not require scienter or intent to defraud."). Therefore, the court will next

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[5] While the court finds that this particular statement within Coyle's declaration must be disregarded under the sham affidavit rule, it does not follow that all statements contained within it must also be disregarded. For instance, Coyle states in his declaration that Linde's engineer, Amanda Guzman, represented in October 2014 that the poultry-freezing equipment to be provided under the 2014 Agreement would be capable of processing 5,000 pounds of poultry per hour. (Coyle Decl. at ¶ 9.) Although the evidence establishes that Linde was unaware that a 5,000-pound-per-hour processing capacity was a requirement for Valley Protein at the time the 2014 Agreement was executed (*see* Doc. No. 52-4 at 19), that does not affirmatively prove that the statement contained within the Coyle declaration was never made.

consider Linde's argument that Valley Protein's misrepresentation claims are barred by the economic loss doctrine. The California Supreme Court recently discussed the economic loss rule, stating as follows:

> Economic loss consists of damages for inadequate value, costs of repair and replacement of [a] defective product or consequent loss of profits—without any claim of personal injury or damages to other. Simply stated, the economic loss rule **[*52]** provides: Where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only "economic" losses. This doctrine hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts. *The economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise*. Quite simply, the economic loss rule prevents the law of contract and the law of tort from dissolving one into the other.

Robinson Helicopter, 34 Cal. 4th at 988 (emphasis added).

At its heart, this rule requires a plaintiff to rely on the law of contracts and implied and express warranties to recover based upon any defect in the product sold to plaintiff, rather than resort to tort law. When applied to product liability suits, one may still sue for damage to **[*53]** property *other than the product* under the economic loss rule, but losses to the allegedly defective product itself are barred as "economic" losses. *Jimenez v. Superior Court of San Diego Cty., 29 Cal. 4th 473, 476, 127 Cal. Rptr. 2d 614, 58 P.3d 450 (2002)*. The economic loss rule has also been applied to bar general negligence claims. *See* *Robinson Helicopter, 34 Cal. 4th at 989* (citing *Aas v. Superior Court, 24 Cal. 4th 627, 640, 101 Cal. Rptr. 2d 718, 12 P.3d 1125 (2000)* and *Seely v. Liberty Mut. Fire Ins., 63 Cal. 2d 41, 45, 45 Cal. Rptr. 8, 403 P.2d 136 (1965))*.

In *Robinson Helicopter*, the California Supreme Court noted other exceptions to the economic loss rule besides those carved out for certain products liability cases. Thus, the court recognized that aside from cases involving physical injury or damage to other property, plaintiffs may also recover for "breach of the covenant of good faith and fair dealing in insurance contracts; for wrongful discharge in violation of fundamental public policy; or *where the contract was fraudulently induced*." *Id. at 989-90* (emphasis added). "In each of these cases, the duty that gives rise to tort liability is either completely independent of the contract or arises from conduct which is both intentional and intended to harm." *Id. at 990* (citations and quotations omitted). "Focusing on intentional conduct gives substance to the proposition that a breach of contract is tortious only when some independent duty arising from tort law is violated." *Id.* However, if "every negligent breach **[*54]** of a contract gives rise to tort damages the limitation would be meaningless, as would the statutory distinction between tort and contract remedies." *Id.* Thus, the focus for the California Supreme Court in *Robinson Helicopter* centered on the intentional nature of the defendant's behavior, because courts should only apply tort remedies to contract suits "when the conduct in question is so clear in its deviation from socially useful business practices that the effect of enforcing such tort duties will be to aid rather than discourage commerce." *Id. at 991-92* (citations and quotations omitted). "California also has a legitimate and compelling interest in preserving a business climate free of fraud and deceptive practices," and therefore fraudulent conduct cannot be considered a "socially useful business practice." *Id. at 992* (citations and quotations omitted).

No published Ninth Circuit opinion nor California Supreme Court decision has analyzed how the exceptions to the economic loss rule identified in *Robinson Helicopter* apply to claims of negligent misrepresentation which, by their very nature, occupy the space between negligence and fraud claims. However, two unpublished Ninth Circuit decisions have suggested **[*55]** negligent misrepresentation claims are not barred by the economic loss rule. *See* *Hannibal Pictures, Inc. v. Sonja Prods. LLC, 432 Fed. App'x 700, 701 (9th Cir. 2011)* (holding that a jury verdict in favor of a negligent misrepresentation claim was not precluded by the economic loss rule where "one party has lied to the other"); *Kalitta Air, L.L.C. v. Cent. Texas Airborne Sys., Inc., 315 Fed. App'x 603, 607 (9th Cir. 2008)* (holding that negligent misrepresentation is a "species of fraud" under California law, for which "economic loss is recoverable"). A third unpublished Ninth Circuit decision reached a contrary holding. *See* *Astrium S.A.S. v. TRW, Inc., 197 Fed. App'x 575, 577 (9th Cir. 2006)* (citing *Robinson Helicopter* for the proposition that the economic loss rule barred recovery for fraud and negligent misrepresentation "because, even if fraud were shown, there is no showing that people or property were placed at risk or that Astrium was exposed to 'personal damages' beyond economic losses"); *accord* Crystal Springs Upland Sch. v. Fieldturf USA, Inc., 219 F. Supp. 3d 962, 969 n.3 (N.D. Cal. 2016) (recognizing this split of authority).[6]

Numerous district courts in California have considered this issue, reaching varying conclusions. *See, e.g.,* Shahinian v. Kimberly-Clark Corp., No. CV 14-8390 DMG(SHx), 2015 U.S. Dist. LEXIS 92782, 2015 WL 4264638, at *8 (C.D. Cal. July 10, 2015); UMG Recordings, Inc. v. Glob. Eagle Entm't, Inc., 117 F. Supp. 3d 1092, 1104 (C.D. Cal. 2015); Ladore v. Sony Comput. Entm't Am., LLC, 75 F. Supp. 3d 1065, 1074-76 (N.D. Cal. 2014); Tasion Commc'ns, Inc. v. Ubiquiti Networks, Inc., No. C-13-1803-EMC, 2013 U.S. Dist. LEXIS 121207, 2013 WL 4530470, at *3-9 (N.D. Cal. Aug. 26, 2013); NuCal Foods, Inc. v. Quality Egg LLC, 918 F. Supp. 2d 1023, 1030 (E.D. Cal. 2013); Castro Valley Union 76, Inc. v. Vapor Sys. Techs., Inc., No. C 11-0299 PJH, 2012 U.S. Dist. LEXIS 151734, 2012 WL 5199458, at *4 (N.D. Cal. Oct. 22, 2012); United Guar. Mortg. Indem. Co. v. Countrywide Fin. Corp., 660 F. Supp. 2d 1163, 1179 (C.D. Cal. 2009); Barrier Specialty Roofing & Coatings, **[*56]** Inc. v. ICI Paints N. Am., Inc., No. CV F 07-1614-LJO-TAG, 2008 U.S. Dist. LEXIS 120604, 2008 WL 2724876, at *5-6 (E.D. Cal. July 11, 2008). One district court has observed that "reasonable minds can and do disagree on the applicability of the economic loss rule to negligent representation claims, and this issue is ripe to be revisited by the California Supreme Court." Broomfield v. Craft Brew All., Inc., No. 17-CV-01027-BLF, 2017 U.S. Dist. LEXIS 142572, 2017 WL 3838453, at *9 (N.D. Cal. Sept. 1, 2017), *on reconsideration in part*, 2017 U.S. Dist. LEXIS 194451, 2017 WL 5665654 (N.D. Cal. Nov. 27, 2017).

Because this question is one of state law, this court is obligated to resolve it as the court believes the California Supreme Court would. Astaire v. Best Film & Video Corp., 116 F.3d 1297, 1300 (9th Cir. 1997), *as amended*, 136 F.3d 1208 (9th Cir. 1998). "In the absence of a controlling California Supreme Court decision, [the court] must predict how the California Supreme Court would decide the issue, using intermediate appellate court decisions, statutes, and decisions from other jurisdictions as interpretive aids." Gravquick A/S v. Trimble Navigation Int'l Ltd., 323 F.3d 1219, 1222 (9th Cir. 2003). As the above-cited cases demonstrate, both district courts and panels of the Ninth Circuit have arrived at differing conclusions. However, having reviewed all of these decisions, the court finds the opinion in Lincoln General Insurance Co. v. Access Claims Administrators, Inc., No. CIV. S-07-1015 LKK/EFB, 2007 U.S. Dist. LEXIS 67172, 2007 WL 2492436 (E.D. Cal. Aug. 30, 2007) to be persuasive. In confronting this issue in that case, Judge Karlton held that the economic loss rule bars negligent **[*57]** misrepresentation claims where the allegation runs "closely parallel" to a concurrent breach of contract claim. Lincoln Gen. Ins. Co., 2007 U.S. Dist. LEXIS 67172, 2007 WL 2492436, at *8. Rather than adopting a bright-line rule that negligent misrepresentation claims either are or are not barred by the economic loss rule, this analysis examines the factual basis of the claim to determine whether, as a practical matter, the negligent misrepresentation claim is in actuality a breach of contract claim in disguise. This approach is in keeping with that employed by the California Supreme Court in *Robinson Helicopter*, where that court concluded that the fraud and intentional misrepresentation claims were not barred "because they were independent of Dana's breach of contract." Robinson Helicopter, 34 Cal. 4th at 991.[7] Accordingly, the court will compare Valley Protein's counter-claims for breach of contract and negligent misrepresentation to determine whether they are predicated on the same or similar factual allegations. *See* Bret Harte Union High Sch. Dist. v. FieldTurf, USA, Inc., No. 1:16-cv-00371-DAD-SMS, 2016 U.S. Dist. LEXIS 83295, 2016 WL 3519294, at *5 (E.D. Cal. June 27, 2016) (declining to dismiss plaintiff's negligent representation claim despite the additional allegation of a breach of contract claim because the negligent representation allegations "are, by nature, different"); **[*58]** Tasion Commc'ns, 2013 U.S. Dist. LEXIS 121207, 2013 WL 4530470, at *9 (collecting

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[6] Citation to these unpublished Ninth Circuit opinions is appropriate pursuant to Ninth Circuit Rule 36-3(b).

[7] California courts undertake a similarly functional analysis in other areas. For instance, in determining whether a particular cause of action sounds in tort or contract, California courts eschew a more formalistic approach in favor of an examination of "the quintessence of the action." Voth v. Wasco Pub. Util. Dist., 56 Cal. App. 3d 353, 356, 128 Cal. Rptr. 608 (1976) ("Whether an action is contractual or tortious depends upon the nature of the right sued upon, and not the form of the pleading or the relief demanded."); *accord* Amtower v. Photon Dynamics, Inc., 158 Cal. App. 4th 1582, 1602, 71 Cal. Rptr. 3d 361 (2008).

cases and noting that "courts have nonetheless dismissed negligent misrepresentation claims as barred by the economic loss rule where the complained-of misrepresentations were simply those made in the course of forming the contract"). If Valley Protein's breach of contract and negligent misrepresentation claims are predicated on the same or similar factual allegations, summary judgment in Linde's favor as to the negligent misrepresentation claim is appropriate.

Here, Valley Protein's breach of contract claim is based on the following factual allegations: (1) Linde's failure to supply Valley Protein with modern, reliable, and efficient poultry-freezing equipment; (2) causing Valley Protein to use significantly more CO_2 gas than was necessary; (3) failing to properly maintain its poultry-freezing equipment; (4) improperly charging Valley Protein fuel surcharge and delivery fees by delivering CO_2 gas from Richmond, CA instead of Pixley, CA; and (5) failing to deliver the poultry-freezing equipment it was obligated to provide under the 2014 Agreement. (Doc. No. 29 at ¶¶ 27, 30.) Its negligent misrepresentation claim is based on alleged misrepresentations that (1) Linde **[*59]** would provide Valley Protein with modern, reliable, and efficient equipment that would satisfy Valley Protein's needs; (2) Linde would deliver CO_2 gas from Pixley, CA rather than Richmond, CA; and (3) Linde would supply Valley Protein with poultry-freezing equipment sufficient to meet Valley Protein's production needs in connection with the 2014 Agreement. (*Id.* at ¶¶ 49, 54, 56.) An examination and comparison of these claims reveals that not only do they "closely parallel" one another, they are effectively identical. Valley Protein's negligent misrepresentation claim plainly seeks to redress the same grievances as the breach of contract claim, namely the economic damages Valley Protein allegedly suffered as a result of entering into the 2011 and 2014 Agreements. Under such circumstances, the economic loss rule limits Valley Protein to recovery under contract law rather than tort law. *See* *JMP Sec. LLP v. Altair Nanotechnologies Inc., 880 F. Supp. 2d 1029, 1043 (N.D. Cal. 2012)* (dismissing claims for fraud and negligent misrepresentation after finding those claims "consist of nothing more than Altair's alleged failure to make good on its contractual promises"). Summary judgment in Linde's favor is therefore also appropriate as to Valley Protein's claim for negligent misrepresentation. **[*60]**

I. Valley Protein's Claims for Unfair Competition

Finally, the court addresses Valley Protein's counter-claim under *California Business and Professions Code § 17200*, commonly referred to as the Unfair Competition Law ("UCL"). Linde argues that this counter-claim is also time-barred, that Valley Protein has not raised a triable issue of fact with respect to the claim, and that Valley Protein is not entitled to any of the remedies available under the UCL.

The UCL prohibits "unfair competition," which is defined as including "any unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*. This language is broad, and deliberately so. As the California Supreme Court has observed,

> The Legislature intended by this sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur. Indeed, the section was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive.

Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 181, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999) (internal quotation marks, brackets, and ellipses omitted); *see also* *Rubin v. Green, 4 Cal. 4th 1187, 1200, 17 Cal. Rptr. 2d 828, 847 P.2d 1044 (1993)* (stating that the law "embraces anything that can properly be called a business practice and that at the same time is forbidden **[*61]** by law").

Notably, courts give independent effect to each of the three prongs of *§ 17200*. With respect to the "unlawful" prong, *§ 17200* "borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *De La Torre v. CashCall, Inc., 5 Cal. 5th 966, 980, 236 Cal. Rptr. 3d 353, 422 P.3d 1004 (2018)* (internal quotation marks omitted). As to the "unfair" prong, *§ 17200* makes clear that "a practice may be deemed unfair even if not specifically proscribed by some other law." *Cel-Tech Commc'ns, 20 Cal. 4th at 180*. "In other words, a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa." *State Farm Fire & Cas. Co. v. Superior Court, 45 Cal. App. 4th 1093, 1102, 53 Cal. Rptr. 2d 229 (1996)*, *abrogated on* *other grounds by* Cel-Tech Commc'ns, 20 Cal. 4th at 184-85. Finally, California courts recognize a distinct cause of action under the "fraudulent" prong of § 17200. Under this prong, "it is necessary only to show that the plaintiff was likely to be deceived, and suffered economic injury as a result of the deception." Zhang v. Superior Court, 57 Cal. 4th 364, 380, 159 Cal. Rptr. 3d 672, 304 P.3d 163 (2013) (citing Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 322, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011) and In re Tobacco II Cases, 46 Cal. 4th 298, 312, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009)). Although the scope of relief under this provision is broad, the available remedies are limited. "Prevailing plaintiffs are generally limited to injunctive relief and restitution . . . [and] Plaintiffs may not receive damages, much less *treble* damages, or attorneys fees." Cel-Tech Commc'ns, 20 Cal. 4th at 179.

With respect to whether Valley Protein's claim filed in February of 2017 is time-barred, **[*62]** the analysis set forth above in addressing the breach of the implied covenant of good faith and fair dealing claim applies to this cause of action as well. As with that cause of action, claims brought under the UCL are subject to a four-year statute of limitations. Cal. Bus. & Prof. Code § 17208. Again, the undisputed evidence before the court on summary judgment demonstrates that Valley Protein was aware by early 2012 that the equipment provided by Linde was not meeting its target CO_2 conversion rate. (Doc. No. 52-4 at 142:25, 143:1-5.) Even accounting for tolling because of California's discovery rule, any recovery under this theory of liability is barred by the four-year statute of limitations which would have expired by early 2016. However, the court finds no basis to apply the statute of limitations with respect to Valley Protein's other theories of recovery with respect to this claim for the same reasons explained above in addressing Valley Protein's counter-claim for breach of the covenant of good faith and fair dealing.

The court next addresses whether Valley Protein is entitled to the relief sought. For violation of § 17200, Valley Protein's counter-claim seeks injunctive relief, restitution, and attorneys' fees. **[*63]** (Doc. No. 29 at 18-19.) A plaintiff must demonstrate standing "with respect to each form of relief sought, whether it be injunctive relief, damages, or civil penalties." *See* Bates v. United Parcel Serv., Inc., 511 F.3d 974, 985 (9th Cir. 2007) (en banc); *see also Haro v. Sebelius, 747 F.3d 1099, 1108 (9th Cir. 2013)* (citing DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006)).

The matter of attorneys' fees is easily resolved since such fees are not recoverable under § 17200. Cel-Tech Commc'ns, 20 Cal. 4th at 179. Nor has Valley Protein demonstrated its entitlement to injunctive relief. Linde asserts in its motion that Valley Protein and Linde are not presently engaged in any business relationship, and there is no evidence before the court indicating to the contrary. (Doc. No. 52 at 35.) Thus, any injunctive relief Valley Protein seeks is necessarily prospective in nature. Indeed, Valley Protein's counter-claim indicates that it seeks injunctive relief "prohibiting Linde from engaging in such false, deceptive and fraudulent conduct *in the future*." (Doc. No. 29 at ¶ 63) (emphasis added). However, to have standing to seek injunctive relief, the threat of injury to plaintiffs "must be actual and imminent, not conjectural or hypothetical." Summers v. Earth Island Inst., 555 U.S. 488, 493, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009). "In other words, the 'threatened injury must be *certainly impending* to constitute injury in fact' and 'allegations of *possible* future injury are not sufficient.'" **[*64]** *Davidson v. Kimberly-Clark Corp., 889 F.3d 956, 967 (9th Cir. 2018)* (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013)). Past wrongs do not by themselves amount to real and immediate threats of injury. *See* San Diego Cty. Gun Rights Comm. v. Reno, 98 F.3d 1121, 1126 (9th Cir. 1996); *see also* O'Shea v. Littleton, 414 U.S. 488, 495-96, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effect"). However, "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury." O'Shea, 414 U.S. at 496. "In addition, the claimed threat of injury must be likely to be redressed by the prospective injunctive relief." Bates, 511 F.3d at 985-86. Valley Protein's brief in opposition to summary judgment does not respond to Linde's argument that injunctive relief is foreclosed here. (*See* Doc. No. 53 at 27-28.) Having reviewed the evidence submitted on summary judgment, the court agrees with Linde that Valley Protein has not demonstrated any "certainly impending" harm. Rather, the evidence establishes that Valley Protein began purchasing CO_2 from Air Liquide, and that its business relationship with Linde has terminated. Under these circumstances, the court finds that injunctive relief is unavailable to Valley Protein.

Finally, the court looks to whether Valley Protein is entitled to restitution damages. California Business & Professions Code § 17203 provides that **[*65]** restitution is an available remedy under the UCL "to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." Linde argues that Valley Protein is not entitled to restitution because it "has not alleged and cannot establish that Linde has obtained money from Valley Protein to which it was not entitled, nor has it established that it gave up money that it was otherwise entitled to keep." (Doc. No. 52 at 36.) At bottom, this amounts to an assertion that Valley Protein's UCL counter-claim fails on the merits. The court therefore turns to Linde's alternative argument that Valley Protein's UCL claim fails as a matter of law, whether couched as unlawful, unfair, or fraudulent.

Under the unlawful prong of the UCL, "a violation of another law is a predicate for stating a cause of action under the UCL's unlawful prong." *Berryman v. Merit Prop. Mgmt., Inc., 152 Cal. App. 4th 1544, 1554, 62 Cal. Rptr. 3d 177 (2007)*. Although Valley Protein's counter-claim alleges generally that "Linde engaged in, and continues to engage in, unlawful and unfair claims practices [*sic*] as alleged herein," it does not identify which law Linde has allegedly violated. (Doc. No. 29 at ¶ 62.) Likewise, in its opposition to Linde's **[*66]** motion for summary judgment Valley Protein has failed to point to any violation of law. The only possible such violations are the common law causes of action asserted in Valley Protein's counter-claim, discussed above. However, "a common law violation . . . is insufficient" as a predicate for a UCL claim under the unlawful prong of the statute. *Shroyer v. New Cingular Wireless Servs., Inc., 622 F.3d 1035, 1044 (9th Cir. 2010)* (citing *Allied Grape Growers v. Bronco Wine Co., 203 Cal. App. 3d 432, 450-54, 249 Cal. Rptr. 872 (1988))*. Finding no other basis to support a claim under the unlawful prong of the UCL, the court will grant Linde's motion for summary judgment with respect to the unlawful prong of Valley Protein's UCL claim.

Next, the court considers whether Linde is entitled to summary judgment on Valley Protein's UCL claim brought under the fraudulent prong of the statute. A business practice is "fraudulent" under the UCL if members of the public are likely to be deceived. *Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1169 (9th Cir. 2012)* (citing *Puentes v. Wells Fargo Home Mortg., Inc., 160 Cal. App. 4th 638, 72 Cal. Rptr. 3d 903 (2008))*. "A UCL claim based on the fraudulent prong can be based on representations that deceive because they are untrue, but also those which may be accurate on some level, but will nonetheless tend to mislead or deceive . . . A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, **[*67]** is actionable under the UCL." *Morgan v. AT&T Wireless Servs., Inc., 177 Cal. App. 4th 1235, 1255, 99 Cal. Rptr. 3d 768 (2009)*.

Here, Valley Protein has not come forward on summary judgment with any evidence of harm to the general public resulting from Linde's misrepresentations. A plaintiff must plead and prove harm to the public as a prerequisite to succeed on a UCL claim under the fraudulent prong. *See, e.g., Travelers Prop. Cas. Co. of Am. v. Centex Homes, No. 11-3638-SC, 2013 U.S. Dist. LEXIS 121401, 2013 WL 4528956, at *5 (N.D. Cal. Aug. 26, 2013)* (dismissing plaintiff's claim under the fraudulent prong with prejudice and noting that "both private individuals and corporations must show that the alleged wrongdoing has some impact on the general public"); *Med. Instrument Dev. Labs. v. Alcon Labs., No. C 05-1138 MJJ, 2005 U.S. Dist. LEXIS 41411, 2005 WL 1926673, at *5 (N.D. Cal. Aug. 10, 2005)* ("Plaintiff fails to allege in its Complaint that any 'members of the public are likely to be deceived' by Defendant's allegedly fraudulent conduct."). Here, Valley Protein appears to base its UCL claim entirely on Linde's conduct in relation to the 2011 and 2014 Agreements. (*See* Doc. No. 53 at 27) ("In the case at hand, there are facts that support claims for unfair business practices, both in the fraudulent conduct used to include [*sic*] Valley Protein into the 2011 Agreement as well as the so-called 'mistake' made by Linde on the sizing of the freezing **[*68]** equipment in connection with the 2014 Agreement[.]"). However, there is no evidence before the court on summary judgment evincing that those Agreements caused any harm to the public. Indeed, Valley Protein has not put forward evidence that Linde ever communicated to the public in any way. In essence, Valley Protein "is trying to use the UCL fraud prong to vindicate its contractual . . . rights." *Travelers Prop. Cas. Co. of Am., 2013 U.S. Dist. LEXIS 121401, 2013 WL 4528956, at *5*. Because of this, Linde is entitled to judgment in its favor with respect to Valley Protein's claim under the fraudulent prong of the UCL. *See* *Capella Photonics, Inc. v. Cisco Sys., Inc., 77 F. Supp. 3d 850, 865 (N.D. Cal. 2014)* (dismissing the defendant's UCL counter-claim brought under the fraudulent prong after finding that the defendant "does not allege that members of the public have been deceived by [plaintiff's] alleged fraudulent misrepresentations about the strength of its patent rights").

Finally, the court considers whether summary judgment is warranted in favor of Linde under the unfair prong of Valley Protein's UCL claim. In the wake of the California Supreme Court's decision in *Cel-Tech*, appellate courts have been split regarding the proper test to be employed in determining whether a business practice is "unfair." Under one line of cases, an unfair business practice **[*69]** occurs "when that practice offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Graham v. Bank of Am., N.A., 226 Cal. App. 4th 594, 612, 172 Cal. Rptr. 3d 218 (2014)*. A second line of cases considers the factors for unfairness set forth in *section 5 of the Federal Trade Commission Act*: "'(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided.'" *Id. at 613* (quoting *Camacho v. Auto. Club of S. Cal., 142 Cal. App. 4th 1394, 1403, 48 Cal. Rptr. 3d 770 (2006))*. Yet a third line of cases holds that "a plaintiff alleging an unfair business practice must show the defendant's conduct is tethered to an underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of an ***antitrust law***." *Id.* (internal quotation marks and brackets omitted).[8]

Regardless of the correct test, however, "where the unfair business practices alleged under the unfair prong of the UCL overlap entirely with the business practices addressed in the fraudulent and unlawful prongs of the UCL, the unfair prong of the UCL cannot survive if the claims under the **[*70]** other two prongs of the UCL do not survive." *Hoai Dang v. Samsung Elecs. Co., No. 14-CV-00530-LHK, 2018 U.S. Dist. LEXIS 204471, 2018 WL 6308738, at *10 (N.D. Cal. Dec. 3, 2018)*; *Hadley v. Kellogg Sales Co., 243 F. Supp. 3d 1074, 1104-05 (N.D. Cal. 2017)* (same). Here, Valley Protein makes no distinction between its UCL claims, whether alleged under the unlawful, unfair, or fraudulent prongs. Because the undersigned has already found that Linde is entitled to summary judgment with respect to Valley Protein's claims under the unlawful and fraudulent prongs, the court finds that summary judgment is also appropriate in favor of Linde with respect to the unfair prong.

CONCLUSION

For the reasons set forth above,

1. Linde's motion for summary judgment (Doc. No. 52) is granted with respect to its breach of contract claim, with damages to be awarded in the amount of $963,084.00;
2. Linde's motion for summary judgment is denied with respect to its claim for breach of the implied covenant of good faith and fair dealing;
3. Linde's motion for summary judgment is granted with respect to its claim for account stated, with damages to be awarded in the amount of $38,963.89;
4. Linde's motion for summary judgment is granted with respect to its claim for goods and services rendered;
5. Linde's motion for summary judgment is granted with respect to Valley Protein's **[*71]** counter-claim for breach of contract;
6. Linde's motion for summary judgment is granted with respect to Valley Protein's counter-claim for breach of the implied covenant of good faith and fair dealing;
7. Linde's motion for summary judgment is granted with respect to Valley Protein's counter-claim for intentional misrepresentation;
8. Linde's motion for summary judgment is granted with respect to Valley Protein's counter-claim for negligent misrepresentation;
9. Linde's motion for summary judgment is granted with respect to Valley Protein's counter-claim for violation of California's Unfair Competition Law;
10. The total amount to be awarded to Linde, LLC on its claims for breach of contract and account stated against Valley Protein, LLC is $1,002,047.89; and

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[8] Neither Linde nor Valley Protein acknowledge that a split of authority exists on this point nor have they briefed the issue of which test this court should adopt. In the absence of any briefing addressing this point, the court declines to resolve the question of what test should properly apply.

11. A status conference to be held on August 20, 2019 at 9:30 a.m. in Courtroom 5 before the undersigned, telephonic appearance authorized, to address the remaining claim in this action.[9] However, if the court receives a notice of voluntary dismissal from plaintiff as to its remaining claim for breach of the implied covenant of good faith and fair dealing prior thereto, the status conference will be vacated and judgment will be entered **[*72]** in accordance with this order.

IT IS SO ORDERED.

Dated: **July 11, 2019**

/s/ Dale A. Drozd

UNITED STATES DISTRICT JUDGE

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[9] If the parties are unavailable on August 20, 2019 at 9:30 a.m., they are directed to contact Courtroom Deputy Jami Thorp at (559) 499-5652, or JThorp@caed.uscourts.gov, within ten days of service of this order to reschedule the status conference to a mutually agreeable date.

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United States v. Hyundai Oilbank Co.

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

July 11, 2019, Decided; July 11, 2019, Filed

CASE NO. 2:19-cv-1037

Reporter

2019 U.S. Dist. LEXIS 160981 *; 2019-2 Trade Cas. (CCH) P80,896; 2019 WL 4793050

UNITED STATES OF AMERICA, Plaintiff, v. HYUNDAI OILBANK CO., LTD., Defendant.

Prior History: United States v. S-Oil Corp., 2019 U.S. Dist. LEXIS 159235 (S.D. Ohio, July 11, 2019)

Core Terms

Antitrust, costs, employees, Parties, Compliance, assigns, plea agreement, cooperation, Unallowable, successors, agrees, settlement agreement, attorney's fees, Settlement, heirs, contracts, notice, best efforts, proceedings, documents, expenses, purposes, rights and privileges, False Claims Act, conditioned, provisions, releases, requests, annual

Counsel: **[*1]** For United States of America, Plaintiff: Andrew M Malek, LEAD ATTORNEY, United States Attorney's Office, Columbus, OH USA; J. Richard Doidge, John Arthur Holler, United States Department of Justice, Washington, DC USA.

For Hyundai Oilbank Co., Ltd., Defendant: Ralph William Kohnen, LEAD ATTORNEY, Taft, Stettinius and Hollister, Cincinnati, OH USA; Andrew J. Lee, Kathryn Hellings, PRO HAC VICE, Hogan Lovells US LLP, Washington, DC USA; Jeanne Marie Cors, Taft Stettinius & Hollister, Cincinnati, OH USA.

For S-Oil Corporation, Defendant: Thomas E Zeno, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Cincinnati, OH USA; James W. Cooper, Sonia Kuester Pfaffenroth, PRO HAC VICE, Arnold & Porter Kaye Scholer LLP, Washington, DC USA.

Judges: Algenon L. Marbley, UNITED STATES DISTRICT JUDGE. MAGISTRATE JUDGE VASCURA.

Opinion by: Algenon L. Marbley

Opinion

FINAL JUDGMENT AS TO DEFENDANT HYUNDAI OILBANK CO., LTD.

WHEREAS Plaintiff, United States of America, filed its Complaint on March 20, 2019, the United States and Defendant Hyundai Oilbank Co., Ltd. ("Hyundai Oilbank"), by then-respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law;

WHEREAS, on such date **[*2]** as may be determined by the Court, Hyundai Oilbank will plead guilty pursuant to Fed. R. Crim. P. 11(c)(1)(C) (the "Plea Agreement") to Count One of a Superseding Indictment filed in the Southern District of Ohio (the "Criminal Action") that alleges a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, relating to the same events giving rise to the allegations described in the Complaint;

WHEREAS, this Final Judgment does not constitute any evidence against or admission by any party regarding any issue of fact or law;

NOW, THEREFORE, before the taking of any testimony and without trial or final adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

This Court has jurisdiction of the subject matter of this action and each of the parties consenting hereto. The Complaint states a claim upon which relief may be granted to the United States against Hyundai Oilbank under *Section 1* of the Sherman Act, *15 U.S.C. §1*.

II. APPLICABILITY

This Final Judgment applies to Hyundai Oilbank, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

III. PAYMENT

Hyundai **[*3]** Oilbank shall pay to the United States within ten (10) business days of the entry of this Final Judgment the amount of thirty-nine million, one hundred thousand dollars ($39,100,000), less the amount paid (excluding any interest) pursuant to the settlement agreement attached hereto as Attachment 1, to satisfy all civil antitrust claims alleged against Hyundai Oilbank by the United States in the Complaint. Payment of the amount ordered hereby shall be made by wire transfer of funds or cashier's check. If the payment is made by wire transfer, Hyundai Oilbank shall contact Janie Ingalls of the Antitrust Division's Antitrust Documents Group at (202) 514-2481 for instructions before making the transfer. If the payment is made by cashier's check, the check shall be made payable to the United States Department of Justice and delivered to: Janie Ingalls, United States Department of Justice Antitrust Division, Antitrust Documents Group, 450 5th Street, NW, Suite 1024, Washington, D.C. 20530. In the event of a default in payment, interest at the rate of eighteen (18) percent per annum shall accrue thereon from the date of default to the date of payment.

IV. COOPERATION

Hyundai Oilbank shall cooperate **[*4]** fully with the United States regarding any matter about which Hyundai Oilbank has knowledge or information relating to any ongoing civil investigation, litigation, or other proceeding arising out of any ongoing federal investigation of the subject matter discussed in the Complaint (hereinafter, any such investigation, litigation, or proceeding shall be referred to as a "Civil Federal Proceeding").

The United States agrees that any cooperation provided in connection with the Plea Agreement and/or pursuant to the settlement agreement attached hereto as Attachment 1 will be considered cooperation for purposes of this Final Judgment, and the United States will use its reasonable best efforts, where appropriate, to coordinate any requests for cooperation in connection with the Civil Federal Proceeding with requests for cooperation in connection with the Plea Agreement and the settlement agreement attached hereto as Attachment 1, so as to avoid unnecessary duplication and expense.

Hyundai Oilbank's cooperation shall include, but not be limited to, the following:

(a) Upon request, completely and truthfully disclosing and producing, to the offices of the United States and at no expense to the **[*5]** United States, copies of all non-privileged information, documents, materials, and records in its possession (and for any foreign-language information, documents, materials, or records, copies must be produced with an English translation), regardless of their geographic location, about which the United States may inquire in connection with any Civil Federal Proceeding, including but not limited to all information about activities of Hyundai Oilbank and present and former officers, directors, employees, and agents of Hyundai Oilbank;

(b) Making available in the United States, at no expense to the United States, its present officers, directors, employees, and agents to provide information and/or testimony as requested by the United States in connection with any Civil Federal Proceeding, including the provision of testimony in trial and other judicial proceedings, as well as interviews with law enforcement authorities, consistent with the rights and privileges of those individuals;

(c) Using its best efforts to make available in the United States, at no expense to the United States, its former officers, directors, employees, and agents to provide information and/or testimony as requested **[*6]** by the United States in connection with any Civil Federal Proceeding, including the provision of testimony in trial and other judicial proceedings, as well as interviews with law enforcement authorities, consistent with the rights and privileges of those individuals;

(d) Providing testimony or information necessary to identify or establish the original location, authenticity, or other basis for admission into evidence of documents or physical evidence produced by Hyundai Oilbank in any Civil Federal Proceeding as requested by the United States; and

(e) Completely and truthfully responding to all other inquiries of the United States in connection with any Civil Federal Proceeding.

However, notwithstanding any provision of this Final Judgment, Hyundai Oilbank is not required to: (1) request of its current or former officers, directors, employees, or agents that they forgo seeking the advice of an attorney nor that they act contrary to that advice; (2) take any action against its officers, directors, employees, or agents for following their attorney's advice; or (3) waive any claim of privilege or work product protection.

The obligations of Hyundai Oilbank to cooperate fully with the United **[*7]** States as described in this Section shall cease upon the conclusion of all Civil Federal Proceedings (which may include Civil Federal Proceedings related to the conduct of third parties), including exhaustion of all appeals or expiration of time for all appeals of any Court ruling in each such Civil Federal Proceeding, at which point the United States will provide written notice to Hyundai Oilbank that its obligations under this Section have expired.

V. ANTITRUST COMPLIANCE PROGRAM

A. Within thirty (30) days after entry of this Final Judgment, Hyundai Oilbank shall appoint an Antitrust Compliance Officer and identify to the United States his or her name, business address, telephone number, and email address. Within forty-five (45) days of a vacancy in the Antitrust Compliance Officer position, Hyundai Oilbank shall appoint a replacement, and shall identify to the United States the Antitrust Compliance Officer's name, business address, telephone number, and email address. Hyundai Oilbank's initial or replacement appointment of an Antitrust Compliance Officer is subject to the approval of the United States, in its sole discretion.

B. The Antitrust Compliance Officer shall institute an antitrust **[*8]** compliance program for the company's employees and directors with responsibility for bidding for any contract with the United States. The antitrust compliance program shall provide at least two hours of training annually on the antitrust laws of the United States, such training to be delivered by an attorney with relevant experience in the field of United States ***antitrust law***.

C. Each Antitrust Compliance Officer shall obtain, within six months after entry of this Final Judgment, and on an annual basis thereafter, on or before each anniversary of the entry of this Final Judgment, from each person subject to Paragraph V.B of this Final Judgment, and thereafter maintaining, a certification that each such person has received the required two hours of annual antitrust training.

D. Each Antitrust Compliance Officer shall communicate annually to all employees that they may disclose to the Antitrust Compliance Officer, without reprisal, information concerning any potential violation of the United States antitrust laws.

E. Each Antitrust Compliance Offer shall provide to the United States within six months after entry of this Final Judgment, and on an annual basis thereafter, on or before each **[*9]** anniversary of the entry of this Final Judgment, a written statement as to the fact and manner of Hyundai Oilbank's compliance with Section V of this Final Judgment.

VI. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any of the parties to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

VII. ENFORCEMENT OF FINAL JUDGMENT

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. Hyundai Oilbank agrees that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of the decree and the appropriateness of any remedy therefor by a preponderance of the evidence, and Hyundai Oilbank waives any argument that a different standard of proof should apply.

B. The Final Judgment should be interpreted **[*10]** to give full effect to the procompetitive purposes of the antitrust laws and to restore all competition the United States alleged was harmed by the challenged conduct. Hyundai Oilbank agrees that they may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

C. In any enforcement proceeding in which the Court finds that Hyundai Oilbank has violated this Final Judgment, the United States may apply to the Court for a one-time extension of this Final Judgment, together with such other relief as may be appropriate. In connection with any successful effort by the United States to enforce this Final Judgment against Hyundai Oilbank, whether litigated or resolved prior to litigation, Hyundai Oilbank agrees to reimburse the United States for the fees and expenses of its attorneys, as well as any other costs **[*11]** including experts' fees, incurred in connection with that enforcement effort, including in the investigation of the potential violation.

VIII. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final **Judgment** shall expire seven (7) years from the date of its entry, except that after five (5) years from the date of its entry, this Final Judgment **may** be terminated upon notice by the United States to the Court and Hyundai Oilbank that the continuation of the Final Judgment no longer is necessary or in the public interest.

IX. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, *15 U.S.C. § 16*, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

DATED: 7/11/19

/s/ Algenon L. Marbley

UNITED STATES DISTRICT JUDGE

ATTACHMENT 1

SETTLEMENT **[*12]** AGREEMENT

This Settlement Agreement ("Agreement") is entered into among the United States of America, acting through the Civil Division of the United States Department of Justice and the United States Attorney's Office for the Southern District of Ohio, on behalf of the Defense Logistics Agency ("DLA") and the Army and Air Force Exchange Service ("AAFES") (collectively the "United States"), Hyundai Oilbank Co., Ltd. ("Hyundai"), and Relator [TEXT REDACTED BY THE COURT] (hereafter collectively referred to as "the Parties"), through their authorized representatives.

RECITALS

A. Hyundai is a South Korea-based energy company that produces various petroleum products that it sells to South Korean and international customers, including the United States Department of Defense ("DoD").

B. On February 28, 2018, Relator, a resident and citizen of South Korea, filed a *qui tam* action in the United States District Court for the Southern District of Ohio captioned *United States ex rel. [TEXT REDACTED BY THE COURT] v. GS Caltex, et al.*, Civil Action No. [TEXT REDACTED BY THE COURT], pursuant to the *qui tam* provisions of the False Claims Act, *31 U.S.C. § 3730(b)* (the "Civil FCA Action"). Relator contends that Hyundai conspired **[*13]** with other South Korean entities to rig bids on DoD contracts to supply fuel to U.S. military bases throughout South Korea beginning in 2005 and continuing until 2016, including DLA Post, Camps, and Stations ("PC&S") contracts executed in 2006, 2009, and 2013, and AAFES contracts executed in 2008.

C. On such date as may be determined by the Court, Hyundai will plead guilty pursuant to *Fed. R. Crim. P. 11(c)(1)(C)* (the "Plea Agreement") to Count One of a Superseding Indictment filed in the Southern District of Ohio (the "Criminal Action") that alleges that Hyundai participated in a combination and conspiracy beginning at least in or around March 2005 and continuing until at least in or around October 2016, to suppress and eliminate competition on certain contracts solicited by the DoD to supply fuel to numerous U.S. Army, Navy, Marine, and Air Force installations in South Korea, including PC&S contracts and the 2008 AAFES contract, in violation of the Sherman Antitrust Act, *15 U.S.C. § 1*.

D. Hyundai will execute a Stipulation with the Antitrust Division of the United States Department of Justice in which Hyundai will consent to the entry of a Final Judgment to be filed in *United States v. Hyundai Oilbank Co., Ltd.*, Civil Action **[*14]** No. [to be assigned] (S.D. Ohio) (the "Civil Antitrust Action") that will settle any and all civil antitrust claims of the United States against Hyundai arising from any act or offense committed before the date of the Stipulation that was undertaken in furtherance of an attempted or completed antitrust conspiracy involving PC&S and/or AAFES fuel supply contracts with the U.S. military in South Korea during the period 2005 through 2016.

E. The United States contends that it has certain civil claims against Hyundai arising from the conduct described in the Plea Agreement in the Criminal Action and in the Stipulation in the Civil Antitrust Action, as well as the conduct, actions, and claims alleged by Relator in the Civil FCA Action. The conduct referenced in this Paragraph is referred to below as the Covered Conduct.

F. With the exception of any admissions that are made by Hyundai in connection with the Plea Agreement in the Criminal Action, this Settlement Agreement is neither an admission of liability by Hyundai nor a concession by the United States that its claims are not well founded.

To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, **[*15]** and in consideration of the mutual promises and obligations of this Settlement Agreement, the Parties agree and covenant as follows:

TERMS AND CONDITIONS

1.a. Hyundai agrees to pay to the United States $28,818,814 ("FCA Settlement Amount"), of which $13,266,973 is restitution, by electronic funds transfer no later than thirteen (13) business days after the Effective Date of this Agreement pursuant to written instructions to be provided by the Civil Division of the Department of Justice. Relator claims entitlement under *31 U.S.C. § 3730(d)* to a share of the proceeds of this Settlement Agreement and to Relator's reasonable expenses, attorneys' fees and costs. The FCA Settlement Amount does not include the Relator's fees and costs, and Hyundai acknowledges that Relator retains all rights to recover such expenses, attorneys' fees, and costs from Hyundai pursuant to *31 U.S.C. § 3730(d)*.

1.b. If Hyundai's Plea Agreement in the Criminal Action is not accepted by the Court or the Court does not enter a Final Judgment in the Civil Antitrust Action, this Agreement shall be null and void at the option of either the United States or Hyundai. If either the United States or Hyundai exercises this option, which option shall be exercised **[*16]** by notifying all Parties, through counsel, in writing within five (5) business days of the Court's decision, the Parties will not object and this Agreement will be rescinded and the FCA Settlement Amount shall be returned to Hyundai. If this Agreement is rescinded, Hyundai will not plead, argue or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel or similar theories, to any civil or administrative claims, actions or proceedings arising from the Covered Conduct that are brought by the United States within ninety (90) calendar days of rescission, except to the extent such defenses were available on the day on which Relator's *qui tam* complaint in the Civil FCA Action was filed.

2. Subject to the exceptions in Paragraph 4 (concerning excluded claims) below, and conditioned upon Hyundai's full payment of the FCA Settlement Amount, the United States releases Hyundai together with its current and former parent corporations; direct and indirect subsidiaries; brother or sister corporations; divisions; current or former corporate owners; and the corporate successors and assigns of any of them from any civil or administrative monetary claim the United **[*17]** States has for the Covered Conduct under the *False Claims Act, 31 U.S.C. §§ 3729-3733*; the *Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812*; *Contract Disputes Act, 41 U.S.C. §§ 7101-7109*; or the common law theories of breach of contract, payment by mistake, unjust enrichment, and fraud.

3. Except as set forth in Paragraph 1 (concerning Relator's claims under *31 U.S.C. § 3730(d)*), and conditioned upon Hyundai's full payment of the FCA Settlement Amount, Relator, for himself and for his heirs, successors, attorneys, agents, and assigns, releases Hyundai together with its current and former parent corporations; direct and indirect subsidiaries; brother or sister corporations; divisions; current or former corporate owners; the corporate successors and assigns of any of them as well as Hyundai owners, directors, officers, agents, employees and counsel from (a) any civil monetary claim the Relator has or may have for the claims set forth in the Civil FCA Action, the Civil Antitrust Action, the Criminal Action, and the Covered Conduct under the False Claims Act, *31 U.S.C. §§ 3729-3733*, up until the date of this Agreement; and (b) all liability, claims, demands, actions, or causes of action whatsoever, whether known or unknown, fixed or contingent, in law or in equity, in contract or in **[*18]** tort, under any federal, state, or Korean statute, law, regulation or doctrine, that Relator, his heirs, successors, attorneys, agents, and assigns otherwise has brought or would have standing to bring as of the date of this Agreement, including any liability to Relator arising from or relating to the claims Relator asserted or could have asserted in the Civil FCA Action, up until the date of this Agreement. Relator represents he does not know of any

conduct by Hyundai or any current or former owners, officers, directors, trustees, shareholders, employees, executives, agents, or affiliates that would constitute a violation of the *False Claims Act* other than the claims set forth in the Civil FCA Action and the Covered Conduct, and Relator acknowledges and agrees that his representations are a material inducement to Hyundai's willingness to enter into this Agreement. Relator further represents and warrants that he and his counsel are the exclusive owner of the rights, claims, and causes of action herein released and none of them have previously assigned, reassigned, or transferred or purported to assign, reassign, or transfer, through bankruptcy or by any other means, any or any portion **[*19]** of any claim, demand, action, cause of action, or other right released or discharged under this Agreement except between themselves and their counsel.

4. Notwithstanding the releases given in paragraphs 2 and 3 of this Agreement, or any other term of this Agreement, the following claims of the United States are specifically reserved and are not released:

a. Any liability arising under Title 26, U.S. Code (Internal Revenue Code);

b. Any criminal liability, except to the extent detailed in the Plea Agreement;

c. Except as explicitly stated in this Agreement, any administrative liability, including the suspension and debarment rights of any federal agency;

d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;

e. Any liability based upon obligations created by this Agreement;

f. Any liability of individuals;

g. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;

h. Any liability for failure to deliver goods or services due; and

i. Any liability for personal injury or property damage or for other consequential damages arising from the Covered **[*20]** Conduct.

5. Relator and his heirs, successors, attorneys, agents, and assigns shall not object to this Agreement but agree and confirm that this Agreement is fair, adequate, and reasonable under all the circumstances, pursuant to *31 U.S.C. § 3730(c)(2)(B)*. The determination of Relator's share, if any, of the FCA Settlement Amount pursuant to *31 U.S.C. § 3730(d)* is a matter that shall be handled separately by and between the Relator and the United States, without any direct involvement or input from Hyundai. In connection with this Agreement and this Civil FCA Action, Relator, on behalf of himself and his heirs, successors, attorneys, agents, and assigns agrees that neither this Agreement, nor any intervention by the United States in the Civil FCA Action in order to dismiss the Civil FCA Action, nor any dismissal of the Civil FCA Action, shall waive or otherwise affect the ability of the United States to contend that provisions in the False Claims Act, including *31 U.S.C. § 3730(d)(3)*, bar Relator from sharing in the proceeds of this Agreement, except that the United States will not contend that Relator is barred from sharing in the proceeds of this Agreement pursuant to *31 U.S.C. § 3730(e)(4)*. Moreover, the United States and Relator, on behalf of himself and his heirs, **[*21]** successors, attorneys, agents, and assigns agree that they each retain all of their rights pursuant to the False Claims Act on the issue of the share percentage, if any, that Relator should receive of any proceeds of the settlement of his claims, and that no agreements concerning Relator share have been reached to date.

6. Hyundai waives and shall not assert any defenses Hyundai may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the *Double Jeopardy Clause in the Fifth Amendment of the Constitution*, or under the *Excessive Fines Clause in the Eighth Amendment of the Constitution*, this Agreement bars a remedy sought in such criminal prosecution or administrative action.

7. Hyundai fully and finally releases the United States, its agencies, officers, agents, employees, and servants, from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that Hyundai has asserted, could have asserted, or may assert in the future against the United States, its agencies, officers, agents, employees, and servants, related to the Covered Conduct and the United States' investigation and prosecution thereof.

8. Conditioned upon Relator's agreement herein, Hyundai fully and finally releases **[*22]** Relator his heirs, successors, assigns, agents and attorneys (the "Relator Released Parties"), from (a) any civil monetary claim Hyundai has or may have now or in the future against the Relator Released Parties related to the claims set forth in the Civil FCA Action, the Civil Antitrust Action, the Criminal Action, and the Covered Conduct under the False Claims Act, *31 U.S.C. §§ 3729-3733*, and the Relator's investigation and prosecution thereof, including attorney's fees, costs, and expenses of every kind and however denominated, up until the date of this Agreement; and (b) all liability, claims, demands, actions, or causes of action whatsoever, whether known or unknown, fixed or contingent, in law or in equity, in contract or in tort, under any federal, state, or Korean statute, law, regulation or doctrine, that Hyundai otherwise have brought or would have standing to bring as of the date of this Agreement, including any liability to Hyundai arising from or relating to claims Hyundai asserted or could have asserted related to the Civil FCA Action, up until the date of this Agreement. Hyundai further acknowledges and agrees that these representations are a material inducement to Relator's willingness to **[*23]** enter into this Agreement.

9. a. Unallowable Costs Defined: All costs (as defined in the Federal Acquisition Regulation, *48 C.F.R. § 31.205-47*) incurred by or on behalf of Hyundai, and its present or former officers, directors, employees, shareholders, and agents in connection with:

(1) the matters covered by this Agreement, any related plea agreement, and any related civil antitrust agreement;

(2) the United States' audit(s) and civil and any criminal investigation(s) of the matters covered by this Agreement;

(3) Hyundai's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil and any criminal investigation(s) in connection with the matters covered by this Agreement (including attorney's fees);

(4) the negotiation and performance of this Agreement, any related plea agreement, and any related civil antitrust agreement;

(5) the payment Hyundai makes to the United States pursuant to this Agreement and any payments that Hyundai may make to Relator, including costs and attorneys' fees,

are unallowable costs for government contracting purposes (hereinafter referred to as Unallowable Costs).

b. Future Treatment of Unallowable Costs: Unallowable Costs will be separately **[*24]** determined and accounted for by Hyundai, and Hyundai shall not charge such Unallowable Costs directly or indirectly to any contract with the United States.

c. Treatment of Unallowable Costs Previously Submitted for Payment: Within 90 days of the Effective Date of this Agreement, Hyundai shall identify and repay by adjustment to future claims for payment or otherwise any Unallowable Costs included in payments previously sought by Hyundai or any of its subsidiaries or affiliates from the United States. Hyundai agrees that the United States, at a minimum, shall be entitled to recoup from Hyundai any overpayment plus applicable interest and penalties as a result of the inclusion of such Unallowable Costs on previously-submitted requests for payment. The United States, including the Department of Justice and/or the affected agencies, reserves its rights to audit, examine, or re-examine Hyundai's books and records and to disagree with any calculations submitted by Hyundai or any of its subsidiaries or affiliates regarding any Unallowable Costs included in payments previously sought by Hyundai, or the effect of any such Unallowable Costs on the amount of such payments.

10. Hyundai agrees to **[*25]** cooperate fully and truthfully with the United States in connection with the Civil FCA Action. The Civil Division of the United States Department of Justice will use reasonable best efforts, where appropriate, to coordinate any requests for cooperation in connection with the Civil FCA Action with requests for cooperation in connection with the Plea Agreement in the Criminal Action and the Civil Antitrust Action, so as to avoid unnecessary duplication and expense. Hyundai's ongoing, full, and truthful cooperation shall include, but not be limited to:

a. upon request by the United States with reasonable notice, producing at the offices of counsel for the United States in Washington, D.C. and not at the expense of the United States, complete and un-redacted copies of all non-privileged documents related to the Covered Conduct wherever located in Hyundai's possession, custody, or control;

b. upon request by the United States with reasonable notice, making current Hyundai directors, officers, and employees available for interviews, consistent with the rights and privileges of such individuals, by counsel for the United States and/or their investigative agents, not at the expense of the United **[*26]** States, in the United States or Hong Kong, unless another place is mutually agreed upon;

c. upon request by the United States with reasonable notice, (i) using best efforts to assist in locating former Hyundai directors, officers, and employees identified by attorneys and/or investigative agents of the United States, and (ii) using best efforts to make any such former Hyundai directors, officers, and employees available for interviews, consistent with the rights and privileges of such individuals, by counsel for the United States and/or their investigative agents, not at the expense of the United States, in the United States or Hong Kong, unless another place is mutually agreed upon; and

d. upon request by the United States with reasonable notice, making current Hyundai directors, officers, and employees available, and using best efforts to make former Hyundai directors, officers, employees available, to testify, consistent with the rights and privileges of such individuals, fully, truthfully, and under oath, without falsely implicating any person or withholding any information, (i) at depositions in the United States, Hong Kong, or any other mutually agreed upon place, (ii) at trial **[*27]** in the United States, and (iii) at any other judicial proceedings wherever located related to the Civil FCA Action.

11. This Agreement is intended to be for the benefit of the Parties only.

12. Upon receipt of the payment of the FCA Settlement Amount described in

Paragraph 1.a. above, the Court's acceptance of Hyundai's Plea Agreement in the Criminal Action, and the Court's entry of a Final Judgment in the Civil Antitrust Action, the United States and Relator shall promptly sign and file a Joint Stipulation of Dismissal, with prejudice, of the claims filed against Hyundai in the Civil FCA Action, pursuant to *Rule 41(a)(1)*, which dismissal shall be conditioned on the Court retaining jurisdiction over Relator's claims to a relator's share and recovery of attorneys' fees and costs pursuant to *31 U.S.C. §3730(d)*.

13. Except with respect to the recovery of Relator's attorneys' fees, expenses, and costs pursuant to *31 U.S.C. §3730(d)*, each Party shall bear its own legal and other costs incurred in connection with this matter. The Parties agree that Relator and Hyundai will not seek to recover from the United States any costs or fees related to the preparation and performance of this Agreement.

14. Each party and signatory to this Agreement **[*28]** represents that it freely and voluntarily enters in to this Agreement without any degree of duress or compulsion. 15. This Agreement is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Agreement is the United States District Court for the Southern District of Ohio. Hyundai agrees that the United States District Court for the Southern District of Ohio has jurisdiction over it for purposes of this case. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

16. This Agreement constitutes the complete agreement between the Parties on the subject matter addressed herein. This Agreement may not be amended except by written consent of the Parties.

17. The undersigned counsel represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.

18. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement.

19. This **[*29]** Agreement is binding on Hyundai's successors, transferees, heirs, and assigns.

20. This Agreement is binding on Relator's successors, transferees, heirs, and assigns.

21. All parties consent to the United States' disclosure of this Agreement, and information about this Agreement, to the public, as permitted by order of the Court. This Agreement shall not be released in un-redacted form until the Court unseals the entire Civil FCA Action.

22. This Agreement is effective on the date of signature of the last signatory to the Agreement (Effective Date of this Agreement). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

THE UNITED STATES OF AMERICA

DATED: 3/14/19

BY: /s/ Andrew A. Steinberg

Andrew A. Steinberg

Trial Attorney

Commercial Litigation Branch

Civil Division, U.S. Department of Justice

DATED: 3/14/19

BY: /s/ Mark T. D'Alessandro

Mark T. D'Alessandro

Civil Chief

Andrew Malek

Assistant United States Attorney

U.S. Attorney's Office for the Southern District of Ohio

HYUNDAI OILBANK CO.. LTD. - DEFENDANT

DATED: 3/14/19

Minsung Kim

Authorized Representative of Hyundai Oilbank Co., Ltd.

DATED: 3/14/19

Gejaa Gobena

Andrew J. Lee

Kathryn M. Hellings

Hogan **[*30]** Lovells U.S. LLP

Counsel for Hyundai Oilbank Co., Ltd.

[TEXT REDACTED BY THE COURT]RELATOR

DATE: __BY: __

[TEXT REDACTED BY THE COURT]

DATE: __BY: __

Eric Havian

Constantine Cannon LLP

Counsel for Relator

End of Document

United States v. S-Oil Corp.

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

July 11, 2019, Decided; July 11, 2019, Filed

CASE NO. 2:19-cv-1037

Reporter

2019 U.S. Dist. LEXIS 159235 *; 2019-2 Trade Cas. (CCH) P80,897; 2019 WL 4782973

UNITED STATES OF AMERICA, Plaintiffs v. S-OIL CORPORATION, Defendant.

Subsequent History: Judgment entered by *United States v. Hyundai Oilbank Co., 2019 U.S. Dist. LEXIS 160981 (S.D. Ohio, July 11, 2019)*

Core Terms

Antitrust, Parties, costs, employees, cooperation, Compliance, assigns, plea agreement, Unallowable, successors, agrees, settlement agreement, attorney's fees, Settlement, heirs, contracts, expenses, notice, best efforts, False Claims Act, proceedings, documents, purposes, rights and privileges, cause of action, conditioned, interviews, provisions, requests, annual

Counsel: **[*1]** For United States of America, Plaintiff: Andrew M Malek, LEAD ATTORNEY, United States Attorney's Office, Columbus, OH USA; J. Richard Doidge, John Arthur Holler, United States Department of Justice, Washington, DC USA.

For Hyundai Oilbank Co., Ltd., Defendant: Ralph William Kohnen, LEAD ATTORNEY, Taft, Stettinius and Hollister, Cincinnati, OH USA; Andrew J. Lee, Kathryn Hellings, PRO HAC VICE, Hogan Lovells US LLP, Washington, DC USA; Jeanne Marie Cors, Taft Stettinius & Hollister - 1, Cincinnati, OH USA.

For S-Oil Corporation, Defendant: Thomas E Zeno, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Cincinnati, OH USA; James W. Cooper, Sonia Kuester Pfaffenroth, PRO HAC VICE, Arnold & Porter Kaye Scholer LLP, Washington, DC USA.

Judges: Algenon L. Marbley, UNITED STATES DISTRICT JUDGE. MAGISTRATE JUDGE VASCURA.

Opinion by: Algenon L. Marbley

Opinion

FINAL JUDGMENT AS TO DEFENDANT S-OIL CORPORATION

WHEREAS Plaintiff, United States of America, filed its Complaint on March 20, 2019, the United States and Defendant S-Oil Corporation ("S-Oil"), by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law:

WHEREAS, on such date as may be determined **[*2]** by the Court, S-Oil will plead guilty pursuant to *Fed. R. Crim. P. 11(c)(1)(C)* (the "Plea Agreement") to Count One of a Superseding Indictment filed in the Southern District of

Ohio (the "Criminal Action") that alleges a violation of *Section 1 of the Sherman Act*, *15 U.S.C. § 1*, relating to the same events giving rise to the allegations described in the Complaint;

WHEREAS, this Final Judgment does not constitute any evidence against or admission by any party regarding any issue of fact or law;

NOW, THEREFORE, before the taking of any testimony and without trial or final adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

This Court has jurisdiction of the subject matter of this action and each of the parties consenting hereto. The Complaint states a claim upon which relief may be granted to the United States against S-Oil under *Section 1 of the Sherman Act*, *15 U.S.C. §1*.

II. APPLICABILITY

This Final Judgment applies to S-Oil, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

III. PAYMENT

S-Oil shall pay to the United States within ten (10) business **[*3]** days of the entry of this Final Judgment the amount of twelve million, nine hundred and eighty thousand dollars ($12,980,000), less the amount paid (excluding any interest) pursuant to the settlement agreement attached hereto as Attachment 1, to satisfy all civil antitrust claims alleged against S-Oil by the United States in the Complaint. Payment of the amount ordered hereby shall be made by wire transfer of funds or cashier's check. If the payment is made by wire transfer, S-Oil shall contact Janie Ingalls of the Antitrust Division's Antitrust Documents Group at (202) 514-2481 for instructions before making the transfer. If the payment is made by cashier's check, the check shall be made payable to the United States Department of Justice and delivered to: Janie Ingalls, United States Department of Justice Antitrust Division, Antitrust Documents Group, 450 5th Street, NW, Suite 1024, Washington, D.C. 20530. In the event of a default in payment, interest at the rate of eighteen (18) percent per annum shall accrue thereon from the date of default to the date of payment.

IV. COOPERATION

S-Oil shall cooperate fully with the United States regarding any matter about which S-Oil has knowledge **[*4]** or information relating to any ongoing civil investigation, litigation, or other proceeding arising out of any ongoing federal investigation of the subject matter discussed in the Complaint (hereinafter, any such investigation, litigation, or proceeding shall be referred to as a "Civil Federal Proceeding").

The United States agrees that any cooperation provided in connection with the Plea Agreement and/or pursuant to the settlement agreement attached hereto as Attachment 1 will be considered cooperation for purposes of this Final Judgment, and the United States will use its reasonable best efforts, where appropriate, to coordinate any requests for cooperation in connection with the Civil Federal Proceeding with requests for cooperation in connection with the Plea Agreement and the settlement agreement attached hereto as Attachment 1, so as to avoid unnecessary duplication and expense.

S-Oil's cooperation shall include, but not be limited to, the following:

(a) Upon request, completely and truthfully disclosing and producing, to the offices of the United States and at no expense to the United States, copies of all non-privileged information, documents, materials, and records in its possession **[*5]** (and for any foreign-language information, documents, materials, or records, copies must be produced with an English translation), regardless of their geographic location, about which the United States may inquire in connection with any Civil Federal Proceeding, including but not limited to all information about activities of S-Oil and present and former officers, directors, employees, and agents of S-Oil;

(b) Making available in the United States, at no expense to the United States, its present officers, directors, employees, and agents to provide information and/or testimony as requested by the United States in connection with any Civil Federal Proceeding, including the provision of testimony in trial and other judicial proceedings, as well as interviews with law enforcement authorities, consistent with the rights and privileges of those individuals;

(c) Using its best efforts to make available in the United States, at no expense to the United States, its former officers, directors, employees, and agents to provide information and/or testimony as requested by the United States in connection with any Civil Federal Proceeding, including the provision of testimony in trial and other judicial **[*6]** proceedings, as well as interviews with law enforcement authorities, consistent with the rights and privileges of those individuals;

(d) Providing testimony or information necessary to identify or establish the original location, authenticity, or other basis for admission into evidence of documents or physical evidence produced by S-Oil in any Civil Federal Proceeding as requested by the United States; and

(e) Completely and truthfully responding to all other inquiries of the United States in connection with any Civil Federal Proceeding.

However, notwithstanding any provision of this Final Judgment, S-Oil is not required to: (1) request of its current or former officers, directors, employees, or agents that they forgo seeking the advice of an attorney nor that they act contrary to that advice; (2) take any action against its officers, directors, employees, or agents for following their attorney's advice; or (3) waive any claim of privilege or work product protection.

The obligations of S-Oil to cooperate fully with the United States as described in this Section shall cease upon the conclusion of all Civil Federal Proceedings (which may include Civil Federal Proceedings related to the conduct **[*7]** of third parties), including exhaustion of all appeals or expiration of time for all appeals of any Court ruling in each such Civil Federal Proceeding, at which point the United States will provide written notice to S-Oil that its obligations under this Section have expired.

V. ANTITRUST COMPLIANCE PROGRAM

A. Within thirty (30) days after entry of this Final Judgment, S-Oil shall appoint an Antitrust Compliance Officer and identify to the United States his or her name, business address, telephone number, and email address. Within forty-five (45) days of a vacancy in the Antitrust Compliance Officer position, S-Oil shall appoint a replacement, and shall identify to the United States the Antitrust Compliance Officer's name, business address, telephone number, and email address. S-Oil's initial or replacement appointment of an Antitrust Compliance Officer is subject to the approval of the United States, in its sole discretion.

B. The Antitrust Compliance Officer shall institute an antitrust compliance program for the company's employees and directors with responsibility for bidding for any contract with the United States. The antitrust compliance program shall provide at least two hours **[*8]** of training annually on the antitrust laws of the United States, such training to be delivered by an attorney with relevant experience in the field of United States ***antitrust law***.

C. Each Antitrust Compliance Officer shall obtain, within six months after entry of this Final Judgment, and on an annual basis thereafter, on or before each anniversary of the entry of this Final Judgment, from each person subject to Paragraph V.B of this Final Judgment, and thereafter maintaining, a certification that each such person has received the required two hours of annual antitrust training.

D. Each Antitrust Compliance Officer shall communicate annually to all employees that they may disclose to the Antitrust Compliance Officer, without reprisal, information concerning any potential violation of the United States antitrust laws.

E. Each Antitrust Compliance Offer shall provide to the United States within six months after entry of this Final Judgment, and on an annual basis thereafter, on or before each anniversary of the entry of this Final Judgment, a written statement as to the fact and manner of S-Oil's compliance with Section V of this Final Judgment.

VI. RETENTION OF JURISDICTION

This Court retains **[*9]** jurisdiction to enable any of the parties to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

VII. ENFORCEMENT OF FINAL JUDGMENT

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. S-Oil agrees that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of the decree and the appropriateness of any remedy therefor by a preponderance of the evidence, and S-Oil waives any argument that a different standard of proof should apply.

B. The Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws and to restore all competition the United States alleged was harmed by the challenged conduct. S-Oil agrees that they may be held in contempt of, and that **[*10]** the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

C. In any enforcement proceeding in which the Court finds that S-Oil has violated this Final Judgment, the United States may apply to the Court for a one-time extension of this Final Judgment, together with such other relief as may be appropriate. In connection with any successful effort by the United States to enforce this Final Judgment against S-Oil, whether litigated or resolved prior to litigation, S-Oil agrees to reimburse the United States for the fees and expenses of its attorneys, as well as any other costs including experts' fees, incurred in connection with that enforcement effort, including in the investigation of the potential violation.

VIII. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire seven (7) years from the **[*11]** date of its entry, except that after five (5) years from the date of its entry, this Final Judgment may be terminated upon notice by the United States to the Court and S-Oil that the continuation of the Final Judgment no longer is necessary or in the public interest.

IX. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the *Antitrust Procedures and Penalties Act, 15 U.S.C. § 16*, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

DATED: 7/11/19

/s/ Algenon L. Marbley

UNITED STATES DISTRICT JUDGE

ATTACHMENT 1

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into among the United States of America, acting through the Civil Division of the United States Department of Justice and the United States Attorney's Office for the Southern District of Ohio, on behalf of the Defense **[*12]** Logistics Agency ("DLA") and the Army and Air Force Exchange Service ("AAFES") (collectively the "United States"), S-Oil Corporations ("S-Oil"), and Relator [TEXT REDACTED BY THE COURT] (hereafter collectively referred to as "the Parties"), through their authorized representatives.

RECITALS

A. S-Oil is a South Korea-based energy company that produces various petroleum products that it sells to South Korean and international customers, including the United States Department of Defense ("DoD").

B. On February 28, 2018, Relator, a resident and citizen of South Korea, filed a *qui tam* action in the United States District Court for the Southern District of Ohio captioned *United States ex rel. [TEXT REDACTED BY THE COURT] v. GS Caltex, et al.*, Civil Action No. [TEXT REDACTED BY THE COURT], pursuant to the *qui tam* provisions of the False Claims Act, *31 U.S.C. § 3730(b)* (the "Civil FCA Action"). Relator contends that S-Oil conspired with other South Korean entities to rig bids on DoD contracts to supply fuel to U S military bases throughout South Korea beginning in 2008 and continuing until 2016, including DLA Post, Camps, and Stations (PC&S) contracts executed in 2009 and 2013.

C. On such date as may be determined **[*13]** by the Court, S-Oil will plead guilty pursuant to *Fed. R. Crim. P. 11(c)(1)(C)* (the "Plea Agreement") to Count One of a

Superseding Indictment filed in *United States v. S-Oil Corp.*, Criminal Action No. 2:18 Cr. 152 (S.D. Ohio) (the "Criminal Action") that will allege that S-Oil participated in a combination and conspiracy beginning at least in or around November or December 2008 and continuing until at least in or around October 2016, to suppress and eliminate competition on certain contracts solicited by the DoD to supply fuel to numerous U.S. Army, Navy, Marine, and Air Force installations in South Korea, including PC&S contracts, in violation of the Sherman Antitrust Act, *15 U.S.C. § 1*.

D. S-Oil will execute a Stipulation with the Antitrust Division of the United States Department of Justice in which S-Oil will consent to the entry of a Final Judgment to be filed in *United States v. S-Oil Corp.*, Civil Action No. [to be assigned] (S.D. Ohio) (the "Civil Antitrust Action") that will settle any and all civil antitrust claims of the United States against S-Oil arising from any act or offense committed before the date of the Stipulation that was undertaken in furtherance of an attempted or completed antitrust conspiracy involving **[*14]** PC&S and/or AAFES fuel supply contracts with the U S military in South Korea during the period 2005 through 2016.

E. The United States contends that it has certain civil claims against S-Oil arising from the conduct described in the Plea Agreement in the Criminal Action and in the Stipulation in the Civil Antitrust Action, as well as the conduct, actions, and claims alleged by Relator in the Civil FCA Action. The conduct referenced in this Paragraph is referred to below as the Covered Conduct.

F. With the exception of any admissions that are made by S-Oil in connection with the Plea Agreement in the Criminal Action, this Settlement Agreement is neither an admission of liability by S-Oil nor a concession by the United States that its claims are not well founded.

To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, and in consideration of the mutual promises and obligations of this Settlement Agreement, the Parties agree and covenant as follows:

TERMS AND CONDITIONS

1.a. S-Oil agrees to pay to the United States $12,980,000 (the "FCA Settlement Amount"), of which $5,900,000 is restitution, by electronic funds transfer no later than ten (10) **[*15]** business days after the Effective Date of this Agreement pursuant to written instructions to be provided by the Civil Division of the Department of Justice.

1.b. Relator claims entitlement under *31 U.S.C. § 3730(d)* to a share of the proceeds of this Settlement Agreement and to Relator's reasonable expenses, attorneys' fees and costs. The FCA Settlement Amount does not include the Relator's fees and costs, and S-Oil acknowledges that Relator retains all rights to recover such reasonable expenses, attorneys' fees, and costs from S-Oil pursuant to *31 U.S.C. § 3730(d)*. Relator's claims pursuant to *31 U.S. C. § 3730(d)* regarding fees and costs will be addressed pursuant to a separate written agreement between S-Oil and Relator or, in the absence of an agreement, as may be ordered by the Court.

1.c. If S-Oil's Plea Agreement in the Criminal Action is not accepted by the

Court or the Court does not enter a Final Judgment in the Civil Antitrust Action, this Agreement shall be null and void at the option of either the United States or S-Oil. If either the United States or S-Oil exercises this option, which option shall be exercised by notifying all Parties, through counsel, in writing within five (5) business days of the Court's decision, the Parties **[*16]** will not object and this Agreement will be rescinded and the FCA Settlement Amount shall be returned to S-Oil. If this Agreement is rescinded, S-Oil will not plead, argue or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel or similar theories, to any civil or administrative claims, actions or proceedings arising from the Covered Conduct that are brought by the United States within ninety (90) calendar days of rescission, except to the extent such defenses were available on the day on which Relator's *qui tam* complaint in the Civil FCA Action was filed.

[*17] 2. Subject to the exceptions in Paragraph 4 (concerning excluded claims) below, and conditioned upon S-Oil's full payment of the FCA Settlement Amount, the United States fully and finally releases S-Oil together with its current and former parent corporation; direct and indirect subsidiaries; brother or sister corporation; divisions; current or former corporates owners; corporates affiliates; and the corporates successors and assigns of any of them (the "S-Oil Released Parties") from any civil or administrative monetary claim the United States has for the Covered Conduct under the *False Claims Act, 31 U.S.C. §§ 3729-3733*; the *Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812*; Contract Disputes Act, *41 U.S.C. §§ 7101-7109*; or the common law theories of breach of contract, payment by mistake, unjust enrichment, and fraud, or under any statute creating causes of action for civil damages or civil penalties which the Civil Division of the United States Department of Justice has authority to assert and compromise pursuant to *28 C.F.R. Part 0, Subpart I, § 0.45(d)*.

3. Subject to the exception set forth in Paragraph lb, and conditioned upon S-Oil's full payment of the FCA Settlement Amount, Relator, for himself and for his heirs, successors, attorneys, agents, and assigns, fully and finally releases the 5-Oil Released Parties, officers, directors, trustees, shareholders, employees, executives,

agents and the successors and assigns of any of them, from (a) any civil monetary claim the Relator has or may have for the claims set forth in the Civil FCA Action, the Civil

Antitrust Action, the Criminal Action, and the Covered Conduct under the False Claims Act, *31 U.S.C. §§ 3729-3733*, up until the date of this Agreement; and (b) all liability, debts, contracts, covenants, promises, claims, demands, actions, causes of action, rights of subrogation, contribution, indemnity, damages, loss, cost or expenses **[*18]** whatsoever, whether known or unknown, fixed or contingent, in law or in equity, in contract or in tort, under any federal, state, or Korean statute, law, regulation or doctrine, that Relator, his heirs, successors, attorneys, agents, and assigns otherwise has brought or would have standing to bring as of the date of this Agreement, including, without limitation, any liability to Relator arising from or relating to the claims Relator has asserted, may assert or could have asserted in the Civil FCA Action, up until the date of this Agreement. Relator represents and warrants that he and his counsel are the exclusive owner of the rights, claims and causes of action herein released and none of them have previously assigned, reassigned, or transferred or purported to assign, reassign or transfer, through bankruptcy or by any other means, any or any portion of any claim, demand, action, cause of action, or other right released or discharged under this Agreement except between themselves and their counsel. Relator further represents he does not know of any conduct by the S-Oil Released Parties or any current or former owners, officers, directors, trustees, shareholders, employees, executives, **[*19]** agents, or affiliates of the S-Oil Released Parties that would constitute a violation of the False Claims Act other than the claims set forth in the Civil FCA Action and the Covered Conduct, and Relator acknowledges and agrees that his representations are a material inducement to S-Oil's willingness to enter into this Agreement.

4. Notwithstanding the releases given in paragraphs 2 and 3 of this Agreement, or any other term of this Agreement, the following claims of the United States are specifically reserved and are not released:

a. Any liability arising under Title 26, U.S. Code (Internal Revenue Code);

b. Any criminal liability, except to the extent detailed in the Plea Agreement;

c. Except as explicitly stated in this Agreement, any administrative liability, including the suspension and debarment rights of any federal agency;

d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;

e. Any liability based upon obligations created by this Agreement;

f. Any liability of individuals;

g. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;

[*20] h. Any liability for failure to deliver goods or services due; and

i. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct.

5. Relator and his heirs, successors, attorneys, agents, and assigns shall not object to this Agreement but agree and confirm that this Agreement is fair, adequate, and reasonable under all the circumstances, pursuant to *31 U.S.C. § 3730(c)(2)(B)*. The determination of Relator's share, if any, of the FCA Settlement Amount pursuant to *31 U.S.C. § 3730(d)* is a matter that shall be handled separately by and between the Relator and the United States, without any direct involvement or input from S-Oil. In connection with this Agreement and the Civil FCA Action, Relator, on behalf of himself and his heirs, successors, attorneys, agents, and assigns agrees that neither this Agreement, nor any intervention by the United States in the Civil FCA Action in order to dismiss the Civil FCA Action, nor any dismissal of the Civil FCA Action, shall waive or otherwise affect the ability of the United States to contend that provisions in the False Claims Act, including *31 U.S.C. § 3730(d)(3)*, bar Relator from sharing in the proceeds of this Agreement, except that the United States **[*21]** will not contend that Relator is barred from sharing in the proceeds of this Agreement pursuant to *31 U.S.C. § 3730(e)(4)*. Moreover, the United States and Relator, on behalf of himself and his heirs, successors, attorneys, agents, and assigns agree that they each retain all of their rights pursuant to the False

Claims Act on the issue of the share percentage, if any, that Relator should receive of any proceeds of the settlement of his claims, and that no agreements concerning Relator share have been reached to date.

6. S-Oil waives and shall not assert any defenses S-Oil may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the *Double Jeopardy Clause* in the

Fifth Amendment of the Constitution, or under the *Excessive Fines Clause in the Eighth Amendment of the Constitution*, this Agreement bars a remedy sought in such criminal prosecution or administrative action.

7. S-Oil fully and finally releases the United States, its agencies, officers, agents, employees, and servants, from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that S-Oil has asserted, could have asserted, or may assert in the future against the United States, its agencies, officers, agents, employees, and servants, **[*22]** related to the Covered Conduct and the United States' investigation and prosecution thereof.

8. Conditioned upon Relator's agreement herein, the S-Oil Released Parties fully and finally release Relator his heirs, successors, assigns, agents and attorneys (the "Relator Released Parties"), from (a) any civil monetary claim S-Oil has or may have now or in the future against the Relator Released Parties related to the claims set forth in the Civil FCA Action, the Civil Antitrust Action, the Criminal Action, and the Covered Conduct under the False Claims Act, *31 U.S.C. §§ 3729-3733*, and the Relator's investigation and prosecution thereof, including attorney's fees, costs, and expenses of every kind and however denominated, up until the date of this Agreement; and (b) all liability, claims, demands, actions, or causes of action whatsoever, whether known or unknown, fixed or contingent, in law or in equity, in contract or in tort, under any federal, state, or Korean statute, law, regulation or doctrine, that the S-Oil Released Parties otherwise have brought or would have standing to bring as of the date of this Agreement, including any liability to S-Oil arising from or relating to claims the S-Oil Released Parties **[*23]** asserted or could have asserted related to the Civil FCA Action, up until the date of this Agreement. The S-Oil Released Parties further acknowledge and agree that these representations are a material inducement to Relator's willingness to enter into this Agreement.

9. a. Unallowable Costs Defined: All costs (as defined in the Federal Acquisition Regulation, *48 C.F.R. § 31.205-47*) incurred by or on behalf of S-Oil, and its present or former officers, directors, employees, shareholders, and agents in connection with:

(1) the matters covered by this Agreement, any related plea agreement, and any related civil antitrust agreement;

(2) the United States' audit(s) and civil and any criminal investigation(s) of the matters covered by this Agreement;

(3) S-Oil's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil and any criminal investigation(s) in connection with the matters covered by this Agreement (including attorney's fees);

(4) the negotiation and performance of this Agreement, any related plea agreement, and any related civil antitrust agreement;

(5) the payment S-Oil makes to the United States pursuant to this Agreement and any payments that S-Oil **[*24]** may make to Relator, including costs and attorneys' fees,

are unallowable costs for government contracting purposes (hereinafter referred to as Unallowable Costs).

b. Future Treatment of Unallowable Costs: Unallowable Costs will be separately determined and accounted for by S-Oil, and S-Oil shall not charge such Unallowable Costs directly or indirectly to any contract with the United States.

c. Treatment of Unallowable Costs Previously Submitted for

Payment: Within 90 days of the Effective Date of this Agreement, S-Oil shall identify and repay by adjustment to future claims for payment or otherwise any Unallowable Costs included in payments previously sought by S-Oil or any of its subsidiaries or affiliates from the United States. S-Oil agrees that the United States, at a minimum, shall be entitled to recoup from S-Oil any overpayment plus applicable interest and penalties as a result of the inclusion of such Unallowable Costs on previously-submitted requests for payment. The United States, including the Department of Justice and/or the affected agencies, reserves its rights to audit, examine, or re-examine S-Oil's books and records and to disagree with any calculations submitted by S-Oil **[*25]** or any of its subsidiaries or affiliates regarding any Unallowable Costs included in payments previously sought by SOil, or the effect of any such Unallowable Costs on the amount of such payments.

10. S-Oil agrees to cooperate fully and truthfully with the United States in connection with the Civil FCA Action. The Civil Division of the United States

Department of Justice will use reasonable best efforts, where appropriate, to coordinate any requests for cooperation in connection with the Civil FCA Action with requests for cooperation in connection with the Plea Agreement in the Criminal Action and the Civil Antitrust Action, so as to avoid unnecessary duplication and expense. S-Oil's ongoing, full, and truthful cooperation shall include, but not be limited to:

a. upon request by the United States with reasonable notice, producing at the offices of counsel for the United States in Washington, D.C. and not at the expense of the United States, complete and un-redacted copies of all non-privileged documents related to the Covered Conduct wherever located in S-Oil's possession, custody, or control, including but not limited to, reports, memoranda of interviews, and records concerning any investigation **[*26]** of the Covered Conduct that S-Oil has undertaken, or that has been performed by another on S-Oil's behalf;

b. upon request by the United States with reasonable notice, making current S-Oil directors, officers, and employees available for interviews, consistent with the rights and privileges of such individuals, by counsel for the United States and/or their investigative agents, not at the expense of the United States, in the United States or Hong Kong, unless another place is mutually agreed upon;

c. upon request by the United States with reasonable notice, (i) using best efforts to assist in locating former S-Oil directors, officers, and employees identified by attorneys and/or investigative agents of the United States, and (ii) using best efforts to make any such former S-Oil directors, officers, and employees available for interviews, consistent with the rights and privileges of such individuals, by counsel for the United States and/or their investigative agents, not at the expense of the United States, in the United States or Hong Kong, unless another place is mutually agreed upon; and

d. upon request by the United States with reasonable notice, making current S-Oil directors, officers, **[*27]** and employees available, and using best efforts to make former S-Oil directors, officers, employees available, to testify, consistent with the rights and privileges of such individuals, fully, truthfully, and under oath, without falsely implicating any person or withholding any information, (i) at depositions in the United States, Hong Kong, or any other mutually agreed upon place, (ii) at trial in the United States, and (iii) at any other judicial proceedings wherever located related to the Civil FCA Action.

11. This Agreement is intended to be for the benefit of the Parties only.

12. Upon receipt of the payment of the FCA Settlement Amount described in Paragraph 1.a. above, the Court's acceptance of S-Oil's Plea Agreement in the Criminal

Action, and the Court's entry of a Final Judgment in the Civil Antitrust Action, the United States and Relator shall promptly sign and file a Joint Stipulation of Dismissal, with prejudice, of the claims filed against S-Oil in the Civil FCA Action, pursuant to *Rule 41(a)(1)*, which dismissal shall be conditioned on the Court retaining jurisdiction over Relator's claims to a relator's share and against S-Oil for recovery of attorneys' fees and costs pursuant to *31 U.S.C. §3730(d)*.

[*28] 13. Except with respect to the recovery of Relator's attorneys' fees, expenses, and costs pursuant to *31 U.S.C. §3730(d)* as provided for in Paragraph 1.b., each Party shall bear its own legal and other costs incurred in connection with this matter. The Parties agree that Relator and S-Oil will not seek to recover from the United States any costs or fees related to the preparation and performance of this Agreement.

14. Each party and signatory to this Agreement represents that it freely and voluntarily enters in to this Agreement without any degree of duress or compulsion. 15. This Agreement is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Agreement is the United States District Court for the Southern District of Ohio. S-Oil agrees that the United

States District Court for the Southern District of Ohio has jurisdiction over it for purposes of this case. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

16. This Agreement constitutes the complete agreement between **[*29]** the Parties on the subject matter addressed herein. This Agreement may not be amended except by written consent of the Parties.

17. The undersigned counsel represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.

18. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement.

19. This Agreement is binding on S-Oil's successors, transferees, heirs, and assigns.

20. This Agreement is binding on Relator's successors, transferees, heirs, and assigns.

21. All parties consent to the United States', S-Oil's and Relator's disclosure of this Agreement, and information about this Agreement, to the public, as permitted by order of the Court. This Agreement shall not be released in un-redacted form until the Court unseals the entire Civil FCA Action.

22. This Agreement is effective on the date of signature of the last signatory to the Agreement (Effective Date of this Agreement). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

THE UNITED STATES OF AMERICA

DATED: 3/14/19

BY: /s/ Andrew A. Steinberg **[*30]**

Andrew A. Steinberg

Trial Attorney

Commercial Litigation Branch

Civil Division, U S. Departments of Justice

DATED: 3/14/19

BY: /s/ Mark T. D'Alessandro

Mark T. D'Alessandro

Civil Chief

Andrew Malek

Assistant United States Attorney

U.S. Attorney's Office for the Southern District of Ohio

S-OIL CORPORATION - DEFENDANT

DATED: __BY: __

Sung-Woo Park

Authorized Representative

of S-Oil Corporation

DATED: __BY: __

Sonia K. Pfaffenroth

William J. Baer

James W. Cooper

Wrede H. Smith III

Andy T. Wang

Arnold & Porter Kaye Scholer LLP

Counsel for S-Oil Corporation

[TEXT REDACTED BY THE COURT] - RELATOR

DATED: __BY: __

[TEXT REDACTED BY THE COURT]

DATED: __BY: __

Eric Havian

Constantine Cannon LLP

Counsel for Relator

THE UNITED STATES OF AMERICA

DATED: __BY: __

Andrew A. Steinberg

Trial Attorney

Commercial Litigation Branch

Civil Division, U.S. Department of Justice

DATED: __ BY: __

Mark T. D'Alessandro

Civil Chief

Andrew Male

Assistant United States Attorney

U.S. Attorney's Office for the Southern District of Ohio

<u>SOIL CORPORATION - DEFENDANT</u>

DATED: 3/13/19

BY: /s/ Sungwoo Park

Sungwoo Park

Authorized Representative

of S-Oil Corporation

DATED: 3/13/19

BY: /s/ Sonia K. Pfaffenroth

Sonia K. Pfaffenroth

William J. Baer

James W. Cooper

Wrede **[*31]** H. Smith III

Andy T. Wang

Arnold & Porter Kaye Seholer LLP

Counsel for S-Oil Corporation

<u>[TEXT REDACTED BY THE COURT]RELATOR</u>

DATED: __BY: __

[TEXT REDACTED BY THE COURT]

DATED: __BY: __

Eric Havian

Constantine Cannon LLP

Counsel for Relator

<u>THE UNITED STATES OF AMERICA</u>

DATED: __BY: __

Andrew A. Steinberg

Trial Attorney

Commercial Litigation Branch

Civil Division. U.S. Department of Justice

DATED: __ BY: __

Mark T. D' Alessandro

Civil Chief

Andrew Malek

Assistant United States Attorney

U.S. Attorney's Office for the Southern District of Ohio

<u>S-OIL CORPORATION - DEFENDANT</u>

DATED: __BY: __

Sung-Woo Park

Authorized Representative

of S-Oil Corporation

DATED: __BY: __

Sonia K. Pfaffenroth

William J. Baer

James W. Cooper

Wrede I I. Smith Ill

Andy T. Wang

Arnold & Porter Kaye Scholer LLl

Counsel for S-Oil Corporation

<u>[TEXT REDACTED BY THE COURT]RELATOR</u>

Date: Mar. 13. 2019. By: [TEXT REDACTED BY THE COURT]

[TEXT REDACTED BY THE COURT]

Date: 3/13/19 BY: /s/ Eric Havian

Eric Havian

Constantine Cannon LLI

Counsel for Relator

Alarm Detection Sys. v. Orland Fire Prot. Dist.

United States Court of Appeals for the Seventh Circuit

April 8, 2019, Argued; July 15, 2019, Decided

No. 18-2926

Reporter

929 F.3d 865 *; 2019 U.S. App. LEXIS 20860 **; 2019-2 Trade Cas. (CCH) P80,841; 2019 WL 3071741

ALARM DETECTION SYSTEMS, INCORPORATED, Plaintiff-Appellant, v. ORLAND FIRE PROTECTION DISTRICT, et al., Defendants-Appellees.

Prior History: [1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:14-cv-00876 — Thomas M. Durkin, Judge.

Alarm Detection Sys. v. Orland Fire Prot. Dist., 326 F. Supp. 3d 602, 2018 U.S. Dist. LEXIS 135105 (N.D. Ill., Aug. 2, 2018)

Core Terms

Ordinances, District Act, provider, signals, district court, dispatch center, alarm-system, anticompetitive, fire-protection, prices, right of action, frequency, implied right, retransmission, transmitter, antitrust, protocol, renewed, cases, radio, sends

LexisNexis® Headnotes

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

HN1[] **Appellate Review, Standards of Review**

A decision made at summary judgment is reviewed de novo.

Governments > Legislation > Statutory Remedies & Rights

HN2[] **Legislation, Statutory Remedies & Rights**

Statutes can provide either express or implied rights of action—or none at all.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Choice of Law

Governments > Legislation > Statutory Remedies & Rights

Civil Procedure > ... > Justiciability > Political Questions > Separation of Powers

HN3[] **Federal & State Interrelationships, Choice of Law**

To determine whether an Illinois statute provides an implied right of action, the court looks to Illinois law. Though the court does so cautiously, recognizing that imputing a right of action where the state was silent assumes "policy-making authority" that is better suited for the state's legislature.

Governments > Legislation > Statutory Remedies & Rights

HN4[] **Legislation, Statutory Remedies & Rights**

Under Illinois law, courts imply a cause of action when: (1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) the plaintiff's injury is one the statute was designed to prevent; (3) a private right of action is consistent with the underlying purpose of the statute; and (4) implying a private right of action is necessary to provide an adequate remedy for violation of the statute.

Civil Procedure > Judgments > Declaratory Judgments

HN5[] **Judgments, Declaratory Judgments**

Declaratory relief presupposes the existence of a judicially remediable right and thus cannot be pursued without a predicate right of action.

Governments > Courts > Judicial Precedent

HN6[] **Courts, Judicial Precedent**

Unexamined assumptions of prior cases do not control the disposition of a contested issue.

Civil Procedure > Judgments > Preclusion of Judgments > Estoppel

HN7[] **Preclusion of Judgments, Estoppel**

Estoppel is a discretionary call in the district court's purview.

Civil Procedure > Trials > Bench Trials

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

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN8[] **Trials, Bench Trials**

When a decision comes after a trial, the court of appeals reviews the district court's legal conclusions de novo and its factual findings for clear error.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope

HN9[] **Sherman Act, Claims**

Restraints on trade that are unilaterally imposed by the government do not form the basis of a claim under *15 U.S.C.S. § 1* of the *Sherman Act*.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope

HN10[] **Sherman Act, Claims**

Unilateral restraints are distinguished from "hybrid" restraints, which do fall under *15 U.S.C.S. § 1* of the *Sherman Act*. The difference between the two is the extent of the government's command. If the government exercises complete control through the restraint, the conduct is not coordinated. If, on the other hand, private parties are granted a degree of private regulatory power, pursuant to which they behave anticompetitively, the regulatory scheme may be attacked under *§ 1*.

Antitrust & Trade Law > Sherman Act > Scope

HN11[] **Antitrust & Trade Law, Sherman Act**

Fisher v. City of Berkeley applies when the potential anti-competitive effect is not the result of private pricing or marketing decisions, but the logical and intended result of the statute itself. As long as the law leaves nothing further to be decided by private parties, there can be no concerted action.

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

HN12[] **Scope, Monopolization Offenses**

15 U.S.C.S. § 2 of the *Sherman Act* prohibits monopolization, or the attempt at it, through willful, anticompetitive conduct.

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Evidence > Inferences & Presumptions > Presumptions > Particular Presumptions

HN13[] **Judicial Review, Standards of Review**

Rational relation to a legitimate government interest is a lenient standard, and laws challenged under rational-basis review carry a strong presumption of validity.

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Judges: Before WOOD, Chief Judge, and SCUDDER and ST. EVE, Circuit Judges.

Opinion by: ST. EVE

Opinion

[*867] ST. EVE, *Circuit Judge*. This appeal is one of two we decide today regarding the market for commercial fire-alarm **[**2]** services in Chicago's suburbs. Here we are concerned with the Villages of Orland Park and Orland Hills (the "Villages") and, to a lesser extent, Bloomingdale and Lemont.

In 2014, citing safety concerns, the Villages passed ordinances that require commercial buildings to send fire-alarm signals directly to the local 911 dispatch center. This decision, sensible as it may seem, comes at an economic cost: either by design or due to technological restraints, the ordinances allow only one alarm-system provider to operate in the Villages. That provider is Tyco Integrated Security, LLC. It services the area pursuant to an exclusive agreement with the Villages' dispatch center, Orland Fire Protection District.

One of Tyco's competitors, Alarm Detection Systems, Inc. ("ADS"), filed this suit against Orland Fire, Tyco, and another dispatch center, DuPage Public Safety Communications ("Du-Comm"), among others. It brought a host of claims, including ones under the *Illinois Fire Protection District Act* (the "District Act"), the *Sherman Act*, and the *Fourteenth Amendment*—all with the goal of breaking Tyco's hold on the market.

The district court decided for the defendants. After dismissing the District Act claims at summary **[**3]** judgment, it concluded after a bench trial that the *Sherman Act* claims fail because they are premised on the unilateral actions of the Villages—which ADS did not sue—and that the *Fourteenth Amendment* claims lacked merit. We agree and affirm.

I. Background

In Illinois, local laws often require commercial buildings and apartment complexes to maintain fire-alarm systems. The buildings and complexes—or "accounts," as the parties call them—contract directly with the alarm-system providers to install and maintain the systems. The National Fire Protection Association's National Fire Alarm and Signaling Code (NFPA 72) sets the nationwide standard for these systems.

Should a system detect fire or smoke, local 911 dispatch centers are responsible for receiving distress calls and sending services. The dispatch center in the Villages and Lemont is Orland Fire. It is what is called a "fire-protection district," established under the District Act. *70 ILCS 705/1 et seq.* The District Act requires fire-protection districts, like Orland Fire, to operate consistent with nationwide standards, like NFPA 72. *See* *70 ILCS 705/11*. In Bloomingdale, Du-Comm is the dispatch center. Du-Comm is not a fire-protection district, but a different creature

[*868] of Illinois law—an **[**4]** "intergovernmental cooperation," formed by several municipal members, including Bloomingdale. *5 ILCS 220/3*.

The logistics of the fire-alarm systems are important to this appeal. Each account's system has essentially three parts: heat or smoke detectors, a panel, and a transmitter. When a detector goes off, it sends an alert to the panel. The panel then connects to the transmitter. The transmitter, in turn, sends a radio signal to one of two places: (1) a central-supervising station run by the alarm-system provider (the "CSS model"); or (2) a remote-supervising station operated by the local dispatch center (the "RSS model"). Which model applies depends on the account and its provider's arrangement or, as here, what the local ordinance requires.

Both the CSS model and the RSS model comply with NFPA 72. *See NFPA 72: National Fire Alarm and Signaling Code* §§ 3.3.282.1, 3.3.282.3 (2016 ed.). If a CSS model is in place, a CSS operator will receive the signal from the property's radio; and if the operator determines that the signal was not a false alarm or a maintenance problem, the CSS calls the dispatch center, which in turn sends help. If, however, the signal goes to the RSS, the RSS either contacts the account directly **[**5]** or sends help. That is why the RSS model is often called a "direct connect" system: accounts send their signals directly to the RSS dispatch center. Alarm-system providers, in addition to their contracts with the accounts, contract with dispatch centers to provide the necessary signal-receiving equipment.

In an RSS model, unlike a CSS model, the dispatch center and the account usually must share an equipment provider. This, according to the record and the district court's findings, is because the dispatch center's receiving equipment operates on FCC-licensed radio frequencies. For that equipment to receive the signal coming from the property, it must operate on the same frequency. And the equipment provider, like Tyco, owns the frequency licenses.

This is at least the current state of play. ADS, however, insists that alternative methods are feasible. First, it asserts that its CSS can instantaneously send alert signals it receives from accounts to the RSS through a process called "automatic retransmission." Doing so, ADS believes, would have the same effect as a signal that is sent directly from the accounts to the dispatch center, as in an RSS model. Second, it claims that it can share **[**6]** a radio frequency with the RSS's alarm-system provider, and thus, its transmitters can send signals directly to the RSS. Neither alternative has, to date, taken hold in the areas with which this appeal is concerned.

That summarizes the technical background. There is an important legal backdrop, too. Alarm-system providers, and ADS specifically, are no strangers to this type of litigation. Two of our past decisions, in which both ADS and Tyco's predecessor, ADT Security Services, Inc., were plaintiffs, feature prominently in ADS's current claims. *See ADT Sec. Servs., Inc. v. Lisle-Woodridge Fire Prot. Dist., 672 F.3d 492 (7th Cir. 2012)* (*ADT I*); *ADT Sec. Servs., Inc. v. Lisle-Woodridge Fire Prot. Dist., 724 F.3d 854 (7th Cir. 2013)* (*ADT II*).

ADT I and *ADT II* concerned another fire-protection district, the Lisle-Woodridge Fire Protection District. The question we faced was whether an ordinance set by the district exceeded NFPA 72, and, by extension, the district's authority under the District Act. We focused on two facets of the ordinance: it (1) mandated an RSS model and (2) required accounts to purchase equipment from Lisle-Woodridge or **[*869]** its exclusive partner. In *ADT I*, we decided that NFPA 72 permitted an RSS model (there also characterized as a "direct connect" model). But NFPA 72 did not permit the district to order accounts to purchase equipment from **[**7]** it or its exclusive partner. *672 F.3d at 500-03*. We then remanded the case for further fact finding. After that fact finding, in *ADT II*, we affirmed the district court's decision that the district was not in fact operating an RSS model or any other form of NFPA 72-approved supervision; it was, instead, routing signals through an intermediary. The district's scheme therefore violated NFPA 72 and by extension the District Act. *724 F.3d at 868-71*.

ADT I and *ADT II* caused fire-protection districts and municipalities in the greater Chicagoland area to reconsider their protocols. Orland Fire and the Villages were among them. Since 2006, Orland Fire had operated under an ordinance it issued requiring that systems "directly connect" to Orland Fire. To make that RSS model work, Orland Fire entered into an exclusive contract with Tyco. The contract made Tyco the sole provider of equipment to Orland Fire and of transmitters to the accounts. The contract also required the accounts to contract directly with Tyco, and Orland Fire and Tyco would share in the monitoring fees.

After *ADT I* and *ADT II*, Orland Fire amended its ordinance, rescinding the direct-connect requirement, and requiring only compliance with NFPA 72. But in 2014 and 2015, the Villages **[**8]** amended ordinances of their own. Those ordinances (which we will refer to as the "Ordinances") mandated an RSS system and designated Orland Fire as the designated dispatch center. Orland Fire soon after renewed its exclusive contract with Tyco for a three-year term. In 2017, the parties renewed the contract again with a one-year term subject to automatic renewals.

As a result of the renewed contracts and the new Ordinances, the Villages essentially returned to the status quo: the accounts had to comply with an RSS system and, because of the exclusive contract, Tyco would be their equipment provider. Tyco currently provides systems to almost all of the 650 accounts in the Villages. Tyco bills accounts $89 per month for its services on average, $23.50 of which is remitted to Orland Fire in consideration for the exclusivity arrangement. ADS charges less for its CSS services—$55 per month, on average. The district court did, however, find that RSS models are more expensive to maintain than CSS models, because a single CSS can monitor multiple jurisdictions at a time, unlike a dispatch center acting as an RSS.

Frustrated that despite *ADT I* and *ADT II* it was still locked out of the market, **[**9]** ADS filed this suit. ADS alleged more than 16 claims, but the relevant ones here are those brought under the District Act, the *Sherman Act*, and the *Fourteenth Amendment*. It claimed that Orland Fire and Du-Comm were collecting excessive fees in Bloomingdale and Lemont in violation of the District Act. It also claimed that Orland Fire and Tyco's arrangement violated *§ 1* and *§ 2 of the Sherman Act*. ADS further claimed that Orland Fire acted arbitrarily, in breach of the *Fourteenth Amendment's* guarantee of substantive due process, by denying ADS the chance to use automatic retransmission or frequency sharing.[1]

[*870] ADS did not, however, sue the Villages. It accepts that the Ordinances are lawful.

The district court resolved ADS's claims at summary judgment and after a bench trial. At summary judgment, the district court ruled that the District Act did not provide a right of action for ADS. After a six-day bench trial, the district court issued a thorough opinion and found that the *Sherman Act* claims failed because Orland Fire and Tyco's conduct was a necessary consequence of the Villages' Ordinances. The court ruled that the *Fourteenth Amendment* claims failed because, similarly, Orland Fire did not act irrationally, but rather as the Ordinances required.

ADS appeals. We consolidated the **[**10]** case with *Alarm Detection Sys., Inc. v. Vill. of Schaumburg, No. 18-3316, 930 F.3d 812, 2019 U.S. App. LEXIS 20870*, which concerns a similar market and ordinance. But deciding the appeals requires addressing different legal, factual, and procedural questions, so we issue this opinion independently.

II. Discussion

On appeal, ADS tries to revive its District Act, *Sherman Act*, and *Fourteenth Amendment* claims. But it makes a broader argument, too. *ADT I* and *ADT II*, ADS says, should guide our way in analyzing the current claims. And, ADS continues, in this case, as in those cases, we should condemn a local effort to concentrate the alarm-system market in the hands of one provider.

ADT I and *ADT II* do not control this appeal. Those decisions concerned a fire-protection district's ability to mandate a particular RSS model under the District Act. This case centers on the Villages' Ordinances, which are not subject to the District Act and, as ADS concedes, are lawful. This case, moreover, concerns an argument never raised in *ADT I* or *ADT II*—that there is no private right of action under the District Act for companies like ADS. This case also poses antitrust and constitutional questions that *ADT I* and *ADT II* never reached.

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[1] ADS also brought state tort law claims, which the district court disposed of after trial. ADS does not pursue these claims on appeal.

We thus address ADS's claims from **[**11]** square one, taking them in turn.

A. The Fire Protection District Act

The district court dismissed the District Act claims for want of a private right of action. Because that ***HN1***[] decision was made at summary judgment, we review it de novo. *Levitin v. Nw. Cmty. Hosp., 923 F.3d 499, 501 (7th Cir. 2019)*.

HN2[] Statutes can provide either express or implied rights of action—or none at all. The District Act does not provide an express right, all agree. ***HN3***[] To determine whether it provides an implied right of action, we look to Illinois law. *See, e.g.*, *Patel v. Zillow, Inc., 915 F.3d 446, 448 (7th Cir. 2019)* (looking to Illinois law to determine whether an Illinois statute created a nonstatutory right of action). Though we do so cautiously, recognizing that imputing a right of action where the state was silent assumes "policy-making authority" that is better suited for the state's legislature. *Helping Others Maintain Envtl. Standards v. Bos, 406 Ill. App. 3d 669, 941 N.E.2d 347, 363, 346 Ill. Dec. 789 (Ill. App. Ct. 2010)*. ***HN4***[] Under Illinois law, courts imply a cause of action when:

> (1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) the plaintiff's injury is one the statute was designed to prevent; (3) a private right of action is consistent with the underlying purpose of the statute; and (4) implying a private right of action is necessary to provide an adequate remedy for violation of the statute.

Metzger v. DaRosa, 209 Ill. 2d 30, 805 N.E.2d 1165, 1168, 282 Ill. Dec. 148 (Ill. 2004). None of those **[**12]** factors is present here.

[*871] The Illinois legislature enacted the District Act to create fire-protection districts. *70 ILCS 705/1*. The Act governs the exercise of the districts' authority to purchase equipment, *id.*, adopt safety codes and protocols, *70 ILCS 705/11*, and employ firefighters and collect needed funds for their operation, *70 ILCS 705/6*. All of this is geared toward a clearly articulated, broader purpose: "to protect the health, safety, and welfare *of the public* by ensuring the provision of adequate fire prevention and control services." *Wauconda Fire Prot. Dist. v. Stonewall Orchards, LLP, 214 Ill. 2d 417, 828 N.E.2d 216, 224, 293 Ill. Dec. 246 (Ill. 2005)* (citing *70 ILCS 705/1*) (emphasis added).

ADS, however, uses the statute for a much different end—to protect competition in the alarm-system market. Nowhere in the lengthy District Act is there evidence of a concern for competition, let alone care for the commercial welfare of competing alarm-system providers. ADS, it follows, is not a member of the protected class (public residents), its competition-related injury is not one the District Act is geared to protect against (fire-related damage or harm), and making a competition claim out of the District Act would not be consistent with its purpose (fire safety). Nor does ADS offer a reason why, but for its right of action, violations of the Act will **[**13]** go unremedied. We therefore find no implied right of action for ADS under the District Act.[2]

ADS's counterarguments are unpersuasive. To start, ADS relies on three cases: *Gaffney v. Bd. of Trustees of Orland Fire Prot. Dist., 2012 IL 110012, 969 N.E.2d 359, 360 Ill. Dec. 549 (Ill. 2012)*, *Wilkes v. Deerfield-Bannockburn Fire Protection Dist., 80 Ill. App. 3d 327, 399 N.E.2d 617, 35 Ill. Dec. 551 (Ill. App. Ct. 1979)*, and *Glenview Rural Fire Prot. Dist. v. Raymond, 19 Ill. App. 3d 272, 311 N.E.2d 302 (Ill. App. Ct. 1974)*. But these cases do not address an implied right of action under the District Act. *Glenview* and *Gaffney* do not even involve a *claim* under the Act. *See* *Glenview, 311 N.E.2d at 303-306*; *Gaffney, 969 N.E.2d at 368-69*. And *Wilkes* is equally unhelpful. It was brought by firemen claiming, essentially, that a fire-protection district's operation of an ambulance service was a misuse of district resources, which impacted the firemen's pay. *399 N.E.2d at 619, 621-23*. Even stretching those facts to say something about an implied right of action—again, an issue not considered by the

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[2] It does not matter that ADS seeks declaratory, rather than monetary, relief under the District Act. ***HN5***[] Declaratory relief "presupposes the existence of a judicially remediable right" and thus cannot be pursued without a predicate right of action. *Schilling v. Rogers, 363 U.S. 666, 677, 80 S. Ct. 1288, 4 L. Ed. 2d 1478 (1960)*.

court—the facts come far closer to touching on the District Act's purpose and operation than ADS's competition-related claims. *See 70 ILCS 705/1*, *705/6*.

ADS also makes the novel argument that even if there is no right of action to enforce particular provisions of the District Act, there should be a right to sue when a fire-protection district exceeds its authority under the Act. That is a distinction without a difference. A regulated entity exceeds its statutory authority *because* it does not comply with particular statutory limits.

ADS further **[**14]** points to *ADT I* and *ADT II*. It argues that those cases must have recognized an implied right of action, because they addressed thoroughly ADS and other alarm-system providers' District Act claims, which were similar to the ones ADS brings in this case. Again, no party raised the right-of-action argument that now comes to our attention. ***HN6***[] "[U]nexamined assumptions of prior cases do not **[*872]** control the disposition of a contested issue." *Stanek v. St. Charles Cmty. Unit Sch. Dist. No. 303, 783 F.3d 634, 640 (7th Cir. 2015)*; *see also Fowler v. Butts, 829 F.3d 788, 792 (7th Cir. 2016)*; *United States v. Rodriguez-Rodriguez, 453 F.3d 458, 460 (7th Cir. 2006)*.

ADS, finally, claims estoppel: that the defendants should be estopped from arguing that there is no right of action because Tyco's predecessor litigated and prevailed in *ADT I* and *ADT II*. The district court rejected that argument. It reasoned that no party, on either side, raised the right-of-action issue in *ADT I* or *ADT II*; Tyco did not embrace a side in that litigation that would now lead to unjust results; and it would be especially unfair to impose estoppel against Orland Fire, which was not a party in *ADT I* or *ADT II*. ***HN7***[] Estoppel is a discretionary call in the district court's purview. *See, e.g.*, *United States v. Trudeau, 812 F.3d 578, 584 (7th Cir. 2016)*. And the district court's sound reasoning was well within its discretion.

The limits of our holding should be noted. We do not foreclose any implied **[**15]** right of action in the District Act. But the District Act gives no reason to oblige ADS's claim, premised on enforcing competition in the alarm-system market.

B. The *Sherman Act*

The district court also found for the defendants on ADS's *Sherman Act* claims. *See 15 U.S.C. §§ 1*, *2*. It concluded that ADS's exclusion from the market was the result of the Ordinances, not the defendants' anticompetitive behavior. ***HN8***[] Because that decision came after a trial, we review the court's legal conclusions de novo and its factual findings for clear error. *ARC Welding Supply Co, Inc. v. Am. Welding & Gas, Inc., 924 F.3d 322, 325 (7th Cir. 2019)*.

Fisher v. City of Berkeley, 475 U.S. 260, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986), holds that ***HN9***[] restraints on trade that are unilaterally imposed by the government do not form the basis of a *§ 1* claim. *See, e.g.*, *Flying J, Inc. v. Van Hollen, 621 F.3d 658, 662-65 (7th Cir. 2010)*. *Fisher*'s facts concerned a local ordinance that set a mandatory rent ceiling for landlords. Landlords sued, arguing, in part, that the *Sherman Act* preempted the local, anticompetitive ordinance. The Supreme Court accepted that the ordinance was anticompetitive but disagreed that it violated the *Sherman Act*. The government's ordinance mandated the landlords' effective price fixing, and thus, there was no anticompetitive meeting of the minds for *§ 1* purposes. *Id. at 266-67*. The ordinance was at fault, not whatever anticompetitive conduct necessarily followed. **[**16]** *Id.*

Fisher distinguished such ***HN10***[] unilateral restraints from "hybrid" restraints, which do fall under *§ 1*. The difference between the two, according to *Fisher*, is the extent of the government's command. If the government exercises "complete control" through the restraint, the conduct is not coordinated. *Id. at 269*. If, on the other hand, private parties are granted "a degree of private regulatory power," pursuant to which they behave anticompetitively, "the regulatory scheme may be attacked under *§ 1*." *Id. at 267-68* (quoting *Rice v. Norman Williams Co., 458 U.S. 654, 666 n.1, 102 S. Ct. 3294, 73 L. Ed. 2d 1042 (1982)*); *see also* AREEDA & HOVENKAMP, ***ANTITRUST LAW***: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 217 (2018 ed.) ("key" to *Fisher* is whether the government exercised "direct" control under the regime). *Fisher* contrasted the rent-control ordinance, a unilateral government action, with a hybrid restraint it had addressed before: local laws that require liquor distributors to set shared prices, but do not set *what* those prices **[*873]** are. *Id. at 268-69* (citing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*; *Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 71 S. Ct. 745, 95 L. Ed. 1035, 60 Ohio Law Abs. 81 (1951))*; *see also 324 Liquor Corp. v. Duffy, 479 U.S. 335, 107 S. Ct. 720, 93 L. Ed. 2d 667 (1987)* (similar, post-*Fisher* hybrid restraint).

Fisher's teachings control here. It is true that, unlike *Fisher*'s rent-control ordinance, the Villages' Ordinances do not, on their face, mandate the challenged anticompetitive conduct—exclusivity with **[**17]** Tyco. But we do not see why that distinction matters here. *Fisher* was concerned with a law's coercive effect, not its facial interpretation. *See 475 U.S. at 266-67*; *see also Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 890 (9th Cir. 2008)* **HN11**[] (*Fisher* applies when "the potential anti-competitive effect is not the result of private pricing or marketing decisions, but the *logical and intended* result of the statute itself") (emphasis added). As long as the law "leave[s] nothing further to be decided" by private parties, there can be no concerted action. AREEDA & HOVENKAMP, ***ANTITRUST LAW*** ¶ 221e4.

Here, the district court found, after carefully reviewing the record evidence and hearing testimony, that implementing an RSS protocol, which the Ordinances *do* mandate on their face, required an exclusive arrangement with an alarm-system provider. This was true, according to the district court, as a technological and economic matter. Radio signals operate on one frequency that is licensed by a provider. So to ensure that accounts can send signals directly to the dispatch center, as an RSS protocol requires, the accounts and the center must share a provider—that is, there must be exclusivity. That exclusivity, moreover, could come as no surprise to the Villages. Exclusivity was the **[**18]** status quo under Orland Fire's previous RSS-mandating ordinance. *Fisher* therefore dictates that the defendants did not violate *§ 1*.

In contending otherwise, ADS insists that its alternative modes can operate in an RSS protocol and, thus, comply with the Ordinances. We are skeptical about the practical feasibility of those alternatives. Automatic retransmission in fact means that the signal goes first to the CSS and second to the RSS, however quickly. *See ADT II, 724 F.3d at 868*. More troubling, a ruling that requires the market's participants to make frequency-sharing available, as ADS seems to request, would mean demanding that Tyco sublicense its frequencies to its competitors. ***Antitrust law*** usually frowns upon such duties to deal. *See Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 450, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)*; *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*.

We can set aside that skepticism, though, because again the district court's factual findings resolve the question for us. The district court considered these alternatives—and rejected them. The court found that ADS had not supported its claim that retransmission can comply with an RSS system. It further found that the evidence of ADS's retransmission capabilities were "at best inconclusive." And as to frequency sharing, the district court found that it was flawed. The sublicensing **[**19]** company could not monitor the signals for trouble or maintenance alerts, a critical part of the alarm-system business. ADS shows no clear error in those findings.

ADS makes another argument. Even if the Ordinances effectively mandate exclusivity, ADS argues, they do not control the prices Orland Fire and Tyco charge. Thus, according to ADS, the Ordinances **[*874]** impose at most a hybrid restraint, because the governmental command is not complete. We agree with the factual premise but not the conclusion. The Ordinances do not speak to pricing, it is true, but the anticompetitive conduct ADS's claim challenges is not inflated prices. Tyco's exclusivity is what caused ADS's asserted antitrust injury—exclusion from the market—not high prices, which ADS of course does not pay. *Accord O.K. Sand & Gravel, Inc. v. Martin Marietta Techs., Inc., 36 F.3d 565, 572 (7th Cir. 1994)* ("increased prices" cause competitors "no injury, let alone antitrust injury").

ADS also insists that the district court misread the Ordinances, which led it to find that *Fisher* applied. The district court, however, did not decide that the Ordinances on their face require an exclusive arrangement. Instead, the court found, based on the evidence, that an exclusive arrangement was the only feasible way to carry out the **[**20]** RSS model that the Ordinances mandate. A different case, with different evidence, may prove differently. But nothing in this record shows that the district court's findings were in clear error.

Fisher thus resolves ADS's *§ 1* claim—and it resolves the *§ 2* claim as well. ***HN12***[] *Section 2* prohibits monopolization, or the attempt at it, through willful, anticompetitive conduct. *E.g.*, *Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 854 (7th Cir. 2011)*. The only willful conduct cited by ADS is the exclusivity arrangement. But for reasons just explained, that conduct was not *willful* under *Fisher*; it was effectively required by the Ordinance. *See* *Englert v. McKeesport, 872 F.2d 1144, 1150 (3d Cir. 1989)* (applying *Fisher* to exclusive-dealing claims under both *§ 1* and *§ 2*).

One final note. ADS worries that without introducing competition against Tyco the alarm-system market will stagnate; Tyco will have little reason to innovate and more flexibility to charge high prices. We are not unsympathetic to the point, in theory. But ADS had its chance at trial to demonstrate to the district court that its alternative methods can work in an RSS system, and it did not. And no one should lose sight of the fact that competition for the exclusive contract *is* competition. *Paddock Publ'ns, Inc. v. Chicago Tribune Co., 103 F.3d 42, 47 (7th Cir. 1996)*. Orland Fire and Tyco's deal has only a one-year, renewable term, and nothing we know **[**21]** of forecloses ADS from making a bid to Orland Fire for another deal.

C. The ***Fourteenth Amendment***

The district court further found for Orland Fire on ADS's substantive due process claims. This decision, like the *Sherman Act* decision, came in the posttrial ruling, so we review the legal conclusions de novo and the factual findings for clear error. *ARC Welding Supply, 924 F.3d at 325*.

Because ADS does not invoke a fundamental right, the exclusion of ADS from the Schaumburg market need only be rationally related to a legitimate government interest. *Washington v. Glucksberg, 521 U.S. 702, 727, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997)*; *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp., 743 F.3d 569, 576 (7th Cir. 2014)*. ***HN13***[] This is a lenient standard, and laws challenged under rational-basis review carry a "strong presumption of validity." *Minerva Dairy, Inc. v. Harsdorf, 905 F.3d 1047, 1053 (7th Cir. 2018)*; *Goodpaster v. City of Indianapolis, 736 F.3d 1060, 1071 (7th Cir. 2013)*.

ADS's substantive due process claim can be easily rejected. It asserts that Orland Fire has acted arbitrarily and irrationally by going with an exclusive provider rather than entertaining ADS's efforts **[*875]** at alternative, RSS-compliant methods. But ADS accepts that the Ordinances are lawful. And for reasons explained in the last section, we have no reason to disturb the district court's sound findings that the Ordinances effectively require Orland Fire to work with an exclusive provider. There was thus a rational basis for Orland Fire to choose an exclusive provider—abiding by **[**22]** municipal command.

III. Conclusion

For these reasons, we affirm the district court's judgment.

Ashton Woods Holdings LLC v. USG Corp. (In re Domestic Drywall Antitrust Litig.)

United States District Court for the Eastern District of Pennsylvania

July 15, 2019, Decided; July 15, 2019, Filed

CIVIL ACTION MDL No. 13-2437; 15-cv-1712

Reporter

2019 U.S. Dist. LEXIS 116988 *; 2019-2 Trade Cas. (CCH) P80,840; 2019 WL 3098913

IN RE: DOMESTIC DRYWALL ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: Ashton Woods Holdings LLC, et al., Plaintiffs, v. USG Corp., et al., Defendants.

Prior History: *In re Domestic Drywall Antitrust Litig., 939 F. Supp. 2d 1371, 2013 U.S. Dist. LEXIS 52566 (J.P.M.L., Apr. 8, 2013)*

Core Terms

subsidiaries, purchases, wallboard, seek damages, summary judgment, drywall, material fact, single entity, UNASSIGNED, antitrust, genuine, partial summary judgment, related entities, legal entity, Plaintiffs', Disclosure, discovery, entities, indirect, parties, brand, cases

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Judges: MICHAEL M. BAYLSON, United States District Judge.

Opinion by: MICHAEL M. BAYLSON

Opinion

MEMORANDUM RE: DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON UNASSIGNED CLAIMS

Baylson, J.

I. INTRODUCTION

Defendants USG Corporation, United States Gypsum Company, L&W Supply Corporation, and PABCO Building Products LLC (collectively, "Defendants")[1] bring this Motion for Partial Summary Judgment three (3) years after the commencement of this action and five (5) years after the commencement of the overall multidistrict litigation, arguing that six of the twelve Homebuilder Plaintiffs lack standing to bring claims for some or all of their wallboard purchases because they seek damages for purchases made by separately-organized subsidiaries and other related entities. The purchasing entities did not assign the claims at issue to the Homebuilder Plaintiffs, and Defendants argue that the unassigned claims must be dismissed because the Homebuilder Plaintiffs lack Article III standing to bring them. This Court must **[*4]** now determine whether genuine disputes of material fact preclude summary judgment for Defendants. For the reasons discussed below, partial summary judgment for Defendants on the unassigned claims is **GRANTED** in part and **DENIED** in part.

II. BACKGROUND

A. Procedural History

As the Court has provided a thorough summary of the procedural history in this multidistrict litigation in several prior opinions, the Court includes only the procedural history relevant to the instant Motion. (See, e.g., ECF 390 ("Choice of Law MSJ Opinion") (denying in part Defendants' motion for summary judgment on questions of choice of law)[2];

[1] The Motion was also brought by former Defendant New NGC, Inc., which was dismissed from this case by Joint Stipulation on July 31, 2018. (ECF 331).

[2] The Choice of Law MSJ Opinion is available on the Homebuilder action docket (No. 15-cv-1712) and at *In re Domestic Drywall Antitrust Litigation, Nos. 13-md-2437 and 15-cv-1712, 399 F. Supp. 3d 280, 2019 U.S. Dist. LEXIS 113051, 2019 WL 2996484 (E.D. Pa. July 8, 2019)* (Baylson J.).

ECF 351 ("February 2016 MSJ Opinion") (granting in part and denying in part manufacturers' motions for summary judgment in the direct and indirect purchaser actions)[3]; ECF 101 ("Homebuilder MTD Opinion") (granting in part and denying in part Defendants' motion to dismiss Plaintiffs' state law and *Sherman Act § 1* claims in the Second Amended Complaint)).[4]

On July 2, 2018, Defendants moved for summary judgment with respect to claims based on wallboard purchases that were (1) made by separately-organized **[*5]** legal entities and not by the named Plaintiffs themselves and (2) not assigned to the named Plaintiffs prior to the filing of this case. (ECF 318, "Motion" or "Mot."). The Motion was accompanied by Defendants' Statement of Undisputed Facts, (ECF 318-2, 324, "SOF"), as well as various exhibits. On July 31, 2018, the parties filed a Joint Stipulation, which the Court approved, voluntarily dismissing all claims against Defendant New NGC, Inc. with prejudice, leaving Defendants USG Corporation, United States Gypsum Company, L&W Supply Corporation, and PABCO Building Products LLC (collectively, "Defendants") in the action. (ECF 331).

Plaintiffs responded in opposition to the Motion on August 20, 2018. (ECF 337, "Opposition" or "Opp'n"). The Opposition included a Response to Defendants' Statement of Undisputed Facts, (ECF 337-2, "Resp. to SOF"), as well as Plaintiffs' own Separate Statement of Material Facts, (ECF 337-3, "Pl.'s SOF"), and various exhibits. Defendants replied in support on September 10, 2018, (ECF 349, "Reply"), and included a Response to Plaintiffs' Separate Statement of Material Facts. (ECF 348, "Resp. to Pl.'s SOF"). The Court then held oral argument on the Motion on March **[*6]** 12, 2019. (ECF 378-81).

B. Undisputed Facts

The following is a fair account of the factual assertions relevant to the instant Motion for Summary Judgment, as taken from both parties' Statements of Fact, and not genuinely disputed.

1. The Legal Entities at Issue

The Third Amended Complaint (ECF 110, "TAC")—the operative complaint in this action—names twelve (12) plaintiffs who bring claims against Defendants related to purchases of wallboard (the "Homebuilder Plaintiffs"). (TAC ¶¶ 31-42). Six of those twelve Homebuilder Plaintiffs seek damages related in part to wallboard purchases made by their subsidiaries or related entities.[5] The Homebuilder Plaintiffs and related entities at issue in this Motion are as follows:

1. Homebuilder Plaintiff Beazer Homes Holdings Corp. seeks damages for wallboard it purchased, as well as for wallboard purchased by the following three subsidiaries: (a) Beazer Homes Corp.; (b) Beazer Homes Indiana LLP; and (c) Beazer Homes Texas, LP. (SOF ¶¶ 1-2). Homebuilder Plaintiff Beazer Homes Holder Corp. and its subsidiaries build and sell new home communities under the "Beazer Homes" brand name. (Pl.'s SOF ¶ 6; Resp. to Pl.'s SOF ¶ 6).

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[3] The February 2016 MSJ Opinion is available on the MDL docket (No. 13-md-2437) and at *In re Domestic Drywall Antitrust Litigation, 163 F. Supp. 3d 175 (E.D. Pa. 2016)* (Baylson, J.).

[4] The Homebuilder MTD Opinion is available on the Homebuilder action docket (No. 15-cv-1712) and at *In re Domestic Drywall Antitrust Litigation Civil Action, No. 15-cv-1712, 2016 U.S. Dist. LEXIS 90619, 2016 WL 3769680 (E.D. Pa. July 13, 2016)* (Baylson, J.).

[5] There is some disagreement about whether the subsidiaries and related entities are wholly owned, separately-organized, or otherwise related to Homebuilder Plaintiffs. The Court's analysis below applies with equal force to any subsidiaries or related entities that are separately-organized legal entities, as opposed to divisions within each Homebuilder Plaintiff's corporate structure. To the extent the parties continue to disagree about which subsidiaries and related entities named in Defendants' Motion are, in fact, divisions, further briefing may be required.

2. Homebuilder Plaintiff The Drees **[*7]** Company seeks damages for wallboard it purchased, as well as for wallboard purchased by the following four subsidiaries: (a) Ausherman Homes, Inc.; (b) Drees Custom Homes L.P; (c) Drees Homes of Florida, Inc.; and (d) Drees Premier Homes, Inc. (SOF ¶¶ 4-5). Homebuilder Plaintiff The Drees Company and its subsidiaries build and sell new home communities and Homebuilder Plaintiffs contend they do so under the brand name "Drees Homes." (Pl.'s SOF ¶ 12; Resp. to SOF ¶ 12).
3. Homebuilder Plaintiff KB Home seeks damages for wallboard it purchased, as well as for wallboard purchased by the following nine subsidiaries: (a) Fremont Pat Ranch LLC; (b) KB Home Arroyo Vista LLC; (c) KB Home Gold Coast LLC; (d) KB Home Las Vegas Inc.; (e) KB Home Nevada Inc.; (f) KB Home Reno Inc.; (g) KB Home/Shaw Louisiana LLC; (h) KB Home South Bay Inc.; and (i) KB Home Treasure Coast LLC. (SOF ¶¶ 7-8).[6] Homebuilder Plaintiff KB Home and some of its subsidiaries build and sell new home communities and Homebuilder Plaintiffs contend they do so under the brand name "KB Home." (Pl.'s SOF ¶ 21; Resp. to Pl.'s SOF ¶ 21).

4. Homebuilder Plaintiff TRI Pointe Homes, Inc. seeks damages for wallboard purchased by the following **[*8]** seven subsidiaries[7]: (a) Maracay Construction, L.L.C.; (b) Pardee Homes; (c) Pardee Homes of Nevada; (d) The Quadrant Corporation; (e) Trendmaker Homes, Inc.; (f) TRI Pointe Contractors, LP; and (g) Winchester Homes Inc. (SOF ¶¶ 10-11).

5. Homebuilder Plaintiff Hovnanian Enterprises, Inc. seeks damages for wallboard purchased by the following fifteen subsidiaries: (a) K. Hovnanian Cambridge Homes, L.L.C.; (b) K. Hovnanian Companies of California, Inc.; (c) K. Hovnanian Developments of Arizona, Inc.; (d) K. Hovnanian Developments of Illinois, Inc.; (e) K. Hovnanian Developments of Maryland, Inc.; (f) K. Hovnanian Developments of Minnesota, Inc.; (g) K. Hovnanian Developments of New Jersey II, Inc.; (h) K. Hovnanian Developments of Ohio, Inc.; (i) K. Hovnanian Homes — DFW, L.L.C.; (j) K. Hovnanian Homes of Delaware, L.L.C.; (k) K. Hovnanian Homes of North Carolina, Inc. (l) K. Hovnanian Homes of Virginia, Inc.; (m) K. Hovnanian JV Services Company, L.L.C.; (n) K. Hovnanian of Houston II, L.L.C.; and (o) K. Hovnanian Windward Homes, LLC. (Id. ¶¶ 13-14). Some of these subsidiaries build and sell new home communities and Homebuilder Plaintiffs contend they do so under the "K. Hovnanian Homes" **[*9]** brand. (Pl.'s SOF ¶ 16; Resp. to Pl.'s SOF ¶ 16).
6. Homebuilder Plaintiff Toll Brothers, Inc. seeks damages for wallboard it purchased, as well as for wallboard purchased by the following four subsidiaries[8]: (a) Jupiter CC LLC; (b) Plum Canyon Master LLC; (c) Porter Ranch Development Co.; and (d) Shapell Industries, Inc. (SOF ¶¶ 16-17).

2. Identifying the Related Entities and the Assignment of Claims

During discovery, Defendants requested that the Homebuilder Plaintiffs identify and produce documents concerning assignments related to their claims. (SOF ¶¶ 35, 37). The six Homebuilder Plaintiffs at issue in this Motion admit that they have not obtained or produced assignments-of-claims from the above-identified subsidiaries, with one exception.[9] (See Resp. to SOF ¶¶ 3, 6, 9, 12, 15, 18). The exception is Jupiter CC LLC, which the parties agree did

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[6] In their Separate Statement of Material Facts, Homebuilder Plaintiffs characterize these subsidiaries as "divisions," but Defendants argue in response that they are, in fact, separately incorporated limited liability corporations with separate legal existences. (See Pl.'s SOF ¶ 19; Resp. to Pl's SOF ¶ 19).

[7] Homebuilder Plaintiffs take issue with Defendants' characterization of these subsidiaries as "separately-organized" because Homebuilder Plaintiffs contend these subsidiaries were acquired as part of TRI Pointe Homes, Inc.'s acquisition of Weyerhaueser Real Estate Company in 2014. (See Resp. to SOF ¶ 11; see also Pl.'s SOF ¶ 22; Resp. to Pl.'s SOF ¶ 22).

[8] Homebuilder Plaintiffs take issue with Defendants' characterization of these subsidiaries, which Homebuilder Plaintiffs contend ignores the fact that three of the four subsidiaries—Plum Canyon Master LLC, Porter Ranch Development Co., and Shapell Industries, Inc.—were acquired by Toll Brothers, Inc. in 2014. (See Resp. to SOF ¶ 17; see also Pl.'s SOF ¶ 30; Resp. to Pl.'s SOF ¶ 30).

produce an assignment-of-claims to its parent, Toll Brothers, Inc., for the wallboard purchases at issue in the TAC. (SOF ¶ 18; Resp. to SOF ¶ 18).

On February 25, 2018, each of the Homebuilder Plaintiffs produced Amended "Amount of Damages" Contention Statements, which identified the legal entities that made the purchases **[*10]** for which they claim damages.[10] (SOF ¶ 41). At least three of the six Homebuilder Plaintiffs—Beazer Homes Holdings Corp., The Drees Company, and TRI Pointe Homes, Inc.—previously identified the subsidiaries at issue in their Corporate Disclosure Statements and Certifications of Interested Entities or Persons, dated March 17, 2015. (See Pl.'s SOF ¶¶ 3, 9, 25; Resp. to Pl.'s SOF ¶¶ 3, 9, 25). Those Corporate Disclosure Statements stated that each subsidiary at issue purchases drywall indirectly from one or more of the Defendants. (Pl.'s SOF ¶¶ 3, 9, 25; Resp. to Pl.'s SOF ¶¶ 3, 9, 25).[11]

III. LEGAL STANDARD

A district court should grant a motion for summary judgment if the movant can show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. A dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A factual dispute is "material" if it "might affect the outcome of the suit under the governing law." Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions **[*11]** of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Where the nonmoving party bears the burden of proof on a particular issue at trial, the moving party's initial burden can be met simply by "pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party's case." *Id. at 325*. After the moving party has met its initial burden, the adverse party's response must, by "citing to particular parts of materials in the record," set out specific facts showing a genuine issue for trial. *Fed. R. Civ. P. 56(c)(1)(A)*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (The nonmoving party "must do more than simply show that there is some metaphysical dispute as to the material facts"). Summary judgment is appropriate if the adverse party fails to rebut the motion by making a factual showing "sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." *Celotex, 477 U.S. at 322*. Under *Rule 56*, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. *Anderson, 477 U.S. at 255*.

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[9] Of the remaining six Homebuilder Plaintiffs named in this suit, three—M/I Homes, Inc., Ashton Woods Holdings L.L.C., D.R. Horton Los Angeles Holding Company, Inc.—have produced assignments-of-claims for their subsidiaries' wallboard purchases. (SOF ¶¶ 21, 24, 27). The other three—Meritage Homes Corporation, Pulte Home Corporation, and CalAtlantic Group, Inc.—seek damages only for their own wallboard purchases or for the purchases of their predecessor entities, and do not assert claims on behalf of any subsidiaries. (Id. ¶¶ 29, 31, 33, 34). The Homebuilder Plaintiffs contest Defendants' characterization of their claims to the extent it intends to limit in any way the damages recoverable by these six Homebuilder Plaintiffs. (Resp. to SOF ¶¶ 23, 26, 29, 31, 33, 34).

[10] Homebuilder Plaintiffs admit that they produced these contention statements, but deny that their production was the first time that Homebuilder Plaintiffs comprehensively identified the legal entities that made purchases for which they claim damages. (Resp. to SOF ¶ 41).

[11] Defendants admit that the Corporate Disclosure Statements identified the subsidiaries as such, but deny that they disclosed that the subsidiaries made drywall purchases in 2012-15 for which Homebuilder Plaintiffs are seeking damages in this action. (Resp. to Pl.'s SOF ¶¶ 3, 9, 25). The parties also disagree about the extent to which Defendants sought discovery from the subsidiaries or asked questions about corporate structure and subsidiary purchases during depositions. (Pl.'s SOF ¶¶ 33-38; Resp. to Pl.'s SOF ¶¶ 33-38).

IV. DISCUSSION

A. The Homebuilder Plaintiffs' Injury in Fact

To have Article III standing to bring a claim, a party must show injury in fact, causation, **[*12]** and redressability. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)*. Harm to a related company, even to a wholly-owned subsidiary, does not necessarily constitute injury to a corporate plaintiff. See, e.g., *Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816, 819-21 (7th Cir. 2015)* (Posner, J.) (holding Motorola could not bring Sherman Act claims for purchases made by its subsidiaries and explaining that "derivative injury rarely gives rise to a claim under ***antitrust law***"); cf. *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 341 n.44 (3d Cir. 2010)* ("As a matter of well-settled common law, a subsidiary is a distinct legal entity and is not liable for the actions of its parent or sister corporations simply by dint of the corporate relationship").

The Supreme Court has explained that, for purposes of determining their ability to conspire under the Sherman Act, a parent and wholly-owned subsidiary "have a complete unity of interest": common objectives, one corporate consciousness, and the same course of action. *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* ("[T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise."). In *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, the Court held that indirect purchasers are barred from seeking damages for Sherman Act violations, with limited exceptions. *Id. at 735-36*. The Third Circuit recognizes those three potential exceptions as: (1) a "cost-plus" exception; (2) a "co-conspirator" **[*13]** exception," and (3) an "owned or controlled" exception. See *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 258-59 (3d Cir. 2010)*; *Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 968 n.22 (3d Cir. 1983)*. Homebuilder Plaintiffs thus argue that where an indirect purchaser and direct purchaser act as a single entity, courts grant indirect purchaser standing under the "owned or controlled" exception to Illinois Brick. (Opp'n at 16).

Defendants' Motion is not concerned with whether a parent and subsidiary can conspire for purposes of antitrust liability, nor is it concerned with whether indirect and direct purchasers are acting as a single entity.[12] Rather, Defendants are arguing that Homebuilder Plaintiffs do not have Article III standing to seek damages for wallboard purchases made by their various subsidiaries and related entities, and for which no assignments-of-claims were produced. Aside from their corporate relationships, Homebuilder Plaintiffs have not put forth any evidence to show that they themselves suffered injury as a result of their subsidiaries' and related entities' purchases.

Article III standing and antitrust standing are distinct concepts. See *Hartig Drug Co., Inc. v. Senju Pharm. Co., Ltd., 836 F.3d 261, 269 (3d Cir. 2016)* ("The two concepts [of Article III standing and antitrust standing] are distinct, with the former implicating the court's subject matter jurisdiction and the latter affecting **[*14]** only the plaintiff's ability to succeed on the merits."); cf. *In re Processed Egg Products Antitrust Litig., 881 F.3d 262, 268 (3d Cir. 2018)* ("For a party to have 'antitrust standing,' it must do more than satisfy the familiar three-part test for [Article III] standing . . . that arises from the constitutional requirement of a 'case or controversy.'" (citation omitted)). If a plaintiff cannot show that it was injured by the activity that forms the basis for its claim, then the Court need not and should not consider whether that plaintiff can move forward with antitrust claims under Copperweld or Illinois Brick.

Copperweld held only that a parent and subsidiary cannot conspire together under the Sherman Act. The single entity theory propounded by Homebuilder Plaintiffs seeks to extend Copperweld to assume a parent is automatically injured by its subsidiary's purchase of drywall at an illegally inflated cost. This theory is endorsed by only three cases. Those cases rely on each other alone as supporting authority. See *Aventis Environmental*

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[12] The Court noted in its recent Choice of Law MSJ Opinion, and reiterates here, that Homebuilder Plaintiffs have contended throughout this action they are entitled to damages for all wallboard purchases, whether direct or indirect. The Court does not reach any conclusions as to whether Homebuilder Plaintiffs qualify as direct or indirect purchasers in ruling on this Motion.

Science USA LP v. Scotts Co., 383 F. Supp. 2d 488 (S.D.N.Y. 2005); *In re Vitamins Antitrust Litig., No. 99-197TFH, 2001 U.S. Dist. LEXIS 8903, 2001 WL 755852 (D.D.C. June 7, 2001)*; and *Farmland Dairies, Inc. v. New York Farm Bureau, Inc., Nos. 87-CV-1622 (FJS) and 89-CV-567 (FJS), 1996 U.S. Dist. LEXIS 5235, 1996 WL 191971 (N.D.N.Y. Apr. 15, 1996)*. The Court declines to follow the reasoning in these cases, particularly in light of the many other **[*15]** cases rejecting this single entity theory. See, e.g., *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 341 n.44 (3d Cir. 2010)* (rejecting Copperweld as authority for holding subsidiaries liable for actions of a parent); *In re Processed Egg Prods. Antitrust Litig., 821 F. Supp. 2d 709, 747 (E.D. Pa. 2011)* (Pratter, J.) (rejecting plaintiffs' "attempt to draw a 'single enterprise' theory from Copperweld" and finding that such a theory "is unsupported by legal authority and does not provide occasion to disregard the separate corporate forms of [the] entities and impose liability on them"); *Perez v. State Farm Mut. Auto. Ins. Co., No. C 06-01962 LW, 2011 U.S. Dist. LEXIS 135844, 2011 WL 5833636, at *1-3 (N.D. Cal. Nov. 15, 2011)*; *Sun Microsystems, Inc. v. Hynix Semiconductor Inc., 608 F. Supp. 2d 1166, 1185-86 (N.D. Cal. 2009)*.

The Court likewise finds that the single entity theory should not apply here, particularly because Homebuilder Plaintiffs have failed to articulate a reasonable standard for determining what falls under the definition of a "single entity." Homebuilder Plaintiffs are asking this Court to augment Article III standing to cover separately-organized subsidiaries and related legal entities simply because they engage in the same line of business and because some of them use the same brand name as their corporate parents. We decline to make such a broad determination.

B. Substitution under *Rule 17*

Standing is determined at the time of the commencement of suit. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 571 n.5, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*; 13A Wright & Miller, *Federal Practice and Procedure*, § 3531 (3d **[*16]** ed.) ("Post-filing events that supply standing that did not exist on filing may be disregarded."). However, *Federal Rule of Civil Procedure 17(a)(3)* allows reasonable time after an objection for a "real party in interest to ratify, join, or be substituted into the action."

Defendants argue that *Rule 17(a)(3)* is meant only to ameliorate honest mistakes on the part of a plaintiff and should have no bearing when a plaintiff knew the proper party or could have named the proper party from the beginning with the exercise of minimal diligence. See, e.g., *Gardner v. State Farm Fire & Cas. Co., 544 F.3d 553, 563 (3d Cir. 2008)*; 6A Wright & Miller, *Federal Practice and Procedure*, § 1555 (3d ed.) ("[T]he rule should be applied only to cases in which substitution of the real party in interest is necessary to avoid injustice. Thus, it has been held that when the determination of the right party to bring the action was not difficult and when no excusable mistake had been made, then *Rule 17(a)(3)* is not applicable and the action should be dismissed.").

The Court does not read these authorities as prescribing an absolute bar to post-complaint addition, substitution, or ratification, especially where, as here, Defendants had ample time to voice an objection to the named plaintiffs. Homebuilder Plaintiffs contend that they "were clear from the **[*17]** start that they were asserting antritrust claims based on their own purchases of drywall as well as purchases made by/through their wholly-owned subsidiaries." (Opp'n at 21). Homebuilder Plaintiffs assert they previously put Defendants on notice of the identities of their subsidiaries that purchased drywall that might be related to their overall claims. Considering the stage of this case and the extensive discovery that has gone on, the Court will afford the Homebuilder Plaintiffs a fair opportunity to substitute or add the correct parties as Plaintiffs, or otherwise have them ratify.

V. CONCLUSION

For the reasons stated above, the Motion for Partial Summary Judgment on Unassigned Claims (ECF 318) is **GRANTED** in part and **DENIED** in part. Although the Court agrees that the Homebuilder Plaintiffs do not have automatic Article III standing to bring claims on behalf of their subsidiaries, the Court will give the Homebuilder Plaintiffs reasonable time to add or substitute previously identified subsidiaries or affiliates as the correct parties as Plaintiffs to this action, or to allow them to ratify, pursuant to *Rule 17(a)(3)*.

An appropriate Order follows.

ORDER RE: UNASSIGNED CLAIMS

For the reasons stated **[*18]** in the foregoing Memorandum, the Defendants' Motion for Partial Summary Judgment on Unassigned Claims is **GRANTED** in part and **DENIED** in part. As to those subsidiaries or affiliates of the Plaintiffs that Plaintiffs have previously and specifically identified in this case, as purchasers of drywall, either in the initial disclosures, or by specific responses to Defendants' discovery, and Plaintiffs have previously disclosed the details of the purchases of drywall in discovery, these subsidiaries or affiliates may be added as parties for the sole purpose of seeking damages in this case, or may otherwise ratify the claims.

Plaintiffs will have thirty (30) days to file a statement to identify these entities, with specific references to where the disclosure was previously made, along with a statement showing that the drywall purchases claimed in this litigation against one or more Defendants were previously provided in discovery, or otherwise, to Defendants.

Defendants will then have thirty (30) days in which to dispute the accuracy or sufficiency of the alleged disclosure in the statement.

The Court will then allow an additional thirty (30) days for counsel to discuss and attempt to resolve **[*19]** any disputes.

Any motion concerning a continuing dispute on this issue must be filed by October 30, 2019.

Dated: July 15, 2019

BY THE COURT:

/s/ Michael M. Baylson

MICHAEL M. BAYLSON

United States District Court Judge

Cheryl Lloyd Humphrey Land Inv. Co., LLC v. Resco Prods.

Court of Appeals of North Carolina

May 22, 2019, Heard in the Court of Appeals; July 16, 2019, Filed

No. COA19-76

Reporter
266 N.C. App. 255 *; 831 S.E.2d 395 **; 2019 N.C. App. LEXIS 595 ***; 2019 WL 3118682

CHERYL LLOYD HUMPHREY LAND INVESTMENT COMPANY, LLC, Plaintiff, v. RESCO PRODUCTS, INC. and PIEDMONT MINERALS COMPANY, INC., Defendants.

Subsequent History: Review granted by, Appeal dismissed by *Cheryl Lloyd Humphrey Land Inv. Co., LLC v. Resco Prods., 837 S.E.2d 885, 2020 N.C. LEXIS 110, 2020 WL 973169 (N.C., Feb. 26, 2020)*

Motion granted by *Cheryl Lloyd Humphrey Land Inv. Co., LLC v. Resco Prods., 838 S.E.2d 463, 2020 N.C. LEXIS 213, 2020 WL 1228579 (N.C., Mar. 12, 2020)*

Motion granted by *Cheryl Lloyd Humphrey Land Inv. Co., LLC v. Resco Prods., 844 S.E.2d 582, 2020 N.C. LEXIS 641, 2020 WL 4208500 (N.C., July 22, 2020)*

Motion granted by *Cheryl Lloyd Humphrey Land Inv. Co., LLC v. Resco Prods., 376 N.C. 545, 849 S.E.2d 879, 2020 N.C. LEXIS 1024, 2020 WL 7018249 (Nov. 30, 2020)*

Reversed by *Cheryl Lloyd Humphrey Land Inv. Co., LLC v. Resco Prods., 2021 N.C. LEXIS 538 (June 11, 2021)*

Prior History: [*1]** Orange County, No. 17 CVS 1399.

Disposition: REVERSED AND REMANDED.

Core Terms

prospective economic advantage, tortious interference, blasting, Phase, misrepresentations, allegations, terminate, acres, Defendants', malicious, immunity, inducing, ultrahazardous, cause of action, trial court, competitor, adjacent, pleaded, marks, sham, alleged misrepresentation, matter of law, third party, failure to state a claim, ultra hazardous activity, reasonable care, planning board, representations, counterclaims, negotiations

LexisNexis® Headnotes

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

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

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

A motion to dismiss under *N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 12(b)(6)*, tests the legal sufficiency of the complaint by presenting the question whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some recognized legal theory. A motion to dismiss for failure to state a claim upon which relief can be granted should not be granted unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.

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

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

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

HN2[] **Standards of Review, De Novo Review**

Appellate review of the decision by a trial court to grant a motion to dismiss under *N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 12(b)(6)*, is de novo. In determining whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory, the appellate court must construe the complaint liberally. The appellate court will not affirm the dismissal of a complaint under *rule 12(b)(6)* unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN3[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

The Noerr-Pennington doctrine originates from the U.S. Supreme Court's decisions in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., and United Mine Workers v. Pennington, which are together its namesake. In Noerr, the Supreme Court held that the First Amendment protects businesses when they engage in certain petitioning activities, such as initiating litigation, providing them with immunity from antitrust liability when their conduct is aimed at influencing governmental action and their petitioning activity otherwise potentially violates §§ 1 and 2 of the Sherman Act, which proscribe conspiracies to restrain trade and attempts to impose monopolies, respectively. Pennington then reiterated the core teaching of Noerr: that immunity from antitrust liability under the First Amendment exists for concerted efforts to influence public officials regardless of intent or purpose.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN4[] **Noerr-Pennington Doctrine, Sham Exception**

An exception to Noerr-Pennington immunity exists where the conduct at issue is a mere sham, such as where an anticompetitive publicity campaign, while ostensibly directed toward influencing governmental action, is actually nothing more than an attempt to interfere directly with the business relationships of a competitor. For the "sham" exception to apply to a lawsuit it must be objectively baseless and must conceal an attempt to interfere directly with the business relationships of a competitor; that is, the plaintiff must have brought baseless claims in an attempt to thwart competition (i.e., in bad faith).

Civil Procedure > Pleading & Practice > Pleadings > Complaints

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

HN5[] **Pleadings, Complaints**

The facts as alleged in a plaintiff's complaint are considered true on review of a trial court's decision to grant a motion to dismiss for failure to state a claim upon which relief can be granted under *N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 12(b)(6)*.

Torts > Strict Liability > Abnormally Dangerous Activities > Types of Activities

HN6[] **Abnormally Dangerous Activities, Types of Activities**

North Carolina law has recognized blasting activities as ultrahazardous. A rule of strict liability applies to actionable harms resulting from blasting.

Torts > Strict Liability > Abnormally Dangerous Activities > Types of Activities

HN7[] **Abnormally Dangerous Activities, Types of Activities**

Blasting is the only ultrahazardous activity under North Carolina law.

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

Torts > Strict Liability > Abnormally Dangerous Activities > Types of Activities

HN8[] **Motions to Dismiss, Failure to State Claim**

A claim that has as an element the truthfulness of a representation about an activity North Carolina law regards as ultrahazardous can survive a motion to dismiss pursuant to *N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 12(b)(6)*, even though the content of the representation relates to an activity regarded by the law as ultrahazardous.

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

HN9[] **Intentional Interference, Elements**

Generally speaking, an action for tortious interference with prospective economic advantage is based on conduct by the defendants which prevents the plaintiff from entering into a contract with a third party. Tortious interference with prospective economic advantage arises when a party interferes with a business relationship by maliciously inducing a person not to enter into a contract with a third person, which he would have entered into but for the interference if damage proximately ensues, when this interference is done not in the legitimate exercise of the interfering person's rights. Stating a claim for tortious interference with prospective economic advantage requires that the plaintiff allege facts showing that the defendants acted without justification in inducing a third party to refrain from entering into a contract with them, which contract would have ensued but for the interference.

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

HN10[] **Intentional Interference, Elements**

The tort of tortious interference with prospective economic advantage under North Carolina law not only embraces instances in which the defendant induces a third party to refrain from entering into a contract with the plaintiff, it also extends to inducement by a third party, the outsider, of a party to a contract to terminate or fail to renew that contract. The reason the difference between the interference preventing a new contract from being made, resulting in the cancellation or termination of an existing agreement, or prompting a party to an existing agreement to allow the agreement to expire rather than renew it for an additional term, is not a meaningful one as this element relates to a party's liability, is that in all three variations, the requirement is met that the prospective economic advantage with which the outsider interferes is substantial enough to permit recovery, and not a mere expectancy, which has been held to be insufficient.

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

HN11[] **Intentional Interference, Elements**

The difference between a party to an agreement exercising modification rights in a multi-phase development deal to terminate one part of a multi-part agreement and the party canceling the entire agreement is not relevant to whether the third party whose interference resulted in the choice to terminate the contract is liable for tortious interference with the prospective economic advantage derived from one or all phases of the multi-part agreement. Inducing a person not to enter into a contract is as much a tort as interference with an established contract. So too is inducing a person or entity to terminate a contract, such as by allegedly inducing a third party not to consummate a later phase of a multi-phase development deal, regardless of whether the contractual vehicle defeating the prospective economic advantage is denominated a termination, cancellation, prevention, rescission, or other language of similar import and effect.

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

HN12[] **Intentional Interference, Elements**

The tort of tortious interference with prospective economic advantage under North Carolina law includes contractual modifications equivalent in effect to terminations of parts of multi-part agreements.

Counsel: Manning Fulton & Skinner, P.A., by Charles L. Steel, IV, and J. Whitfield Gibson, for the Plaintiff-Appellant.

McGuireWoods LLP, by Abbey M. Krysak, for the Defendants-Appellees.

Judges: BROOK, Judge. Judges STROUD and HAMPSON concur.

Opinion by: BROOK

Opinion

[397]** Appeal by Plaintiff from order entered 1 October 2018 by Judge Michael J. O'Foghludha in Orange County Superior Court. Heard in the Court of Appeals 22 May 2019.

[*256] BROOK, Judge.

Plaintiff appeals the dismissal of its complaint by the trial court. Because the trial court dismissed Plaintiff's complaint under *Rule 12(b)(6) of the North Carolina Rules of Civil Procedure*, our recitation of the facts is based on the allegations in Plaintiff's complaint.

I. Background

A. Factual Background

Plaintiff Cheryl Lloyd Humphrey Land Investment Company, LLC ("Plaintiff") is a limited liability company that owns real estate in Orange County, North Carolina. In the summer of 2013, Plaintiff entered negotiations with Braddock Park Homes, Inc. ("Braddock Park Homes") to sell Braddock Park Homes approximately 45 acres of real property located on Orange Grove and Enoe Mountain Road in Hillsborough, North Carolina. Braddock Park Homes planned to develop a 118 unit townhome subdivision similar **[***2]** in style to the existing Braddock Park townhome development located in Hillsborough. However, the proposed development could not be completed as planned unless the Town of Hillsborough ("the Town") agreed to annex the property and make certain zoning changes.

A series of meetings took place in the fall of 2013 in which the Town and its planning board considered whether to annex and re-zone the property as proposed. Defendants Resco Products, Inc. and Piedmont Minerals Company, Inc. ("Defendants"), owners of real property adjacent to the proposed development, participated in these meetings, opposing approval of the project by the Town. During the course of these proceedings, Defendants made various representations to the Town and **[*257]** its planning board regarding the dangers posed by fly rock, air blasts, and ground vibrations resulting from their operations of a mine on land adjacent to the proposed townhome development and, specifically, blasting conducted at the mine. Despite Defendants' opposition to the project, however, the meetings before the Town and its planning board culminated in the Town approving Braddock Park Homes's request that the property be annexed by the Town, and making **[***3]** the required zoning changes.

After securing approval of the project from the Town, Plaintiff entered into a Purchase and Sale Agreement ("the Agreement") with Braddock Park Homes, the negotiation of which had been ongoing throughout the time of the proceedings before the Town and its planning board in fall of 2013 and early 2014. Defendants were aware of these negotiations.

The Agreement Plaintiff entered into with Braddock Park Homes contemplated two development phases. In Phase I, Braddock Park Homes agreed to purchase approximately 41 acres of real estate from Plaintiff for $85,000 per acre. In Phase II, Braddock Park Homes was granted a "free look" for a specified period of time to purchase an additional 5.5 acres, which was directly adjacent **[**398]** to land owned by Defendants, near the location of their mining operation. Under the Agreement, Braddock Park Homes enjoyed the right to terminate Phase II of the project. Although Phase I was consummated, Braddock Park Homes exercised its right to modify the Agreement on 9 October 2014, terminating Phase II. Braddock Park Homes cited the representations made by Defendants to the Town during the approval process as the reason for terminating **[***4]** Phase II.

B. Procedural History

On 27 October 2017, Plaintiff initiated this action. In its complaint, Plaintiff alleges a single cause of action for tortious interference with prospective economic advantage. Plaintiff's claim for tortious interference with prospective economic advantage is based on representations made by Defendants to the Town and its planning board during the approval process. Plaintiff asserts that these representations were in fact misrepresentations, and that these misrepresentations were made by Defendants maliciously, intentionally, and without justification, proximately resulting in the termination by Braddock Park Homes of Phase II of the Agreement, and injuring Plaintiff in an amount equal to the $85,000 per acre price of Phase I.

In lieu of an answer, Defendants filed a motion to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted under *Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.* **[*258]** The motion came on for hearing before the Honorable Michael J. O'Foghludha in Orange County Superior Court on 1 October 2018. The trial court granted Defendants' motion in an order entered the same day. Plaintiff entered timely notice of appeal on 29 October 2018.

II. Analysis

A. Standard **[***5]** of Review

HN1[] A motion to dismiss under *Rule 12(b)(6) of the North Carolina Rules of Civil Procedure* "tests the legal sufficiency of the complaint by presenting the question whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some recognized legal theory." *Cage v. Colonial Bldg. Co., Inc., 337 N.C. 682, 683, 448 S.E.2d 115, 116 (1994)* (internal marks and citation omitted). A motion to dismiss for failure to state a claim upon which relief can be granted should not be granted unless it "appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Sutton v. Duke, 277 N.C. 94, 103, 176 S.E.2d 161, 166 (1970)*.

HN2[] Our review of the decision by a trial court to grant a motion to dismiss under *Rule 12(b)(6)* is *de novo. Ventriglia v. Deese, 194 N.C. App. 344, 347, 669 S.E.2d 817, 819-20 (2008)*. In determining whether "the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory[,] . . . [we] must construe the complaint liberally[.]" *Hinson v. City of Greensboro, 232 N.C. App. 204, 208, 753 S.E.2d 822, 826 (2014)* (internal marks and citation omitted). We will not affirm the dismissal of a complaint under *Rule 12(b)(6)* "unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Enoch v. Inman, 164 N.C. App. 415, 417, 596 S.E.2d 361, 363 (2004)* (internal marks and citation omitted).

B. The *Noerr-Pennington* ***[***6]*** Doctrine

This appeal first presents the question of the applicability of the *Noerr-Pennington* doctrine. Defendants contend that the trial court did not err in concluding that Plaintiffs' complaint fails to state a claim upon which relief can be granted because the allegations in Plaintiffs' complaint are insufficient, as a matter of law, under the *Noerr-Pennington* doctrine. We disagree.

[*259] i. Introduction

We note at the outset that this case is not a dispute between competitors in the marketplace, nor does it arise in a context in which concerns about the consolidation of market power detrimentally impacting consumers animate a statutory or regulatory framework under which any claim at issue in this case arises. In the discussion that follows we summarize the origins of the *Noerr-Pennington* **[**399]** doctrine and its application in North Carolina. We go on to hold that the *Noerr-Pennington* doctrine does not apply to this case. Accordingly, we reject the argument that the complaint fails to state a claim upon which relief can be granted under the *Noerr-Pennington* doctrine.

ii. The Origins of the *Noerr-Pennington* Doctrine

HN3[] The *Noerr-Pennington* doctrine originates from the U.S. Supreme Court's decisions **[***7]** in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed.2d 464 (1961)* ("*Noerr*"), and *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed.2d 626 (1965)* ("*Pennington*"), which are together its namesake. In *Noerr*, the Supreme Court held that the *First Amendment* protects businesses when they engage in certain petitioning activities, such as initiating litigation, providing them with immunity from antitrust liability when their conduct is aimed at influencing governmental action and their petitioning activity otherwise potentially violates *§§ 1* and *2 of the Sherman Act*, which proscribe conspiracies to restrain trade and attempts to impose monopolies, respectively. *See 365 U.S. at 135-37, 81 S. Ct. at 528-29*. *Pennington* then reiterated the core teaching of *Noerr*: that immunity from antitrust liability under the *First Amendment* exists for "concerted effort[s] to influence public officials regardless of intent or purpose." *381 U.S. at 670, 85 S. Ct. at 1593*.

However, the Supreme Court in *Noerr* recognized ***HN4***[] an exception to this immunity where the conduct at issue is a "mere sham," such as where an anticompetitive publicity campaign, while "ostensibly directed toward influencing governmental action, is . . . actually nothing more than an attempt to interfere directly with the business relationships of a competitor[.]" 365 U.S. at 144, 81 S. Ct. at 533. For example, for the "sham" exception to the doctrine to apply to a lawsuit it "must be objectively baseless and **[***8]** must conceal an attempt to interfere directly with the business relationships of a competitor"; that is, "the plaintiff must have brought baseless claims in an attempt to thwart competition (i.e., in bad faith)." Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 556, **[*260]** 134 S. Ct. 1749, 1757, 188 L. Ed.2d 816 (2014) (internal marks and citation omitted).

iii. The Application of the *Noerr-Pennington* Doctrine in North Carolina

This Court has addressed the applicability of the *Noerr-Pennington* doctrine three times previously. The first was Reichhold Chemicals, Inc. v. Goel, 146 N.C. App. 137, 555 S.E.2d 281 (2001). *Reichhold Chemicals* involved the departure of an expert in the field of moisture cured polyurethane adhesives from the employ of the plaintiff, a business competing in the adhesives space, and the subsequent engagement of this expert, the defendant, by a direct competitor of the plaintiff in the adhesives business, who was not a party to the appeal to this Court. *Id. at 142-43, 555 S.E.2d at 284-85*.

We observed in *Reichhold Chemicals* that the Supreme Court's decision in *Noerr* was based "on the First Amendment right to petition and . . . federal ***antitrust law***." *Id. at 148, 555 S.E.2d at 288*. Rejecting the plaintiff's challenge to the sufficiency of the pleading of the defendant's counterclaims based on the *Noerr-Pennington* doctrine, we reasoned that the defendant's counterclaims did not interfere with the plaintiff's First Amendment rights to seek **[***9]** redress from the government for the harms it allegedly suffered as a result of its competitor's conduct. *Id.* The defendant, therefore, was not required to supplement the pleadings in his counterclaim by including allegations that, if proven, would establish that the sham exception under the *Noerr-Pennington* doctrine applied. *See id.* We instead concluded that the *Noerr-Pennington* doctrine itself did not apply, refusing to accept the argument that the failure to plead through the exception to *Noerr-Pennington* immunity was fatal to the defendant's counter-complaint. *See id.* (observing that "even if plaintiff's suit against [its competitor] was objectively reasonable, plaintiff could still be liable for tortious interference" to the defendant).

We addressed the *Noerr-Pennington* doctrine for a second time in Good Hope Hosp., Inc. v. N.C. Dep't of Health and Hum. Sevs., 174 N.C. App. 266, 620 S.E.2d 873 (2005). **[**400]** *Good Hope Hosp.* involved a Certificate of Need ("CON") issued by the North Carolina Department of Health and Human Services ("the Department") to one of the plaintiffs, a hospital, to build a replacement facility roughly three miles from its existing facility. *Id. at 268, 620 S.E.2d at 876-77*. After the CON was issued by the Department, the plaintiff entered a joint venture with a hospital group, and through this **[***10]** joint venture applied for a second CON, this time for a larger facility, in a different location than the replacement facility that **[*261]** had initially been approved. *Id. at 268, 620 S.E.2d at 877*. The application for this second CON was not approved, and the plaintiff-hospital and plaintiff-hospital group, along with the municipality where the second, larger proposed facility was to be located, sought a declaratory judgment that the proposed, larger facility was not subject to the CON approval requirements under the Department's purview. *Id. at 269, 620 S.E.2d at 877*. They also filed various claims against the Department and another hospital that had opposed approval of the second facility, including claims for tortious interference with contract, tortious interference with prospective economic advantage, a conspiracy in restraint of trade under N.C. Gen. Stat. § 75-1, unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1, and common law unfair competition. *Id.*

In *Good Hope Hosp.*, we held that the *Noerr-Pennington* doctrine applied. *Id. at 275, 620 S.E.2d at 881*. Observing that numerous federal courts, including the Fourth Circuit, had applied the *Noerr-Pennington* doctrine, we noted in particular that *Noerr-Pennington* immunity had been recognized by the federal courts to be applicable "in the context of certificate **[***11]** of need cases." *Id. at 276, 620 S.E.2d at 881*. In holding the doctrine applicable, we affirmed the trial court's dismissal of the plaintiffs' claims on the basis of the *Noerr-Pennington* doctrine because the plaintiffs' complaint did not contain allegations that, if proven, would establish that their lawsuit was not a "mere sham," thus falling within the exception to *Noerr-Pennington* immunity. *Id. at 276-78, 620 S.E.2d at 881-82*. We went on to explain that in CON cases implicating *Noerr-Pennington* immunity, the allegations in the plaintiff's complaint must "show one of three things":

> (1) defendant's advocacy before the Department was objectively baseless and merely an attempt to stifle competition; (2) defendant engaged in a pattern of petitions before the Department without regard to the merit

> of the petitions; or (3) defendant's misrepresentations before the Department deprived the entire CON proceeding of its legitimacy.

Id. at 276, 620 S.E.2d at 882 (internal marks omitted). Because a review of the complaint revealed no allegations that, if proven, would establish that the sham exception applied, we affirmed the trial court's dismissal of the complaint on the basis of *Noerr-Pennington* immunity. *Id. at 277-78, 620 S.E.2d at 882*.

Good Hope Hosp. was not this Court's last word on the applicability of the *Noerr-Pennington* ***[***12]*** doctrine in North Carolina state courts. **[*262]** *See* North Carolina Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc., 220 N.C. App. 212, 725 S.E.2d 638 (2012), *rev'd in part on other grounds*, 366 N.C. 505, 742 S.E.2d 781 (2013). *Cully's Motorcross* involved the denial of an insurance claim on a policy covering a historic building that burned under circumstances considered suspicious by the plaintiff, the defendants' insurance company. *Id. at 214-15, 725 S.E.2d at 640-41*. Based on the circumstances surrounding the purchase of the building and the fire that destroyed it, the insurance company made a report to law enforcement, and one of the defendants was arrested and charged with obtaining property by false pretenses on the basis of this report. *Id. at 215, 725 S.E.2d at 641*. Thereafter, the insured who was arrested and charged criminally, one of the defendants, asserted a counterclaim against the insurance company, for malicious prosecution. *Id. at 215, 725 S.E.2d at 641*. The criminal charge against this defendant was later dismissed. *Id.*

After a bench trial but before the court entered a judgment, the plaintiff moved for a new trial or, in the alternative, a judgment that it enjoyed *Noerr-Pennington* immunity as a defense to the malicious prosecution claim. *Id. at 215-16, 725 S.E.2d at 641*. The **[**401]** trial court denied the motion, finding the plaintiff liable for malicious prosecution, and awarding the defendants damages and costs, including treble damages **[***13]** and attorney's fees. *Id. at 215-16, 725 S.E.2d at 641*.

We rejected the plaintiff's argument on appeal that the trial court erred in denying the motion for new trial or for judgment as a matter of law on the issue of *Noerr-Pennington* immunity. *Id. at 232, 725 S.E.2d at 650*. We clarified that our decision in *Reichhold Chemicals* was based on the objective reasonableness of the defendant's counterclaims, which did not need to be pleaded through the sham exception to *Noerr-Pennington* immunity where the doctrine did not apply. *Id. at 231-32, 725 S.E.2d at 650*. We reasoned that the trial court's ruling on the motion for a new trial or for judgment as a matter of law based on the *Noerr-Pennington* doctrine was not error because the trial court's basis for concluding that the doctrine did not apply — that the claim for malicious prosecution was asserted without probable cause — was sound. *Id. at 232, 725 S.E.2d at 650*. We therefore affirmed the trial court's conclusion that the doctrine did not apply to the facts before us, despite our holding in *Good Hope Hosp.*, that the doctrine is applicable in North Carolina state courts. *See id.*

[*263] iv. Applicability of the *Noerr-Pennington* Doctrine to the Present Case

As noted previously, the present case is not a dispute between competitors in the marketplace, nor does it arise **[***14]** in the CON context, where concerns about the consolidation of market power detrimentally impacting consumers inform decisions by the Department to approve or deny a CON. There is no cause of action pleaded by Plaintiff or Defendants for a conspiracy in restraint of trade under N.C. Gen. Stat. § 75-1, unfair and deceptive practices under N.C. Gen. Stat. § 75-1.1, common law unfair competition, or any other anti-competitive-related harm proscribed by law. Instead, Plaintiff's sole cause of action involves various alleged misrepresentations made by Defendants to the Town about the dangers posed by fly rock, air blasts, and ground vibrations created by the mining operation conducted by Defendants on the property adjacent to the proposed townhome development, including both the approximately 41 acres in Phase I, the sale of which was consummated, and the 5.5 acres in Phase II, which Plaintiff alleges Defendants' "malicious[], intentional[], and [] [un]justifi[ed] misrepresent[ations]" rendered significantly less valuable that it would have been, were it not for these alleged misrepresentations.

We hold that the *Noerr-Pennington* doctrine does not apply to ***HN5***[] the facts as alleged in Plaintiff's complaint, which we consider true on review **[***15]** of a trial court's decision to grant a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. *See, e.g.,* Hinson, 232 N.C. App. at 208, 753 S.E.2d at 826 ("We consider whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.") (internal marks and citation omitted). The absence of allegations in Plaintiff's complaint pleading the cause of action for tortious interference with prospective economic advantage into the "sham" exception to the *Noerr-Pennington* doctrine is not a defect of the complaint, much less one warranting dismissal of the complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6). This is the case because the allegations in the complaint do not show that Defendants, as a matter of law, enjoy *Noerr-Pennington* immunity from Plaintiff's claim for tortious interference with prospective economic advantage. To be sure, the question would be closer if there were an allegation that actionable anti-competitive-related harms resulted from petitioning activity protected by the First Amendment. However, no such allegation has been made in this case, and there does not appear to be support for such **[***16]** an allegation in the record before us. Accordingly, we conclude that, on the facts of the complaint, the *Noerr-Pennington* doctrine does not apply.

[*264] C. The Alleged Misrepresentations

The alleged misrepresentations at issue present a question of first impression under North Carolina law; namely, whether misrepresentations about the dangers of an activity North Carolina law regards as ultrahazardous **[**402]** —indeed, the only activity regarded by North Carolina law as ultrahazardous—can be overstated and, in their overstatement, become actionable misrepresentations upon which a cause of action for tortious interference with prospective economic advantage can be predicated. We hold that they can.

HN6[] North Carolina law has recognized blasting activities as ultrahazardous since the Supreme Court's decision in *Guilford Realty & Ins. Co. v. Blythe Bros. Co., 260 N.C. 69, 131 S.E.2d 900 (1963)*. The Supreme Court in *Blythe* identified blasting as "intrinsically dangerous," reasoning that the impossibility of "predict[ing] with certainty the extent or severity of [resulting] consequences" rendered blasting ultrahazardous. *Id. at 74, 131 S.E.2d at 904*. The Supreme Court held that a rule of strict liability applies to actionable harms resulting from blasting. *Id.* Numerous subsequent decisions by the Supreme Court have reiterated **[***17]** the holding of *Blythe. See, e.g., Trull v. Carolina-Virginia Well Co., 264 N.C. 687, 691, 142 S.E.2d 622, 624 (1965)* ("[O]ne who is lawfully engaged in blasting operations is liable without regard to whether he has been negligent, if by reason of the blasting he causes direct injury to neighboring property or premises"); *Falls Sales Co. v. Bd. of Transp., 292 N.C. 437, 442, 233 S.E.2d 569, 572 (1977)* ("We have held that blasting is an . . . [ultrahazardous] activity and that persons using explosives are strictly liable for damages proximately caused by an explosion"); *Woodson v. Rowland, 329 N.C. 330, 350, 407 S.E.2d 222, 234 (1991)* ("Parties whose blasting proximately causes injury are held strictly liable for damages . . . largely because reasonable care cannot eliminate the risk of serious harm."). ***HN7***[] Blasting is the only ultrahazardous activity under North Carolina law. *See Jones v. Willamette Indus., 120 N.C. App. 591, 596, 463 S.E.2d 294, 298 (1995)*; *O'Carroll v. Texasgulf, Inc., 132 N.C. App. 307, 311 n. 2, 511 S.E.2d 313, 317 n. 2 (1999)*; *Kinsey v. Spann, 139 N.C. App. 370, 374, 533 S.E.2d 487, 491 (2000)*; *Harris v. Tri-Arc Food Sys., 165 N.C. App. 495, 499, 598 S.E.2d 644, 647 (2004)*; *Vecellio & Grogan, Inc. v. Piedmont Drilling & Blasting, Inc., 183 N.C. App. 66, 69, 644 S.E.2d 16, 19 (2007)*.

The alleged misrepresentations in this case involve the very dangers North Carolina law guards against in its recognition of blasting as ultrahazardous. However, Defendants, the parties engaged in the blasting activities at issue, cite the ultrahazardous nature of their activities as the **[*265]** reason Plaintiff's claim cannot succeed, unlike in the more typical case, where the plaintiff will be relieved of proving an element of his or her case — breach of a duty of reasonable care — against a defendant engaged in blasting activities. **[***18]** Citing the numerous decisions by the Supreme Court reiterating the principle that no amount of reasonable care can "eliminate the risk of serious harm" accompanying an ultrahazardous activity such as blasting, *see Woodson, 329 N.C. at 350, 407 S.E.2d at 234*, Defendants contend that these risks simply cannot be overstated to an extent that they constitute actionable misrepresentations upon which a claim for tortious interference with prospective economic advantage can be based. We disagree.[1]

It does not follow that simply because no amount of reasonable care eliminates the risk of serious harm from blasting it is impossible, as a matter of law, to overstate the risks of harm from blasting. The former principle is a proposition stating the rationale for imposing strict liability for injuries resulting from blasting; it does not mean that the dangers inherent in the activity cannot be described — or mis-described. And it does not mean that an injury resulting from such mis-description, as is alleged in this case, is not actionable. Similarly, the principle that no amount of reasonable care eliminates the risk of serious harm from blasting does not imply that detrimental reliance on a misrepresentation of the risk of this ultrahazardous **[***19]** activity could not be the basis for recovery on a fraud claim, or for challenging the validity of a contract, a party's consent to which was procured by fraud. We hold that ***HN8***[] a claim that has as an element the truthfulness of a representation **[**403]** about an activity North Carolina law regards as ultrahazardous can survive a motion to dismiss pursuant to *Rule 12(b)(6) of the North Carolina Rules of Civil Procedure* even though the content of the representation relates to an activity regarded by the law as ultrahazardous. Success on Plaintiff's claim for tortious interference with prospective economic advantage thus is not precluded by the content of Defendants' representations to the Town, notwithstanding the rule of strict liability applicable to cases in which injury is alleged to result from an ultrahazardous activity.

D. Tortious Interference with Prospective Economic Advantage

A number of arguments raised by the parties relate to whether the cause of action for tortious interference with prospective economic advantage was properly pleaded by Plaintiff. In a related vein, **[*266]** Defendants argue that facts alleged in the complaint, if established, foreclose the possibility of Plaintiff's success at trial. We disagree, and hold that the claim for tortious **[***20]** interference with prospective economic advantage was properly pleaded, and that the facts alleged in Plaintiff's complaint do not foreclose the possibility of Plaintiff's success at trial.

HN9[] Generally speaking, "[a]n action for tortious interference with prospective economic advantage is based on conduct by the defendants which prevents the plaintiff[] from entering into a contract with a third party." *Walker v. Sloan, 137 N.C. App. 387, 392-93, 529 S.E.2d 236, 241 (2000)*. Tortious interference with prospective economic advantage

> arises when a party interferes with a business relationship by maliciously inducing a person not to enter into a contract with a third person, which he would have entered into but for the interference if damage proximately ensues, when this interference is done not in the legitimate exercise of the interfering person's rights.

Beverage Sys. of the Carolinas v. Assoc. Beverage Repair et al., 368 N.C. 693, 701, 784 S.E.2d 457, 463 (2016) (internal marks and citation omitted). Stating a claim for tortious interference with prospective economic advantage requires that the plaintiff "allege facts [] show[ing] that the defendants acted without justification in inducing a third party to refrain from entering into a contract with them[,] which contract would have ensued but for the interference." *Walker, 137 N.C. App. at 393, 529 S.E.2d at 242*.

In its complaint, Plaintiff alleges as follows:

> **[***21]** 17. In the summer of 2013, the Plaintiff began negotiations with Braddock Park Homes, Inc., to sell that entity approximately 45 acres of real property located on Orange Grove and Enoe Mountain Road, Hillsborough, North Carolina.
>
> . . .
>
> 29. At the time Defendants made [certain] malicious misrepresentations to the Town of Hillsborough, it was aware that the Plaintiff was negotiating with Braddock Park Homes for the townhome development project.
>
> 30. On February 28, 2014, the Plaintiff entered into a Purchase and Sale Agreement with Braddock Park Homes, Inc., whereby the Plaintiff agreed to sell Braddock Park Homes, Inc. approximately 41 acres of real

[1] We also note that the Town apparently did not credit Defendants' alleged misrepresentations, approving the Braddock Park Homes development project despite their vocal opposition to approval of the project.

property **[*267]** located in Orange Groves and Enoe Mountain Road, Hillsborough, North Carolina at $85,000 per acre.

31. The February 28, 2014 Purchase and Sale Agreement contained a provision that gave Braddock Home a specified period of time for a "free look" at Phase II (Section B) of the project, which was the 5.5 acres located adjacent to Defendants' Hillsborough Mine, due to the request of the Defendants to deny the approval of that Phase of the project due to the potential threat of damage to health, safety and welfare of future residents of Enoe **[***22]** Mountain Village due to fly rock, nitrogen and structural damage from the operations of the Defendant's Hillsborough Mine.

32. The February 29, 2014 [*sic*] Purchase and Sale Agreement further gave Braddock Park Homes, Inc. the right, subject to Plaintiff's acceptance, to terminate Phase II of the Town Home Project from the contract if this threat of liability was not removed to its satisfaction.

[404]** 33. On October 9, 2014, Braddock Park Homes, Inc. exercised its right to modify the Purchase and Sale Agreement and terminate Phase II (Parcel B-3) from the Agreement, citing dangers of foundation damage to homes, fly rock from blasting and nitrogen dangers to future inhabitants based on the Defendants misrepresentation to the Town of Hillsborough.

34. The Defendants' malicious misrepresentations to the Town of Hillsborough were without justification in that at the time they were made, the Defendants were required by their September 11, 2013 Permit to take measures to prevent physical hazard to any neighboring dwelling house if their mining excavation came within 300 feet thereof, regardless of the cost of doing so.

35. The Defendants intentionally induced Braddock Park, Inc. not to enter into a **[***23]** contract for the purchase of Phase II of the Town Home Project by making these intentional misrepresentations to the Town of Hillsborough.

36. The Defendants' malicious misrepresentations to the Town of Hillsborough were without justification in that at the time they were made the Defendants had no evidence that the blasting operations from their Hillsborough Mine **[*268]** had endangered persons or neighboring property from fly rock or excessive air blasts or ground violations.

37. The Defendants' interference with the Plaintiff's pending contract with Braddock Park Homes, Inc. was without justification in that the Defendants' motives were not reasonably related to the protection of the legitimate business interest of the Defendants.

38. In making these intentional misrepresentations, the Defendants acted without justification, not in the legitimate exercise of Defendants' own rights, but with design to injure Plaintiff or obtain some advantage at their expense.

39. By virtue of their malicious misrepresentations made to the Town of Hillsborough, the Defendants induced Braddock Park Homes, Inc. not to perform Phase II of the Purchase and Sale Agreement so that the Defendants could purchase the **[***24]** 5.5 acre tract adjacent to their property at a substantially discounted price.

40. Subsequent to the town's approval of the Town Home Project, the Defendant did in fact offer to purchase the 5.5 acre tract located adjacent to its Hillsborough Mine far below the fair market value for the Property.

41. By virtue of their intentional and malicious misrepresentations made to the Town of Hillsborough, the Defendants tortuously interfered with the Plaintiff's economic advantage by inducing Braddock Park Homes, Inc. not to perform Phase 2 of the Town Home Project.

42. But for the intentional misrepresentations of the Defendants, Braddock Park Homes, Inc. would not have modified the February 29, 2014 Purchase and Sale Agreement to eliminate Phase II of the Town Home Project.

43. By virtue of the Defendants' tortious interference with the Plaintiff's prospective economic advantage, the Plaintiff has suffered damages in the amount of $467,755.

Our review of the allegations in Plaintiff's complaint confirms that Plaintiff has alleged (1) the existence of a valid business relationship; (2) interference with that business relationship by an outsider; (3) the absence of a legitimate justification for **[***25]** the alleged interference by the outsider; (4) malice by the outsider in engaging in the alleged **[*269]** interference; (5) causation from the alleged interference resulting in damages to Plaintiff; and (6) damages suffered by Plaintiff to a sum certain, $467,755. These allegations are adequate to make out a cause of action for tortious interference with prospective economic advantage.

Defendants argue that Plaintiff has not adequately pleaded a claim for tortious interference with prospective economic advantage because the alleged interference did not induce Braddock Park Homes to refrain from entering into a new contract with Plaintiff but instead only induced Braddock Park Homes to exercise its modification rights to back out of Phase II of its multi-phase development deal with Plaintiff. Defendants suggest **[**405]** that it would be an expansion of the tort of tortious interference with prospective economic advantage under North Carolina law "to include . . . modifications in addition to prevented contracts and contract breaches." We disagree.

HN10[] The tort of tortious interference with prospective economic advantage under North Carolina law not only embraces instances in which "the defendant . . . induce[s] **[***26]** a third party to refrain from entering into a contract with the plaintiff," *see* *MCL Automotive v. Town of Southern Pines, 207 N.C. App. 555, 571, 702 S.E.2d 68, 79 (2010)*, it also extends to inducement by a third party, the outsider, of a party to a contract "to terminate or fail to renew [that] contract," *see* *Robinson, Bradshaw & Hinson v. Smith, 129 N.C. App. 305, 317, 498 S.E.2d 841, 850 (1998)*. The reason the difference between the interference preventing a new contract from being made, resulting in the cancellation or termination of an existing agreement, or prompting a party to an existing agreement to allow the agreement to expire rather than renew it for an additional term, is not a meaningful one as this element relates to a party's liability, is that in all three variations, the requirement is met that the prospective economic advantage with which the outsider interferes is substantial enough to permit recovery, and not a "mere expectancy," which has been held to be insufficient. *See* *Beverage Sys. of the Carolinas, 368 N.C. at 701, 784 S.E.2d at 463*.

Similarly, ***HN11***[] the difference between a party to an agreement exercising modification rights in a multi-phase development deal to terminate one part of a multi-part agreement, as is alleged to have occurred in this case, and the party canceling the entire agreement, is not relevant to whether the third party whose interference resulted in the choice to terminate the contract **[***27]** is liable for tortious interference with the prospective economic advantage derived from one or all phases of the multi-part agreement. As we observed in *Reichhold Chemicals*, "[i]nducing a person not to enter into a contract is as much a tort as interference with an **[*270]** established contract." *146 N.C. App. at 151, 555 S.E.2d at 290*. So too is inducing a person or entity to terminate a contract, *see* *Smith, 129 N.C. App. at 317, 498 S.E.2d at 850*, such as in this case, by allegedly inducing a third party not to consummate a later phase of a multi-phase development deal, regardless of whether the contractual vehicle defeating the prospective economic advantage is denominated a termination, cancellation, prevention, rescission, or other language of similar import and effect. Accordingly, we hold that ***HN12***[] the tort of tortious interference with prospective economic advantage under North Carolina law includes contractual modifications equivalent in effect to terminations of parts of multi-part agreements.

III. Conclusion

We reverse and remand the trial court's dismissal of Plaintiff's complaint for failure to state a claim upon which relief can be granted for three reasons. First, the allegations in the complaint do not establish the *Noerr-Pennington* doctrine applies to this case to **[***28]** bar Plaintiff's claims. Second, the alleged misrepresentations are actionable under North Carolina law even though their content relates to activity regarded by the law as ultrahazardous. Third, the cause of action for tortious interference with prospective economic advantage alleged in Plaintiff's complaint is properly pleaded, and this tort includes terminations of parts of multi-part agreements.

REVERSED AND REMANDED.

Judges STROUD and HAMPSON concur.

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Becton, Dickinson & Co. v. Cytek Biosciences, Inc.

United States District Court for the Northern District of California

July 17, 2019, Decided; July 17, 2019, Filed

Case No. 18-cv-00933-MMC

Reporter

2019 U.S. Dist. LEXIS 119276 *; 2019 WL 3220244

BECTON, DICKINSON AND COMPANY, Plaintiff, v. CYTEK BIOSCIENCES INC., et al., Defendants.

Prior History: Becton, Dickinson & Co. v. Cytek Biosciences Inc., 2018 U.S. Dist. LEXIS 85121 (N.D. Cal., May 21, 2018)

Core Terms

Customer, reagents, alleges, cytometer, tying arrangement, tying product, injunctive relief, sufficient facts, unfair, prong, pled, threats, market power, purchasing, tied product, employees, tie, subject to dismissal, Counterclaims, misconduct, asserts, amend

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For Ming Yan, Alfred Riley, David Vrane, Stephen Zhang, Zhenxiang Gong, Alex Zhong, Maria Jaimes, Gil Reinin, Janelle Shook, Defendants: Allan J. Gomes, LEAD ATTORNEY, Shane K. Anderies, Anderies & Gomes LLP, San Francisco, CA.

Judges: MAXINE M. CHESNEY, United States District Judge.

Opinion by: MAXINE M. CHESNEY

Opinion

ORDER GRANTING MOTION TO DISMISS; AFFORDING LEAVE TO AMEND

Re: Dkt. No. 116

Before the Court is plaintiff/counterdefendant Becton, Dickinson and Company's ("BD") motion, filed April 5, 2019, to dismiss the First Cause of Action asserted against it in defendant/counterclaimant Cytek Biosciences, Inc.'s ("Cytek") First Amended Counterclaims ("FACC"). Cytek has filed opposition, to which BD has replied.

Having read and considered the papers filed in support of and in opposition to the motion, the Court **[*2]** rules as follows.[1]

BACKGROUND

Cytek is a company that "provide[s] . . . flow cytometry products and services in the United States." (See FACC ¶ 2.)[2] BD is a company that, Cytek alleges, "dominates more than half the United States market for flow cytometers" (see id. ¶ 2) and "markets a number of different reagents" (see id. ¶ 21).[3] Cytek further alleges that BD "has 100% of the global market for . . . UV reagents" (see id. ¶ 47), which are "designed to interact specifically with UV light" in flow cytometers (see id. ¶ 22).

In June 2017, Cytek "release[d] . . . the Cytek AuroraTM ('Aurora') cytometer" (see id. ¶ 14), a cytometer that, according to Cytek, "depart[s] from the traditional cytometer designs that BD and others have employed for decades" (see id.) and "provides superior or equal performance to the BD FACSymphony for half the cost" (see id. ¶ 48).[4]

Cytek alleges that, "[j]ust months after the Aurora's release," one of its customers "relayed" that "a BD executive threatened that BD would no longer supply the customer with the critical reagents for its BD cytometers if the [customer] purchased an Aurora from Cytek." (See id. ¶ 18.) Cytek further alleges that **[*3]** "[a] major U.S. cancer treatment center that was in discussions for the purchase of [an] Aurora reported to Cytek sales personnel that BD was holding hostage a reagent that is available only from BD," and that "[a]nother cancer research center in the U.S. has also reported to Cytek sales personnel that, despite interest, it could not engage in the evaluation or purchase of a Cytek Aurora flow cytometer because it feared losing access to necessary BD reagents." (See id. ¶ 19)

Moreover, Cytek alleges, BD "requir[ed] its employees — including certain Individual Defendants[5] — to enter into employee agreements" (see id. ¶ 50), which contained "an assignment, or 'holdover,' provision that requires former employees to assign all 'right, title, and interest in any Innovation relating to Confidential Information arising because of [their] employment with [BD], conceived or made by [them] . . . at any time for a period of one (1) year after employment" (see id. ¶ 51 (alterations in original) (emphasis omitted)).

Based on the above, Cytek asserts against BD (1) a claim for injunctive relief under *California Business and Professions Code § 17200*, California's Unfair Competition Law ("UCL") (First Cause of Action); and (2) a claim for declaratory **[*4]** relief under *28 U.S.C. § 2201* (Second Cause of Action).

LEGAL STANDARD

Dismissal under *Rule 12(b)(6) of the Federal Rules of Civil Procedure* "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." See *Balistreri v. Pacifica*

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[1] By order filed June 11, 2019, the Court took the motion under submission.

[2] "Flow cytometry is a powerful, laser-based technology used for identifying and quantifying cellular characteristics on a cell-by-cell basis that offers a variety of biomedical and therapeutic applications." (See id. ¶ 1.)

[3] "Reagents are essential consumable substances used in flow cytometers to identify and analyze certain cellular characteristics," which "are marketed and sold separate and apart from the cytometry machines themselves." (See id. ¶ 20.) In particular, reagents are specifically "designed to be excited by lasers of different wavelengths" and, "[w]hen excited by the intended laser, the reagents fluoresce . . . and provide[] information regarding the cell at issue." (See id.)

[4] The FACSymphony is BD's "highest-end UV cytometer." (See id. ¶ 23.)

[5] The Individual Defendants are "nine former BD employees" who "left BD . . . and joined Cytek." (See id. ¶ 4.)

Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). Rule 8(a)(2), however, "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). Consequently, "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations." See id. Nonetheless, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." See id. (internal quotation, citation, and alteration omitted).

In analyzing a motion to dismiss, a district court must accept as true all material allegations in the complaint, and construe them in the light most favorable to the nonmoving party. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). "To survive a motion to dismiss, a complaint must contain sufficient factual material, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Twombly, 550 U.S. at 570). "Factual allegations must be enough to raise a right to relief above the speculative level[.]" Twombly, 550 U.S. at 555. Courts **[*5]** "are not bound to accept as true a legal conclusion couched as a factual allegation." See Iqbal, 556 U.S. at 678 (internal quotation and citation omitted).

DISCUSSION

By order filed February 14, 2019, the Court granted BD's motion to dismiss the First Cause of Action as alleged in Cytek's initial Counterclaims ("ICC"). As set forth in said order, the Court found the claim was subject to dismissal because Cytek had not pled sufficient facts to state a claim under the UCL's "unfair" or "unlawful" prongs, and because Cytek had not adequately alleged entitlement to injunctive relief.

By the instant motion, BD seeks an order dismissing the First Cause of Action as alleged in the FACC, by which claim Cytek again asserts it is entitled to injunctive relief based on BD's alleged violations under the "unfair" and "unlawful" prongs of the UCL.

A. The "Unfair" Prong

A violation under the "unfair" prong of the UCL occurs when a competitor engages in "conduct that threatens an incipient violation of ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." See Cel-Tech Comm'ns, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999).

In asserting BD's **[*6]** conduct falls under the "unfair" prong, Cytek relies on a tying arrangement theory. In particular, Cytek alleges BD has threatened to "t[ie] . . . the sale of its UV reagents . . . to its customers' refusal to purchase competing Cytek machines" (see FACC ¶ 48), and thereby engaged in conduct that "threatens an incipient violation of" section 3 of the Clayton Act, 15 U.S.C. § 14, as well as the Cartwright Act, specifically, California Business and Professions Code §§ 16720 and 16727 (see id. ¶ 49).

BD argues that, to the extent the First Cause of Action is predicated on Cytek's tying arrangement theory, such claim is again subject to dismissal because Cytek has not pled sufficient facts in support of its tying arrangement theory and has not adequately alleged entitlement to injunctive relief based on its tying arrangement theory. As discussed below, the Court agrees, and finds dismissal is warranted on both grounds.

1. Failure to Plead Sufficient Facts

a. *Section 3* of the Clayton Act

A tying arrangement is "defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." See *N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. "For a tying claim to suffer per se **[*7]** condemnation, a plaintiff must prove: (1) that the defendant tied together the sale of two distinct products or services; (2) that the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product; and (3) that the tying arrangement affects a not insubstantial volume of commerce in the tied product market." See. *Rick-Mik Enters., Inc. v. Equilon Enters. LLC, 532 F.3d 963, 971 (9th Cir. 2008)* (internal quotation and citation omitted).

In that regard, the Court previously found Cytek, in its ICC, failed to allege facts sufficient to support a finding that BD had engaged in conduct that "threatened an incipient violation" of *section 3* of the Clayton Act. In particular, the Court found Cytek failed to plead BD's market power in the tying product market, and failed to plead the threatened tie would affect a substantial volume of commerce in the tied product market. As to market power, the Court found, inter alia, the allegations in the ICC did not show BD possessed an adequate share of the tying product market. As to the volume of commerce affected by the threatened tie, the Court found Cytek had not pled any facts to support a finding that the customer to whom the threatened tie had been directed had any interest **[*8]** in purchasing a Cytek cytometer, or that such purchase would have entailed a substantial sum.

In an effort to cure the defect in the ICC as to BD's market power, Cytek now identifies a different market as the tying product market. Specifically, Cytek has changed the tying product market from the "cytometry reagent market in the United States" to the "global market for UV reagents" (compare ICC ¶ 19 with FACC ¶ 47; see also Opp. at 10:19-20 (identifying "relevant" tying product market as "global market for UV reagents")), as to which, Cytek alleges, BD "owns 100% market share" (see FACC ¶ 22).[6] The Court finds the above-referenced allegations adequate to plead BD's market power in the tying product market. See *Teradata Corp. v. SAP SE, 2018 U.S. Dist. LEXIS 209872, 2018 WL 6528009, at *11, 15 (N.D. Cal. Dec. 12, 2018)* (finding, where plaintiff alleged defendant held "a dominant position in the market of about 60% to 90%," such allegation "suffice[d] to plead [defendant's] market power" for "per se tying claim"); see also *Tucker v. Apple Comput., Inc., 493 F. Supp. 2d 1090, 1097-98 (N.D. Cal. 2006)* (finding, where plaintiff alleged defendant owned 75% of tying product market, plaintiff "alleged sufficient economic power" to state claim for "per se tying violation").[7]

Nevertheless, although the above-referenced change in the tying product market served to **[*9]** cure one inadequately pleaded element, specifically, market power, such change has created a new problem. As discussed below, Cytek has not pled sufficient facts to support a finding that BD directed to any of the customers identified in its FACC a threat that pertained to UV reagents, and thus has failed to establish a connection between the alleged threats on which Cytek's tying arrangement theory is based and the tying product market in which BD possesses market power.

At the outset, the Court finds Cytek, as to two of the three customers identified in the FACC, has not adequately alleged BD made any statement threatening a tie. Cytek alleges the second customer identified in the FACC (hereinafter, "Customer 2") "reported to Cytek sales personnel that BD was holding hostage a reagent that is available only from BD." (See FACC ¶ 19.) Such allegation, however, is ambiguous as to the nature of BD's alleged

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[6] To the extent BD, citing *Apple, Inc. v. Psystar Corp., 586 F. Supp. 2d 1190 (N.D. Cal. 2008)*, and *Oracle Am., Inc. v. Cedarcrestone, Inc., 938 F. Supp. 2d 895 (N.D. Cal. 2013)*, contends the UV reagent market is "invalid as a matter of law" because such market "is the functional equivalent of a contractually-created aftermarket" (see Mot. at 17:23-24), the Court disagrees. Specifically, the Court finds the cases on which BD relies in support of such argument are distinguishable because, inter alia, each concerned aftermarket restrictions that were "fully disclosed and expressly agreed upon." See *Psystar, 586 F. Supp. 2d at 1203*.

[7] Although BD also argues the UV reagent market is not legally cognizable because "the FACC does not offer any factual allegations to show a lack of cross-elasticity between the products included in and excluded from [said] proposed market" (see Reply at 9:20-21), the argument was raised for the first time in the Reply and, consequently, the Court does not consider it further herein. As set forth below, however, Cytek will be given leave to amend, and it may wish to address this issue in its amended allegations.

wrongful conduct, as Cytek does not specify what "ransom" BD demanded in exchange for such reagent, or otherwise plead facts clarifying the condition(s) to which Customer 2 was required to agree.

As to the third customer identified in the FACC (hereinafter, "Customer 3"), Cytek alleges **[*10]** said customer "reported to Cytek sales personnel that, despite its interest, it could not engage in the evaluation or purchase of a Cytek Aurora flow cytometer because it feared losing access to necessary BD reagents." (See FACC ¶ 19.) Such allegation, however, is unaccompanied by any facts setting forth the source of Customer 3's alleged fear, or otherwise connecting such concern with any wrongful conduct on BD's part.

Moreover, although, as to the first customer identified in the FACC (hereinafter, "Customer 1"), Cytek has adequately alleged a threatened tie, namely, a threat to "no longer supply . . . critical reagents for [Customer 1's] BD cytometers" if the customer "purchased an Aurora from Cytek" (see id. ¶ 18), such allegation is ambiguous as to the particular reagent BD threatened to withhold from said customer, and there is nothing in said customer's report as cited in the FACC, nor are there facts alleged elsewhere in the FACC, to support Cytek's allegation that, "[o]n information and belief, the reagents that BD threatened to withhold included reagents designed to interact specifically with UV light" (see id. ¶ 22).

Given such deficiency, Cytek likewise has failed to adequately **[*11]** allege it has lost "substantial sales" (see Opp. at 12:20) due to any threat to withhold the sale of UV reagents. Moreover, although Cytek has adequately alleged that Customers 2 and 3 had an interest in purchasing a cytometer from Cytek (see FACC ¶ 19 (alleging Customer 2 was "in discussions for the purchase of a Cytek Aurora" and Customer 3 expressed "interest" in purchasing an Aurora)), and that such customers "represent a potential loss of more than $300,000 in Aurora sales" (see id.), Cytek has not, as discussed above, pled sufficient facts to establish either Customer 2 or Customer 3 received from BD any threat to tie, and Cytek, once again, has not pled any facts to support an inference that Customer 1 had an interest in purchasing a cytometer from Cytek or that such purchase would have entailed a not insubstantial sum.

b. The Cartwright Act

"A tying arrangement may be condemned under either or both *section 16720* and *section 16727*" of the California Business and Professions Code. *Morrison v. Viacom Inc., 66 Cal. App. 4th 534, 541, 78 Cal. Rptr. 2d 133 (1998)*. To establish a "per se tying arrangement violative of *section 16720*," the following elements must be met:

> (1) a tying agreement, arrangement or condition whereby the sale of the tying product was linked to the sale of the tied product or **[*12]** service; (2) the party had sufficient economic power in the tying market to coerce the purchase of the tied product; (3) a substantial amount of sale was affected in the tied product; and (4) the complaining party sustained pecuniary loss as a consequence of the unlawful act.

See *id. at 541-42*. "Under *section 16727*, a per se violation is established if either element (2) or (3) is established along with elements (1) and (4)." See *id. at 542* (emphasis in original).[8]

Here, as discussed above, although Cytek has adequately alleged BD possesses "sufficient economic power" in the UV reagent market, the FACC lacks sufficient facts to support an inference that BD has threatened to condition the sale of its UV reagents on its customers' refusal to purchase a cytometer from Cytek, or that Cytek has lost a substantial amount of sales due to any threatened ties on BD's part.

2. Entitlement to Injunctive Relief

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[8] Contrary to BD's argument, the Supreme Court, in *Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 31, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*, did not overrule the cases on which Morrison relied in setting forth the elements of a per se tying claim under *section 16727*, and BD has not cited, nor has the Court located, any authority citing Illinois Tool Works for such proposition.

Under California law, courts may award injunctive relief "as may be necessary to prevent the use or employment . . . of any practice which constitutes unfair competition." See *Cal. Bus. & Prof. Code § 17203*. Injunctive relief under *§ 17203*, however, "cannot be used . . . to enjoin an event which has already transpired; a showing of **[*13]** threatened or future harm or continuing violation is required." See *People v. Toomey, 157 Cal. App. 3d 1, 20, 203 Cal. Rptr. 642 (1984)*; see also *Madrid v. Perot Sys. Corp., 130 Cal. App. 4th 440, 464, 30 Cal. Rptr. 3d 210 (2005)* (acknowledging "the general rule is that an injunction may not issue unless the alleged misconduct is ongoing or likely to recur").

BD contends Cytek has not adequately alleged it is entitled to injunctive relief based on its tying arrangement theory because "the FACC . . . does not allege any facts to support [a finding that] there is tying conduct that is likely to recur, or that there is any continuing harm flowing from BD's past alleged misconduct." (See Reply at 3:23-25.) As discussed below, the Court agrees.

First, contrary to Cytek's argument, the FACC lacks sufficient facts to support a finding that "BD's wrongful conduct is continuing and is likely to recur" (see Opp. at 18:20-21). In particular, even assuming, arguendo, Customers 2 and 3 had been subjected to threats "similar" to that which was made to Customer 1 in 2017 (see FACC ¶¶ 18-19), Cytek's allegations are silent as to the timing of BD's threats to Customers 2 and 3, and thus provide no basis for an inference that any threats were made after the one remark in 2017, let alone that BD, at present, continues to subject customers to such threats and **[*14]** is likely to is likely to make additional threats in the future.

Moreover, and again contrary to Cytek's argument, Cytek has not pled sufficient facts to support a finding that it continues to suffer harm from "the ongoing effects and consequences of BD's past misconduct" (see Opp. at 20:1). Specifically, while Cytek alleges "BD has not withdrawn the threats . . . that it made" (see FACC ¶ 55), Cytek has not pled any facts demonstrating that, to date, either of the customers who previously exhibited an interest in purchasing an Aurora remain interested in making such a purchase and, consequently, has not adequately alleged that BD's purported threats in the past have continued to deprive Cytek of potential sales and inflict harm on Cytek.

3. Conclusion as to "Unfair" Prong

For the reasons discussed above, to the extent the First Cause of Action is premised on Cytek's tying arrangement theory, such claim is subject to dismissal.

B. The "Unlawful" Prong

Under the "unlawful" prong, the UCL "borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." See *Cel-Tech, 20 Cal. 4th at 180* (internal quotation and citation omitted).

In the First Cause of Action, **[*15]** Cytek asserts BD has engaged in conduct that falls under the UCL's "unlawful" prong by "requiring its employees — including certain Individual Defendants — to enter into employee agreements that are illegal under *California Business & Professions Code § 16600*" (see FACC ¶ 51) (hereinafter, "employee agreement theory").

BD argues that, to the extent the First Cause of Action is predicated on Cytek's employee agreement theory, such claim is subject to dismissal because Cytek has not adequately alleged entitlement to injunctive relief based thereon. The Court agrees.

As BD points out, although Cytek alleges BD "has not conceded that its holdover clause is void under California law and has preserved the right to enforce [such] provision as to the Individual Defendants and all other employees in California in the future" (see FACC ¶ 53), such allegation does not support a finding that Cytek is entitled to injunctive relief, as Cytek has not pled sufficient facts to demonstrate how Cytek itself faces "future harm" due to the prospect of BD's asserting against other individuals claims based on the holdover provisions. See *Toomey, 157*

Cal. App. 3d at 20; cf. *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc., 28 Cal. App. 5th 923, 239 Cal. Rptr. 3d 577, 599-600 (2018)* (holding trial court did not abuse discretion in "enjoining [plaintiff] from attempting to enforce [non-compete **[*16]** clause] against" all of plaintiff's former employees, including non-parties, where evidence demonstrated plaintiff's continued efforts to preclude non-party employees from seeking employment with defendant).

Accordingly, to the extent the First Cause of Action is predicated on Cytek's employee agreement theory, such claim is subject to dismissal.

C. Leave to Amend

Cytek argues that, in the event "any portion" of its First Cause of Action is dismissed (see Opp. at 21:15), it should be given leave to amend because it "has now become aware of new acts of unfair competition that BD committed after Cytek filed its amended counterclaims" (see id. at 21:20-21 (emphasis omitted)). While Cytek has not identified with specificity the additional facts it would plead to show BD "recent[ly]" engaged in "additional . . . acts of misconduct" (see id. at 21:21), or offered any explanation as to how such additional facts will "provide further support of harm to Cytek and recurrence of BD's misconduct" (see id. 21:22), the Court nonetheless will grant Cytek an opportunity to amend its First Cause of Action to cure the deficiencies identified above.

CONCLUSION

For the reasons set forth above, BD's motion **[*17]** is hereby GRANTED and Cytek's First Cause of Action is hereby DISMISSED with leave to amend. Cytek's Second Amended Counterclaims, if any, shall be filed no later than August 7, 2019.

IT IS SO ORDERED.

Dated: July 17, 2019

/s/ Maxine M. Chesney

MAXINE M. CHESNEY

United States District Judge

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Home Depot, U.S.A., Inc. v. E.I. du Pont de Nemours & Co.

United States District Court for the Northern District of California, San Jose Division

July 22, 2019, Decided; August 13, 2019, Filed

Case No. 16-cv-04865-BLF

Reporter

2019 U.S. Dist. LEXIS 136627 *; 2019-2 Trade Cas. (CCH) P80,885; 2019 WL 3804667

HOME DEPOT, U.S.A., INC., Plaintiff, v. E.I. DUPONT DE NEMOURS & COMPANY, et al., Defendants.

Prior History: *Home Depot U.S.A. v. E.I. Dupont De Nemours & Co., 2017 U.S. Dist. LEXIS 85202 (N.D. Cal., June 2, 2017)*

Core Terms

conspiracy, announcements, summary judgment, titanium dioxide, pricing, increased price, quotation, marks, alleged conspiracy, antitrust, Defendants', price-fixing, cases, summary judgment motion, conspirators', motive, documents, oligopoly, factors, Sherman Act, articulated, tending, independent action, fix prices, competitor's, implying, circumstantial evidence, legal standard, interdependence, thirty-one

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Judges: BETH LABSON FREEMAN, United States District Judge.

Opinion by: BETH LABSON FREEMAN

Opinion

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This is one of several antitrust cases filed throughout the country based on an alleged price-fixing conspiracy among the major suppliers of titanium dioxide. Plaintiff Home Depot **[*2]** U.S.A., Inc. ("Home Depot") claims that as a result of the alleged conspiracy, it paid supra-competitive prices when it purchased billions of dollars' worth of Architectural Coatings containing titanium dioxide. *See* First Am'd Compl., ECF 70. Home Depot sues Defendants

E.I. du Pont de Nemours and Co. ("DuPont"), Millennium Inorganic Chemicals ("Millennium"),[1] Huntsman International, LLC ("Huntsman"), and Kronos Worldwide, Inc. ("Kronos") under federal and state antitrust laws.

All of the titanium dioxide cases share substantially the same record, but summary judgment motions have resulted in opposite rulings. In *Haley Paint*, the United States District Court for the District of Maryland denied the defendants' motions for summary judgment under Fourth Circuit law. *See* *Haley Paint, 959 F.Supp.2d 799 (D. Md. 2013)*.[2] In *Valspar*, the United States District Court for the District of Delaware granted the defendant's motion for summary judgment, and was affirmed in a published opinion of the United States Court of Appeals for the Third Circuit. *See* *Valspar Corp. v. E.I. Du Pont de Nemours and Co., 873 F.3d 185 (3d Cir. 2017)*. Shortly after the affirmance issued, Defendants in the present case obtained leave of court to file an early motion for summary judgment based on *Valspar*. In essence, Defendants ask this Court **[*3]** to break the tie created by the conflicting summary judgment decisions.

Defendants urge the Court to follow *Valspar*, arguing that the legal standards applied by the Third Circuit in that case are identical to those in the Ninth Circuit, and thus the same result is warranted. In opposition, Home Depot disputes Defendants' characterization of the legal standards applied in *Valspar*, asserting that they are very different from those in the Ninth Circuit. Home Depot asks this Court to follow the *Haley Paint* court's lead in denying Defendants' summary judgment motion.

This Court concludes that an antitrust plaintiff's burden to oppose summary judgment under Third Circuit law as articulated in *Valspar* is far more onerous than under Ninth Circuit law. Applying Ninth Circuit precedent interpreting the Supreme Court's seminal decision in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, this Court finds that Home Depot has demonstrated the existence of triable issues of material fact. Defendants therefore are not entitled to summary judgment, and their motion is DENIED.

I. BACKGROUND

The chronology of events underpinning *Valspar, Haley Paint*, and the present action is undisputed. The market for titanium dioxide **[*4]** is an oligopoly, meaning that only a few producers account for the bulk of the output. In the 1990s, the titanium dioxide industry suffered declines in consumption and price, and profitability hit an all-time low in 2001. Early in 2002, a trade group founded by the European producers of titanium dioxide — the Titanium Dioxide Manufacturers Association ("TDMA") — opened to non-European companies for the first time. TDMA members unanimously agreed to accept DuPont, the largest American supplier of titanium dioxide, on January 24, 2002. Days later, on January 28, 2002, DuPont announced a price increase. Within two weeks, DuPont's announced price increase was matched by TDMA members Millennium, Kronos, and Huntsman.

DuPont was formally approved as a TDMA member in September 2002. At about the same time, the TDMA implemented its new Global Statistics Program, under which each member reported its monthly sales production and inventory figures, which were consolidated into reports for distribution to TDMA members. The Global Statistics Program allowed TDMA members to estimate market shares, inventories, and production for themselves and each other. Over the twelve-year period commencing with **[*5]** DuPont's acceptance for membership in the TDMA and implementation of the Global Statistics Program, DuPont, Millennium, Kronos, and Huntsman announced thirty-one parallel price increases. This was a marked change from the 1994-2001 period, in which Defendants announced only a few parallel price increase.

In 2010, direct purchasers of titanium dioxide filed *Haley Paint* in the District of Maryland, alleging a *Sherman Act § 1* claim based on a price-fixing conspiracy among titanium dioxide suppliers. *See* *Haley Paint, 959 F. Supp. 2d 799*.

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[1] During the alleged conspiracy period, Millennium was acquired by Cristal USA Inc. The briefing refers to the company interchangeably as Millennium, Millennium/Cristal, and Cristal. For ease reference, this order refers to the company as Millennium.

[2] The parties refer to the case interchangeably as *Haley Paint* and *In re Titanium Dioxide*.

The district court denied the defendants' motion for summary judgment, after which the case settled. Valspar, a large-scale purchaser of titanium dioxide, opted out of the Maryland action and filed its own suit. On substantially the same record as that before the Maryland Court, the United States District Court for the District of Delaware granted a defense motion for summary judgment, which was affirmed by the Third Circuit. *See* *Valspar, 873 F.3d at 190*.

Indirect purchasers of titanium dioxide filed suit in the Northern District of California based on the same alleged price-fixing scheme. *See Harrison v. E.I. du Pont de Nemours*, Case No. 13-cv-01180-BLF. The case was assigned to the undersigned and ultimately was **[*6]** resolved pursuant to a class action settlement. The settlement class did not include retailers such as Home Depot.

Home Depot filed the present indirect purchaser action in August 2016, asserting antitrust claims against DuPont, Millennium, Huntsman, and Kronos under the same alleged price-fixing conspiracy. Compl., ECF 1. Huntsman and Kronos have been dismissed pursuant to stipulation of the parties. *See* Order of Dismissal of Huntsman, ECF 68; Order Approving Joint Motion for Order of Dismissal of Kronos, ECF 113. With respect to the remaining defendants, DuPont and Millennium, the operative first amended complaint ("FAC") alleges two claims, the first under California's Cartwright Act, *Cal. Bus. & Prof. Code § 16700 et seq.*, and the second under the Sherman Act, *15 U.S.C. § 1*. FAC, ECF 70. Defendants DuPont and Millennium now seek summary judgment.

II. DISCUSSION

Defendants' motion for summary judgment presents two issues: whether Third Circuit law as articulated in *Valspar* is identical to Ninth Circuit law, and whether Defendants are entitled to summary judgment under Ninth Circuit law. The Court addresses those issues in turn.

A. *Valspar* and Ninth Circuit Law

In the three decades since the Supreme Court decided *Matsushita*, each of the **[*7]** circuits has developed a set of legal standards to address motions for summary judgment brought in antitrust cases. In *Matsushita*, the Supreme Court held that although the familiar burden-shifting framework of *Federal Rule of Civil Procedure 56* applies, and all inferences must be viewed in the light most favorable to the non-moving party, "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* case." *Matsushita, 475 U.S. at 587-88*. Thus, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id. at 588*. "To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of *§ 1* must present evidence that tends to exclude the possibility that the alleged conspirators acted independently." *Id.* (internal quotation marks and citation omitted). The Supreme Court made clear that "courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct." *Id. at 593*.

1. *Valspar*

The *Valspar* court recited the above holdings of *Matsushita*, and then stated, "[w]ith those principles informing our analysis, this **[*8]** Court has developed *specialized evidentiary standards* at summary judgment in antitrust cases in general and in oligopoly cases in particular." *Valspar, 873 F.3d at 193* (emphasis added). Because parallel conduct "can be a necessary fact of life" in an oligopolistic market, the court explained, "evidence of conscious parallelism cannot alone create a reasonable inference of conspiracy." *Id.* (internal quotation marks and citation omitted). The court held that "to prove an oligopolistic conspiracy with proof of parallel behavior, that evidence must go beyond mere interdependence and *be so unusual that in the absence of an advance agreement, no reasonable firm would have engaged in it*." *Id.* (internal quotation marks and citation omitted, emphasis added). "[I]n order to move the ball across the goal line," the plaintiff generally will "need to show that certain plus factors are present." *Id.* (internal quotation marks, citation, and brackets omitted).

Although the Third Circuit has not identified an exhaustive list of plus factors, the *Valspar* court identified three categories of evidence which may qualify: "(1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the **[*9]** defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy." *Valspar, 873 F.3d at 193* (internal quotation marks and citation omitted). However, the court gave short shrift to the first two categories, stating that "in the case of oligopolies the first two factors are deemphasized because they largely restate the phenomenon of interdependence." *Id.* (internal quotation marks and citation omitted). *Valspar* indicated that courts should focus primarily on the third factor, that is, evidence implying a traditional conspiracy. *Id.* In order to satisfy that factor, *Valspar* stated, the plaintiff must provide "proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown." *Id.* (internal quotation marks and citation omitted). The plaintiff may defeat summary judgment *only if*, after evaluating the evidence as a whole, *the court determines that it is more likely than not* that the defendants conspired to fix prices. *Id.* The *Valspar* court acknowledged that it was imposing "a high bar — but it is the bar established by this Court." *Id. at 194 n.4*.

The *Valspar* majority was untroubled **[*10]** by the fact that it granted summary judgment on the same record that led the Maryland court to deny summary judgment in *Haley Paint*, observing that the Maryland court applied Fourth Circuit law, which *Valspar* characterized as "quite different" from Third Circuit law. *Valspar, 873 F.3d at 203*. The dissent, on the other hand, was of the opinion that *Valspar* constituted a grave misstep in Third Circuit jurisprudence. According to the dissent, the majority's ruling created "an unworkable burden, not supported by our precedent, for plaintiffs seeking to prove a Sherman Act price-fixing case with circumstantial evidence." *Valspar, 873 F.3d at 203*. The dissent pointed out that under the majority's holding, "smoking gun" evidence is necessary to survive summary judgment in in oligopoly cases, and district judges are expected to weigh evidence. *Id. at 203-04*. The dissent characterized the majority's approach as a "misapplication of *Matsushita*." *Id. at 206*.

2. Ninth Circuit

Like *Valspar*, the lead Ninth Circuit cases addressing summary judgment in the antitrust context recite black letter principles that "[s]ummary judgment is appropriate 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter **[*11]** of law,'" and that the Court must "view the facts and draw factual inferences in favor of" the non-moving party. *Stanislaus Food Prods. Co. v. USS-POSCO Indus., 803 F.3d 1084, 1088 (9th Cir. 2015)* (quoting *Fed. R. Civ. P. 56(a)*); *see also* *In re Citric Acid Litig., 191 F.3d 1090, 1094 (9th Cir. 1999)*. The Ninth Circuit cases also focus on *Matsushita*'s key holdings, reiterating that "to survive summary judgment on the basis of circumstantial evidence, 'a plaintiff seeking damages for a violation of *§ 1* must present evidence that tends to exclude the possibility that the alleged conspirators acted independently,'" *Stanislaus, 803 F.3d at 1088* (quoting *Matsushita, 475 U.S. at 588*), and "'conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy,'" *Citric Acid, 191 F.3d at 1094* (quoting *Matsushita, 475 U.S. at 586*).

Beyond those superficial similarities, however, the Ninth Circuit's approach to implementation of *Matsushita* is quite different from that of the *Valspar* court. The Ninth Circuit has articulated a two-part test to be applied when a defendant seeks summary judgment with respect to a *§ 1* claim that is based on circumstantial evidence. *See* *Citric Acid, 191 F.3d at 1094*. "First, the defendant can rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice." *Id.* (internal quotation marks and citation omitted). If **[*12]** the defendant makes that showing, "[t]he burden then shifts back to the plaintiff to provide specific evidence tending to show that the defendant was not engaging in permissible competitive behavior." *Id.*

A defendant may satisfy its burden at step one in a variety of ways. The defendant may show that the allegedly conspiratorial conduct "was in each defendant's *independent self-interest*." *Citric Acid, 191 F.3d at 1095*. Alternatively, the defendant may demonstrate that the potential benefit of the scheme "is just not apparent," such that the defendant's "participation in the alleged conspiracy is economically implausible." *Stanislaus, 803 F.3d at 1091*.

At step two, a *§ 1* violation cannot be inferred from parallel pricing alone, or from an industry's follow-the-leader pricing strategy. *Citric Acid, 191 F.3d at 1102*. However, "parallel pricing is a relevant factor to be considered along with the evidence as a whole; if there are sufficient other 'plus' factors, an inference of conspiracy can be reasonable." *Stanislaus, 803 F.3d at 1092*. "[T]he crucial question is whether all the evidence considered as a whole can reasonably support the inference that [the defendant] conspired . . . to fix prices.. *Citric Acid, 191 F.3d at 1097*.

3. The Legal Standards are not Identical

Comparing the Third Circuit's standards as articulated in *Valspar* ***[*13]*** with the Ninth Circuit's standards as articulated in *Stanislaus* and *Citric Acid*, this Court concludes that the standards are not identical. In fact, they are significantly different. The standards articulated in *Valspar* all but eliminate an antitrust plaintiff's opportunity to defeat summary judgment in an oligopoly case based on reasonable inferences arising from circumstantial evidence. Under *Valspar*, certain types of plus factors are discounted and the plaintiff's success turns on its ability to produce "evidence implying a traditional conspiracy," which the majority defined as "proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown." *Valspar, 873 F.3d at 193* (internal quotation marks and citations omitted). As the *Valspar* dissent recognized, this approach appears to require the plaintiff to present "smoking gun" type evidence in order to avoid summary judgment. *Id. at 203-04*. Nothing in the Ninth Circuit's jurisprudence cabins an antitrust plaintiff's ability to defeat summary judgment through circumstantial evidence in this manner.

Nor does Ninth Circuit authority allow, much less require, **[*14]** district judges to weigh evidence. While a plaintiff opposing summary judgment under *Valspar*'s standards must persuade the district court that it is "more likely than not" that the defendants conspired to fix prices, *873 F.3d at 193*, in the Ninth Circuit the plaintiff need only present evidence showing "that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [the plaintiff]." *Stanislaus, 803 F.3d at 1089* (internal quotation marks and citation omitted).

The Court notes that the Ninth Circuit's opinion in *Musical Instruments*, cited by Defendants, seems to track language in *Valspar* indicating that certain plus factors, such as motive and conduct contrary to self-interest, should be given little weight in oligopoly cases. *Compare In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1194-1195 (9th Cir. 2015)*, *with Valspar, 873 F.3d at 193*. Defendants point to that fact in support of their position that the legal standards articulated in *Valspar* are identical to those of the Ninth Circuit. As Home Depot notes, however, *Musical Instruments* was decided at the motion to dismiss stage, and it did not address the evidentiary issues critical to determination of a summary judgment motion. Consequently, while *Musical Instruments* is helpful to **[*15]** an understanding of plus factors and how they work in oligopoly cases, this Court looks to *Stanislaus* and *Citric Acid* to determine whether the *Valspar* court applied the same framework on summary judgment as would be applied in the Ninth Circuit. As discussed above, the standards set forth in those cases are different from the standards set forth in *Valspar*.

Stanislaus, in particular, emphasized the importance of motive evidence at the summary judgment stage: "The factual context of a claim and the economic plausibility of a defendant's motivation to conspire play an explicit, central role in the standards set forth in *Matsushita*." *Stanislaus, 803 F.3d at 1090 n.3*. "It is an uncontroversial tenet of ***antitrust law*** that the clarity and intensity of a motivation may bear on the inferences to be drawn from ambiguous evidence of coordinated behavior." *Id.* (internal quotation marks, citation, and alteration omitted). "Implausible claims require a 'more persuasive' showing 'that tends to exclude the possibility' of independent action. *Id. at 1089* (citing *Matsushita, 475 U.S. at 587-88*). As the *Valspar* dissent pointed out, the majority appeared to ignore these considerations in its analysis — "Valspar presented an economic theory that makes perfect economic sense, **[*16]** yet the District Court and majority did not draw any inferences in Valspar's favor." *Valspar, 873 F.3d at 204*.

In light of the foregoing, Defendants' motion for summary judgment is DENIED to the extent it is based on Defendants' assertion that Third Circuit law as articulated in *Valspar* is identical to Ninth Circuit law.

B. Application of Ninth Circuit's Standards to Facts of this Case

The Court next considers Defendants' argument that they are entitled to summary judgment under applicable Ninth Circuit legal standards. The standards regarding claims under *§ 1* of the Sherman Act apply equally to Home Depot's claim under California's Cartwright Act, because the claims under the two statutes are based on the same conduct. *See* *Lenhoff Enterprises, Inc. v. United Talent Agency, Inc., 729 F. App'x 528, 531 (9th Cir. 2018)* ("Where a complaint alleges the same conduct as both a violation of the Sherman Act and a violation of California's Cartwright Act . . . the determination that the alleged conduct is not an unreasonable restraint of trade under the Sherman Act necessarily implies that the conduct is not unlawful under the Cartwright Act."); *Persian Gulf Inc. v. BP W. Coast Prods. LLC, 324 F. Supp. 3d 1142, 1156-57 (Cal. 2018)*) ("The Cartwright Act is California's equivalent to the Sherman Act, and the analysis under the Cartwright Act is identical to that under the Sherman Act." (internal quotation **[*17]** marks and citations omitted)). Accordingly, while the Court's analysis focuses on Home Depot's claims under *§ 1* of the Sherman Act, the analysis applies equally to its claims under the Cartwright Act. The parties do not brief the Cartwright Act claim separately or suggest that different standards apply to the federal and state law claims.

1. Scope of the Record

Before addressing the parties' substantive arguments, the Court addresses the practicalities of working with a voluminous record that has been developed over the course of multiple antitrust cases arising from the alleged price fixing conspiracy. Both sides have submitted declarations of counsel attaching deposition excerpts and other documents which were produced in the earlier actions. *See* Mackowski Decl., ECF 116-3; Anzidei Decl., 116-5; Johnson Decl., ECF 123-1. Home Depot also has filed a Request for Judicial Notice, asking the Court to judicially notice briefing and exhibits filed in *Haley Paint, Valspar*, and a case titled *Valspar Corp. v. Kronos Worldwide, Inc.*, (S.D. Tex.), Case No. 4:14-cv-01130. *See* RJN, ECF 123-2.

While the record made available to the Court comprises thousands of pages of documents, relatively few of those **[*18]** documents are actually cited in the parties' briefs. On summary judgment, it is not the Court's task to "scour the record in search of a genuine issue of triable fact." *Californians for Renewable Energy v. California Pub. Utilities Comm'n, 922 F.3d 929, 935-36 (9th Cir. 2019)* (internal quotation marks and citation omitted). The Court "rel[ies] on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment." *Id. at 936*. "Specific citations, not bulk references, are essential to pinpoint key facts and factual disputes." *Stanislaus Food Prods. Co. v. USS-POSCO Indus., 803 F.3d 1084, 1094 (9th Cir. 2015)*. Accordingly, the Court has considered only those documents cited in the briefing, and only those portions of documents that are pin-cited or otherwise identified with particularity, "without mining the entire document for more substantiation." *Id.*

Moreover, with respect to Home Depot's request for judicial notice, "[j]ust because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth." *Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 999 (9th Cir. 2018)*. Thus, while it may be able to take judicial notice of the existence of any number of documents in the record, the Court cannot take judicial notice of the contents of such documents unless they comprise facts which are "generally known," or "can be accurately **[*19]** and readily determined from sources whose accuracy cannot reasonably be questioned." *Id.*

2. Analysis

A plaintiff asserting a claim of concerted price fixing under [§ 1](#) of the Sherman Act bears the burden of proving that an agreement to fix prices existed. *See* [Citric Acid, 191 F.3d at 1093](#). Where, as here, the plaintiff seeks to prove the conspiracy with circumstantial evidence, a two-part test applies to a defense motion for summary judgment. *See* [id. at 1094](#). "First, the defendant can rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice." *Id.* (internal quotation marks and citation omitted). If the defendant makes that showing, "[t]he burden then shifts back to the plaintiff to provide specific evidence tending to show that the defendant was not engaging in permissible competitive behavior." *Id.* Summary judgment will be denied if "the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [the plaintiff]." [Stanislaus, 803 F.3d at 1089](#) (internal quotation marks and citation omitted).

a. Step 1

Home Depot's theory is that the thirty-one parallel price increase announcements by DuPont, **[*20]** Millennium, Kronos, and Huntsman were the product of a conspiracy to fix prices. Defendants argue that those price increase announcements were not the product of a conspiracy, and that each company chose to announce price increases when it did based on the company's independent judgment.

Defendants submit the deposition testimony of DuPont senior executives, who described their process for analyzing market supply and demand, costs, company strategies, and goals when deciding whether to implement a price increase. *See* Mackowski Decl. Exh. 1, Gallagher Dep. 233:2-236:23, ECF 116-3; Mackowski Decl. Exh. 2, Rubin Dep. 32:4-33:9, ECF 116-3. Defendants also point to documents which support the DuPont executives' version of events. *See* Mackowski Decl. Exhs. 3-6, ECF 116-3. With respect to Millennium, Defendants submit the deposition testimony of a vice president, explaining Millennium's process in deciding whether to announce a price increase. *See* Anzidei Decl. Exh. 1, Hall Dep. 78:2-10, ECF 116-5. Defendants also cite to expert reports that were produced in *Haley Paint*, showing that the number of days it took Millennium to announce a price increase following a competitor's announcement varied **[*21]** over the course of the alleged conspiracy. *See, e.g.*, Anzidei Decl. Exh. 2, Hamilton Report at App. B1, ECF 116-6. Millennium also submits evidence that at times it undercut competitor's prices to increase its sales. *See* Anzidei Decl., Exhs. 9-12.

A trier of fact could conclude, based on this evidence, that Defendants' announcements of price increases were based on independent internal deliberations rather than an agreement to fix prices. The Court therefore concludes that Defendants have satisfied their step 1 burden. The burden therefore shifts to Plaintiffs, at step 2 of the test, to provide specific evidence tending to show that Defendants were not engaging in permissible competitive behavior.

b. Step 2

i. Plausibility

Home Depot begins by arguing that its price-fixing claim is plausible, noting that the *Stanislaus* court found context to be "key" when evaluating whether an antitrust plaintiff has presented evidence sufficient to raise a reasonable inference of anticompetitive conduct. "The factual context of a claim and the economic plausibility of a defendant's motivation to conspire play an explicit, central role in the standards set forth in *Matsushita*." [Stanislaus, 803 F.3d at 1090 n.3](#). "Implausible claims require **[*22]** a 'more persuasive' showing 'that tends to exclude the possibility' of independent action." [Id. at 1089](#) (citing [Matsushita, 475 U.S. at 587-88](#)).

It is undisputed that at the start of the alleged conspiracy period, the titanium dioxide industry had suffered significant declines in demand and profitability, and that prices were at a low. At that point, the TDMA for the first time permitted an American supplier — DuPont — to join. Within weeks, the first of the thirty-one parallel price increase announcements occurred, and the alleged conspirators continued to announce price increases in parallel over the next decade. In this factual context, Home Depot's theory that the major suppliers of titanium dioxide agreed to fix prices for their mutual benefit is entirely plausible. That fact was recognized by both the *Haley Paint* court, which commented that "an agreement among the five largest producers of titanium dioxide to fix prices at a supracompetitive level . . . makes perfect economic sense," *Haley Paint, 959 F. Supp. 2d at 824* (internal quotation marks and citation omitted), and the *Valspar* dissent, which observed that "Valspar presented an economic theory that makes perfect economic sense," *Valspar, 873 F.3d at 204*.

ii. Parallel Conduct

Next, Home Depot points to the abrupt change in **[*23]** industry practice, from the pre-2002 period in which there were only a few instances of parallel price increase announcements, to the thirty-one instances of parallel price increase announcements in the twelve years following the TDMA's agreement to allow DuPont to join. *See* Johnson Decl. Exh. 1, App B (price increase announcement chronology), ECF 122-7.[3] While some of the parallel announcements were days or even weeks apart, they generally occurred in lockstep. Thus, even taking into account variations in timing, the sudden jump from only a few parallel price increase announcements prior to 2002 to *thirty-one* during the alleged conspiracy period is startling. Defendants' characterization of the industry change as "[a] mere uptick in the frequency of price announcements" is unpersuasive. *See* Reply at 8, ECF 133. As the *Valspar* dissent recognized, "[t]he sheer number of parallel price increase announcements in this case — 31 to be exact — is unprecedented," and "would undoubtedly raise red flags to any reasonable fact finder." *Valspar, 873 F.3d at 205*. The *Haley Paint* court similarly characterized the parallel price increase announcements as "noteworthy, because they were so pervasive." *Haley Paint, 959 F. Supp. 2d at 825*.

[*24] While parallel conduct is insufficient on its own to give rise to an inference of conspiracy, it is "a relevant factor to be considered along with the evidence as a whole." *Citric Acid, 191 F.3d at 1102*. "[I]f there are sufficient other 'plus' factors, an inference of conspiracy can be reasonable." *Id.* It is against this backdrop of a plausible claim coupled with a sudden pattern of prolonged parallel price announcements that this Court must determine whether Home Depot has presented sufficient plus factors to render the inference of a price-fixing conspiracy reasonable when held up against competing inferences of independent action. *See* *Stanislaus, 803 F.3d at 1089*.

iii. Motive

Home Depot presents expert evidence that Defendants had motive to enter into a price-fixing conspiracy. The titanium dioxide market is highly concentrated; titanium dioxide is a commodity-like product with no substitutes; and there are substantial barriers to entry in the market. *See* Johnson Decl. Exh. 36, Lamb Report at 11-30, ECF 122-59. Consequently, the structure of the titanium dioxide market was conducive to a price-fixing conspiracy. *See* Johnson Decl. Exh. 8, Hamilton Report at 3-4, ECF 122-31; Johnson Decl. Exh. 36, Lamb Report at 11-30, ECF 122-59. Both the Third Circuit in *Valspar*, and the District of Maryland in *Haley Paint*, concluded that these conditions established the existence of motive, and Defendants do not dispute that conclusion. *See* *Valspar, 873 F.3d at 197* ("There is little doubt that this highly concentrated market for a commodity-like product with no viable substitutes and substantial barriers to entry was conducive to price fixing."); *Haley Paint, 959 F. Supp. 2d at 826* ("In this case, the first plus factor is satisfied. The structure **[*25]** of the United States titanium dioxide market is conducive to price-fixing, based on multiple factors.").

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[3] The cited evidence is an appendix submitted by the plaintiffs in *Haley Paint*, setting forth the chronology of price increase announcements. The Court may take judicial notice of the appendix as a court record. *See* *Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006)* ("We may take judicial notice of court filings and other matters of public record."). As noted above, the fact that the document itself is subject to judicial notice "does not mean that every assertion of fact within that document is judicially noticeable for its truth." *Khoja, 899 F.3d at 999*. The Court finds it appropriate to accept the truth of the chronology here, because it is not challenged by Defendants and "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Id.*

The Ninth Circuit has made clear that in oligopoly cases, "alleging 'common motive to conspire' simply restates that a market is interdependent (*i.e.*, that the profitability of a firm's decisions regarding pricing depends on competitors' reactions)." Musical Instruments, 798 F.3d at 1195. "Interdependence, however, does not entail collusion, as interdependent firms may engage in consciously parallel conduct through observation of their competitors' decisions, even absent an agreement." *Id.* "[O]ne firm can risk being the first to raise prices, confident that if its price is followed, all firms will benefit." *Id.* "By that process ('follow the leader'), supracompetitive prices and other anticompetitive practices, once initiated, can spread through a market without any prior agreement." *Id.* Such conduct — either raising prices or following suit — is not a violation of antitrust laws when it is merely an example of the "conscious parallelism endemic to an oligopoly." Prosterman v. Am. Airlines, Inc., 747 F. App'x 458, 461 (9th Cir. 2018).

The thirty-one parallel price increase announcements certainly could be explained by follow-the-leader pricing. Indeed, the *Valspar* court concluded that conscious **[*26]** parallelism was the only reasonable inference to be drawn from the record evidence, concluding that there was insufficient evidence of conspiracy and that DuPont could not argue with a straight face that the competitor's decisions to raise prices were discrete events. *See* Valspar, 873 F.3d at 195. However, Home Depot submits testimony from representatives of DuPont, Millennium, Huntsman, and Kronos, expressly *denying* that the companies engaged in follow-the-leader pricing. *See* Johnson Decl. Exh. 40, Rubin Dep. 36:6-11 (DuPont); Johnson Decl. Exh. 41, Stoll Dep. 47:24-48:7 (Millennium); Johnson Decl. Exh. 38, Maas Dep. 88:1-8 (Kronos); Johnson Decl. Exh. 39, Quinn Dep. 30:12-17 (Huntsman). DuPont, Kronos, and Huntsman representatives denied even considering a competitor's price announcements when determining the company's own price announcements. Johnson Decl. Exh. 40, Rubin Dep. 36:6-18 (DuPont); Johnson Decl. Exh. 16, Becker Dep. 106:13-17 (Kronos); Johnson Decl. Exh. 39, Quinn Dep. 28:20-30:17, 61:1-4 (Huntsman). At the hearing, Home Depot's counsel made the point that "it's hard for the defendants to even argue that this is legitimate follow-the-leader pricing if their own witnesses are denying it." Tr. **[*27]** 53:5-54:7, ECF 145.

While Defendants argue that the evidence of motive may be dismissed as equally consistent with the conscious parallelism expected in an interdependent market, the alleged conspirators' denials of follow-the-leader pricing — or even consideration of competitors' pricing — gives rise to a reasonable contrary inference that Defendants did not act independently but rather in concert.

iv. Actions Against Self-Interest

Home Depot also points to evidence that the alleged conspirators took actions against their economic self-interest. For example, they sold titanium dioxide to each other at below market prices and swapped raw materials needed for manufacture, conduct that normally would not be expected between market rivals. *See* Johnson Decl. Exh. 8, Hamilton Report at 28-33, ECF 122-31; Johnson Decl. Exh. 44, Williams Report at 49-59, ECF 122-66. Millennium's John Hall referred to this conduct as "co-opertition." Johnson Decl. Exh. 26, Hall email, ECF 122-49.

When DuPont shut down one of its plants in 2005 after Hurricane Katrina, DuPont announced that it would bring the plant back online slowly and would "NOT flood the market with product," and would "not be aggressively **[*28]** pursuing their lost share" of the market. *See* Johnson Decl. Exh. 27, email, ECF 122-50. It is not clear why DuPont would not have attempted to recover its market share. However, internal Millennium emails and notes from a later time-frame show that, at least in 2006-2008, Millennium consciously avoided competition with DuPont. *See, e.g.*, Johnson Exh. 29, email ("we do not want to be disruptive to DuPont"), ECF 122-52; Johnson Exh. 30, handwritten note ("Don't steal Dup tonnes").

The alleged conspirators also shared confidential and commercially sensitive information through the TDMA and its Global Statistics Program. *See* Johnson Decl. Exh. 9, ECF 122-32. The *Haley Paint* court found evidence regarding the Global Statistics Program suggestive of collusion, citing authority that "knowledge of market share is the most important information to sustain a conspiracy." Haley Paint, 959 F. Supp. 2d at 828.

Defendants argue that participation in the Global Statistics Program was entirely legal, and that a decision to avoid undercutting a competitor's prices may be a natural consequence of interdependence rather than the result of collusion. Defendants point out that the described conduct allowed the titanium dioxide producers to **[*29]** "in effect share monopoly power and maintain prices at a profit-maximizing supracompetitive level" without necessarily evidencing an express agreement to do so. Reply at 10, ECF 133 (internal quotation marks and citations omitted). While the Court agrees that the alleged conspirators' conduct may be explained in such a fashion, Home Depot presents expert evidence that the rise in prices of titanium dioxide during the alleged conspiracy period cannot be explained by competition alone. *See* Johnson Decl. Exh. 36, Lamb Report at 56, ECF 122-59; Johnson Decl. Exh. 42, McClave Report at 10, ECF 122-64; Johnson Decl. Exh. 43, McClave Rebuttal Report at 3, ECF 122-65. The Court concludes that Home Depot's evidence, as placed in context by the expert reports, gives rise to a reasonable inference that Defendants' actions against self-interest were pursuant to a price-fixing conspiracy.

v. Evidence Implying a Traditional Conspiracy

Home Depot also presents evidence implying a traditional conspiracy. Following a 16 meeting between senior executives of Millennium and Huntsman in Baltimore on September 13, 2004, Millennium sent colleagues an email stating: "now that we have competition on board for **[*30]** the Oct 1 price increase announcement, please relook at your agents [sic] commissions." Johnson Decl. ¶¶ 23-24 & Exhs. 20-21, ECF 122-43, ECF 122-44.

Other evidence suggests more indirectly that DuPont, Millennium and others were using Intertech conferences and speeches to meet with each other and communicate about parallel pricing. For example, Millennium's Mr. Zwicker commented that Intertech conferences were a "great place for . . . side meetings," and DuPont's Mr. Edwards indicated in an email that while his written materials for Intertech were "fairly cautious," he was "more direct" in his verbal presentations. *See* Johnson Decl. ¶¶ 25-26 & Exhs. 22-23, ECF 122-45, ECF 122-46. Jim Fisher, an industry consultant, testified that at the 2005 Intertech conference the titanium dioxide producers "discussed the need to take advantage of tight market conditions to improve pricing." *See* Johnson Decl. ¶ 28 & Exh. 25 at TRONOX0000089, ECF 122-48. Mr. Fisher's statement would appear to carry significant weight given that he appears to have "communicated contemporaneously with people from Kronos, Millennium, Huntsman, and DuPont" during the conspiracy period. *See* *Valspar, 873 F.3d at 215*. Indeed, Home Depot suggests **[*31]** that Mr. Fisher may have been used as an intermediary by the alleged conspirators.

Defendants contend that Home Depot's evidence does not show any "direct communications about pricing between any alleged conspirators," and "falls far short" of tending to exclude the possibility of independent action. Reply at 9, ECF 133. While the Court agrees that the evidence does not establish direct communications about pricing, the Court also agrees with the *Haley Paint* court that evidence regarding the alleged conspirators' communications, is "the kind of circumstantial evidence that, when viewed in conjunction with the massive record in this case, could lead a jury to reasonably infer a conspiracy in restraint of trade." *Haley Paint, 959 F. Supp. 2d at 830*.

vi. Conclusion

Viewing this record as a whole, the Court concludes that, under Ninth Circuit standards as articulated herein, Home Depot has presented evidence from which a reasonable trier of fact could conclude that the thirty-one parallel price increase announcements were the product of a price-fixing conspiracy rather than lawful market activity to be expected in an oligopoly. In reaching that conclusion, the Court has considered the context and plausibility of Home Depot's **[*32]** claim; the startling number of parallel price announcements during the alleged conspiracy period in contrast to the pre-conspiracy period; the testimony of the alleged conspirators' representatives which appear to negate a follow-the-leader explanation for the parallel price announcements; the alleged conspirator's "co-opertition," rather than competition, with each other; and the internal email evidence implying a traditional conspiracy. This evidence renders the inference of a price-fixing conspiracy reasonable, even considering the nature of an oligopolistic market and competing inferences of independent action. *See* *Stanislaus, 803 F.3d at 1089*.

This Court's view of the evidence was shared by the *Valspar* dissent, which — albeit under different legal standards — concluded that the question of whether Defendants' parallel conduct "was a lawful coincidence or an unlawful agreement should be decided by a jury." *Valspar, 873 F.3d at 203*; *see also* Haley Paint, 959 F. Supp. 2d at 830 ("Having carefully considered the sheer number of parallel price increase announcements, the structure of the titanium dioxide industry, the industry crisis in the decade before the Class Period, the Defendants' alleged acts against their self-interest, and the myriad non-economic evidence implying **[*33]** a conspiracy, this Court finds that the Plaintiffs put forward sufficient evidence tending to exclude the possibility of independent action.").

III. ORDER

(1) Defendants' motion for summary judgment is DENIED; and

(2) This order shall be conditionally filed under seal. The parties shall meet and confer regarding proposed redactions to the order before it is filed in the public docket, and shall submit agreed-upon proposed redactions to the Court on or before August 2, 2019.

Dated: July 22, 2019

/s/ Beth Labson Freeman

BETH LABSON FREEMAN

United States District Judge

Presque Isle Colon & Rectal Surgery v. Highmark Health

United States District Court for the Western District of Pennsylvania

July 22, 2019, Decided; July 22, 2019, Filed

Civil Action No. 17-122

Reporter

391 F. Supp. 3d 485 *; 2019 U.S. Dist. LEXIS 121755 **; 2019-2 Trade Cas. (CCH) P80,859; 2019 WL 3308209

PRESQUE ISLE COLON AND RECTAL SURGERY, on Behalf of Itself and All Others Similarly Situated, Plaintiff v. HIGHMARK HEALTH, HIGHMARK, INC. f/k/a HIGHMARK HEALTH SERVICES, and HIGHMARK CHOICE COMPANY f/k/a KEYSTONE HEALTH PLAN WEST, INC., Defendants.

Core Terms

antitrust, anticompetitive conduct, amended complaint, allegations, patients, products, motion to dismiss, cause of action, anticompetitive, reimbursement rate, unjust enrichment, reimbursements, outpatient, consumers, counts, anti trust law, physician's services, common law, reformation, pleadings, health insurance, contends, rates, buyers, fair dealing, monopsonization, providers, insured, parties, audits

Counsel: **[**1]** For PRESQUE ISLE COLON AND RECTAL SURGERY, Plaintiff: Kenneth J. Grunfeld, LEAD ATTORNEY, Golomb & Honik, P.C., Philadelphia, PA.

For HIGHMARK HEALTH, HIGHMARK INC., formerly known as HIGHMARK HEALTH SERVICES, HIGHMARK CHOICE COMPANY, formerly known as KEYSTONE HEALTH PLAN WEST, INC., Defendants: Daniel I. Booker, LEAD ATTORNEY, Courtney B. Averbach, William J. Sheridan, Reed Smith LLP, Pittsburgh, PA.

Judges: BARBARA J. ROTHSTEIN, UNITED STATES DISTRICT JUDGE.

Opinion by: BARBARA J. ROTHSTEIN

Opinion

[*491] ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

The matter before the Court is Defendants Highmark Health, Highmark Inc., and Highmark Choice Company's (collectively "Highmark") second motion to dismiss. Plaintiff Presque Isle Colon and Rectal Surgery ("Plaintiff") instituted this action against Highmark alleging in its original complaint that Highmark violated *Sections 1* and *2* of the Sherman Antitrust Act as well as Pennsylvania's antitrust laws, breached the parties' contract and implied covenant of good faith and fair dealing, and was unjustly enriched. Dkt. No. 1. Highmark then moved to dismiss Plaintiff's claims, arguing that Plaintiff failed to sufficiently allege a violation of the **[**2]** federal antitrust laws. Dkt. No. 17. This Court agreed with Highmark and dismissed largely for failure to sufficiently set forth a federal antitrust violation but granted plaintiff leave to amend its federal law claims and replead its pendent state and common law claims. Dkt. No. 35.

Plaintiff filed an amended complaint on December 3, 2018. Dkt. No. 42. In it, Plaintiff reasserts its claims as to Highmark's violations of the Sherman Antitrust Act, Pennsylvania's antitrust laws, and Pennsylvania common law causes of action including unjust enrichment, breach of contract and covenant of good faith and fair dealing, and reformation or rescission. Dkt. No. 42. Currently before the Court is Highmark's motion to dismiss the amended complaint in its entirety, pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, arguing that the amended complaint still fails to state a claim on which relief can be granted. Dkt. No. 47.

Having reviewed the motion to dismiss the amended complaint, the opposition thereto, the record of the case, and the relevant legal authorities, the Court will GRANT in part and DENY in part the motion. Specifically, the Court will grant the motion as to Plaintiff's *Section 1* and **[*492]** related Pennsylvania common law claims, as well **[**3]** as its claims of unjust enrichment and breach of contract. The Court will deny, however, the motion as to Plaintiff's *Section 2* and related Pennsylvania common law claims, as well as its claims for breach of implied covenant of good faith and fair dealing and reformation and rescission. The Court's reasoning follows:

II. BACKGROUND

The Court assumes familiarity with the facts of this case, as described in the Court's September 6, 2018 Memorandum Order granting the Highmark's first motion to dismiss for failure to state a claim. Dkt. No. 17. For clarity's sake, however, the Court will reiterate some of the salient facts, as pled in the amended complaint. Dkt. No. 42.

A. The Parties

Plaintiff operates an independent physician-run medical practice organized under the laws of Pennsylvania and located in Erie County, Pennsylvania, part of the Erie County Metropolitan Statistical Area ("MSA"). Dkt. No. 42 at ¶ 14.[1]

Highmark is comprised of three Pennsylvania corporations that provide health insurance coverage to its members under various healthcare plans, including PPOs, HMOs, and ACA[2] - compliant private health insurance plans. *Id.* at ¶ 15-17; Dkt. No. 47 at 3. In the healthcare industry, medical service **[**4]** providers, such as Plaintiff, are considered sellers because while they provide care to patients they sell their services to insurers, like Highmark, in exchange for contractually determined "reimbursements."[3] Dkt. No. 35 at 2-3 (internal citations removed). Insurers, such as Highmark, are then considered buyers of physician services. *Id.* (internal citations removed).

Highmark is one of the largest health insurers in the Commonwealth of Pennsylvania, with "more than 4 million covered lives." Dkt. No. 42 at ¶¶ 2, 42; Dkt. No 47 at 3 n.3. Plaintiff alleges that Highmark is the "dominant" health insurer in the region, insuring at least 65% of health insurance enrollees in Western Pennsylvania[4] and far in

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[1] The instant case is a putative class action in which Plaintiff purports to represent a proposed class comprised of all "independent physicians and/or independent physician practices" alternatively in the Erie County MSA or the 29-county Western Pennsylvania area who treat patients covered by a "Highmark health insurance product." Dkt. No. 42 at ¶¶ 1, 67.

[2] *Patient Protection and Affordable Care Act, Pub.L. No. 111-148, 124 Stat. 119 (2010)* (the "ACA") (codified at *42 U.S.C. § 18001 et seq.*).

[3] Reimbursements are the payments insurers give to providers to cover services rendered to the insurers' subscribers. *West Penn, 627 F.3d at 92*.

[4] According to Plaintiff, Highmark defines Western Pennsylvania to include Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Cameron, part of Centre, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forest, Greene, Huntingdon, Indiana, Jefferson, Lawrence, McKean, Mercer, Potter, Somerset, Venango, Warren, Washington, and Westmoreland counties. Dkt. No. 42 at ¶ 2 n.1.

excess of 65% of enrollees in the Erie County MSA. Dkt. No. 42 at ¶¶ 2, 43. Additionally, Plaintiff contends that Highmark "controls commensurate shares of reimbursements" to independent physicians in both the Erie County MSA and Western Pennsylvania based on the assertion that it is "responsible for 'buying'" at least 65% of the outpatient physician services to insured patients in Western Pennsylvania and "well in excess" of 65-70% of the same services in the Erie County MSA. *Id.* at ¶¶ **[**5]** 3, 43. Thus, Plaintiff asserts, "Highmark is both the largest health **[*493]** insurer *and* the largest buyer of outpatient physician services in these areas." *Id.* at ¶ 3 (emphasis in original).

In addition to its health insurance business, Highmark recently entered the outpatient physician services market by acquiring several hospitals and other healthcare facilities. *Id.* at ¶¶ 4, 46. Highmark now controls St. Vincent Hospital, which Plaintiff explains is the "largest hospital system in Erie." *Id.* at ¶ 4. Plaintiff also reports that Highmark has announced plans to build or operate at least four other facilities in Pennsylvania. *Id.* at ¶ 4 n.2.

In 2011, Plaintiff and Highmark signed a Professional (or Participating or Preferred) Provider Agreement ("PPA"), in which Plaintiff agreed to render medical care to Highmark-covered patients and Highmark, in turn, agreed to pay, or "reimburse," Plaintiff for its services. Dkt. No. 42-1; *see also* Dkt. No. 42 at ¶¶ 14, 59-61.[5] The PPA governs the reimbursement terms between the parties and includes two relevant clauses to the instant case. First, the PPA provides for a variable reimbursement rate, in which "allowances [paid to specialist] may be reviewed and **[**6]** adjusted from time to time during the Term." Dkt. No. 42-1 at Att. 6.1 § 4.2; *see also* Dkt. No. 42 at ¶ 60. Second, the PPA contains an "all products" clause, through which Plaintiff agreed to treat patients enrolled in any insurance product offered by Highmark (the "All Products Clause"). Dkt. No. 42-1 at § 4.1; *see also* Dkt. No. 42 at ¶¶ 13, 61.[6]

B. The Current Dispute and The Court's Previous Order granting Motion to Dismiss

Relations between the parties deteriorated when Highmark implemented a 4.5% "across-the-board" reimbursement rate cut effective April 1, 2016, for outpatient services rendered to patients covered by one of Highmark's ACA-compliant healthcare plans. Dkt. No. 42 at ¶¶ 10, 65, 164. Plaintiff instituted the instant action on May 11, 2017, alleging antitrust violations of both *Section 1*, *15 U.S.C. § 1*, and *Section 2*, *id.* at *§ 2*, of the Sherman Antitrust Act, as well as related Pennsylvania common law causes of action. Dkt. No. 1. Plaintiff's original complaint focused on the PPA, alleging that it constitutes an unreasonable restraint of trade under *Section 1*, Dkt. No. 1 at ¶¶ 111-12, 126-27, and that Highmark maintains and abuses monopsony[7] **[*494]** power by combining the reimbursement rate cuts with the All Products Clause to "forc[e] upon **[**7]** independent physician" an "anticompetitive scheme." Dkt. No. 35 at 6 (internal quotations and citations removed). As stated above, Highmark moved to dismiss the original complaint for failure to state a claim, which this Court granted in a written decision dated September 6, 2018 ("hereinafter, "the September Order"). Dkt. Nos. 17 and 35.

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[5] The PPA is a standard form contract drafted by Highmark. Plaintiff contends that Highmark does not negotiate any of its terms, including reimbursement rates. Dkt. No. 42 at ¶¶ 59-60.

[6] In its entirety, the All Products Clause reads: **Network Product Participation**. Provider must and, where applicable, must ensure that all Practitioners participate in all Network Products covered under this Agreement, as described by [Keystone Health Plan West] and so long as Provider and Practitioners, as applicable, meet all required Participation Criteria applicable to a Network Product. Provider's and each Practitioner's participation in a Network Product will be subject to all terms and conditions contained in this Agreement and, as applicable, related attachments hereto. Provider and [Keystone Health Plan West] agree that such participation is not exclusive and that other Providers and Practitioners may also participate as designated by [Keystone Health Plan West].

[7] A monopsony is a monopoly, but on the "buy side" of the market, in which one consumer is able to dictate conditions in the given market based on its dominant position. *See* *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 320, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007)* ("a monopsony is to the buy side of the market what a monopoly is to the sell side and is sometimes colloquially called a 'buyer's monopoly"). As mentioned previously, health insurers, such as Highmark, are considered "buyers" of doctors' services. Dkt. 35 at 7 (citing *Kartell, 749 F.2d at 924*.

The September Order focused on Plaintiff's *Section 1* and *2* claims. In regard to the *Section 1* claim, the Court held that Plaintiff failed to allege an "agreement" which is required to satisfy Section l's prohibition against "*agreement*[s] that unreasonable restrain trade." Dkt. No. 35 at 9 (emphasis in original). With respect to the *Section 2* claims, the Court held that Plaintiff failed to satisfy both the requirements of antitrust injury and the substantive requirements of *Section 2*, which prohibits "unlawful monopsony" and attempted monopsony. *Id.* at 9-16. This Court's reasoning rested on the conclusion that a unilateral depression of reimbursement rates "does not, on its own, run afoul of *§ 2*." *Id.* at 10. As this Court stated, "absent 'special circumstances, where, for example, a price is below incremental cost,' there is no harm *to the market, i.e.*, there is no 'antitrust injury." *Id.* at 11 (emphasis in original) **[**8]** (quoting *Kartell v. Blue Shield of Massachusetts, 749 F.2d 922, 927 (1st Cir. 1984)*, *cert. denied*, *471 U.S. 1029, 105 S. Ct. 2040, 105 S. Ct. 2049 (1985))*; *see also* *W Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 103 (3d Cir. 2010)* ("*West Penn*")). Therefore, this Court dismissed the complaint with leave to amend.

As both parties have noted in their briefing, *see, e.g.*, Dkt. No. 48 at 1-2, the Court invited Plaintiff in its repleading to address how (1) Highmark's acquisition of Saint Vincent enhanced its unlawful monopsony as a health insurer and (2) Highmark treats independent physicians differently from Highmark-acquired hospitals, Dkt. No. 12-13. In addition, this Court instructed Plaintiff to provide a "breakdown of [its] insured, non-insured, and ACA-insured patients," as well as additional business-related information, necessary to support a predatory pricing claim. *Id.* at 13-14.

C. Amended Complaint and Motion to Dismiss

Plaintiff has now provided an amended complaint. Dkt. No. 42. Plaintiff still advances causes of action under *Section 1* of the Sherman Antitrust Act (Counts 5 and 7) and related Pennsylvania common law antitrust claims (Counts 6 and 8); *Section 2* of the Sherman Antitrust Act (Counts 1 and 3) and related Pennsylvania common law antitrust claims (Counts 2 and 4); and Pennsylvania common law causes of action for Unjust Enrichment (Count 9), Breach of Contract and Implied Covenant of Good **[**9]** Faith and Fair Dealing (Count 10), and Reformation or Recission (Count 11).

The most immediate difference between the original complaint and the amended complaint is that Plaintiff has refashioned its *Section 1* claim as an "unlawful tying" claim, in which it claims Highmark restrained trade by "unlawfully tying" reimbursements "under any of its health insurance products to the reimbursement of the same under any of its other health insurance product" through the All Products Clause. *Id.* at ¶ 119.[8] Additionally, Plaintiff **[*495]** revised large sections of its *Section 2*-related allegations in an attempt to address some of this Court's concerns highlighted in the September Order.

Plaintiff now contends that Highmark's reduction in reimbursements rates "has led, and will continue to lead," to a reduction in the quantity and quality of outpatient physician services, including colorectal services in both the Erie County MSA and Western Pennsylvania. Dkt. No. 42 at ¶ 5. Specifically, Plaintiff claims that "predatorily reduced reimbursement rates to below independent physicians' costs" will result in such physicians going out of business, reducing the quantity of such services available to patients, and that Highmark has not imposed the same rate reductions **[**10]** on physicians working at Highmark-controlled facilities. *Id.* at ¶ 6. Further, according to Plaintiff, rate reductions will also result in a degradation of quality of services available to patients as independent physicians will "cease performing better, higher-quality procedures with favorable patient outcomes." *Id.* at ¶ 7. Plaintiff also alleges that at the same time Highmark cut reimbursement rates, it simultaneously raised premium rates for enrollees, for example increasing rates for Highmark ACA plans between 20.1%-21.5% in 2016 and 48.1%, "or more," in 2017. *Id.* at 9-10, 44.

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[8] The Court originally dismissed Plaintiff's *Section 1* claim with prejudice. Dkt. No. 35 at 16. Plaintiff then filed a motion for reconsideration its *Section 1* claim under a tying theory. Dkt. 38. After full briefing and consideration, the Court granted Plaintiff's motion. Dkt. No. 41.

In addition to "predatorily depressed reimbursement rates," Plaintiff now adds "other anticompetitive conduct," which it contends is "designed to raise [Plaintiff s] costs, harm their [*sic*] business[], or impede their *[sic]* ability to compete against Highmark-controlled outpatient physician services." Dkt. No. 42 at ¶ 12. This alleged conduct includes (1) an "extraordinary number of so-called 'audits,'" which Plaintiff contends are pretextual attempts to "claw-back" fairly earned reimbursements and interfere with quality of care, (2) steering patients away from Plaintiff in favor of Highmark's own outpatient services, and **[**11]** (3) instituting procedure codes that "result in gross inefficiencies," including forcing Plaintiff to perform multiple procedures where it could perform just one, resulting in "inconvenience and burden on [Plaintiff's] patients." Dkt. No. 42 at ¶¶ 12, 49-58. Plaintiff contends that independent physicians are unable to avoid this anticompetitive conduct based on the All Products Clause, which forces physicians "to accept reimbursement from *all* of Highmark's health insurance products or none at all." *Id.* at ¶ 13. Independent physicians, according to Plaintiff, cannot forgo treating Highmark patients because of the insurers' dominance in the relevant markets. *Id.* at ¶¶ 13, 59-66. As a result, Plaintiff claims it has "lost approximately $200,000 to $300,000 annually." *Id.* at ¶¶ 11, 47.

As stated above, Highmark moves to dismiss the amended complaint pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, arguing that it still fails to state a claim upon which relief can be granted.

III. LEGAL STANDARD

A *Rule 12(b)(6)* motion tests the legal sufficiency of claims asserted in a complaint. To survive such a motion, a plaintiff must plead "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. A claim is **[**12]** "facially plausible" when the plaintiff pleads sufficient facts for a court to **[*496]** "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*. In determining whether a complaint "states a plausible claim for relief," the reviewing court must "draw on its judicial experience and common sense." *Id. at 679*.

When considering a motion to dismiss, a court must "'accept all factual allegations as true and construe the complaint in the light most favorable to the plaintiff.' *Estate of Roman v. City of Newark, 914 F.3d 789, 795 (3d Cir. 2019)* (quoting *Warren Gen. Hosp. v. Amgen Inc., 643 F.3d 77, 84 (3d Cir. 2011))*. At the same time, the court is "not compelled to accept 'unsupported conclusions and unwarranted inferences.' *Baraka v. McGreevey, 481 F.3d 187, 195 (3d Cir. 2007)* (quoting *Schuylkill Energy Res., Inc. v. Pennsylvania Power & Light Co., 113 F.3d 405, 417 (3d Cir. 1997))*. Nor is it compelled to accept "'a legal conclusion couched as a factual allegation.' *Id.* (quoting *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986))*.

IV. ANALYSIS

The central thrust of Highmark's renewed motion to dismiss is that Plaintiff's amended complaint is long on conclusory statements and short on factual allegations. *See, e.g.*, Dkt. No. 47 at 2 ("Plaintiffs Amended Complaint fails to state an antitrust claim because, among its generalized grievances, there are no allegations of reduced competition that increase prices or harm consumers."). Highmark is largely correct. Plaintiffs amended complaint contains many assertions **[**13]** regarding the degradation of quality and quantity of outpatient physician services in the relevant markets and the harm that "has and will result," Dkt. No. 42 at ¶ 6, but provides little by way of specific factual allegations regarding the alleged harm to the market in general (*e.g.* other independent physician practices) or patients. However, construing the amended complaint most favorably to Plaintiff as this Court is required to do at this nascent stage of the litigation, as is discussed in detail below, the Court concludes that most of Plaintiffs claims survive Highmark's motion to dismiss.

Highmark's central argument is that the amended complaint fails to adequately plead an antitrust injury.[9] Thus, the Court will begin there.[10]

A. Antitrust Injury

Section 4 of the Clayton Act enables a private plaintiff "who shall be injured in his [or her] business or property by reason of anything forbidden in the antitrust laws" to sue for treble damages. **[*497]** *15 U.S.C. § 15*. "While the statutory language of *[Section 4*] is broad," the Supreme Court and the Third Circuit have recognized that "plaintiffs must also have 'antitrust standing'" *Lifewatch Servs. Inc. v. Highmark Inc., 902 F.3d 323, 341 (3d Cir. 2018)* (quoting *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc., 806 F.3d 162, 171 (3d Cir. 2015)*. Antitrust standing differs from Article III constitutional standing **[**14]** in that it is "prudential." *Phila. Taxi Ass 'n, Inc v. Uber Techs., Inc., 886 F.3d 332, 338 (3d Cir.)*, *cert. denied*, *139 S. Ct. 211, 202 L. Ed. 2d 126 (2018)* ("*Phila. Taxi"); Ethypharm S.A. France v. Abbott Labs., 707 F.3d 223, 232 (3d Cir. 2013)*. "It does not affect the subject matter jurisdiction of the court, as Article III standing does, but prevents a plaintiff from recovering under the antitrust laws." *Ethypharm S.A. France, 707 F.3d at 232*.

Antitrust injury, in turn, is a "necessary but insufficient condition of antitrust standing." *Barton & Pittinos, Inc. v. SmithKline Beecham Corp., 118 F.3d 178, 182 (3d Cir. 1997)* (citing *In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1166 (3d Cir. 1993))*; *see also* *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 110 n.5, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)* ("A showing of antitrust injury is necessary, but not always sufficient, to establish standing under *§ 4*, because a party may have suffered antitrust injury but may not be a proper plaintiff under *§ 4* for other reasons."). Establishment of an antitrust injury is meant to advance the goals of ***antitrust law***—protect[ing] *competition*, not *competitors*," *Phila. Taxi, 886 F.3d at 338* (emphasis is original)—by ensuring "that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place," *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*; *West Penn, 627 F.3d at 101*.

To establish antitrust injury, a "plaintiff must do more than show that it would have been better off absent the violation." *West Penn, 627 F.3d at 101* (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. Rather, a plaintiff must prove that it suffered an "injury of the type the antitrust laws were intended to prevent" and that the injury "flows from that which makes defendants' **[**15]** acts unlawful." *Brunswick Corp., 429 U.S. at 489*; *Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 76 (3d Cir. 2010)* ("the injury prong requires: (1) harm of the type the antitrust laws were intended to prevent; and (2) an injury to the plaintiff which flows from that which makes defendant's acts unlawful") (internal quotations and citation removed). Plaintiff bears the burden of this showing. *See* *Phila. Taxi, 886 F.3d at 343* ("the plaintiff must prove . . .").

At this early stage, the pleading standard is permissive; indeed, as the Third Circuit has recognized, "[t]he existence of antitrust injury is not typically resolved through motions to dismiss." *Schuylkill Energy Res., 113 F.3d at 417*)

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[9] "Antitrust injury" is but one element of "antitrust standing," which involves an analysis of "(1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiffs alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages." *In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144,1165-66 (3d Cir. 1993)*. Highmark has challenged only the sufficiency of Plaintiff's showing antitrust injury, and no other element of antitrust standing. *See* Dkt. No. 48 at 7 n.1; *see generally* Dkt. No. 47 at 6-12.

[10] The Third Circuit has left unresolved which to address first, "an antitrust violation or an antitrust injury." *Phila. Taxi, 886 F.3d at 338*. As such, the Court sees no issue in starting with the prudential antitrust standing issue before proceeding to the substantive claims of *Section 1* and *2*.

(citing Brader v. Allegheny Gen. Hosp., 64 F.3d 869, 876 (3d Cir. 1995). An antitrust plaintiff is only required to "allege facts capable of supporting a finding or inference that the purported anticompetitive conduct produced" the purported harm. In re Remicade Antitrust Ling., 345 F. Supp. 3d 566, 577 (E.D. Pa. 2018) (quoting In re EpePen ((Epinephrine Injection, USP) Mktg., Sales Practices and Antitrust Litig., No. 17-2785, 2017 U.S. Dist. LEXIS 209710, 2017 WL 6524839, at *15 (D. Kan. Dec. 21, 2017)).

Highmark claims that Plaintiff has failed to meet even this low standard in its amended complaint. It moves the Court to **[*498]** dismiss based largely on the contention that the Plaintiff has advanced only "purely conclusory" allegations of reduced output and quality and that these allegations are "unsupported by any factual allegations" showing harm to competition or consumers. Dkt. No. 47 at 7. Further, it alleges that Plaintiff has failed to adequately plead injury stemming **[**16]** from anticompetitive conduct based on a summary claim of a "$200-300,000 annual loss." *See* Dkt. No. 47 at 10-11.

Plaintiff replies that it has sufficiently alleged antitrust injury based on pleading that Highmark's anticompetitive conduct, including predatorily low reimbursement rates for outpatient services, unnecessary audits, unfair steering of patients away from independent physicians, and inefficient procedure codes and requirements, leaves patients with "no choice but to turn to inferior, more costly services" and independent physicians with "no choice but to endure Highmark's" anticompetitive actions or go out of business.[11] Dkt. No. 48 at 2, 4-6. For the reasons stated below, the Court finds that Plaintiff has alleged a sufficient antitrust injury to establish its antitrust standing.

1. Plaintiff Pleads Injury of the Type the Antitrust Laws Were Intended to Prevent

To establish an antitrust injury, a plaintiff must allege an injury that is "the type the antitrust laws were intended to prevent." Brunswick Corp., 429 U.S. at 489. This inquiry involves identifying the alleged anticompetitive conduct and determining whether that conduct injured "consumers or [] competition in general." *See* Phila. Taxi, 886 F.3d at 344; *see also* id. at 339 ("[a]llegations **[**17]** of purportedly anticompetitive conduct are meritless if those acts would cause no deleterious effect on competition"). To determine whether conduct is anticompetitive, the court must look at the conduct "as a whole rather than considering each aspect in isolation." LePage's, Inc. v. 3M, 324 F.3d 141, 162 (3d Cir. 2003) (en banc) (citing Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)); *see also* Phila. Taxi, 886 F.3d at 339. From there, the alleged injury must be "attributable to an anti-competitive aspect of the practice under scrutiny." Atl. Richfield Co., 495 U.S. at 334; West Penn, 627 F.3d at 101. As such, the court must "examine the causal connection between the purportedly unlawful conduct and the injury" claimed to the market and consumers. Lifewatch Servs. Inc., 902 F.3d at 342 (quoting City of Pittsburgh v. W Penn Power Co., 147 F.3d 256, 265 (3d Cir. 1998)).

Highmark contends that Plaintiff has failed to allege "a single example of an actual reduction in the delivery of outpatient physician services or any reduction in competition," Dkt. No. 47 at 7, or harm to consumers, *id.* at 9-10. For example, Highland contests that patients will be forced to "turn to inferior, more costly services from Highmark-controlled facilities," Dkt. No. 48 at 2, by claiming that there are "no factual allegations . . . to suggest that patient choice has been reduced or that St. Vincent Hospital's services are inferior to Plaintiff's [services]," Dkt. No. 49 at 5. In sum, the thrust **[**18]** of Highmark's arguments is that Plaintiff has still failed to allege anticompetitive conduct and that such conduct **[*499]** led to harm to competition or consumers.

Plaintiff replies that the amended complaint adequately alleges antitrust injury based on the addition of further alleged anticompetitive conduct, which supplemented Plaintiff's original complaint of predatorily low reimbursement rates, including unnecessary audits, unfair steering, and inefficient procedure codes and requirements. Dkt. No. 48 at 2,4-6.

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[11] Specifically, Plaintiff contends that Highland has attempted "multiple times" to buy out Plaintiff's practice and get Plaintiff to "join Highmark's own system at St. Vincent Hospital." Dkt. No. 42 at ¶ 48. According to Plaintiff, this behavior constitutes a pattern in which "Highmark aims to absorb its rivals in the outpatient patient services market, or put them out of business." Dkt. No. 48 at 4.

As it is the complaint that must "state[] a plausible claim for relief," the Court examines the amended complaint critically to see if it has met the minimal standard necessary to survive a motion to dismiss. *Iqbal, 556 U.S. at 679* (citing *Twombly, 550 U.S. at 556*). The central contention of the amended complaint remains Plaintiff's allegations of predatorily low reimbursement rates and independent physicians' inability to escape or bargain around such cuts based on Highmark's claimed monopsony. As the Court previously held in the September Order, Plaintiff's allegations regarding rate reductions, even when coupled with the All Products Clause, do not suffice to establish antitrust injury or a substantive claim under *Section 2*. *See* Dkt. 35 at 10-14 (holding **[**19]** that there is no "harm *to the market*" when insurers, even with monopsony power, "contractually extract, and then pay, noncompetitive prices to medical providers") (citing *Kartell, 749 F.2d at 927*)) (emphasis in original).

In its amended complaint, however, Plaintiff has added substantive claims of additional anticompetitive conduct that it alleges has and will continue to cause adverse effects on competition and consumers. First, Plaintiff claims it and other independent physicians have been subjected to unnecessary audits as a means to "claw-back" previously disbursed reimbursements that "interfere with treatment decisions." Dkt. No. 42 at ¶¶ 12,49-50. Plaintiff claims that Highmark "does not subject physicians working at Highmark-controlled facilities to the same scrutiny." *Id.* at ¶ 12. These audits hurt independent physicians by "rais[ing] [physicians'] costs" and "diverting resources away from providing outpatient colorectal services to patients." *Id.* at ¶ 50.

Second, Plaintiff alleges that Highmark subjects independent physicians to inefficient procedure codes and requirements. Dkt. No. 42 at ¶ 51. These procedure codes have forced Plaintiff to schedule patients for two different **[**20]** "procedures," where one would suffice, subjecting patients to "inconvenience and burden" not to mention any pain and discomfort resultant from the procedures themselves. *Id.*

Finally, Plaintiff alleges that Highmark uses its dominance and market presences to "steer" patients away from independent physicians to its own facility. *See* Dkt. No. 42 at ¶ 12, 46 ("Highmark seeks to . . . steer patients away from independent physicians and to Highmark-controlled providers"), ¶¶ 53-57 (recounting the experiences of patients A through D, who report to Plaintiff attempts by hospital staff at Highland facilities to steer them away from care at independent physicians). "This includes," according to Plaintiff, allegations that Highmark has "misrepresent[ed]" to patients that Plaintiff's physicians do not have admitting privileges at St. Vincent, when they do, and that patients must use St. Vincent physicians only. *Id.* at ¶ 53.

When these allegations are taken in concert with Plaintiff's allegations of predatory reimbursement reductions, market dominance, and alleged coercion through the use of the All Product Clause, a facially plausible pleading emerges. *See* *Iqbal, 556 U.S. at 678*. **[*500]** First, there is plausible harm to competition. Plaintiff **[**21]** has alleged that Highmark uses its dominance on the "buy side" of the market, including insisting on unnecessary audits, inefficient procedure codes, and predatorily low reimbursement rates, to drive up the costs for and lower the income of independent physicians. All the while, according to Plaintiff, Highmark does not subject its own facilities to such treatment. And, according to Plaintiff, independent physicians "cannot avoid the anticompetitive or predatory effects" of Highmark's actions based on its market dominance, and its non-negotiable insistence on the All Products Clause. Dkt. No. 42 at ¶ 12. "This has and will result," according to Plaintiff, "in independent physicians providing fewer outpatient physician services, or going out of business entirely." *Id.* at ¶ 6. Additionally, "independent physicians have lost substantial money as a result of Highmark's predatory reimbursement rates and related practices." *Id.* at ¶ 11. In fact, this is the entire point according to Plaintiff, as Highland's dominance on the insurance end of the market allows it to unfairly compete on the physician services end of the market, driving independent physicians into the Hobson's choice between absorption or going out of business. **[**22]** Thus, these allegations are enough to establish anticompetitive conduct in differentiated treatment meant to harm competition on the provider side of the market by utilizing monopsony power on the insurance side of the market.

Meanwhile, Plaintiff has also plausibly alleged harm to patients. Through weakening competition between independent physicians and Highmark facilities by exploiting its position as buyers of medical services, Plaintiff alleges that patients have been subjected to a "reduction in the quantity [and] a degradation in the quality of outpatient physician services." Dkt. No. 42 at ¶ 5. This includes patients being subjected to unnecessary procedures, increases in premiums, and the confusion and frustration that potentially arises when being steered away from one's preferred physician based on what insurance allegedly will and will not cover.

These allegations, taken as true and as a whole as the Court must, are sufficient to adequately plead at the 12(b)(6) stage that Highmark has engaged in anticompetitive conduct and that the alleged conduct has caused harm to competition and consumers.

2. Plaintiff Pleads Injury Which Flowed from Anticompetitive Conduct

As stated above, **[**23]** it is not sufficient for Plaintiff to simply allege that there has been anticompetitive conduct that caused harm to the market and consumers. Rather, Plaintiff must also show that it was injured by the anticompetitive conduct and that the injury "flows from that which makes defendants' acts unlawful." *Id.*

Highmark contends that Plaintiff has failed to sufficiently plead this prong of antitrust injury in the amended complaint. It disputes the amended complaint's contention that Plaintiff "has lost approximately $200,000 to $300,000 annually," Dkt. No. 42 at ¶¶ 11, 47, on two levels. First, Highmark asserts that the loss "is not an antitrust injury because it does not arise" from conduct the type of which the antitrust laws were intended to prevent. Dkt. 47 at 10-11. Second, it attacks the figure directly by asserting that the alleged losses are insufficient because they "say[] nothing about whether and to what extent those losses relate to reimbursements from Highmark or other payors, how Highmark's reimbursements relate to Plaintiff's costs," *etc.* Dkt. 49 at 3-4. Plaintiff simply responds that it has alleged **[*501]** proper injury based on the claimed losses of "$200,000 to $300,000 annually **[**24]** due to Highmark's predatory rates." Dkt. No. 48 at 5.

While Plaintiff's pleading regarding injury stemming from anticompetitive conduct is barebones, it is sufficient to survive this stage of the pleadings. Plaintiff has alleged an injury, "$200,000 to $300,000 annually," resulting from a "rates drop below its costs for numerous procedures" attributable to "predatorily depressed reimbursement rates." Dkt. No. 42 at ¶ 47. Plaintiff has also alleged that Highmark's anticompetitive conduct, in the form of unnecessary audits and inefficient procedure codes "raise its costs" and "divert[] resources away from providing" patient care. *Id.* at ¶ 50. This is a sufficient allegation of losses stemming from anticompetitive conduct.

As such, Plaintiff has established a showing of antitrust injury, which comports with the goals of ***antitrust law***. *See Iqbal, 556 U.S. at 678*. In essence, the inquiry into antitrust standing and antitrust injury is a question of whether the right plaintiff is before a court to assert a private cause of action under the antitrust laws. *See Associated Gen. Contractors of Cal., Inc. v. Cal. Council of Carpenters, 459 U.S. 519, 535 n.31, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* (antitrust standing differs from the constitutional standing requirement of injury in fact in that a court "must make a further determination whether the **[**25]** plaintiff is a proper party to bring a private antitrust action"); *Phila. Taxi, 886 F.3d at 343*. Plaintiff claims that it, and the putative class it represents, are both direct competitors to and at the mercy of Highmark based on Highmark's unique position as both dominant buyer and competitive seller in the relevant market. Having reviewed the pleadings and relevant case law, the Court determines that at this stage in litigation Plaintiff has demonstrated that it is the correct plaintiff to advance an antitrust claim.

Having so determined, the Court will proceed to examine Plaintiff's substantive claims under *Sections 1* and *2* of the Sherman Antitrust Act.

B. *Section 2* of the Sherman Antitrust Act

In counts one and three of the amended complaint, Plaintiff charges Highmark with unlawful monopsonization and unlawful attempted monopsonization in violation of *Section 2* of the Sherman Antitrust Act. Dkt. No. 42 at ¶¶ 81-90, 100-08. Similarly, Plaintiff charges Highmark with unlawful monopsonization and unlawful attempted monopsonization in violation of Pennsylvania common law in counts two and four. *Id.* at ¶¶ 90-99, 109-17. As these causes of action contain significant overlap, the Court will address them together. *See Inter Vest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 158 n.8 (3d Cir. 2003)* ("[b]ecause Pennsylvania **[**26]** has no separate antitrust statute, [Plaintiff]'s [Pennsylvania antitrust] 'allegation rises or falls with plaintiff's federal antitrust claims'") (quoting *Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1014 (3d Cir.1994))*.

1. Count 1: Unlawful Monopsonization in Violation of Section 2

Section 2 of the Sherman Antitrust Act provides that it is illegal for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 2*.[12] In order to establish a claim **[*502]** under *Section 2*, a plaintiff must allege "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *LePage's Inc., 324 F.3d at 149* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*.

In its motion to dismiss, Highmark claims that Plaintiff fails to adequately plead the necessary elements for a claim under *Section 2* based largely on the same complaint of "conclusory" anticompetitive conduct "unconnected to any antitrust injury." Dkt. No. 47 at 13. Plaintiff's pleading, according to Highmark, fails to allege the second required element of willful acquisition or maintenance of power **[**27]** because, "[a]side from reduced rates" which the Court previously determined could not sustain a *Section 2* claim alone under *Kartell*, Plaintiff has alleged conduct "that is not in fact anticompetitive." *Id.* at 14.

Plaintiff responds that it has adequately pled a *Section 2* claim based on Highmark's dominant position in the market and ability to effect prices, including reducing prices paid to independent providers, while simultaneously raising premiums paid by consumers. Dkt. 48 at 12.

As it relates to the first element, market share, Plaintiff claims that Highmark insures "in excess of" 65-75% of all health insurance enrollees in Western Pennsylvania and "far in excess of' 65-70% of all health insurance enrollees in the Erie County MSA. Dkt. No. 42 at ¶ 2. Similarly, it pleads that Highmark is responsible for buying "at least" 65% of outpatient services in Western Pennsylvania and "well in excess" of 65-75% of the same services in the Erie County MSA. *Id.* at ¶ 3. Such high market shares are sufficient, at this stage, to plead monopsony power in the relevant markets. *See, e.g., In re Mushroom Direct Purchaser Antitrust Litig., 514 F. Supp. 2d 683, 700 (E.D. Pa. 2007)* (Plaintiffs at *Rule 12(b)(6)* stage had "pled sufficiently monopoly power for defendant . . . by alleging that defendant . . . controlled sixty to ninety **[**28]** percent of the [relevant] market.").

As it relates to the second element, that of the "the willful acquisition or maintenance of that power," "[a] monopolist willfully acquires or maintains monopoly power when it competes on some basis other than the merits." *LePage's Inc., 324 F.3d at 146-147* (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n. 32, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985))*. The Court has already established that Plaintiff has sufficiently pled that Highmark engaged in anticompetitive conduct and that such conduct caused injury to competition and consumers to survive a 12(b)(6) motion. *See supra at 12-16*. As such, the Court finds that Plaintiff has sufficiently pled a claim under *Section 2* to survive a *12(b)(6)* challenge. *See Iqbal, 556 U.S. at 678*.

2. Count 3: Unlawful Attempted Monopsonization in Violation of Section 2

In order to establish a claim of attempted monopolization, a plaintiff must sufficiently plead "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Race Tires **[*503]** Am., 614 F.3d at 75* (quoting *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993))*.

Highmark attacks Plaintiff's pleading of attempted monopsonization on the independent ground that Plaintiff has failed to adequately allege intent. Dkt. No. 47 at 15 n.5. As the Court stated in the September Order, "Plaintiff

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[12] The Court applies the same standard as a claim of monopoly to this situation of an allege monopsony based on the close "kinship between monopoly and monopsony," which suggests that "similar legal standards should apply to claims of monopolization and to claims of monopsonization." *Weyerhaeuser Co., 549 U.S. at 322*.

understandably has trouble" **[**29]** setting forth sufficient allegations as it has "assumed that Highmark already has monopsony power." Dkt. No. 35 at 15. Plaintiff responds that the amended complaint alleges that "Highmark acted with anticompetitive purpose to gain unlawful market power" sufficient to meet the intent requirement of attempted monopsonization. Dkt. No. 48 at 16.

The amended complaint charges Highmark with engaging in conduct that "had and continues to have an anticompetitive purpose and effect on competition" that was not "offset by any procompetitive benefits." Dkt. 42 at ¶¶ 102, 111. "[E]vidence that business conduct is 'not related to any apparent efficiency' may constitute proof of specific intent to monopolize." *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 318 (3d Cir. 2007)* (quoting *Aspen Skiing, 472 U.S. at 608 n.39*). These allegations take the form of the previously mentioned "other anticompetitive conduct" such as unnecessary audits, unfair steering, and inefficient procedure codes meant to "raise [independent physician's] costs" and "divert[] resources away from providing" patient care. Dkt. No. 42 at ¶ 50. These practices, according to the amended complaint, were intended to "reap supra-competitive profits" for Highmark, "entrench its own market power in the outpatient physician services **[**30]** market and private health insurance market," and force independent physicians to either join Highmark or go out of business. *Id.* at ¶ 44, 48. For example, the amended complaint charges specific conduct as "pretextual," such as audits that have "no medically-related or other legitimate basis." *Id.* at ¶ 50. Further, the amended complaint alleges that Highmark's procedure codes "result in gross inefficiencies" motivated by "forc[ing] Presque Isle, a competitor, to spend more time on less efficacious treatments on the hope that patients will become frustrated and switch" care providers. *Id.* at ¶ 51. These pleadings are sufficient to establish the intent element under *Iqbal*'s standards. *See* *Iqbal, 556 U.S. at 678*.

3. Counts 2 and 4: Unlawful Monopsonization and Unlawful Attempted Monopsonization in Violation of Pennsylvania Common Law

Highmark advances no independent grounds for dismissal of Plaintiff's Pennsylvania common law antitrust causes of action. Instead, Highmark's motion to dismiss merely contends that, if the Court dismisses Plaintiff's causes of action under the Sherman Antitrust Act, "it must also dismiss" the common law claims "which are based on identical allegations." Dkt. 47 at 6 n.2 (citing *Inter Vest, 340 F.3d at 158 n.8* **[**31]** ; *Alvord-Polk, 37 F.3d at 1014*). Plaintiff concedes that the elements necessary to plead a Pennsylvania common law antitrust claim are "substantially similar" to its federal claims. Dkt. 48 at 12 n.2.

This, however, is not the full picture. "Pennsylvania has no general antitrust statute, nor any statute creating a private right of action against restraints of trade." *In re K-Dur Antitrust Litig., No. 01-1652, 2008 U.S. Dist. LEXIS 71767, 2008 WL 2660778, at *3 (D.N.J. Feb. 25, 2008)*. In fact, the Pennsylvania courts that have examined the issue have expressly concluded that no private remedy for damages is available under Pennsylvania law. *XF Enters. v. BASF* ***[*504]*** *Corp., 47 Pa. D. & C.4th 147, 149-51 (Ps. Com. Pl. 2000)* ("[w]ithout legislation similar to the Sherman Act's, Pennsylvania common law lacks the damage provision necessary to give Pennsylvanians the cause of action which plaintiff seeks here"); *see also* *Stutzle v. Rhone-Poulenc S.A., No. 002768 Oct. Term 2002, 2003 Phila. Ct. Com. Pl. LEXIS 74, 2003 WL 22250424, at *1 (Pa. Com. Pl. Sept. 26, 2003)* ("No date, no court in Pennsylvania has held that a private remedy is available for damages under Pennsylvania's common law on antitrust violations"). Numerous federal courts have followed this guidance, disallowing claims for damages under Pennsylvania common law for antitrust violations to proceed. *See, e.g.,* *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., 64 F. Supp. 3d 665, 710 (E.D. Pa. 2014)*; *In re K-Dur Antitrust Litig., 2008 U.S. Dist. LEXIS 71768, 2008 WL 2660780, at *4*; *In re TFT-LCD (Flat Panel) Antitrust Litig., 586 F. Supp. 2d 1109, 1131 (N.D. Cal. 2008)*; *In re Static Random Access Memory (SRAM) Antitrust Litig., 580 F. Supp. 2d 896, 905-06 (N.D. Cal. 2008)*.

Plaintiff's complaint does seek injunctive relief. Dkt. No. 42 at ¶¶ 99, 117. As such, the Court grants Highmark's motion to dismiss Plaintiff's Pennsylvania common law antitrust claims, **[**32]** counts 2 and 4, so far as it seeks damages but not so far as it seeks injunctive relief. *See* *AlarMax Distribs. v. Tyco Safety Prod. Canada Ltd., No. 7-1744, 2008 U.S. Dist. LEXIS 49623, 2008 WL 2622899, at *4 (W.D. Pa. June 27, 2008)* (declining to dismiss claim asserted under Pennsylvania law where Plaintiff sought only injunctive relief).

C. *Section 1* of the Sherman Antitrust Act

Similar in structure to its *Section 2* claims, Plaintiff advances causes of action for unlawful restraint of trade in violation of *Section 1* of the Sherman Antitrust Act in counts five and seven and Pennsylvania common law in counts six and eight. Dkt. No. 42 at ¶¶ 118-153. All four causes of action rest on a theory of unlawful tying, *i.e.*, that Highmark violated antitrust laws by "unlawfully tying the reimbursement of outpatient physician services . . . under any of its health insurance products to the reimbursement of the same under any of its other health insurance products." *Id.* at ¶¶ 119, 128, 137, 146. Highmark seeks to dismiss all four causes of action for the simple reason that there is no precedent to assert a tying theory against an alleged monopsonist. Dkt. 47 at 18 ("Plaintiff has to date failed to identify any cases in which the court found that a contract between a plaintiff and a defendant **[**33]** can form the basis of a buy-side tying claim.").

Section 1 of the Sherman Antitrust Act outlaws "[e]very contract ... in restraint of [interstate or international] trade or commerce." *15 U.S.C. § 1*. Tying, in turn, is the practice of "selling one good (the tying product) on the condition that the buyer also purchase another, separate good (the tied product)." *Gordon v. Lewistown Hosp., 423 F.3d 184, 213 (3d Cir. 2005)* (citing *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 475 (3d Cir.)*, *cert. denied*, *506 U.S. 868, 113 S. Ct. 196, 121 L. Ed. 2d 139 (1992))*. There are two theories under which to prove an illegal tying agreement; per se and the rule of reason. *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 511 (3d Cir. 1998)*.

A plaintiff may establish a *per se* claim by showing that "(I) a defendant seller ties two distinct products; (2) the seller possesses market power in the tying product market; and (3) a substantial amount of interstate commerce is affected." *Town Sound & Custom Tops, 959 F.2d at 477*; *see also* *Gordon, 423 F.3d at 214*. If a plaintiff can make such a showing, **[*505]** "then the defendant's tying practices are automatically illegal without further proof of anticompetitive effect." *Town Sound & Custom Tops, 959 F.2d at 477*. If, however, a plaintiff cannot make such a showing, the plaintiff may still establish an illegal tying agreement by demonstrating that the agreement violated the "rule of reason," by showing that the tying agreement "unreasonably restrained competition." *Brokerage Concepts, 140 F.3d at 519* (quoting *Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 29, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)* ("*Jefferson Parish*")).

The Court need not, however, proceed **[**34]** to the substantive requirements of a prima facia case, because the principals underlying a tying claim's illegality do not extend from the established case of a monopolist to a monopsonist. "The law is well developed as to when tying arrangements should give rise to liability under the Sherman Act." *Brokerage Concepts, 140 F.3d at 511*. Elaborations on the underlying principle for the illegality of tying agreements consistently emphasize concerns over sellers' market power, not buyers. *See, e.g., Jefferson Parish, 466 U.S. at 13-14 (1984)* ("we have condemned tying arrangements when the seller has some special ability—usually called 'market power'—to force a purchaser to do something that he would not do in a competitive market"); *Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 611, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)* ("the essence of illegality in tying agreements is the wielding of *monopolistic* leverage; a *seller* exploits his dominant position in one market to expand his empire into the next"); *Gordon, 423 F.3d at 214* ("[t]he essential characteristic of a tying arrangement lies in the *seller*'s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms"); *Brokerage Concepts, 140 F.3d at 510* ("[t]he antitrust concern over tying arrangements arises when **[**35]** the *seller* can exploit its market power in the tying market to force buyers to purchase the tied product which they otherwise would not, thereby restraining competition in the tied product market); *Allen-Myland, Inc. v. Int'l Bus. Machines Corp., 33 F.3d 194, 200 (3d Cir. 1994)* ("the antitrust concern over tying arrangements is *limited to those situations* in which the *seller* can exploit its power in the market for the tying product to force buyers to purchase the tied product when they otherwise would not, thereby restraining competition in the tied product market"); *Town Sound & Custom Tops, 959 F.2d at 475* ("[t]he cases thus reveal a concern that a *monopolist* in the tying product market may use that leverage to garner sales in a second market, thereby foreclosing competitors and monopolizing the formerly competitive tied product market too") (emphasis added to all).

As Highmark points out, tying arrangements raise antitrust concerns among courts for three prominent reasons. Dkt. No. 47 at 18-20. First, such agreements foreclose markets to competitors. *See e.g., N Pac. Ry. Co. v. United States, 356 U.S. 1,6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)* ("[t]hey deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market"). Second, they create **[**36]** barriers to entry for new entrants. *See, e.g., Town Sound & Custom Tops, 959 F.2d at 475* ("the arrangement may raise barriers to entry to the tied product market because new entrants would have to sell both tied and tying products to compete"). Finally, tying arrangements are a concern because, quite simply, they force **[*506]** consumers to buy a product they do not want, offending free will and distorting demand. *See, e.g., N. Pac. Ry. Co., 356 U.S. at 6* ("buyers are forced to forego their free choice between competing products"); *Jefferson Parish, 466 U.S. at 12* ("[w]hen such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated"). Plaintiff does not refute this underlying logic. *See, generally*, Dkt. No. 48 at 17-20.

As Highmark points out, Plaintiff is unable to identify a case in which a court extended tying liability to a monopsonist. Dkt. No. 47 at 18. The Court is also unable to find such a case. As such, the Court will dismiss Plaintiff's amended unlawful restraint of trade counts of action under violation of *Section 1* of the Sherman Antitrust Act and Pennsylvania common law without leave to amend.

D. *Parker* State Action Doctrine

In the event that the Court declined to dismiss some or all of the Plaintiff's antitrust claims, **[**37]** as it has, Highmark contends it is "insulated from antitrust liability by the [*Parker*] state action doctrine." Dkt. No. 47 at 21. The *Parker* doctrine descends from *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, in which the Supreme Court held that States are immune from antitrust liability because the purpose of the Sherman Antitrust Act "was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations" and gave "no hint" that it was intended to "restrain state action or official action directed by a state." *Id. at 351*; *see also Edinboro Coll. Park Apartments v. Edinboro Univ. Found., 850 F.3d 567, 572-73 (3d Cir. 2017)*. The underlying justification rests on "principles of federalism and state sovereignty," *Hoover v. Ronwin, 466 U.S. 558, 567, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984)*, recognizing that "[a]ntitrust laws do not bar anticompetitive restraints that sovereign states impose "as an act of government,"' *A.D. Bedell Wholesale Co. v. Philip Morris Inc., 263 F.3d 239, 254 (3d Cir. 2001)* (quoting *Parker, 317 U.S. at 352*).

Highmark claims, in essence, that the Commonwealth of Pennsylvania effectively inoculated any of Highmark's alleged anticompetitive conduct through approval of the PPA[13] and the All Products Clause contained therein. Under Pennsylvania administrative code, health insurers, such as Highmark, are required to "submit the standard form of each type of health care provider contract," such as the PPA, and any "material change or amendment" thereafter, to the Pennsylvania Department **[**38]** of Health ("DOH"). *28 Pa. Code § 9.722(a)—(b)*. Highmark submits, as Exhibit A to the Declaration of Attorney William J. Sheridan, the August 26, 2009 DOH correspondence approving the PPA presently at issue. Dkt. No. 47-2.[14] Through **[*507]** DOH's approval, Highmark asserts, "any allegedly anticompetitive terms in the PPA are immune from antitrust liability." Dkt. No. 47 at 24.

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[13] The "Professional (or Participating or Preferred) Provider Agreement," which is the standard form contract governing the relations between the parties. *See supra at 4*.

[14] The parties disagree as to whether the Court may consider Exhibit A. *Compare* Dkt. No. 48 at 24 n.7 (Plaintiff arguing that the Court should "strike or disregard" the Exhibit because "[a] court may not consider materials outside the pleadings on a *Rule 12(b)(6)* motion") (citing *Pension Benefit Guar. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993)*; *Fed. R. Evid. 201(b)*) with Dkt. No. 49 at 9 n.6 (Defendants arguing that the Court may consider Exhibit A "because it is a matter of public record") (citing *Pension Benefit Guar., 998 F.2d at 1197*). The Court finds that it may consider Exhibit A as a "matter of public record." *See Pension Benefit Guar., 998 F.2d at 1197*) ("Courts have defined a public record, for purposes of what properly may be considered on a motion to dismiss, to include ... letter decisions of government agencies.").

Plaintiff contests the applicability of the *Parker* doctrine to this case. In its opposition, Plaintiff in essence argues that Highmark's *Parker* contentions are both too broad and too deep. First, Plaintiff claims that its allegations of antitrust conduct extend beyond the PPA and the All Products Clause. *See* Dkt. No. 48 at 21. Thus, Highmark's invocation of the *Parker* doctrine sweeps too broadly in attempting to immunize all of Highmark's alleged anticompetitive actions simply through the State's approval of the PPA. Second, Plaintiff claims that Highmark extends the *Parker* doctrine too deeply, attempting to expand a simple ministerial approval into an expression of state policy approving anticompetitive conduct. *See* *id. at 22-24*. In this instance, Plaintiffs arguments carry the day.

In order to invoke the protections of the *Parker* doctrine in this instance, Highmark must pass **[**39]** a "rigorous" two-part test: "[f]irst, the state must enact a 'clearly articulated and affirmatively expressed' policy permitting anticompetitive conduct; and second, the State must 'actively supervise[ ]' that conduct." *Edinboro Coll. Park Apartments, 850 F.3d at 573* (quoting *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980))*.[15] Highmark bears the burden of establishing this affirmative defense. *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co., 22 F.3d 1260, 1266 (3d Cir. 1994)* (listing cases).

As to the first prong, that of "clearly articulated and affirmatively expressed," "[i]t is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." *Midcal Aluminum, 445 U.S. at 104* (quoting *Goldfarb v. Virginia State Bar, 421 U.S. 773, 791, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975))*. Further, "*Midcal* confirm[ed]" that States could not "confer antitrust immunity on private persons by fiat." *F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 633, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992)*. Instead, competition may only be displaced "if the displacement is both intended by the State and implemented in its specific details." *Id.* "State-action immunity is disfavored," *id. at 636*, and thus is applicable "only when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that 'is the State's own,'" *F.T.C. v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 225, 133 S. Ct. 1003, 185 **[*508]** L. Ed. 2d 43 (2013)* (quoting *Ticor Title Ins., 504 U.S. at 635*). While it is true that "[i]t is not necessary . . . for the state legislature to have stated explicitly" within **[**40]** the statute that it intended to displace competition, *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 42, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)* ("*Hallie*"), the anticompetitive effect must be the "'foreseeable result' of the state's authorization." *Edinboro Coll. Park Apartments, 850 F.3d at 580* (quoting *Hallie, 471 U.S. at 41*).

Regarding the second prong, "active supervision," the inquiry is whether the State has "exercised sufficient independent judgment and control" to establish that the anticompetitive conduct was sanctioned "as a product of deliberate state intervention." *Ticor Title Ins. Co., 504 U.S. at 634-35*. "The active supervision requirement stems," after all, "from the recognition that [w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.'" *Patrick v. Burget, 486 U.S. 94, 100, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988)* (quoting *Hallie, 471 U.S. at 47*). Through "active 29 supervision," then, States may ensure that only conduct that "actually further[s] state regulatory policies," as compared to the interests of the private party, are protected. *Id. at 101*.

With these principles in mind, Highmark's appeal to the *Parker* doctrine is unavailing for two independent reasons. First, Highmark is incorrect that all of Plaintiff's alleged harms flow from the All Products Clause and the PPA, the state approval of which provides the basis for its invocation of the *Parker* doctrine. *See* Dkt. **[**41]** No. 47 at 21. As Plaintiff replies, "[t]he all products clause is but one aspect of Highmark's anticompetitive behavior." Dkt. 48 at 20. As previously discussed, Plaintiff's amended complaint alleges other anticompetitive conduct, which the Court

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[15] The Supreme Court has devised "three approaches" to analyzing a Parker doctrine defense: "(1) ipso facto immunity, (2) *Midcal* scrutiny, and (3) *Hallie* scrutiny." *Edinboro Coll. Park Apartments, 850 F.3d at 572* (referencing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)* and *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985))*. Which applies is determined by whether the "relevant actor" is "comparable to a sovereign power, a private business, or something in between." *Id. at 572*. Here, both parties utilize the *Midcal* standard. *See* Dkt. No. 47 at 22; Dkt. No. 48 at 21 (citing to *Edinboro Coll, Park Apartments, 850 F.3d 567*). This is the correct standard as "*Midcal* analysis applies where private actors seek to immunize their anticompetitive conduct under the Parker doctrine" and Highmark is a private actor. *Edinboro Coll. Park Apartments, 850 F.3d at 573* (citing *Midcal, 445 U.S. at 106*).

considered to determine whether Plaintiff had met the pleading requirements to establish anticompetitive conduct. *See supra* at 12-16. Plaintiff's amended complaint characterizes the All Products clause as an exacerbating factor, not a sole factor. *See, e.g.* Dkt. No. 42 at ¶ 13. There is no indication in the Pennsylvania administrative code, or Exhibit A, that Pennsylvania approved of Plaintiff's alleged other anticompetitive conduct or the reduced rates of primary concern to Plaintiff. As such, Highmark has failed to make a prima facia showing that the *Parker* doctrine is broadly applicable to all the alleged conduct.

Second, Highmark fails to meet the substantive requirements of the *Midcal* standard. Quite simply, Highmark overstates the extent of Pennsylvania's approval of its actions through submission and review of the draft PPA. For example, *Section 9.722* contains no indication that the DOH reviews for antitrust concerns, let alone expresses a "clearly articulated **[**42]** and affirmatively expressed" state policy to permit anticompetitive conduct. *See generally 28 Pa. Code § 9.722*. To the contrary, DOH's affirmative obligations evidence a concern for consumer protection, for example by (1) prohibiting retaliatory clauses against healthcare providers who "[a]dvocate for medically necessary and appropriate health care services for an enrollee" or who file grievances on behalf of an enrollee, *id.* at *§ 9.722(c)*, and (2) requiring certain consumer protection provisions, for example, "[l]anguage stating that enrollee records shall be kept confidential by the plan and the health care provider," *id.* at *§ 9.722(e)*. There is simply no evidence in the statute of antitrust concerns and, as Plaintiff points out, Highmark "cannot and **[*509]** does not point to any Pennsylvania legislative decree empowering Highmark to act anticompetitively." Dkt. No. 48 at 22.

Nor does the submission of annual and quarterly reports, as required by *28 Pa. Code § 9.604* and pointed to by Highmark, *see* Dkt. No. 47 at 23-24, prove "active supervision" where, again, the provision evidences no condoning of anticompetitive activity. Nothing within either texts provides evidence of a policy approving all the possible negative ramifications that may arise from **[**43]** the contract or inoculating plans from federal antitrust scrutiny.

Exhibit A is similarly unavailing. It evidences nothing more than that DOH "reviewed the changes" to the most recent PPA and had "no objections to them." Dkt. 47-2 at 2. Again, there is no indication that DOH, in its review, was concerned with, or even reviewed for, anticompetitive conduct let alone that Pennsylvania asserted an affirmative policy to condone such conduct. The letter is evidence of nothing more than a ministerial approval and, as the Supreme Court has made clear, 'simple permission to play in a market' does not 'foreseeably entail permission to roughhouse in that market unlawfully.'" *Phoebe Putney Health Sys., 568 U.S. at 231* (quoting *Kay Elec. Cooperative v. Newkirk, 647 F.3d 1039, 1043 (10th Cir. 2011))*. As such, Highmark's invocation of the *Parker* doctrine is unavailing, and Plaintiffs surviving antitrust claims may proceed.

E. Count Nine: Unjust Enrichment

Having determined that at least some of Plaintiff's antitrust causes of action may stand, the Court will address the pendant common law causes of action. The first of which, in count nine, is Plaintiff's claim of unjust enrichment based on the allegation that Highmark "knowingly received and retained wrongful benefits. . . in the form of [] the difference in **[**44]** the amount of the reimbursement rates and claw-back 'audits' as well as "other wrongfully held amounts." Dkt. No. 42 at ¶ 155.

Highmark moves to dismiss this cause of action based on the contention that "'[a] cause of action for unjust enrichment may arise only when a transaction of the parties [is] not otherwise governed by an express contract.'" Dkt. No. 47 at 24 (quoting *Villoresi v. Femminella, 2004 PA Super 256, 856 A.2d 78, 84 (Pa. Super. Ct. 2004))*. As the PPA governs the relationship between the parties, Highmark argues this cause of action should be dismissed.

Plaintiff responds by pointing out that Highmark has not challenged the sufficiency of Plaintiff's pleading of the necessary elements of an unjust enrichment claim, but rather whether such a claim may advance in the face of the PPA. Plaintiff cites a similarly situated recent Eleventh Circuit case and also argues that it may plead unjust enrichment in the alternative, under on *Fed. R. Civ. Pro. 8(d)(3)*, based on the Court's earlier suggestion in the September Order that the PPA might not cover all of Highmark's health insurance products. *See* Dkt. No. 35 at 6 n.8.

The Court is persuaded that Highmark is correct. First, as Highmark points out, under both Third Circuit precedent and Pennsylvania law unjust enrichment is inapposite **[**45]** where a valid contract exists. *See* *Grudkowski v. Foremost Ins. Co., 556 F. App'x 165, 169-70 (3d Cir. 2014)* ("'the doctrine of unjust enrichment is inapplicable when the relationship between parties is founded upon a written agreement or express contract'") (quoting *Wilson Area Sch. Dist. v. Skepton, 586 Pa. 513, 895 A.2d 1250, 1254 (Pa. 2006))*. Nowhere in its complaint or subsequent pleadings **[*510]** has Plaintiff claimed that the PPA is invalid. *See generally* Dkt. No. 42.

Plaintiff's sole precedential support is unavailing. It points to only one out-of-Circuit case, *Quality Auto Painting Ctr. Of Roselle, Inc. v. v. State Farm Indem. Co., 870 F.3d. 1262 (11th Cir. 2017)*, for the proposition that "the existence of the PPA does not extinguish" its unjust enrichment claim. Dkt. No. 48 at 28. That case, however, rested its conclusion on an assumption that a valid contract did not exist between the parties. *See* *Quality Auto Painting Ctr. of Roselle, 870 F.3d at 1277* ("[a]ssuming the truth of the allegations and drawing inferences in favor of the [Plaintiffs], the [Defendants] forced the [Plaintiffs] to perform repairs, and any dealing between the [Plaintiffs] and the [Defendants] was based on an invalid, unenforceable contract"). Here, however, we have an unchallenged, valid agreement between the parties.[16]

As for Plaintiff's contention that it may plead unjust enrichment in the alternative based on the Court's observation in the September Order that **[**46]** the PPA might not cover all of Highmark's health insurance products, it has been overtaken by subsequent pleadings. In its amended complaint, Plaintiff now pleads that "Highmark applies the PPA to *all of its products, including those that were not extant at the time an independent physician might have signed it*." Dkt. No. 42 at ¶ 16 (emphasis added). As such, the Court is now persuaded that the PPA, and the All Products Clause, covers the entirety of Highmark's health insurance products and relationship with Plaintiff. As such, Plaintiff's claim for unjust enrichment is futile given the existence of the PPA and the lack of contention that it is invalid or does not control. *See* *Gorecki v. Clearview Elec., Inc., 338 F. Supp. 3d 470, 476 (W.D. Pa. 2018)* ("[a] claim for unjust enrichment may be pleaded in the alternative to other contract claims, but 'such alternative pleading is plausible only when the validity of the contract is itself actually disputed, making unjust enrichment a potentially available remedy'") (quoting *Grudkowski, 556 F. App'x at 170 n.8*).

The Court therefore will dismiss Plaintiff's cause of action for unjust enrichment with prejudice.

F. Count Ten: Breach of Contract and Implied Covenant of Good Faith and Fair Dealing

Plaintiff pleads its claim for breach of contract and breach of implied covenant of good **[**47]** faith and fair dealing in one count. As the parties have argued separate theories for dismissing or maintaining these separate grounds, the Court will address them in turn.

1. Breach of Contract

Plaintiff does not allege a breach of the terms of the PPA itself. Instead, the amended complaint accuses Highmark of violating the ACA's antidiscrimination provision,[17] which the PPA in turn incorporates **[*511]** by reference.[18] *See*

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[16] Even more fatal to Plaintiff's argument, however, is the fact that the Eleventh Circuit, sitting en banc, subsequently reversed this very holding on this very point, albeit after Plaintiff filed its memorandum in opposition to Highmark's motion to dismiss. *See* *Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co., 917 F.3d 1249, 1272-73 (11th Cir. 2019)* (en banc) ("[Plaintiffs] cite no law—in any of the four states—to the effect that market power alone is sufficient to invalidate a contract voluntarily entered into").

[17] The ACA provides: "A group health plan and a health insurance issuer offering group or individual health insurance coverage shall not discriminate with respect to participation under the plan or coverage against any health care provider who is acting within the scope of that provider's license or certification under applicable State law. This section shall not require that a group health plan or health insurance issuer contract with any health care provider willing to abide by the terms and conditions for

Dkt. No. 42 at ¶ 164-68. "By discriminating in reimbursement rates on a basis other than quality of care," alleges Plaintiff, "Highmark has materially, continuously breached" the PPA. *Id.* at ¶ 168.

While Highmark contests whether it materially violated the provisions of the ACA, Highmark chiefly argues that Plaintiff cannot assert a breach of action claim under Pennsylvania law based on the incorporation of a statute which gives Plaintiff no private right of action. Dkt. No. 47 at 25. Plaintiff disagrees based on the substance and understanding of Pennsylvania law and the ACA. *See* Dkt. No. 48 at 25-6.

The Court finds *Petty v. Hosp. Serv. Ass'n of Northeastern Pa., 611 Pa. 119, 23 A.3d 1004 (Pa. 2011)* persuasive and controlling for the proposition that Plaintiff cannot assert a claim for breach of contract in this instance. In *Petty*, Pennsylvania's Supreme **[**48]** Court set out to determine whether an employer could assert a breach of contract claim against a nonprofit hospital corporation that contracted to provide health insurance coverage to the employer's employees. *Id. at 123*. Employer first sought to hold insurer liable under Pennsylvania's Nonprofit Law, *15 Pa. Stat. and Cons. Stat. Ann. § 5545*, but the Court held that Plaintiff did not have standing based on the Law's statutorily prescribed limitation on standing. *Id. at 133*; *see also* *15 Pa. Stat. and Cons. Stat. Ann. § 5793(a)*.

In turn, employer pled a breach of contract claim alleging a violation of the parties' contractual relation based on the incorporation by reference of the Nonprofit Law. *Petty, 23 A.3d at 123,133-34*. The Pennsylvania Supreme Court, however, held that employer did not have standing to assert such a claim because, in essence, "a party cannot do indirectly what it cannot do directly" or, in other words, the employer could not "base a breach of contract claim on an alleged Nonprofit Law violation when the Nonprofit Law does not provide for a private cause of action." *Id. at 134*; *see also* *id. at 136* ("we cannot, in this case, permit appellants to do under common law what they are clearly prohibited from doing under statute. . . and hold appellants **[**49]** lack standing to maintain their breach of contract claim").

Plaintiff points to *Liss & Marion, P.C. v. Recordex Acquisition Corp., 603 Pa. 198, 983 A.2d 652 (Pa. 2009)*, to counter the foregoing conclusion by arguing that *Liss* stands for the proposition that the Pennsylvania Supreme Court permitted a "breach of contract claim to proceed based on excess rates charged for copies of electronic records even though [the] statute setting rates does not create a private right of action." Dkt. No. 48 at 25. Additionally, Plaintiff attempts to distinguish *Petty* by asserting that "[t]he *Petty* court expressly distinguished the Nonprofit Law from the statute at issue in *Liss*." *Id. at 26*.

[*512] The problem with Plaintiff's argument is that it is incorrect in its assertion that "the ACA lacks any limit on who can sue under it." Dkt. No. 48 at 26. There is fair consensus that the ACA's antidiscrimination provision, *42 U.S.C. § 300gg-5*, does not create a private right of action. *See* *A. Z. v. Regence Blueshield, 333 F. Supp. 3d 1069, 1082-83 (W.D. Wash. 2018)*; *Vorpahl v. Harvard Pilgrim Health Ins. Co., No. 17-0844, 2018 U.S. Dist. LEXIS 121316, 2018 WL 3518511, at *5 (D. Mass. July 20, 2018)*; *Ass'n of N.J. Chiropractors, Inc. v. Horizon Healthcare Servs., No. 16-08400, 2017 U.S. Dist. LEXIS 90545, 2017 WL 2560350, at *3-*5 (D.N.J. June 13, 2017)*; *Dominion Pathology Labs., P.C. v. Anthem Health Plans of Virginia, Inc., 111 F. Supp. 3d 731, 736 (E.D. Va. 2015)*. Further still, as Highmark points out, the ACA expressly provides that only the States and secondarily the Secretary of the Department of Health and Human Services may enforce the antidiscrimination provision. *42 U.S.C. § 300gg-22*. It is therefore not silent on the issue of enforcement, it determines precisely who may and may not sue **[**50]** to enforce its provisions.

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participation established by the plan or issuer. Nothing in this section shall be construed as preventing a group health plan, a health insurance issuer, or the Secretary from establishing varying reimbursement rates based on quality or performance measures." *42 U.S.C.A. § 300gg-5*; *see also* Dkt. No. 42 at ¶ 165.

[18] The PPA provides: "Provider and [Keystone Health Plan West] agree to operate, and perform their obligations under this Agreement, in accordance with all applicable Laws." Dkt. No. 42-1 at § 7.1. The definition section then defines "Laws" to include "any applicable foreign, United States, federal, state and/or local constitution, treaty, statute, regulation, rule, code, ordinance, order, policy, directive, injunction, writ, decree, award or the like of any Official Body that is in effect." Dkt. No. 42-1 at Att. 1, § 2.Q.

Liss is distinguishable from the present circumstance. In *Liss* the incorporated statute, the Medical Records Act ("MRA"), 42 Pa. Stat. and Cons. Stat. Ann. § 6152 et seq., provided no "evidence [of] legislative intent to limit Appellee's common law rights or preempt common law causes of action" and "the legislature did not provide any mechanism or procedure for the resolution of disputes." Liss, 983 A.2d at 660. Thus, as distinguishable from the ACA's antidiscrimination provision, the MRA was a blank slate as to enforcement, whereas the ACA affirmatively does not support a suit by Plaintiff *Petty* explicitly distinguished Liss on this point. As the Court in *Petty* stated, "whereas in *Liss* the legislature intended for the appellants to be subject to the MRA's pricing limits and provided no limitation as to who could raise that challenge, the Nonprofit Act's plain language indicates the legislature did not intend for general consumers to challenge corporate actions in a court of law." Petty, 23 A.3d at 1014. Thus, under Pennsylvania law, Plaintiff does not have standing to assert a breach of contract claim based on the ACA, where it could not enforce its rights directly through the ACA.

2. Covenant of Good Faith and ***[**51]*** *Fair Dealing*

The Court, however, will not dismiss this count to the extent that Plaintiff alleges a violation of the covenant of good faith and fair dealing. "Every contract in Pennsylvania imposes on each party a duty of good faith and fair dealing in its performance and its enforcement." Donahue v. Fed. Exp. Corp., 2000 PA Super 146, 753 A.2d 238, 242 (Pa. 2000). Highmark, according to Plaintiff, violated that duty by unilaterally imposing discriminatory reimbursement rate cuts and engaging in other unfair, anticompetitive conduct." Dkt. 42 at ¶ 169. Highmark counters that "[t]o the extent that Plaintiff purports to base its claim" for breach of fiduciary duty on such allegations, dismissal is appropriate because, under Pennsylvania law, such claims must be based on a specific provision of a contract. Dkt. No. 47 at 26 n.8.

Plaintiff's however, can point to such a provision, the variable reimbursement rate clause, which provides that "allowances [paid to specialist] may be reviewed and adjusted from time to time during the Term." Dkt. No. 42-1 at Att. 6.1 § 4.2. Thus, Plaintiff contends that "[e]ven if the PPA affords Highmark the discretion to pay whatever rates it chooses, Highmark still has a duty to exercise its discretion in good faith." Dkt. No. 48 at 27. **[**52]**

Under Pennsylvania law, a duty of good faith "is not divorced from **[*513]** the specific clauses of the contract and cannot be used to override an express contractual term." Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78, 91 (3d Cir. 2000). Instead, the duty is defined as "[h]onesty in fact in the conduct or transaction concerned." Creeger Brick & Bldg. Supply Inc. v. Mid-State Bank & Tr. Co., 385 Pa. Super. 30, 560 A.2d 151, 153 (Pa. Super. Ct. 1989) (quoting 13 Pa. Stat. And Cons. Stat. Ann. § 1201). "[C]ourts generally utilize the good faith duty as an interpretive tool to determine 'the parties' justifiable expectations,' and do not enforce an independent duty divorced from the specific clauses of the contract." Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 617 (3d Cir. 1995) (internal citation removed). As the Pennsylvania Court of Common pleas has stated, after confessing that the duty is "shrouded in mystery and confusion in Pennsylvania," the duty "does *not* allow for a claim separate and distinct from a breach of contract claim" but rather "a claim arising from a breach of the covenant of good faith must be prosecuted as a breach of contract claim, as the covenant does nothing more than imply certain obligations into the contract itself." JHE, Inc. v. SEPTA, No. 1790 Nov. Term 2001, 2002 Phila. Ct. Com. Pl. LEXIS 78, 2002 WL 1018941, at *5 (Pa. Corn. Pl. May 17, 2002) (emphasis in original).

Pennsylvania Courts have recognized that it is not possible to classify every situation constituting a breach of the duty, but have instead determined that examples include "evasion **[**53]** of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." Somers v. Somers, 418 Pa. Super. 131, 613 A.2d 1211, 1213 (Pa. Super. Ct. 1992); *see also* Phila. Plaza-Phase II v. Bank of Am. Nat. Tr. & Sav. Ass'n, No. 3745 Apr. Term 2002, 2002 Phila. Ct. Com. Pl. LEXIS 14, 2002 WL 1472337, at *6 (Pa. Corn. Pl. June 21, 2002). Relevantly, "[t]he covenant of good faith may also be breached when a party exercises discretion authorized in a contract in an unreasonable way." Phila. Plaza-Phase II, 2002 Phila. Ct. Com. Pl. LEXIS 14, 2002 WL 1472337, at *6 (citing Burke v. Daughters of the Most Holy Redeemer, Inc., 344 Pa. 579, 26 A.2d 460, 461 (Pa. 1942)).

Thus, Plaintiff's breach of contract and implied covenant of good faith and fair dealing may survive to the extent that Plaintiff alleges that Highmark exercised its contractual rights under the variable rates clause in violation of its duty of good faith but not to the extent that either (1) it violated the terms of the PPA by exercising its right to adjust rates in the first place or (2) by adjusting rates it violated the antidiscrimination provision of the ACA.

G. Count Eleven: Reformation and Rescission

Plaintiff's final cause of action is for "reformation or recession." Dkt. No. 42 at ¶¶ 72-80. Through this count, Plaintiff pleads that the PPA "should either be reformed or partially rescinded" based on the contention that "[c]onsent" by Plaintiff and other class members was not "real or free, **[**54]** and/or was given under force, coercion, and/or without consent or mutual material consideration." *Id.* at ¶ 173-74. The root of this allegation is that the PPA and its terms, including the All Product Clause, "were not fully disclosed" by Highmark or that they were "confusing" and contained "abstruse conditions or terminology." *Id.* at ¶ 175-76.

Highmark contends that this count should be dismissed because "reformation or rescission" is not a separate cause of action but, instead, constitutes a remedy provided for a breach of contract. Dkt. No. **[*514]** 47 at 26. Plaintiff disagrees on the substance of Pennsylvania law. Dkt. No. 48 at 27-28.

Thus, the Court must determine whether "reformation or recession" constitute a distinct cause of action under Pennsylvania law. The Court concludes it does. Plaintiff in its reply brief provides several examples of "claims" or "actions" in equity for "reformation" or "recession." Dkt. No. 48 at 27; *see, e.g., Keenheel v. Corn., Pennsylvania Sec. Comm'n, 523 Pa. 223, 565 A.2d 1147, 1148 (Pa. 1989)* (appellant "commenced this action seeking equitable rescission of the settlement agreement"); *Line Lexington Lumber & Millwork Co. v. Pennsylvania Pub. Corp., 451 Pa. 154, 301 A.2d 684, 685 (Pa. 1973)* ("[a]ppellant contends that his amended complaint stated a cause of action for reformation of contract. We agree and reverse the order below.); *Murray v. Willistown Twp., 2017 PA Super 265, 169 A.3d 84, 90 (Pa. Super. Ct. 2017)* ("[b]oth parties agree that contract **[**55]** reformation is an appropriate equitable remedy in this case: the Township sought such reformation in its complaint"); *Baltimore v. Freed, 103 A.3d 888, 2014 Pa. Commw. Unpub. LEXIS 660, 2014 WL 10298875, at *1 (Pa. Commw. Ct. 2014)* ("[t]his appeal arises out of a dispute whereby neighboring property owners, Terry and Soni Baltimore (Baltimores), sought reformation of a quitclaim deed."). In fact, one of Highmark's cited cases lends credence to this conclusion. *See Moffatt Enterprises, Inc. v. Borden Inc., 807 F.2d 1169, 1174 (3d Cir. 1986)* ("Under Pennsylvania law, a defrauded party may *pursue* several remedies including *an action* of damages for deceit, *recission* and restitution based on fraud, and *reformation* of the contract for fraud.") (Emphasis added). As such, the Court determines that such an action exists under Pennsylvania law.

Alternatively, Highmark claims that Plaintiff's "purported claim for reformation or rescission" should be dismissed because under Pennsylvania law "those equitable remedies are appropriate only where there has been a showing of fraud, accident, or mistake." Dkt. No. 47 at 27 n.9. Here, Highmark is correct on the law. *See Moffatt Enterprises, 807 F.2d at 1174* ("[u]nder Pennsylvania law, a *defrauded* party may pursue several remedies including an action of damages for deceit, recission and restitution *based on frau*d, and reformation of the **[**56]** contract for *fraud*") (emphasis added); *Clark v. Allstate Ins. Co., No. 10-294, 2010 U.S. Dist. LEXIS 45933, 2010 WL 1904013, at *2 (W.D. Pa. May 7, 2010)* ("rescission is an equitable remedy that a court may grant when an insurer proves fraud by the insured in obtaining the policy"); *Kutsenkow v. Kutsenkow, 414 Pa. 610, 202 A.2d 68, 68-69 (Pa. 1964)* ("[i]t has long been the law that courts of equity have the power to reform a written instrument where there has been a showing of fraud, accident or mistake"); *Overmiller v. Town & Vill. Ins. Serv., 145 Pa. Super. 347, 21 A.2d 411, 412 (Pa. Super. Ct. 1941)* (stating that courts sitting in equity have the power to "direct and to enforce the surrender and cancellation of written instruments for due cause" and "due cause" includes fraud) (internal quotations removed); *Penn Park, Inc. v. Falls Twp. Auth., 51 Pa. D. & C.2d 360, 363, 19 Bucks Co. Law Rep. 595 (Pa. Corn. Pl. 1970)* ("[t]his power of a court of equity will be exercised only in clear cases and only where there is a showing of fraud, mistake or lack of consideration").

Plaintiff has pled sufficient fraud or misrepresentation in its amended complaint to survive a 12(b)(6) challenge. As quoted earlier, Plaintiff alleges that the terms of the PAA were not "fully disclosed" or that "Plaintiff and other Class members were forced or induced to enter into a PPA insofar as Highmark coercively required and/or omitted the full terms or actual arrangement concerning reimbursement." **[*515]** Dkt. No. 42 at ¶¶ 175, 177. Accepting all factual allegations as true and construing the amended **[**57]** complaint in the light most favorable to the Plaintiff, the Court finds these allegations sufficient to satisfy *Iqbal*'s standards. S*ee* *Iqbal, 556 U.S. at 678*.

V. CONCLUSION

For the forgoing reasons, the Court ORDERS as follows:

1. Defendants' motion to dismiss [47] is DENIED as to counts 1 and 3.

2. Defendants' motion to dismiss [47] is DENIED as to counts 2 and 4, to the extent that Plaintiff seeks only injunctive relief.

3. Defendants' motion to dismiss [47] is GRANTED as to counts 5, 6, 7, and 8. Counts 5, 6, 7, and 8 are DISMISSED WITH PREJUDICE.

4. Defendants' motion to dismiss [47] is GRANTED as to count 9. Count 9 is DISMISSED WITH PREJUDICE.

5. Defendants' motion to dismiss [47] is GRANTED in part and DENIED in part as to count 10.

6. Defendants' motion to dismiss [47] is DENIED as to count 11.

IT IS SO ORDERED.

DATED this day 22nd of July, 2019.

/s/ Barbara J. Rothstein

BARBARA J. ROTHSTEIN

UNITED STATES DISTRICT JUDGE

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Sec. Data Supply, LLC v. Nortek Sec. & Control LLC

United States District Court for the Northern District of Texas, Dallas Division

July 22, 2019, Decided; July 22, 2019, Filed

CASE NO. 3:18-CV-1399-S

Reporter

2019 U.S. Dist. LEXIS 122537 *; 2019-2 Trade Cas. (CCH) P80,862; 2019 WL 3305628

SECURITY DATA SUPPLY, LLC et al. v. NORTEK SECURITY AND CONTROL LLC et al.

Prior History: *Sec. Data Supply, LLC v. Nortek Sec. Control, LLC, 2018 U.S. Dist. LEXIS 90736 (E.D. La., May 31, 2018)*

Core Terms

commercial bribery, pricing, Franchisees, tortious interference, products, allegations, antitrust, customers, purchaser, pleaded, bribes, motion to dismiss, business relationship, wholesale, cases, price discrimination, unlawful act, distributors, employees, reasons, sales, light most favorable, existing contract, civil conspiracy, proper plaintiff, discriminatory, injury-in-fact, probability, violations, cost-plus

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For SDS of New Orleans LLC, SDS of Baton Rouge LLC, SDS of Mandeville LLC, SDS of Monroe LLC, SDS of Bossier City LLC, SDS of Dallas LLC, SDS of Houston LLC, SDS of San Antonio LLC, SDS of Jackson LLC, SDS of Mobile LLC, SDS of Central Texas LLC, Plaintiffs: David Louis Carrigee, LEAD ATTORNEY, Larry E Mobley, Baldwin Haspel Burke & Mayer LLC, New Orleans, LA; Beverly Klundt Baudouin, Lawrence Raymond DeMarcay, III, Steven Beauregard Jones, Thomas J. Cortazzo, Valerie E. Fontenot, Baldwin, Haspel, Burke & Mayer, LLC (New Orleans), New Orleans, LA.

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Judges: KAREN GREN SCHOLER, UNITED STATES DISTRICT JUDGE.

Opinion by: KAREN GREN SCHOLER

Opinion

MEMORANDUM OPINION AND ORDER

This Order addresses Defendants Earnest Bernard's ("Bernard") Motion to Dismiss [ECF No. 104], Nortek Security and Control LLC's ("Nortek") Motion to Dismiss [ECF No. 106], and Wave Electronics Inc.'s ("Wave") (collectively, "Defendants") Motion to Dismiss [ECF No. 108] (the "Motions"). For the following reasons, the Court grants in part and denies in part the Motions.

I. BACKGROUND

A. Procedural History

Plaintiffs Security Data Supply, LLC ("SDS") and its franchisees ("SDS Franchisees") (collectively, "Plaintiffs") filed this lawsuit on October 12, 2017, in the U.S. District Court for the Eastern District of Louisiana alleging violations of the federal antitrust laws and tortious interference. Resp. 1, 4. Defendants moved to dismiss for lack of personal jurisdiction, and the Louisiana District Court transferred **[*3]** the case to this Court an May 31, 2018. *See* ECF No. 62. During a hearing on September 20, 2018, Plaintiffs orally moved for leave to file an amended complaint, which the Court granted. *See* ECF No. 99. After Plaintiffs filed their Second Amended Complaint on October 5, 2018, Defendants again moved to dismiss. *See* ECF Nos. 102, 104, 106, 108. The parties through their counsel appeared before the Court for oral argument on the pending Motions on June 19, 2019.

B. *Factual History*

Nortek is a leading manufacturer of security, home automation, and personal security systems that distributes its products through wholesale distributors such as SDS. Second Am. Compl. ¶¶ 17-18. Although Nortek maintains a 10% market share of intrusion alarm systems overall, Nortek is the sole manufacturer of 2GIG—"an intelligent connected system for residential intrusion detection." *Id.* ¶¶ 19-20. Nortek sells its products to wholesale distributors, who then sell it to retailers and installers, who provide the equipment to the end user. *Id.* ¶ 18. Nortek manufactures and distributes its 2GIG products from California and Colorado. *Id.* ¶ 37.

Plaintiffs are wholesale distributors of CCTV, intrusion alarm systems, access **[*4]** control, fire alarms, and home automation systems, including Nortek's 2GIG and other products. *Id.* ¶¶ 3-15. Plaintiffs maintain outlets in Texas and Louisiana, and have been distributing Nortek's products since 2004. *Id.* ¶¶ 32-33, 37. Nortek's prices were generally consistent and only varied in limited circumstances, such as when Nortek sold to dealers in extraordinary volume. *Id.* ¶ 44. Plaintiffs contend that SDS and the SDS Franchisees operate as a single enterprise. *Id.* ¶¶ 89-92. SDS and the SDS Franchisees have entered into a "Cost Plus [sic] Contract," whereby the SDS Franchisees purchase all of their inventory from SDS for a set price based upon a standard mark-up on the wholesale price, *Id.* ¶ 90. Thus, "there is a functional or economic unity between SDS ... and its franchisees." *Id.* ¶ 91. Nortek also treated SDS and the SDS Franchisees as a single enterprise. *Id.* ¶ 92.

Wave began distributing Nortek's 2GIG products in 2015, and has since been Plaintiffs' direct competitor, maintaining outlets in Texas and Louisiana. *Id.* ¶¶ 18, 22-23, 35-37. By 2017, Wave became the largest purchaser of 2GIG products. *Id.* ¶ 38. According to Plaintiffs, this was possible because Nortek and Wave **[*5]** entered into a special pricing program called the "Four Star Program." *Id.* ¶¶ 28, 38. Plaintiffs also interviewed former Wave employees aware of the alleged pricing scheme, who told Plaintiffs that the Four Star Program was designed to attract customers to Wave. *Id.* ¶ 68. This pricing program allegedly involved special rebates that Wave's customers received after the sale was complete. *Id.* ¶ 45. According to Plaintiffs, the rebate was "kicked back" to Wave, which allowed Wave to earn a significant profit while selling Nortek's products up to 40% below the wholesale price Nortek charged Plaintiffs and other distributors. *Id.* ¶¶ 45-46, 97.

Although there were some requirements for a customer to obtain special pricing, Wave provided the special pricing to nearly all of its customers, allegedly with Nortek's tacit consent. *Id.* ¶¶ 47-48. When Plaintiffs inquired about entering into a similar arrangement, Nortek denied the existence of the Four Star Program. *Id.* ¶ 49. Bernard, Nortek's sales representative, purportedly told Plaintiffs that they were receiving Nortek's best price and that all of the distributors were paying the same amount for Nortek's products. *Id.*

Plaintiffs allege that Bernard **[*6]** and other Nortek employees were receiving "bribes ... consisting of payments and American Express gift cards" from Wave in exchange for maintaining the pricing program. *Id.* ¶¶ 26, 28, 38-39, 53, 70-75. As part of this scheme, Nortek's employees would also identify Plaintiffs' customers to Wave as potential "leads." *Id.* ¶¶ 60-61. Once Nortek learned of these employees' activities, Bernard resigned and the other employees engaged in the alleged bribery were terminated. *Id.* ¶ 54. Nonetheless, Plaintiffs allege that even after Nortek discovered the pricing program and allowed Plaintiffs to provide limited special pricing to a handful of their customers, Nortek continued to give Wave preferential treatment. *See id.* ¶ 62. For example, two days after Plaintiffs had Nortek approve Plaintiffs' longstanding and largest client for special pricing, the client was approached by Wave's branch manager and a Nortek employee about switching to Wave for "even ... better pricing." *Id.* Nortek also extended Wave's pricing program for an extra sixty days and grandfathered in Wave's top thirty dealers, allowing Wave to maintain an edge over Plaintiffs. *Id.* ¶ 81.

Moreover, Nortek's outside counsel allegedly **[*7]** warned Nortek that the pricing program was illegal. *Id.* ¶ 85. Similarly, Nortek's executives and management allegedly admitted in discussions with Plaintiffs' representatives that the Four Star Program "provided for unfair competition, was illegal and needed to be stopped." *Id.* ¶¶ 76-85. Nortek's sales manager further admitted that allowing Wave to grandfather in thirty of its best dealers was unfair and "would have a detrimental impact upon the relevant market." *Id.* ¶ 81. Despite warnings from internal advisers and outside counsel, Nortek allowed the rebate program to continue until the end of 2017. *Id.* ¶¶ 55-56, 83-87.

Once Nortek phased out the pricing program, Wave entered into a special pricing arrangement with Nortek's competitor, Quolsys. *Id.* ¶ 57. Plaintiffs allege that all of Wave's customers currently purchase Quolsys products instead of Nortek's 2GIG products. *Id.* Although the pricing scheme has stopped, Plaintiffs allege that it injured competition. *Id.* ¶ 93. Plaintiffs allegedly "lost a significant number of customers to Wave, have been unable to compete with Wave for new potential customers and have suffered significant financial losses including the loss of sales, profits **[*8]** and market share." *Id.* ¶ 94. By preliminary estimates, Plaintiffs lost approximately 59 existing clients, or $9,575,000 in "annual losses," and an unspecified number of potential customers. *Id.* ¶¶ 95-98.

Once Nortek began offering Plaintiffs the pricing program, Plaintiffs' sales of 2GIG products increased by 40% between July and December 2017. *Id.* ¶ 99. In January 2018, however, Nortek pulled its products from Plaintiffs without providing them with the contractually required notice. *Id.* ¶ 100. Although Plaintiffs offered to pay all of the outstanding invoices for the unsold inventory, Nortek refused to accept the return of unsold merchandise and initiated a lawsuit in California seeking the collection of the past due invoices. *Id.* ¶ 101.

In response, Plaintiffs initiated the present action. In Count I against Nortek and in Count II against Wave, Plaintiffs allege that Nortek and Wave violated *§§ 2(a)* and *(f)* of the Robinson-Patman Act ("RPA"), *15 U.S.C. §§ 13(a)* and *13(f)*, by knowingly inducing, receiving, or engaging in price discrimination. *Id.* ¶¶ 103-38. In Count III, Plaintiffs allege that Defendants engaged in commercial bribery in violation of *RPA § 2(c)*, *15 U.S.C. § 13(c)*. *Id.* ¶¶ 139-51. Finally, Plaintiffs assert claims for tortious **[*9]** interference in Count IV, against Wave and Bernard, and in Count V,[1] against all Defendants. *Id.* ¶¶ 152-70.

II. LEGAL STANDARD

To defeat a motion to dismiss filed pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570,*

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[1] There are two sections labeled "Count IV" in the Second Amended Complaint. The Court presumes that this is a numbering error and will refer to the second section labeled Count IV, pleading tortious interference against all Defendants, as Count V.

127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 742 (5th Cir. 2008). To meet this "facial plausibility" standard, a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Plausibility does not require probability, but a plaintiff must establish "more than a sheer possibility that a defendant has acted unlawfully." *Id.* The court must accept well-pleaded facts as true and view them in the light most favorable to the plaintiff. Sonnier v. State Farm Mut. Auto. Ins. Co., 509 F.3d 673, 675 (5th Cir. 2007). However, the court does not accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions." Ferrer v. Chevron Corp., 484 F.3d 776, 780 (5th Cir. 2007). A plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (internal citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level ... on the assumption that all the allegations in the complaint are true (even **[*10]** if doubtful in fact)." *Id.* (internal citations omitted).

The ultimate question is whether the complaint states a valid claim when viewed in the light most favorable to the plaintiff. Great Plains Tr, Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 312 (5th Cir. 2002). At the motion to dismiss stage, the court does not evaluate the plaintiff's likelihood of success. It only determines whether the plaintiff has stated a claim upon which relief can be granted. Mann v. Adams Realty Co., 556 F.2d 288, 293 (5th Cir. 1977).

III. ANALYSIS

A. Standing

Defendants moved to dismiss the portions of Counts I and II that are asserted by the SDS Franchisees, arguing that the SDS Franchisees lack standing to assert a claim for price discrimination under RPA § 2. Standing in a private antitrust action for damages arises under § 4 of the Clayton Act. *See* 15 U.S.C. § 15; J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981) ("[P]roof of a violation does not mean that a disfavored purchaser has been actually 'injured' within the meaning of § 4."); Feeney v. Chamberlain Mfg. Corp., 831 F.2d 93, 95 (5th Cir. 1987) (analyzing an RPA claim for damages under §§ 4 and 7 of the Clayton Act). "Standing to pursue an antitrust suit [exists] only if [Plaintiffs] show[]; '1) injury-in-fact, an injury to [Plaintiffs] proximately caused by [Defendants'] conduct; 2) antitrust injury; and 3) proper plaintiff status ....'" Waggoner v. Denbury Onshore, L.L.C., 612 F. App'x 734, 736 (5th Cir. 2015) (quoting Doctor's Hosp. v. Southeast Medical Alliance, 123 F.3d 301, 305 (5th Cir. 1997)). For the following reasons, the Court finds that the SDS Franchisees have standing **[*11]** to assert a violation of RPA § 2.

(1) Injury-in-Fact

A court analyzing antitrust standing must first determine whether Plaintiffs have properly alleged an injury-in-fact to their business or property. Norris v. Hearst Tr., 500 F.3d 454, 465 (5th Cir. 2007) (collecting cases); Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266, 270 (5th Cir. 1979). A plaintiff successfully shows injury-in-fact by pleading a decline in sales because of the defendant's conduct, but lacks standing if no actual injury has yet occurred because of the defendant's conduct. *Compare* Impala African Safaris, LLC v. Dall. Safari Club, Inc., Civ. A, No, 3:13-CV-2175-Impala African Safaris, LLC, 2014 U.S. Dist. LEXIS 127660, 2014 WL 4555659, at *5 (N.D. Tex, Sept, 9, 2014) (finding no standing where no injury had occurred), *with* David L. Aldridge Co. v. Microsoft Corp., 995 F. Supp. 728, 748 (S.D. Tex. 1998) (finding standing where the plaintiff suffered a "significant decline in sales"). In this case, SDS and its franchisees allege that they lost 59 clients and approximately $9,575,000 in annual revenue because of Defendants' discriminatory pricing program. *See* Second Am, Compl. ¶¶ 95-96. Accordingly, the SDS Franchisees sufficiently pleaded an injury-in-fact.

(2) Antitrust Injury

The Supreme Court has described antitrust injury as:

> [I]njury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation **[*12]** or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations ... would be likely to cause."

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977) (alteration in original) (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969))*; *Waggoner, 612 F. App'x at 737*. There are three categories of competitive injuries that can give rise to an RPA claim:

> Primary-line cases entail conduct—most conspicuously, predatory pricing—that injures competition at the level of the discriminating seller and its direct competitors. Secondary-line cases, of which this is one, involve price discrimination that injures competition among the discriminating seller's customers (here, [Plaintiffs and Wave]); cases in this category typically refer to "favored" and "disfavored" purchasers. Tertiary-line cases involve injury to competition at the level of the purchaser's customers.

Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 176, 126 S. Ct. 860, 163 L. Ed. 2d 663 (2006) (citations omitted); *Water Craft Mgmt. LLC v. Mercury Marine, 457 F.3d 484, 487 n.2 (5th Cir. 2006)*. "A hallmark of the requisite competitive injury [in a secondary-line case] ... is the diversion of sales or profits from a disfavored purchaser to a favored purchaser." *Volvo Trucks, 546 U.S. at 177* (collecting cases). Here, the Complaint is replete with allegations of the diversion of sales and profits from Plaintiffs to Wave. Plaintiff alleged that the discriminatory pricing program allowed Wave to win **[*13]** 59 clients and $9,575,000 in annual revenue from Plaintiffs. *Id.* ¶¶ 94-99. The Complaint thus contains allegations showing the hallmark of the requisite competitive injury. Additionally, Plaintiffs pleaded the existence of significant discriminatory pricing that allowed Wave to sell Nortek products up to 40% below the wholesale price Nortek charged Plaintiffs, *see* Second Am. Compl. ¶¶ 46, 97, which alone may be sufficient to show injury. *See* *FTC v. Morton Salt Co., 334 U.S. 37, 46-47, 68 S. Ct. 822, 92 L. Ed. 1196, 44 F.T.C. 1499 (1948)* (suggesting that the requisite injury can be inferred from a significant price discrimination alone); *Hanson v. Pittsburgh Plate Glass Indus., Inc., 482 F.2d 220, 227 (5th Cir. 1973)* (same).

Defendants argue that, under *Security Tire & Rubber Co. v. Gates Rubber Co.*, the SDS Franchisees have not suffered an antitrust injury because the SDS Franchisees obtained their inventory only through transfers from SDS, and "transfers from a parent corporation to its wholly-owned subsidiary corporation can never be considered separate sales ... in a[n] [RPA] discrimination suit." *598 F.2d 962, 965 (5th Cir. 1979)*. *Security Tire* is inapposite here. In *Security Tire*, the only evidence of price discrimination was the fact that the defendant favored its wholly-owned subsidiary over the plaintiff. *See* *598 F.2d at 964-65*. The Fifth Circuit held that a defendant's transfer of goods to a wholly-owned **[*14]** subsidiary would not constitute a "favored sale' for the purposes of the RPA. *Id. at 965*. Nothing in *Security Tire* suggests that a plaintiff who otherwise suffered an antitrust injury is precluded from alleging a violation of the RPA solely because the plaintiff obtained its inventory from a parent corporation.[2] Accordingly, the Court finds that the SDS Franchisees adequately pleaded an antitrust injury.

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[2] To the extent that Defendants intended to argue that Plaintiffs failed to adequately plead an essential element of a price discrimination claim under the RPA—two separate and contemporaneous sales to two distinct purchasers—Defendants are incorrect, The allegations in *Security Tire* were deficient because the defendants in that case "did not make a sale to two buyers at the same level of competition" and so the plaintiff "could not have suffered secondary-line injury." *Eximco, Inc. v. Trane Co., 737 F.2d 505, 517 (5th Cir. 1984)* (discussing *Security Tire*), Here, however, Plaintiffs adequately pleaded two separate and contemporaneous sales to direct competitors: Wave, which is a corporation that is not Nortek's subsidiary, and Plaintiffs, which are limited liability companies that are not Nortek's subsidiaries. Am. Compl. ¶¶ 3-23, 38, 45, 49, 68, 97.

(3) *Proper Plaintiff Status*

Finally, the Court must consider whether the SDS Franchisees are "proper plaintiffs" to sue for damages. To this end, the Court must consider: "(1) whether the plaintiff's injuries or their causal link to the defendant are speculative, (2) whether other parties have been more directly harmed, and (3) whether allowing this plaintiff to sue would risk multiple lawsuits, duplicative recoveries, or complex damage apportionment." *Norris, 500 F.3d at 465* (quoting *McCormack v. NCAA, 845 F.2d 1338, 1341 (5th Cir. 1988))*.

Defendants assert that the SDS Franchisees are not proper plaintiffs because they received their inventory from SDS, not from Defendants. In general, only the direct purchaser of goods will have standing to assert an antitrust violation. *See Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520, 203 L. Ed. 2d 802 (2019)* (citing *Ill. Brick Co. v. Illinois, 431 U.S. 720, 745-46, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977))*; *Free v. Abbott Labs., Inc., 176 F.3d 298, 299 (5th Cir. 1999)* (same). This indirect purchaser rule does not apply, however, **[*15]** in the "cost-plus" contract setting. *See In re Beef Indus. Antitrust Litig., 600 F.2d 1148, 1163-66 (5th Cir. 1979)*. In a cost-plus contract, the purchaser "commit[s] to buy[] a fixed quantity regardless of price," such that "[t]he effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand." *Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 217, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990)* (quoting *Ill. Brick, 431 U.S. at 736*). A purchaser can plead "the functional equivalent of cost-plus contracts" by showing that the price of a good was determined "by strictly applying certain formulae to the ... wholesale ... price."[3] *In re Beef, 600 F.2d at 1165*; *see also In re Plymood Antitrust Litig., 655 F.2d 627, 640 (5th Cir. Unit A Sept. 1981)*. As a result, the purchaser and the middleman incur "wholly separable items of damage"—the middleman loses volume while the purchaser absorbs the overcharge. *In re Beef 600 F.2d at 1164*.

The Court finds that Plaintiffs adequately pleaded that, at a minimum, the SDS Franchisees have the functional equivalent of a cost-plus contract with SDS. The Complaint alleges that "[e]ach of the SDS Franchisees have entered into a franchise agreement where they purchase 100% of their products through [SDS] for a set price based upon a standard mark up [sic] on the wholesale price provided to [SDS] from the manufacturer." Second Am. Compl. ¶ 90. As **[*16]** a result, any overcharge "is not absorbed by SDS," but "is passed directly to [the SDS Franchisees]." *Id.* Accepting these allegations as true, the Court finds that the SDS Franchisees have a cost-plus contract with SDS and are, therefore, proper plaintiffs to allege price discrimination under the RPA.

B. *Count III: Commercial Bribery*

(1) *Viability of the Claim under the RPA*

Defendants contend that Count III must be dismissed because commercial bribery is not a violation of *RPA § 2(c)*, The Court disagrees for several reasons. First, although the Fifth Circuit has not decided whether commercial bribery constitutes a violation of the RPA, *see Excel Handbag Co. v. Edison Bros. Stores, Inc., 630 F.2d 379, 387-88 (5th Cir. 1980)* (declining to reach the issue), every circuit to have addressed the issue has held that commercial bribery can amount to a violation of *RPA § 2(c)*. *See Seaboard Supply Co. v. Congoleum Corp., 770 F.2d 367, 372 (3d Cir. 1985)* (observing that "[t]here is good reason to question whether Congress intended to sweep commercial bribery within the ambit of *section 2(c)*," but joining the other "three Court of Appeals[,] which found that certain events constituting commercial bribery came within the terms of *2(c)*" (citations omitted)); *Grace v. E.J. Kozin Co., 538 F.2d 170, 173 (7th Cir. 1976)* ("[A]lthough defendants argue that *Section 2(c)* of the [RPA.1 does not reach commercial bribery cases such as this, we agree with the Sixth **[*17]** and Ninth Circuits that it does." (citations

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[3] Some circuits adopted a narrow interpretation of the cost-plus exception in light of *Kansas v. UtiliCorp United. See* EARL W. KINTNER ET AL., 11 FEDERAL ***ANTITRUST LAW*** § 78.8(c)(3) (collecting cases). To date, however, neither the Fifth Circuit nor the Supreme Court has overruled *In re Beef*.

omitted)); *Calnetics Corp. v. Volkswagen of Am., Inc., 532 F.2d 674, 696 (9th Cir. 1976)* ("We hold that, if distributor is able on remand to prove that counterdefendants indeed committed acts of commercial bribery in violation of *[§] 2(c)*, then the defendants ought to be allowed any damages proximately caused by that violation."); *Fitch v. Ky.-Tenn. Light & Power, 136 F.2d 12, 15 (6th Cir. 1943)* ("[T]he statute makes it illegal to make such a payment"—a bribe—"either to the other party to the transaction or to an agent or representative of such party." (internal quotation mark omitted)). In the absence of Fifth Circuit precedent, the Court finds it reasonable to rely on persuasive authority from the sister circuits. *See* *United States v. Graves, 908 F.3d 137, 142 (5th Cir. 2018)* ("We are always chary to create a circuit split." (quoting *Alfaro v. Comm'r, 349 F.3d 225, 229 (5th Cir. 2003))*).

Second, commercial bribery that involves a "person engaged in commerce" who "pay[s] or grant[s], or . . . receive[s] or accept[s]" while "in the course of such commerce . . . anything of value as a commission . . . or . . . any allowance or discount in lieu thereof; except for services rendered in connection with the sale or purchase of goods" appears to come within the plain language of *§ 2(c)*. *15 U.S.C. § 13(c)*. Third, the sister circuits' decision to recognize commercial briber as a violation of *§ 2(c)* appears to fulfill the legislative **[*18]** purpose of the RPA, which is "to prevent sellers . . . from yielding to the economic pressures of a large buying organization by granting unfair preferences in connection with the sale of goods." *FTC v. Henry Broch & Co., 363 U.S. 166, 174, 80 S. Ct. 1158, 4 L. Ed. 2d 1124 (1960)*. Commercial bribery is one avenue large buying organizations may employ to gain such an unfair advantage and divert profits from the rival buyer to the payer of the bribe, which is the hallmark of anticompetitive injury in RPA cases. *See* *Volvo Trucks, 546 U.S. at 177*. Finally, the Supreme Court suggested, in dictum, that "bribery of a public purchasing agent may constitute a violation of *[§] 2(c)*."[4] *Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*.

For these reasons, the Court finds that commercial bribery may amount to a violation of *RPA § 2(c)*.

(2) ***Safficiency of the Allegations***

Having determined that commercial bribery is actionable under *§ 2(c)*, the Court now turns to analyzing whether the Complaint sufficiently states such a claim. The Fifth Circuit has suggested that a claim for commercial bribery under the RPA requires a plaintiff to establish an underlying commercial bribery offense. *See* *Excel Handbag Co., 630 F.2d at 386, 387-88* (holding that the *RPA § 2(c)* claim premised on commercial bribery failed because the counterclaimant **[*19]** did not establish these elements). The offense of commercial bribery generally has the following elements: (1) the giving or offering of something of value; (2) to an agent or fiduciary; (3) without the consent of the principal; (4) with intent to influence the conduct of the agent or the fiduciary.[5] *See, e.g.,* *Perrin v. United States, 444 U.S. 37, 39 n.3, 100 S. Ct. 311, 62 L. Ed. 2d 199 (1979)* (discussing commercial bribery under the *Travel Act, 18 U.S.C. § 1952*); *Nyakatura v. AG, United States, 256 Fed. Appx. 461, 466 (3d Cir. 2007)* (discussing the common law definition of commercial bribery); *In re DePuy Orthopaedics, Inc., MDL Dkt. No. 3:11-MD-2244-K, 2016 U.S. Dist. LEXIS 156696, 2016 WL 6271465, at *6 (N.D. Tex. Jan 5, 2016)* (same under Texas law); AREEDA & HOVENKAMP, *supra*, ¶ 2362i (same under the RPA); *see also* MODEL PENAL CODE § 224.8 (AM. LAW INST. 1985) (proposing elements); *Commercial Bribery*, BLACK'S LAW DICTIONARY (11th ed. 2019). Both the payor and the payee can commit commercial bribery. *See, e.g.,* *Samsung Elecs. Am., Inc. v. Yang Kun Chung, Civ. A. No. 3:15-CV-4108-D, 2017 U.S. Dist. LEXIS 21700, 2017 WL 635031, at *6 (N.D. Tex. Feb. 16, 2017)*. Additionally,

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[4] The Court also notes that leading treatises and practice guides agree that *§ 2(c)* prohibits commercial bribery. *See, e.g.*, 14 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ***ANTITRUST LAW*** ¶ 2632i (3d ed. 2012) ("[*RPA § 2(c)*] was intended to cover some practices that could be described as 'commercial bribery.'"); CORPORATE COUNSEL'S GUIDE TO ROBINSON-PATMAN ACT § 3:13 (2018) ("In addition to the various state statutes, federal laws also proscribe commercial bribery, such as the [RPA], otherwise known as the price discrimination law.").

[5] These elements are consistent with the language of *§ 2(c)*. *See* *15 § 13(c)*,

to state a claim under the RPA, a plaintiff must plead injury and causation under *§ 4* of the Clayton Act. *See Grace, 538 F.2d at 173-74*.[6]

a. *Nortek*

Plaintiffs did not allege that Nortek offered, accepted, or paid bribes; to the contrary, the Complaint affirmatively states that Nortek did not consent to the bribery. *See* Second Am. Compl. ¶¶ 54, 155, 163. Nor could Nortek, a principal, be **[*20]** principally liable for commercial bribery, which involves the corruption without the consent of the principal. *See Perrin, 444 U.S. at 39 n.3*; *In re DuPuy, 2016 U.S. Dist. LEXIS 156696, 2016 Wl 6271465, at *6*; *see also Grace, 538 F.2d at 173* (explaining that the purpose of *§ 2(c) of the RPA* "is to protect the integrity of the principal-agent relationship").

Plaintiffs asserts that if Nortek cannot be held principally liable for the commercial bribery, it may be held vicariously liable. *See* Pls.' Supp. Br. 1-4. The Court agrees with this argument. *See, e.g, Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 569, 572-73, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982)* (imposing vicarious liability for antitrust violations). Thus, although the Court grants Nortek's Motion as to the direct commercial bribery claim against Nortek, the Court denies the Motion as to the vicarious liability claim.

b. *Bernard*

Bernard contends that Plaintiffs did not plead with specificity under *Federal Rule of Civil Procedure 9(b)* that Bernard engaged in commercial bribery. In general, courts do not impose a higher pleading standard for RPA claims, *see Larry R. George, 587 F.2d at 270*, *Games People Play, Inc. v. Nike, Inc., Civ. A. No. 1:14-cv-321, 2015 U.S. Dist. LEXIS 33217, 2015 WL 13657672, at *2-3 (ED. Tex. Feb. 13, 2015)*, but require a plaintiff to plead the offense of commercial bribery with specificity under *Rule 9(b)*. *See In re DePuy, 2016 U.S. Dist. LEXIS 156696, 2016 WL 6271465, at *6-7*. Under *Rule 9(b)*, a complaint must set out "the essentials of the first paragraph of a newspaper story, namely the who, what, when, where, and how." *Melder v. Morris, 27 F.3d 1097, 1100 n.5 (5th Cir. 1994)* (citation omitted).

Even if the **[*21]** *Rule 9(b)* standard applies, the Court finds that Plaintiffs pleaded Bernard's involvement in commercial bribery with specificity. The Complaint sets forth sufficient facts showing that Bernard was Nortek's sales representative, who received bribes from Wave in the form of payments and American Express gift cards. *See* Second Am. Compl. ¶¶ 25, 26, 28, 53, 59, 70. There are numerous facts pleaded that show that Bernard provided low, discriminatory pricing to Wave in exchange for these payments. *Id.* ¶¶ 26, 49, 53, 70, 112, 143-45, 150, 154. Plaintiffs even pleaded the alleged method of calculation of the bribe and the method of delivery, based on testimony of a former Wave employee and other documentation. *Id.* ¶¶ 64-65, 69-70 & Ex. D. Viewing the Complaint in the light most favorable to Plaintiffs, the Court finds that Plaintiffs adequately alleged that Bernard engaged in commercial bribery.

c. *Wave*

Wave argues that Plaintiffs did not sufficiently plead commercial bribery for two reasons. First, Wave contends that the allegations are not plausible and "make[] no sense," because: "If Nortek would give the discounts anyway, there would have been no reason or purpose in Wave's bribing Bernard." Wave's **[*22]** Br, 5, The Court, however, does

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[6] To the extent that the alleged bribe needs to cross the seller-buyer line—*i.e.*, where the payment is paid "by the [buyer] with the intent to improperly influence or corrupt" the seller's conduct, *Blue Tree Hotels Inv. (Can), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 222 (2d Cir, 2004)*; *Seaboard Supply Co., 770 F.2d at 372*, the Court finds that Plaintiffs satisfied this requirement by pleading that Wave, the buyer, paid the bribe to Nortek's agents, the seller. *See* Second Am. Compl. ¶¶59-75.

not evaluate Plaintiffs' likelihood of success at trial in the context of a motion to dismiss, but decides only whether the Complaint states a valid claim, which it does here. *See* *Great Plains Tr., 313 F.3d at 312*. Second, Wave asserts that Plaintiffs did not plead that Bernard and Nortek's other employees acted "for or in [sic] behalf of" Nortek; rather, Wave contends, Plaintiffs affirmatively pleaded that Nortek was unaware of the alleged bribe. *See generally* Wave's Suppl. Br. The Court finds this argument unpersuasive. Commercial bribery, by definition, involves "*secret* payments to an agent," *Excel Handbag, 630 F.2d at 386* (emphasis added), without the consent of the principal, *see supra* § III.B.2 (collecting authorities). Plaintiffs' allegations here are sufficient, because they alleged that Nortek's employees accepted bribes without Nortek's consent. *See* Second Am. Compl. ¶¶ 25-26, 28, 52-54, 155, 163,

C. *Tortious Interference*

Defendants contend that the Complaint fails to state a claim for tortious interference with existing contracts, prospective business relationships, or existing business relationships.

(1) *Tortious Interference with Existing Contract*

"The elements of a tortious interference with contract claim **[*23]** are: (1) the existence of a contract subject to interference; (2) a willful and intentional act of interference; (3) such act was a proximate cause of damage; and (4) actual damage or loss occurred." *Fluorine On Call, Ltd. v. Fluorogas Ltd., 380 F.3d 849, 864 (5th Cir. 2004)* (citation omitted). "To prevail on a claim for tortious interference with an existing contract, [Plaintiffs] ha[ve] to present evidence that [Defendants] induced [a third party] to 'breach the contract.'" *El Paso Healthcare Sys., Ltd. v. Murphy, 518 S.W.3d 412, 421-22 (Tex. 2017)*. The Complaint does not include any facts showing that Defendants induced any party to breach a contract. Accordingly, the Court grants the Motions as to Counts IV and V insofar as these Counts plead tortious interference with an existing contract. However, because Plaintiffs requested in their Response for leave to plead additional facts to support their claims, the Court will permit them to replead.

(2) *Tortious Interference with Prospective Business Relations*

> The elements of a claim for tortious interference with prospective business relations are 1) a reasonable probability that the parties would have entered into a contractual relationship; 2) an independently tortious or unlawful act by the defendant that prevented the relationship from occurring; 3) the defendant acted with a conscious **[*24]** desire to prevent the relationship from occurring, or it knew that the interference was certain or substantially certain to occur as a result of his conduct; and 4) the plaintiff suffered actual harm or damage as a result of the defendant's interference.

Ewbank v. ChoicePoint Inc., 551 F. Supp. 2d 563, 566-67 (N.D. Tex. 2008) (citing *Raj Partners, Ltd. v. Darco Constr. Corp., 217 S.W.3d 638, 649 n.10 (Tex. App.—Amarillo 2006, no pet.)*; *Richardson-Eagle, Inc. v. William. M. Mercer, Inc., 213 S.W.3d 469, 475 (Tex. App.—Houston [1st Dist.] 2006, pet. denied))*. Defendants only challenge the first two elements of this claim.

To establish a reasonable probability of a future business relationship, "a plaintiff must prove that more than mere negotiations occurred." *Richardson-Eagle, 213 S.W.3d at 475* (citing *Milam v. Nat'l Ins. Crime Bureau, 989 S.W.2d 126, 132 (Tex. App.—San Antonio 1999, no pet.)*. A "pre-existing business relationship can suffice to show a reasonable probability of prospective contractual relations," *Santander Consumer USA, Inc. v. Zeigler Chrysler Dodge Jeep-Downers Grove, LLC, Civ. A. No. 3:16-cv-3310-B, 2017 U.S. Dist. LEXIS 98041, 2017 WL 2729998, at *9 (N.D. Tex. June 26, 2017)* (citation omitted), provided that the pre-existing business relationships is an ongoing contractual relationship. *See* *N Cypress Med. Ctr. Operating Co. v. Gallagher Benefit Servs., Inc., Civ, A. No. 11-CV-00685, 2012 U.S. Dist. LEXIS 95789, 2012 WL 2870639, at *7 (S.D. Tex. July 11, 2012)*.

Here, Plaintiffs pleaded tortious interference with at least two business relationships that were beyond the negotiations stage. First, the Complaint states that Plaintiffs had a long, ongoing relationship with Nortek; that due to Bernard and Wave's rebate program, Plaintiffs lost market share of Nortek's products; and that Nortek pulled other related product lines from **[*25]** Plaintiffs, *See* Second Am. Compl. ¶¶ 38, 42, 100. Second, the Complaint alleges that Nortek and Wave contacted Plaintiffs' longstanding client to encourage it to switch to Wave. *Id.* ¶ 62, Moreover, this allegedly occurred after Plaintiffs had Nortek approve special pricing terms for the client, which suggests that Plaintiffs reached or were close to reaching an agreement with the client. *Id.* Viewing the Complaint in the light most favorable to Plaintiffs, the Court finds that these allegations are sufficient to establish a reasonable probability of a future business relationship.

As for pleading an independently tortious or unlawful act, Plaintiffs must show that Defendants engaged in conduct that is more than "merely 'sharp' or unfair"—it must be "actionable under a recognized tort [theory]," *Centuria, Inc. v. Regiment Sec., LLC, Civ. A, No, 3:11-CV-2500-N, 2013 WL 12250941, at *2 (N.D. Tex. Jan. 11, 2013)* (alteration in original) (quoting *Ash v. Hack Branch Distrib, Co., 54 S.W.3d 401, 414-15 (Tex. App.—Waco 2001, pet, denied))*. A violation of the antitrust laws suffices as an independently tortious or wrongful act. *See* *In re Mem'l Hermann Hosp. Sys., 464 S.W.3d 686, 704-06 (Tex. 2015)*. As explained above, Plaintiffs adequately alleged that Defendants engaged in violations of the RPA. Accordingly, the Court finds that Plaintiffs sufficiently stated a claim for tortious interference with **[*26]** a prospective business relationship.

(3) ***Tortious Interference with Existing Business Relationships***

"To the extent that Texas recognizes a cause of action for tortious interference with an existing business relationship, its elements are: '(1) unlawful actions undertaken by [Defendants] without a legal right or justifiable excuse; (2) with the intent to harm [Plaintiffs]; and (3) resulting actual harm or damage.'" *D'Onofrio v. Vacation Publ'ns, Inc., 888 F.3d 197, 214-15 (5th Cir. 2018)* (footnote omitted) (quoting *Am. Med. Int'l, Inc. v. Giurintano, 821 S.W.2d 331, 335 (Tex. App.—Houston [14th Dist.] 1991, no writ))*. The unlawful act requirement is satisfied by showing that the defendant engaged in conduct that is "independently tortious or unlawful." *Adrain v. Genetec Inc., No. 2:08-CV-423, 2009 U.S. Dist. LEXIS 90946, 2009 WL 3161386, at *3 (ED. Tex. Sept. 30, 2019)*. Additionally, Plaintiffs must show that Defendants' interference was motivated by malice, but do not need to allege the existence of a contract subject to interference. *Id. at 215* (quoting *CF & I Steel Corp. v. Pete Sublett & Co., 623 S.W.2d 709, 715 (Tex. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.)*. In the tortious interference context, malice "is not to be understood in its proper sense of ill will against a person, but in its legal sense, as characterizing an unlawful act, done intentionally without just cause or excuse.'" *Montoya v. San Angelo Cmty. Med. Ctr., No. 03-16-00510-CV, 2018 Tex. App. LEXIS 3868, 2018 WL 2437508 (Tex. App.—Austin May 31, 2018, pet. denied)* (quoting *Exxon Corp v. Allsup, 808 S.W.2d 648, 659 (Tex. App.—Corpus Christi 1991, writ denied))*.

Defendants argue that Plaintiffs did not sufficiently plead that they engaged in an unlawful act or that they acted with malice. As previously discussed, **[*27]** Defendants allegedly engaged in violations of the RPA, which satisfies the unlawful act element of the claim. The Court further finds that Plaintiffs sufficiently pleaded that Defendants acted intentionally and without just cause or excuse. The Complaint states that Defendants knew of Plaintiffs' customers and business relationships, knew or should have known that their conduct was illegal or wrongful, knew that Plaintiffs were losing customers, and acted despite this knowledge. *See* Second Am. Compl. ¶¶ 29, 54, 60-61, 76, 154, 162. Accordingly, the Court finds that Plaintiffs sufficiently pleaded a claim for tortious interference with existing business relationships.

(4) ***Civil Conspiracy***

Wave asks the Court to dismiss Plaintiffs' claim for civil conspiracy or to strike these allegations under *Federal Rule of Civil Procedure 12(f)*.[7] Defendants can be held jointly and severally liable if they were part of a conspiracy and one of them committed an underlying tort. *See* *Shaw v. Karnes Cty., Civ. A. No. SA-16-CA-203-FB, 2017 U.S. Dist. LEXIS 218314, 2017 WL 6403052, at *2-3 (W.D. Tex. Sept. 28, 2017)* (noting that a civil conspiracy claim creates at least derivative liability). To create derivative liability, Plaintiffs must establish the following elements: "(1) two or more persons; (2) an object to be accomplished; **[*28]** (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result." *Wackman Rubsamen, 602 F.3d 391, 408 (5th Cir. 2010)* (internal quotation marks omitted) (quoting *Tri v. J.T.T., 162 S.W.3d 552, 556 (Tex. 2005))*.

Here, the Court finds that Plaintiffs successfully pleaded facts to support a claim of civil conspiracy when viewed in the light most favorable to Plaintiffs. For example, Bernard and Wave allegedly conspired to foster the discriminatory pricing program in exchange for bribes, which harmed Plaintiffs ability to retain clients. *See, e.g.*, Second Am. Compl. ¶¶ 26, 28-29, 53. The Complaint also states that Nortek and Wave allegedly jointly solicited Plaintiffs' clients to switch to Wave. *See id.* ¶ 62. Plaintiffs' allegations are facially plausible and sufficient to show that Defendants conspired to commit one or more unlawful, overt acts, which harmed Plaintiffs. Accordingly, the Court denies the Motions as to the civil conspiracy allegations.

IV. CONCLUSION

For the foregoing reasons, the Court grants in part and denies in part the Motions. The Court grants the Motions as to Counts IV and V insofar as these counts allege claims for the tortious interference with an existing contract. The Court also grants **[*29]** Nortek's Motion as to a direct commercial bribery claim under Count III, but denies the Motion as to a vicarious liability claim. The Court otherwise denies the Motions. The Court grants Plaintiffs' request for leave to amend. Plaintiffs must file an amended complaint no later than August 21, 2019. If an amended complaint is not filed by this date, the dismissed claims will be dismissed with prejudice.

SO ORDERED.

SIGNED July 22, 2019.

/s/ Karen Gren Scholer

KAREN GREN SCHOLER

UNITED STATES DISTRICT JUDGE

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[7] At the hearing on June 19, 2019, counsel for Plaintiffs clarified that they are not alleging an independent claim for civil conspiracy.

Cent. Valley Med. Grp., Inc. v. Indep. Physician Assocs. Med. Grp., Inc.

United States District Court for the Eastern District of California

July 25, 2019, Decided; July 25, 2019, Filed

1:19-cv-00404-LJO-SKO

Reporter
2019 U.S. Dist. LEXIS 124388 *; 2019 WL 3337891

CENTRAL VALLEY MEDICAL GROUP, INC., Plaintiffs, v. INDEPENDENT PHYSICIAN ASSOCIATES MEDICAL GROUP, INC., dba ALLCARE IPA, DOES 1 through 10, inclusive, Defendants.

Core Terms

federal question, unfair, threatens, antitrust, harms, federal law, unfair competition, anti trust law, removal, cases, state law, policies, federal court, monopoly, parties, costs, prong, retain jurisdiction, antitrust claim, cause of action, federal issue, state court, violations, predicate, state-law

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For Independent Physician Associates Medical Group, Inc., Doing business as, Allcare, IPA, Defendant: James Maxwell Cooper, LEAD ATTORNEY, Kessenick Gamma & Free LLP, San Francisco, CA.

Judges: Lawrence J. O'Neill, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: Lawrence J. O'Neill

Opinion

MEMORANDUM DECISION AND ORDER ON PLAINTIFF'S RENEWED MOTION TO REMAND. (ECF NO. 22) AND PLAINTIFF'S REQUEST FOR A TEMPORARY RESTRAINING ORDER (ECF NO. 31)

I. INTRODUCTION

This case concerns claims brought by Central Valley Medical Group, Inc. ("CVMG") against Independent Physician Associates Medical Group, Inc., dba AllCare ("AllCare") and Does 1 through 10. This case was originally filed in Stanislaus County Superior Court on March 19, 2019. ECF No. 1, Ex. A. On March 27, 2019, AllCare filed a notice of removal to this Court. ECF No. 1. On April 5, 2019, CVMG filed a motion to remand, followed by an opposition from AllCare on April 22, 2019 and a reply from CVMG on April 29, 2019. ECF Nos. 6, 8, 9. That motion **[*2]** to remand was denied without prejudice on June 14, 2019. ECF No. 20. On July 8, 2019, CVMG filed a first amended complaint ("FAC"). ECF No. 21. On July 15, 2019, CVMG filed a renewed motion to remand, including a request for frees and costs. ECF No. 22. The same day, CVMG also filed an *ex parte* request for a shortened briefing schedule, which the Court granted in part. ECF No. 30. On July 22, 2019, CVMG filed a motion for a temporary restraining order. ECF No. 31. Due to the urgency of CVMG's request for a TRO, the Court issued an order notifying the parties it would rule on the motion to remand without a reply. ECF No. 32. AllCare filed its opposition to the renewed motion to remand on July 24, 2019. ECF No. 34. Pursuant to *Local Rule 230(g)*, the Court finds this matter suitable for decision on the papers

For the following reasons, CVMG's motion to remand is **GRANTED**. CVMG's request for a temporary restraining order is **DENIED** as moot.

II. BACKGROUND

The Court incorporates by reference its prior recitation of the facts of this case. *See* ECF No. 20 at 1-2. CVMG's amended complaint pleads a significant number of additional factual and legal bases for its claims. ECF No. 21. Most pertinent to this motion, **[*3]** CVMG amended its Unfair Business Practices cause of action to remove the references to federal ***antitrust law***, and instead pleaded as the necessary predicate violation for the *§ 17200* Unfair Competition Law ("UCL") unfair business practices claim that AllCare's conduct "offends the policies of free competition and free trade, and significantly threatens or harms competition." *Id.* ¶ 183.

III. STANDARD OF DECISION

A defendant may remove a civil case from state court to federal court if the action presents either a federal question or the action's parties are citizens of different states and the amount in controversy is over $75,000. *28 U.S.C. §§ 1331*, *1441*. Subject-matter jurisdiction (in the form of either federal question or diversity jurisdiction) may be challenged at any time prior to final judgment. *Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 571, 124 S. Ct. 1920, 158 L. Ed. 2d 866 (2004)*.

The artful pleading doctrine prevents a plaintiff from circumventing federal jurisdiction by embedding federal issues within state law causes of action. *See Franchise Tax Bd. of State of Cal. v. Const. Laborers Vacation Trust for So. Cal., 463 U.S. 1, 14, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)* ("Even though state law creates appellant's causes of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal **[*4]** law in dispute between the parties."); *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 312, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005)* ("[F]ederal question jurisdiction will lie over state-law claims that implicate significant federal issues."). The Ninth Circuit has elaborated that

> the artful pleading doctrine allows federal courts to retain jurisdiction over state law claims that implicate a substantial federal question. A state law claim falls within this . . . category when: (1) "a substantial, disputed question of federal law is a necessary element of . . . the well-pleaded state claim," . . . or the claim is an "inherently federal claim" articulated in state-law terms, . . . or (2) "the right to relief depends on the resolution of a substantial, disputed federal question . . . ." A careful reading of artful pleading cases shows that no specific recipe exists for a court to alchemize a state claim into a federal claim—a court must look at a complex group of factors in any particular case to decide whether a state claim actually "arises" under federal law.

Lippitt v. Raymond James Fin. Servs., Inc., 340 F.3d 1033, 1042-43 (9th Cir. 2003), *as amended* (Sept. 22, 2003) (internal citations and quotation marks omitted); *see also Gunn v. Minton, 568 U.S. 251, 258, 133 S. Ct. 1059, 185 L. Ed. 2d 72 (2013)* (explaining substantial federal question jurisdiction will lie "if a federal issue is: (1) necessarily raised, (2) actually disputed, **[*5]** (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress."); *Grable, 545 U.S. at 312* (explaining substantial federal question doctrine "captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law").

"Courts have fashioned a number of proxies to determine whether a state claim depends on the resolution of a federal question to such an extent as to trigger subject matter jurisdiction." *Lippitt, 340 F.3d at 1045*. In evaluating whether jurisdiction exists, a court must determine if the federal question goes to the gravamen of a plaintiff's claims, or, in other words, "[i]s the federal question 'basic' and 'necessary' as opposed to 'collateral' and 'merely possible'? Is the federal question 'pivotal' as opposed to merely 'incidental'? Is the federal question 'direct and essential' as opposed to 'attenuated?'" *Id.* (internal citations omitted). Nevertheless, "the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Id. at 1040*.

Finally, a plaintiff may be able to defeat federal jurisdiction if an **[*6]** "alternative and independent" violation of state antitrust policies is offered as a basis for an unfair competition claim, even if a federal basis is also offered. *See Rains v. Criterion Systems, Inc., 80 F.3d 339, 346 (9th Cir. 1996)* ("When a claim can be supported by alternative and independent theories—one of which is a state law theory and one of which is a federal law theory—federal question jurisdiction does not attach because federal law is not a necessary element of the claim.").

IV. ANALYSIS

A. Federal Question Jurisdiction

The core dispute between the parties remains whether a substantial federal issue is necessarily raised by one of CVMG's California Unfair Competition Law claims. *See Gunn, 568 U.S. at 258*; *Lippitt, 340 F.3d at 1041-43*.[1] As discussed in the Court's prior order, the California Supreme Court has defined an "unfair" business practice as "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. Therefore, when pleading under the "unfair" prong of the UCL and alleging a violation of the policy or spirit of a state or federal ***antitrust law***, the policy must be "tethered to specific **[*7]** constitutional, statutory or regulatory provisions." *Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc., No. 12-cv-05847-WHO, 2015 U.S. Dist. LEXIS 49740, 2015 WL 1744330, at *24 (N.D. Cal. Apr. 15, 2015)* (quoting *Bardin v. Daimlerchrysler Corp., 136 Cal. App. 4th 1255, 1271, 39 Cal. Rptr. 3d 634 (2006))*; *see also Cel-Tech, 20 Cal. 4th at 186-87* ("we must require that any finding of unfairness to competitors under *section 17200* be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition."). But "a violation of the unfair prong may be based on conduct that 'significantly threatens or harms competition,' regardless of whether it represents an actual or incipient violation of an ***antitrust law***." *PeopleBrowsr, Inc. v. Twitter, Inc., No. C-12-6120-EMC, 2013 U.S. Dist. LEXIS 31786, 2013 WL 843032, at *4 (N.D. Cal. Mar. 6, 2013)*.

The Court previously ruled that CVMG's claim raised a substantial federal question because CVMG's sole theory of UCL unfair competition liability was that AllCare's conduct violated policies tethered to federal ***antitrust law***. ECF. No. 20 at 10. The Court agrees with CVMG that the First Amended Complaint cures theses defects.

CVMG has removed the explicit references to federal antitrust policies. In fact, CVMG has moved away from antitrust allegations of any sort and does not allege that AllCare was a monopoly or was attempting to monopolize any market. Instead, CVMG's First Amended Complaint now pleads as the **[*8]** predicates for its "unfair" UCL claim that AllCare tortiously interfered with CVMG's contracts and prospective economic advantage and violated statutory requirements regarding communications with patients, alleging that in taking those actions AllCare "unfairly competed with CVMG" and this conduct "offends the policies of free competition and free trade, and significantly threatens or harms competition." ECF No. 21 ¶¶ 176-81, 183.

AllCare correctly points out that CVMG still fails to plead the state law "policies of free competition and free trade" underlying the claim. However, *Cel-Tech* provides that there are three possible predicates for an unfair competition

[1] AllCare makes a threshold argument that CVMG's motion is untimely. While CVMG did violate the Court's ordered deadline, CVMG is correct that *28 U.S.C. § 1447(c)* requires that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

claim: "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc., 20 Cal. 4th at 187*; *see also* *Peoplebrowsr, No. C-12-6120-EMC, 2013 U.S. Dist. LEXIS 31786, 2013 WL 843032, *4* (noting the alternative formulations of the unfair prong should be read in the disjunctive). CVMG's pleading that AllCare's conduct "significantly threatens or harms competition" creates an "alternative and independent" state **[*9]** law theory to support its unfair UCL claim. *Rains, 80 F.3d at 346*; *Cel-Tech, 20 Cal.4th at 187*. Such an alternative and independent theory means that federal law is no longer a necessary element of CVMG's unfair UCL claim. *See id.*; *Peoplebrowsr, No. C-12-6120-EMC, 2013 U.S. Dist. LEXIS 31786, 2013 WL 843032* ("Thus, a violation of the unfair prong of the UCL does not necessarily require establishing a violation of the *Sherman Act*. . . . As Twitter has not demonstrated that PeopleBrowsr's unfair acts UCL claim arises under federal law, remand is appropriate."); *Gershfeld v. Champion Aerospace LLC*, No. SACV 13-1318-JVS (JEMx), 2013 WL 12123685, at *2 (C.D. Cal. Oct. 8, 2013) (ordering remand where "Plaintiff may succeed on his UCL failure-to-disclose claim with or without proving a violation of federal law."); *Caldwell v. N. Pac. Mortg. Corp., No. C10-05306-THE, 2011 U.S. Dist. LEXIS 39698, 2011 WL 1303629, at *3 (N.D. Cal. Apr. 4, 2011)* ("Thus because Plaintiffs' UCL claim is supported by state-law theories of liability, the claim is not necessarily federal in character, and the Caldwells' right to relief does not depend on the resolution of a disputed federal question."); *Briggs v. First Nat'l Lending Servs., No. C 10-00267-RS, 2010 U.S. Dist. LEXIS 35639, 2010 WL 962955, at *3 (N.D. Cal. Dec. 9, 2010)* ("Here, since the complaint's UCL claim is supported by numerous theories of recovery under California law, the alleged violation of TILA is not considered a necessary element under *Rains*."); *California Pinnacle Sec. CA. LP, 746 F. Supp. 2d 1129, 1131 (N.D. Cal. 2010)* ("Because plaintiff is able to show defendant acted unlawfully **[*10]** based on these state law provisions and without any references to federal law, remand is appropriate."); *Hendricks v. Dynegy Power Mktg., Inc., 160 F. Supp. 2d 1155, 1165 (S.D. Cal. 2001)* ("As a result, Plaintiffs can state a violation under *§ 17200* in two ways, independent of the *Federal Power Act*: either by alleging a violation of the *Cartwright Act* as the predicate offense, or by alleging that the anti-competitive activity was unfair or deceptive even if not unlawful."); *Castro v. Providian Nat'l Bank, No. C-00-4256-VRW, 2000 U.S. Dist. LEXIS 19062, 2000 WL 1929366, at *3 (N.D. Cal. Dec. 29, 2000)* (ordering remand because "plaintiffs have both pled and intend to prove that the unlawful prong of *section 17200* is supported by violations of state law as well.").

AllCare responds that CVMG's FAC UCL claim raises a necessary, substantial federal question, because the alleged conduct is solely cognizable as a federal anti-trust claim. ECF No. 34 at 8. AllCare supports this argument by citing to *In re NFLs Sunday Ticket Antitrust Litig., No. ML 15-02668-BRO, 2016 U.S. Dist. LEXIS 41639, 2016 WL 1192642, at *5 (C.D. Cal. Mar. 28, 2016)*, which ruled that the plaintiff's case necessarily raised a substantial federal question because the plaintiff could not recover unless they showed that the defendants obtained a monopoly and abused their monopoly position to charge supra-competitive prices. *Id.* ("[n]o California statute deals **[*11]** expressly with monopolization") (quoting *Dimidowich v. Bell & Howell, 803 F.2d 1473, 1478 (9th Cir. 1986))*. However, critically, the plaintiff in *In re National Football Leagues* did not allege that the defendants significantly threatened or harmed competition in any way that was independent of the monopolization allegations. *See id.* ("Plaintiff's UCL cause of action relies on [d]efendants' alleged abuse of its monopoly position and charging supra-competitive prices.") (internal quotation marks omitted). The importance of that distinction was specifically addressed by the *In re National Football Leagues* court: "Unlike in *PeopleBrowsr*, [p]laintiff's [c]omplaint does not allege conduct that significantly threatens or harms competition, *regardless of* whether it represents an actual or incipient violation of an ***antitrust law***." *Id.* (internal quotation marks omitted) (emphasis in the original). The other relevant cases cited by AllCare similarly involve claims that were explicitly tied to ***antitrust law***, without distinct allegations that the conduct at issue "significantly threatens or harms competition." *See* *Nat'l Credit Reporting Ass'n v. Experian Info. Solutions, Inc., No. C04-01661-WHA, 2004 U.S. Dist. LEXIS 17303, 2004 WL 1888769 (N.D. Cal 2004)* (involving a claim explicitly tied to monopoly power); *Dimidowich v. Bell & Howard, 803 F.2d 1473 (9th Cir. 1986)*, *as* ***[*12]*** *modified*, *810 F.2d. 1517 (9th Cir. 1987)* (involving explicit antitrust claims); *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc., 198 Cal. App. 4th 1366, 131 Cal. Rptr. 3d 519 (Cal. Ct. App. 2011)* (involving explicit antitrust claims); *Free FreeHand Corp. v. Adobe Sys. Inc., 852 F. Supp. 2d 1171 (N.D. Cal. 2012)* (involving parties who agreed that their UCL claim was tied to federal antitrust); *Lorenzo v. Qualcomm Inc., 603 F. Supp. 2d 1291 (S.D. Cal. 2009)* (involving a claim of "common law monopoly"); *Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997)* (involving a claim explicitly based on the Sherman Act); *Allied*

Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991 (9th Cir. 2010) (involving a claim explicitly based on the Sherman Act).

AllCare also cites a number of cases for the proposition that a finding that conduct is not an antitrust violation precludes a finding of unfair competition. *See* ECF No. 34 at 13-14. But in all of those cases, the plaintiff either brought explicit antitrust claims or unfair competition claims based on underlying conduct that was *per se* lawful under the statute at issue. *LiveUniverse, Inc. v. MySpace, Inc., 304 Fed. Appx. 554 (9th Cir. 2008)* (involving explicit federal antitrust claims); *Chavez v. Whirlpool Corp., 93 Cal. App. 4th 363, 113 Cal. Rptr. 2d 175 (Cal. Ct. App. 2001)* (involving a claim that was expressly precluded by statute); *U.S. Colo, LLC v. Coresite One Wilshire, No. CV 14-4044 PSG (PLAx), 2014 U.S. Dist. LEXIS 165072, 2014 WL 12689269 (C.D. Cal. 2014)* (involving a claim based on violation of the Sherman Act); *DocMagic, Inc. v. Ellie Mae, Inc., 745 F. Supp. 2d 1119 (N.D. Cal 2010)* (involving explicit antitrust claims). While a finding of no antitrust violation could mean no unfair competition claim is available, *Cel-Tech* still creates a separate class of unfair competition claims for parties alleging "conduct that significantly threatens **[*13]** or harms competition" separate and apart from anti-trust violations. A finding of an anti-trust violation is not a mandatory predicate for such claims.

Here, like in *PeopleBrowsr*, CVMG has alleged that AllCare's conduct "significantly threatens or harms competition." ECF No. 21 ¶ 183. As *In re National Football Leagues* recognized, by pleading under this prong of *Cel-Tech*, CVMG's claim is not solely cognizable as a violation of federal ***antitrust law***. AllCare raises legitimate concerns regarding whether CVMG's claim may be ultimately dismissed because it barely pleads how AllCare "significantly threatens or harms competition" in a manner distinct from unilateral monopolization or other violations of federal anti-trust law. Nevertheless, for purposes of this remand motion, CVMG's allegations are sufficient to state an "alternative and independent theory" that does not necessarily depend on federal antitrust laws or violations of antitrust policies.

Therefore, the Court concludes that CVMG's UCL claim in the FAC does not necessarily raise a substantial federal question, and there is no federal question jurisdiction.

B. Discretionary Retention of Jurisdiction Not Appropriate

A "district court **[*14]** has discretion 'to remand a properly removed case to state court when all federal-law claims in the action have been eliminated and only pendent state-law claims remain' when doing so 'serves the principles of economy, convenience, fairness, and comity.'" *Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1149 (9th Cir. 2012)* (quoting *Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 345, 357, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988))*. Remand is preferred "[w]hen the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain." *Cohill, 484 U.S. at 350*. This case is still in a very early stage and CVMG's filing of the FAC has eliminated federal question jurisdiction. ECF No. 21 at 29-31. While the Court does not condone CVMG's tactics—even if CVMG was acting in good faith and not forum shopping as it claims, the unnecessary use of the parties' and court's precious resources could have been avoided had CVMG put minimal time and effort into researching and drafting their original complaint—there is little-to-no unfairness to AllCare in remanding to state court. And comity weighs at least equally in favor of letting California courts adjudicating their unfair competition laws, as opposed to the federal system's potential interest in interpreting **[*15]** federal anti-trust laws.

Furthermore, in the interests of judicial economy, the overburdened Eastern District of California Federal Court should be reluctant to retain jurisdiction over cases where it is so early in the case and there is no mandatory subject matter jurisdiction over the claims. The cases cited by AllCare for the proposition "once jurisdiction, always jurisdiction" all note the discretionary nature of retaining jurisdiction after amendments have removed the basis for federal jurisdiction. *Stafford v. Dollar Tree Stores, Inc., No. 2:13-CV-01187-KLM, 2014 U.S. Dist. LEXIS 42564, 2014 WL 1330675 (E.D. Cal. 2014)* (addressing a claim that a prior court's decision to maintain jurisdiction was clear error, and finding it was not); *Sanchez v. Ritz Carlton, No. CV-15-3484-PSG-PJWX, 2015 U.S. Dist. LEXIS 109044, 2015 WL 4919972, (C.D. Cal 2015)* (addressing a claim by the plaintiff that the court was compelled to remand after the basis of federal jurisdiction was gone). In fact, two of the cases cited by AllCare to support "once jurisdiction, always jurisdiction" ultimately remanded the cases before those courts. *Millar v. BART Dist., 236 F. Supp. 2d 1110, 1118 (N.D. Cal 2002)* (discussing the history of remand decisions where federal courts retain jurisdiction, but ultimately granting the plaintiff's motion to amend and remanding the case); *Firoozye v. Earthlink Network, 153 F. Supp. 2d 1115, 1121 (N.D. Cal. 2001)* ("if none of the plaintiff's claims **[*16]** is preempted, the face of the plaintiff's well-pleaded complaint would not arise under federal law and this Court would not have jurisdiction, compelling remand to state court."). Consequently, the Court declines to exercise its discretion to retain jurisdiction.

C. Costs and Attorney's Fees

CVMG asks the Court to award costs and attorney's fees incurred as a result of the removal of this case. ECF No. 22 at 13-14. *28 U.S.C. § 1447(c)* provides that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Such awards are appropriate "where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp., 546 U.S. 132, 141, 126 S. Ct. 704, 163 L. Ed. 2d 547 (2005)*. "[W]hen an objectively reasonable basis exists, fees should be denied." *Martin, 546 U.S. at 141*. "The objective reasonableness of removal is measured at the time of removal." *Pope v. Wells Fargo Bank, N.A., No. CIV.2:10-2807-WBS-KJM, 2010 U.S. Dist. LEXIS 125341, 2010 WL 8388301, at *5 (E.D. Cal. Nov. 29, 2010)*. Nevertheless, "[i]n applying this rule, district courts retain discretion to consider whether unusual circumstances warrant a departure from the rule in a given case." *Martin, 546 U.S. at 141*; *see* *Gardner v. UICI, 508 F.3d 559, 562 (9th Cir. 2007)* ("Under *Martin*, however, whether a removal is improper is not dispositive in determining whether fees should be awarded **[*17]** under *28 U.S.C. § 1447(c)*."); *see also* *Martin, 546 U.S. at 140* ("[T]here is no reason to suppose Congress meant to confer a right to remove, while at the same time discouraging its exercise in all but obvious cases.").

Because the Court held that CVMG's original complaint presented a substantial and necessary federal question, AllCare had an objectively reasonable basis for seeking removal. ECF No. 20 at 10; *Martin, 546 U.S. at 141*. CVMG does not allege the existence of any unusual circumstances that would warrant a departure from the rule that counsels a denial of fees. ECF No. 22 at 13-14. CVMG's request for costs and fees will be denied.

V. CONCLUSION AND ORDER

For the reasons stated above, CVMG's Renewed Motion to Remand is **GRANTED**. CVMG's request to recover costs and attorney's fees is **DENIED**. CVMG's request for a temporary restraining order is **DENIED** as moot.

IT IS SO ORDERED.

Dated: **July 25, 2019**

/s/ Lawrence J. O'Neill

UNITED STATES CHIEF DISTRICT JUDGE

City of Oakland v. Oakland Raiders

United States District Court for the Northern District of California

July 25, 2019, Decided; July 25, 2019, Filed

Case No. 18-cv-07444-JCS

Reporter

2019 U.S. Dist. LEXIS 124465 *; 2019-2 Trade Cas. (CCH) P80,851; 2019 WL 3344624

CITY OF OAKLAND, Plaintiff, v. OAKLAND RAIDERS, et al., Defendants.

Subsequent History: Dismissed by, Without prejudice *City of Oakland v. Oakland Raiders, 2020 U.S. Dist. LEXIS 76589 (N.D. Cal., Apr. 30, 2020)*

Core Terms

teams, relocation, stadium, antitrust, damages, host, Defendants', League, factors, antitrust claim, allegations, anti trust law, third party, Sherman Act, circumstances, funding, amend, lease, professional football, contracting parties, unjust enrichment, tax revenue, third-party, contends, asserts, parties, restrictions, thirty-two, territory, bylaws

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For Arizona Cardinals Football Club LLC, Atlanta Falcons Football Club, LLC, Baltimore Ravens Limited Partnership, Buffalo Bills, LLC, Panthers Football, LLC, Chicago Bears Football Club, Inc., Cincinnati Bengals, Inc., Cleveland Browns Football **[*2]** Company LLC, Dallas Cowboys Football Club, Ltd., PDB Sports, Ltd., Detroit Lions, Inc., Green Bay Packers, Inc., Houston NFL Holdings, LP, Indianapolis Colts, Inc., Jacksonville Jaguars, LLC, Kansas City Chiefs Football Club, Inc.,, Chargers Football Company, LLC, Rams Football Company, LLC, Miami Dolphins, Ltd., Minnesota Vikings Football, LLC, New York Football Giants, Inc.., New York Jets LLC, Philadelphia Eagles, LLC, Pittsburgh Steelers LLC, Forty Niners Football Company LLC, Football Northwest LLC, Buccaneers Team LLC, Tennessee Football, Inc., Pro-Football, Inc., National Football League, New England Patriots LLC, New Orleans Louisiana Saints, LLC, Defendants: John Edward Hall, LEAD ATTORNEY, Covington & Burling LLP, Washington, DC; Benjamin John Razi, Covington and Burling LLP, Washington, DC; Daniel B. Asimow, LEAD ATTORNEY, Arnold & Porter Kaye Scholer LLP, San Francisco, CA; Derek Ludwin, One CityCenter, Washington, DC; Gregg H. Levy, Covington Burling, Washington, DC; Sean F. Howell, Covington & Burling LLP, San Francisco, CA.

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Judges: JOSEPH C. SPERO, Chief Magistrate **[*3]** Judge.

Opinion by: JOSEPH C. SPERO

Opinion

ORDER GRANTING MOTION TO DISMISS

Re: Dkt. No. 41

I. INTRODUCTION

Plaintiff the City of Oakland ("Oakland") brings this action against the Defendants the Oakland Raiders (the "Raiders"), the National Football League (the "NFL"), and all thirty-one other teams in the NFL, asserting that the Raiders' decision to leave Oakland, and the NFL's approval of that decision, violate the antitrust laws and the NFL's own governing documents, among other claims.[1] Defendants move to dismiss for failure to state a claim under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. The Court held a hearing on July 19, 2019. For the reasons discussed below, Defendants' motion is GRANTED, although Oakland may amend its claims if it can allege facts sufficient to cure the deficiencies identified below. If Oakland chooses to amend, it may file an amended complaint no later than September 9, 2019.[2]

II. BACKGROUND

A. Factual Background and Allegations of the Complaint

Because factual allegations are generally taken as true on a motion to dismiss under *Rule 12(b)(6)*, this section recites the allegations of Oakland's complaint as if true. Nothing in this order should be construed as resolving any issue of fact that might be disputed at a later stage of the case. **[*4]**

1. Overview of Raiders History

The Raiders were based in Oakland from the creation of the franchise in 1960 through 1982, and again from 1994 through the present, playing their home games for most of that period at a stadium in Oakland known as the Coliseum. *See* Compl. ¶¶ 38-47. The Raiders were managed and at least partially owned by the late Al Davis for much of the team's existence. *See id.* ¶¶ 40-50. Al Davis's son Mark Davis assumed control of the team after his father's death in 2011. *Id.* ¶ 54.

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[1] The other teams are the Arizona Cardinals, Atlanta Falcons, Baltimore Ravens, Buffalo Bills, Carolina Panthers, Chicago Bears, Cincinnati Bengals, Cleveland Browns, Dallas Cowboys, Denver Broncos, Detroit Lions, Green Bay Packers, Houston Texans, Indianapolis Colts, Jacksonville Jaguars, Kansas City Chiefs, Los Angeles Chargers, Los Angeles Rams, Miami Dolphins, Minnesota Vikings, New England Patriots, New Orleans Saints, New York Giants, New York Jets, Philadelphia Eagles, Pittsburgh Steelers, San Francisco 49ers, Seattle Seahawks, Tampa Bay Buccaneers, Tennessee Titans, and Washington Redskins. The full names of the entities controlling those teams and named as defendants can be found at paragraph 19 of Oakland's complaint.

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

The team's history has been fraught with litigation, much of it related to the team's 1982 move to Los Angeles and its lease at the Coliseum after returning to Oakland. As but a few examples, Oakland unsuccessfully attempted to acquire the Raiders through eminent domain (*City of Oakland v. Oakland Raiders, 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (1985))*, the Raiders and a stadium commission in Los Angeles successfully sued to enjoin enforcement of the NFL's then-existing rules restricting movement of teams (*L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381 (9th Cir. 1984))*, and after the Raiders' return to Oakland, the Raiders and Oakland engaged in litigation over the status of the Raiders' lease of the Coliseum (Compl. ¶¶ 48-49).

2. Plans to Relocate

In 2017, the Raiders announced that they were relocating from Oakland to Las Vegas—giving **[*5]** rise to the present case. Compl. ¶ 2. Oakland alleges that Mark Davis and the Raiders had considered such a move as early as 1998, when Mark Davis registered the domain name "LasVegasRaiders.com" (which he subsequently renewed annually) and acquired a cell phone number with a Las Vegas area code. *Id.* ¶ 51.

"In December of 2008, NFL Commissioner Roger Goodell . . . announced that the NFL wanted the Raiders to receive a new stadium," but the Raiders renewed their lease at the Coliseum the following year. *Id.* ¶ 52. The Raiders nevertheless engaged in discussions with the San Francisco 49ers regarding potentially sharing a stadium in Santa Clara, California. *Id.* ¶ 53. In 2010, a private entity proposed building a stadium in Los Angeles for several NFL teams including the Raiders, and in 2012, the NFL sent a memorandum to its teams describing circumstances under which two teams could move to Los Angeles, which "was believed to be largely addressed to the Raiders, Rams, and Chargers." *Id.* ¶¶ 53, 55. Those three teams applied in 2016 to relocate to Los Angeles, but the NFL granted the Raiders permission for such a move only if the Chargers declined to move to Los Angeles. *Id.* ¶¶ 60-61.

Meanwhile, **[*6]** the Raiders also pursued relocation to Las Vegas. Mark Davis told an NFL executive in 2014, "I'm going to Vegas, baby!" *Id.* ¶ 57. Despite that statement and the application to move to Los Angeles, the Raiders continued negotiating with Oakland regarding a potential new stadium. Davis announced in 2015 that he would commit $500 million to build a stadium if Oakland provided an additional $400 million, for a total cost of $900 million. *Id.* ¶ 59. In January of 2016, Davis met with Nevada billionaire Sheldon Adelson to discuss funding a $1.7 billion stadium in Las Vegas, despite having announced his intention to keep the Raiders in Oakland at a town hall "a few weeks" earlier. *Id.* ¶ 62. Davis told a Nevada tourism committee in April of 2016 that he would commit $500 million to a stadium in Las Vegas, and the following month characterized his position as a "commitment" to move the Raiders to Las Vegas if sufficient public funding was provided for a stadium. *Id.* ¶ 63. "In August 2016, Adelson convinced the Nevada state legislature to create a bill that appropriated $750 million in public money, which had originally been intended to fund a public project, to a professional football stadium." **[*7]** *Id.* While NFL Commissioner Goodell stated in September 2016 that he hoped the Raiders would reach an agreement for a stadium in Oakland, Dallas Cowboys owner Jerry Jones encouraged Nevada lawmakers to pursue bringing the Raiders to Las Vegas. *Id.* ¶ 64.

Oakland, meanwhile, attempted to reach a deal to keep the Raiders in Oakland. An investment group including former NFL players Ronnie Lott and Rodney Peete offered $600 million towards a stadium in Oakland in November of 2016—$200 million more than the $400 million in public funding that the Raiders had claimed was needed in 2015. *Id.* ¶ 65. In December of 2016, Oakland officials voted to enter negotiations with Lott's group, earmarking $350 million in public funds for the project, to be combined with $400 million from Lott's group and $500 million from the Raiders for an approximately $1.3 billion stadium. *Id.* ¶ 65. The proposal "included the possibility that Mark Davis would eventually sell some part of the team to the Lott group," which Oakland characterizes as a development that the NFL should have supported as consistent with its efforts to increase leadership positions held by racial minorities. *Id.* ¶ 66. While Oakland contends that **[*8]** "the Lott Proposal was real," the NFL dismissed it as incomplete and unworkable, and a Raiders official at a "closed-door NFL meeting" described it as a "political, cover-your-ass joke." *Id.* ¶ 67.

The Raiders officially applied to the NFL for permission to move to Las Vegas on January 19, 2017. *Id.* ¶ 68.

3. NFL Rules Regarding Team Relocation

The relocation of NFL teams is governed by Article 4.3 of the Constitution and Bylaws of the NFL:

> The League shall have exclusive control of the exhibition of football games by member clubs within the home territory of each member. No member club shall have the right to transfer its franchise or playing site to a different city, either within or outside its home territory, without prior approval by the affirmative vote of three-fourths of the existing member clubs of the League.

Compl. Ex. 1 art. 4.3. In litigation related to the Raiders' 1982 move to Los Angeles, the Ninth Circuit affirmed a jury's determination that Article 4.3, at least as the NFL sought to apply it to block that relocation, was an unreasonable restraint of trade in violation of *§ 1* of the Sherman Act. *L.A. Mem'l Coliseum, 726 F.2d at 1390-98*. The Ninth Circuit's opinion discussed changes that might make similar restrictions permissible:

> To withstand antitrust **[*9]** scrutiny, restrictions on team movement should be more closely tailored to serve the needs inherent in producing the NFL "product" and competing with other forms of entertainment. An express recognition and consideration of those objective factors espoused by the NFL as important, such as population, economic projections, facilities, regional balance, etc., would be well advised. *See* L. Kurlantzick, *Thoughts on Professional Sports and the Antitrust Laws*, 15 Conn. L.R. 183, 206 (1983). Fan loyalty and location continuity could also be considered. *Id.* at 206-207. Al Davis in fact testified that in 1978 he proposed that the League adopt a set of objective guidelines to govern team relocation rather than continuing to utilize a subjective voting procedure.
>
> Some sort of procedural mechanism to ensure consideration of all the above factors may also be necessary, including an opportunity for the team proposing the move to present its case. *Id.*; *see* *Silver v. New York Stock Exchange, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963)* (without procedural safeguards, the collective act of the Exchange in disconnecting the wire service to a broker constituted a boycott, per se illegal under *§ 1*); *cf.* *Deesen v. Professional Golfers Ass'n, 358 F.2d 165 (9th Cir.)*, *cert. denied*, *385 U.S. 846, 87 S. Ct. 72, 17 L. Ed. 2d 76 (1966)* (where PGA had reasonable rules governing eligibility of players for tournaments, there was not a *§ 1* violation). **[*10]** In the present case, for example, testimony indicated that some owners, as well as Commissioner Rozelle, dislike Al Davis and consider him a maverick. Their vote against the Raiders' move could have been motivated by animosity rather than business judgment.

Id. at 1397-98.

At some point after that decision, the NFL Commissioner, pursuant to his authority under Article 8.5 of the NFL bylaws to "interpret and from time to time establish policy and procedure in respect to the provisions of the Constitution and Bylaws," promulgated "Policy and Procedures for Proposed Franchise Relocations," fleshing out the basic three-fourths vote required by Article 4.3 with additional policies, procedures, and factors to be considered. Compl. ¶ 32 & Ex. 2. Under that policy, "each club's primary obligation to the League and to all other member clubs is to advance the interests of the League in its home territory," and relocations are "disfavor[ed] . . . if a club has been well-supported and financially successful and is expected to remain so." *Id.* Ex. 2; *see id.* ¶ 33. The policy also provides that the "business judgment" to be exercised in deciding whether to approve a transfer "may be informed by consideration of" a non-exhaustive list **[*11]** of factors including, for example, fan loyalty, stadium adequacy, financial performance, the degree of good faith negotiations to remain, and the extent to which team owners have contributed to circumstances giving rise to the proposed relocation. *Id.* Ex. 2 pt. C; *see also id.* ¶ 34. Oakland characterizes these policies as an effort to avoid antitrust problems by complying with the suggestions of the Ninth Circuit in *Los Angeles Memorial Coliseum. Id.* ¶ 32.

Under the policy, "the relocating club will ordinarily be expected to pay a transfer fee to the League" if its request is approved, to "compensate other member clubs of the League for the loss of the opportunity appropriated by the relocating club and the enhancement (if any) in the value of the franchise resulting from the move." *Id.* Ex. 2 pt. E; *see id.* ¶ 36. Oakland characterizes this fee as "a source of income that the NFL Club owners do not share" and "a pure cartel payment that goes straight to the NFL Club owners' bottom lines when they together decide that a team should leave its Host City." *Id.* ¶ 37.

4. Approval of Relocation to Las Vegas

On March 6, 2017, Bank of America agreed to provide financing for the Las Vegas stadium, **[*12]** and the NFL teams' owners held a meeting the same day to determine the fee that the Raiders would be required to pay if the relocation was approved. *Id.* ¶ 69. Oakland characterizes that meeting as "effectively an auction for a 'yes' vote" where "the relocation fee was bid up until enough NFL owners were satisfied with their personal payment to vote 'yes,'" and cites a report that owners purportedly opposed to the relocation pushed for a higher fee. *Id.* The owners agreed on a fee of $378 million. *Id.*

Oakland submitted its final proposal in conjunction with Lott's investment group the same month, but the NFL rejected it as not "clear and specific, actionable in a reasonable timeframe, and free of major contingencies," and thus not "a viable solution." *Id.* ¶ 72. Oakland Mayor Libby Schaaf appealed to the team owners to reject the relocation, although she conceded "that Oakland was 'unable to provide the level of public subsidy Nevada offers.'" *Id.* ¶¶ 73-74.

The owners voted 31 to 1 to approve the relocation. *Id.* ¶ 75. According to Oakland, that vote violated the NFL's relocation policy, because "every objective factor to be considered in the Relocation Policies favored a stay in Oakland," **[*13]** the Oakland market is more favorable than Las Vegas, and Oakland negotiated in good faith the keep the Raiders. *Id.* ¶¶ 75, 78-79. Oakland cites a statement from the Miami Dolphins' owner Stephen Ross—the lone dissenting vote—that he "just [did]n't think everything was done to try and stay in Oakland," *id.* ¶ 76, as well as comments from Mark Cuban—the owner of a professional basketball team in Dallas—that he considered Oakland to be a better market than Las Vegas for an NFL team, *id.* ¶ 70.

5. Oakland's Claims

Oakland alleges that the NFL and its teams act as an anticompetitive cartel extracting significantly greater payments for stadium construction and maintenance from host cities than would be possible in a competitive market "by not only limiting the number of NFL Clubs in the United States [to thirty-two teams], but also collectively controlling, and dictating under what terms and conditions, cities can have professional football team presence." *Id.* ¶ 8; *see also id.* ¶¶ 23-29 (alleging that the NFL has secured public funding for a majority or significant share of the cost of several stadiums costing hundreds of millions to over a billion dollars each since 2000, and shared in relocation **[*14]** fees of approximately $1.4 billion). Oakland defines the relevant market for its antitrust claims as "the market of all Host Cities offering, and all cities and communities that are willing to offer (*i.e.*, potential Host Cities), home stadia and other support to major league professional football teams in the geographic United States." *Id.* ¶ 88.

Oakland asserts the following seven claims: (1) group boycott in violation of *section 1* of the Sherman Act, based on Oakland's inability to retain the Raiders or attract another NFL team so long as it is not willing to "pay the enormous demands associated with new and renovated stadia," *id.* ¶¶ 98-107; (2) concerted refusal to deal in violation of *section 1* of the Sherman Act, based on Defendants' demands for stadium funding as well as "freez[ing] the number of competitive professional football teams, *id.* ¶¶ 108-18; (3) price fixing in violation of *section 1* of the Sherman Act, based again on the demands for stadium financing, *id.* ¶¶ 119-29; (4) declaratory judgment that Defendants' conduct violates *section 1* of the Sherman Act as a result of Defendants' "boycott of Oakland and refusal to comply with their own relocation policies" and "redistribution of the resulting ill-gotten **[*15]** supra-competitive gains though artificially set relocation fees," *id.* ¶¶ 130-137; (5) breach of contract under California law, based on the premise that the relocation policy is a binding contract to which Oakland is a third-party beneficiary, *id.* ¶¶ 138-46; (6) quantum meruit, based on Oakland's alleged investments in the Raiders in reliance on the relocation policy, *id.* ¶¶ 147-56; and (7) unjust enrichment, on the basis that Defendants received "ill-gotten gains resulting from their unlawful , unjust, and inequitable conduct," *id.* ¶¶ 157-61.

Oakland claims damages including over $240 million invested in reliance on the Raiders remaining in Oakland, loss of "tax and other income that it derives from the presence of the Raiders and the economic activity their presence generates," and reduced property value of the Coliseum as a result of the stadium having "been boycotted by the NFL." *Id.* ¶ 96. Oakland seeks treble damages for its antitrust claims. *See id.* at 44 (prayer for relief).

B. Parties' Arguments

1. Defendants' Motion to Dismiss

Defendants move to dismiss all of Oakland's claims with prejudice. With respect to Oakland's antitrust claims, Defendants argue that Oakland has not alleged antitrust **[*16]** injury, because allowing the Raiders to move to a city willing to provide more funding promotes, rather than impairs, competition, and because the restrictions on relocation tended to benefit rather than harm Oakland in its efforts to keep the team from leaving. Mot. at 7-9. Defendants contend that Oakland lacks standing because the only concrete injury it has alleged, loss of tax revenue, is a sovereign rather than commercial interest, because its indirect ownership interest in the Coliseum is insufficient, and because Oakland is not a participant in the same market as any defendant. *Id.* at 9-12. Defendants also argue that Oakland has not sufficiently alleged a relevant market. *Id.* at 12-14. Although Oakland's complaint asserts a relevant market of cities and other communities "offering . . . [or] willing to offer . . . home stadia and other support to major league professional football teams in the geographic United States," Compl. ¶ 88, Defendants argue that such a market is not cognizable because "[h]ost cities are not bought and sold," and markets must be defined by a product itself rather than the consumers of a product, Mot. at 13-14.

In addition to those broad objections to Oakland's antitrust theory, **[*17]** Defendants contend that Oakland's individual antitrust claims are substantively flawed. According to Defendants, Oakland's first two claims—"Group Boycott" and "Refusal to Deal"—describe the same theory of recovery, and fail because Oakland has not alleged that that any team besides the Raiders sought to prevent the Raiders or any other team from dealing with Oakland. *Id.* at 15. Defendants contend that Oakland cannot bring a boycott claim based on the other NFL teams' failure to *prevent* the Raiders from leaving Oakland. *Id.* As for Oakland's price fixing claim, Defendants argue that Oakland fails to "allege an agreement between the Raiders and any other party regarding 'rents' paid by Oakland." *Id.* at 16. Defendants argue that Oakland's declaratory judgment claim is derivative of its antitrust claims and is therefore also subject to dismissal for the reasons discussed above. *Id.*

Turning to Oakland's claim for breach of contract under California law, Defendants argue that the NFL's relocation policy is not a contract, both because it does not include mandatory language and because it was imposed unilaterally by the NFL Commissioner, not mutually agreed upon by the teams. *Id.* at 17-18. Defendants also argue that even **[*18]** if the relocation policy were construed as a contract, Oakland is not a party to or third-party beneficiary of the policy, and has not alleged that Defendants breached the policy, which only required Defendants to "consider" certain factors. *Id.* at 18-22.

Defendants contend that Oakland's remaining claims, for quantum meruit and unjust enrichment (which Defendants argue is not a claim under California law) are derivative of Oakland's other claims and also should be dismissed. *Id.* at 22-23.

2. Oakland's Opposition

Oakland's opposition brief focuses more heavily than its complaint on the NFL's limitation to thirty-two teams. *See, e.g.*, Opp'n (dkt. 48) at 3 ("[T]he market for Host Cities for NFL teams is not competitive: it is intentionally constrained to 32 teams and its incentives are skewed by the Relocation Fee."). According to Oakland, that restriction causes the reduction in competition necessary to establish antitrust injury, because "the relocation process demonstrates that that in a competitive market, there would now be 33 clubs, with one in Oakland and one in Las Vegas," both of which "want and could support NFL clubs." *Id.* at 5 (emphasis omitted). Oakland contends that the limit on number of teams, combined **[*19]** with the NFL's process for collectively determining where those teams are based, allows Defendants to "act[] as a 'classic cartel' to 'extract excess profits.'" *Id.* at 7 (citation omitted).[3]

With respect to antitrust standing, Oakland asserts that Defendants' position regarding ownership of the Coliseum is incorrect: the stadium is not owned by the Oakland-Alameda County Coliseum Authority (the "OACCA"), but instead jointly owned by Oakland and Alameda County, which leased it to another entity, which assigned its rights under the lease to the OACCA. *Id.* at 7-8. Oakland contends that case law supports its recovery of sunken investments and reduced property value as antitrust damages, and that although the Supreme Court has held that a state cannot recover for damages to its "general economy" on behalf of its citizens, such authority does not prohibit a local government from recovering lost tax revenue as antitrust damages. *Id.* at 8-11. Oakland notes that the Ninth Circuit has previously recognized the market for NFL stadiums in litigation related to the Raiders' 1982 move to Los Angeles, and argues that a market for "Host Cities" here is similar but properly modified to include not only stadiums that already exist, **[*20]** but also cities willing to build new stadiums. *Id.* at 11-14. As for its specific antitrust claims, Oakland argues that Defendants' collective vote, influenced by the relocation fee and purportedly in violation of the NFL relocation policy, establishes a group boycott and refusal to deal,[4] *id.* at 14-15, and that the limitation to thirty-two teams is a market restriction sufficient to support a claim for "price fixing" with respect to stadium funding even if Defendants did not agree to a specific amount of funding required, *id.* at 15-16. Oakland contends that its declaratory judgment claim should survive for the same reasons. *Id.* at 16.

Oakland argues that the relocation policy is enforceable as a contract because it was established pursuant to the NFL Commissioner's authority under the NFL Constitution and Bylaws, which has itself been recognized as a contract by multiple courts. *Id.* at 17-18. Oakland contends that the relocation policy's references to a team's obligation to advance the NFL's interests "'in its *home territory*'" renders Oakland a third-party beneficiary of the policy, and that Oakland meets the test for such status recently articulated by the California Supreme Court. *Id.* at 18-23 (citing *Goonewardene v. ADP, LLC, 6 Cal. 5th 817, 243 Cal. Rptr. 3d 299, 434 P.3d 124 (2019))*. Oakland also contends that it has sufficiently **[*21]** alleged a breach of the policy. *Id.* at 23-24.

Finally, Oakland argues that its claim for quantum meruit is sufficient because such a claim "is simply the common law equivalent of a contract claim, and is often alternatively pled in addition to breach of contract," and that its claim for unjust enrichment should be construed as a quasi-contract claim and allowed to proceed. *Id.* at 24-25.

3. Defendants' Reply

Defendants characterize Oakland's focus on the thirty-two team limit as an attempt "to recast its complaint," and argue that Oakland cannot succeed on such a claim. Reply (dkt. 49) at 2-7. As a starting point, Defendants contend that Oakland has not shown injury in fact from the limited number of teams, because it has not alleged that a team would play in Oakland if the NFL allowed additional teams. *Id.* at 3. Defendants also argue that the Supreme Court dissent Oakland cites for the proposition it should be able to recover lost tax revenue is inapposite, *id.* at 4 (citing *Hemi Grp., LLC v. City of New York, 559 U.S. 1, 31, 130 S. Ct. 983, 175 L. Ed. 2d 943 (2010)* (Breyer, J., dissenting)), and that Ninth Circuit precedent bars Oakland from recovering "losses based on purported municipal investments in business development, *id. at 5* (citing *City of Rohnert Park v. Harris, 601 F.2d 1040, 1044 (9th Cir. 1979))*. Defendants contend that Oakland's alleged injury is "indirect" because "the only **[*22]** party 'directly' affected by an agreement to prescribe the number of teams would be a team that sought to join the NFL joint venture," because Oakland serves at most as a landlord, and because even in that role its relationship with the Raiders runs through the OACCA, which is not a party to this case. *Id. at 5-6*. Finally, Defendants argue that even if Oakland were properly situated to challenge the limitation on the number of teams, such a challenge would fail,

[3] Despite this apparent focus of the brief, Oakland's attorneys disclaimed at the hearing an intent to base Oakland's theory of recovery on the thirty-two team structure of the NFL.

[4] In addressing these two claims together, Oakland appears to agree with Defendants that they describe the same theory of recovery.

because the Third Circuit ruled in favor of the NFL when a non-NFL football team brought such a claim in 1983. *Id. at 6-7* (citing *Mid-South Grizzlies v. Nat'l Football League, 720 F.2d 772 (3d Cir. 1983))*.

Defendants contend that Oakland cannot prevail on an antitrust claim based on the NFL's refusal to block the relocation because: (1) Oakland—having declined to pay the costs to which it objects—has not suffered an antitrust injury as result of the relocation; (2) "Host Cities" is not a cognizable market; (3) a single team choosing to leave Oakland is not a group boycott; and (4) Oakland does not allege that Defendants fixed any particular price with respect to stadiums. *Id. at 7-10*. Defendants also renew their arguments that the relocation policy is not a contract, that Oakland is not a third-party beneficiary, and that Oakland **[*23]** has not alleged breach of the policy, as well as Defendants' request that the remaining claims be dismissed as derivative of other defective claims. *Id. at 10-14*.

III. ANALYSIS

A. Legal Standard

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

In ruling on a motion to dismiss under *Rule 12(b)(6)*, the court analyzes the complaint and takes "all allegations of material fact as true and construe[s] them in the light most favorable to the non-moving party." *Parks Sch. of Bus. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995)*. Dismissal may be based on a lack of a cognizable legal theory or on the absence of facts that would support a valid theory. *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. A complaint "'must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory.'" *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 562, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984))*. "A pleading that offers 'labels and conclusions' or 'a formulaic **[*24]** recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 555*). "[C]ourts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Twombly, 550 U.S. at 555* (quoting *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986))*. "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 557*) (alteration in original). Rather, the claim must be "'plausible on its face,'" meaning that the plaintiff must plead sufficient factual allegations to "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly, 550 U.S. at 570*).

B. Antitrust Claims

Oakland's complaint asserts three antitrust claims for damages, all for violation of *section 1* of the Sherman Act, which prohibits "contract[s], combination[s] in the form of trust or otherwise, or conspirac[ies], in restraint of trade." *15 U.S.C. § 1*. Courts have long held that the Sherman Act is not as broad as its literal language might suggest, and "that Congress intended to outlaw only *unreasonable* restraints." *Texaco v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)* (quoting *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997))* (emphasis in *Texaco*). Courts "presumptively appl[y] rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable **[*25]** and anticompetitive before it will be found unlawful." *Id.*

Oakland's three antitrust damages claims are captioned as "Group Boycott," "Refusal to Deal," and "Price Fixing."[5] Both parties appear to agree that the first two claims describe the same theory of recovery, and Oakland does not identify separate conduct as supporting its various claims, although the parties address Oakland's price fixing claim as distinct from its claims for a group boycott or concerted refusal to deal. The statutory language of the Sherman Act does not distinguish among these theories, which are instead relevant primarily to judicially created doctrines under which certain restraints of trade are per se illegal rather than subject to the generally applicable rule of reason. *See, e.g., NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 138, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)* ("[A]ntitrust law does not permit the application of the *per se* rule in the boycott context in the absence of a horizontal agreement, though in other contexts, say, vertical price fixing, conduct may fall within the scope of a *per se* rule not at issue here . . . .").

Where some "'restraints on competition are essential if the product is to be available at all,'" however—as in the case of professional sports leagues—"*per se* **[*26]** rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason." *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)* (quoting *NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*); *see also L.A. Mem'l Coliseum, 726 F.2d at 1392* ("[T]he unique structure of the NFL precludes application of the per se rule.").[6] Under that analysis, it is not material whether Oakland captions its claims as based on theories of "boycott" or "price fixing." Regardless of such labels, Oakland must "demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive," *Texaco, 547 U.S. at 5*, or in other words, "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition," *Am. Needle, 560 U.S. at 203 n.10* (quoting *Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*). The Court therefore analyzes Oakland's antitrust damages claims together based on the rule of reason and other generally applicable principles of ***antitrust law***.[7]

1. Antitrust Standing and Injury

Section 4 of the Clayton Act, codified as *15 U.S.C. § 15*, authorizes suits for treble damages by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." *15 U.S.C. § 15(a)*. In much the same way that the facially broad language of the Sherman Act has been construed as addressing only certain restraints on competition, however, "[t]he Supreme Court has held that Congress did not intend to afford a remedy to everyone injured by an antitrust violation." *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 987 (9th Cir. 2000)* (citing *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*). In other words, it is not enough that a plaintiff has been injured; the plaintiff also "must have 'antitrust standing.'" *Id.* That question turns on the following factors: "(1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the

[5] For the purpose of the present motion, the parties agree that Oakland's declaratory judgment claim stands or falls with its antitrust damages claims. *See* Mot. at 16; Opp'n at 16.

[6] Oakland argues in a footnote that the per se rule applies to its claims, Opp'n at 12 n.7, but fails to address precedent holding per se doctrines inapplicable in the context of professional sports leagues.

[7] To the extent that these labels might be relevant to the analysis of an amended complaint, the Court agrees with Defendants that Oakland has not alleged a "group boycott" where Oakland claims only that Defendants jointly *allowed* the Raiders to relocate, not an agreement that *no team* could be located in or do business with Oakland. While the term "price fixing," based on the plain meaning of those words, might not apply in the absence of an allegation of any fixed supra-competitive price, that doctrine is more on point, as courts have recognized that restrictions on supply can have an equivalent effect to fixing prices. *See, e.g., Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 226 (7th Cir. 1978)* ("[A]n agreement to restrict the production of uranium unquestionably is a price fixing arrangement. 'Price fixing' is a characterization which extends to all conspiracies designed to manipulate the price of goods.").

complexity in apportioning damages." *Id.* (quoting Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1054 (9th Cir. 1999)).

The first of those factors, "antitrust injury," is **[*27]** a "substantive element of an antitrust claim, and the fact of injury or damage must be alleged at the pleading stage." Somers v. Apple, Inc., 729 F.3d 953, 963 (9th Cir. 2013). "'Antitrust injury' means 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful,'" and "consists of four elements: '(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent.'" *Id.* (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977); Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1055 (9th Cir. 1999)). The Ninth Circuit also requires "that 'the injured party be a participant in the same market as the alleged malefactors, meaning 'the party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market.'"[8] *Id.* (quoting Glen Holly Entm't, Inc. v. Tektronix, Inc., 343 F.3d 1000, 1008 (9th Cir. 2003)). In at least some circumstances, a potential market entrant thwarted from entering a market by the defendant's violations can also establish antitrust injury. *See, e.g.,* In re Dual-Deck Video Cassette Recorder Antitrust Litig., 11 F.3d 1460, 1464 (9th Cir. 1993).

a. Relocation Fee

To the extent that Oakland bases its claims on the NFL's requirement that teams seeking to relocate pay a fee to the NFL to obtain approval, Oakland has not plausibly alleged **[*28]** antitrust injury as a result of that policy. Oakland implies that the fee is an incentive for teams to relocate, but the Raiders gain nothing by having to pay the NFL hundreds of millions of dollars. Even if, as Oakland contends in its opposition brief, "Host Cities and fans, not the Raiders, are paying the Relocation Fee,"[9] Opp'n at 15, the Raiders would presumably have been in a position to capture and keep greater payments for themselves from public entities and fans who wanted to see an NFL team in Las Vegas if the NFL had not assessed the fee. It is difficult to see how the relocation fee could have encouraged, rather than discouraged, the Raiders' decision to relocate, and Oakland has not plausibly alleged that the Raiders would have been less likely to seek relocation but for the fee.

After the Raiders made that decision, and apparently resolved to pay a significant relocation fee if imposed, the fee—which Oakland characterizes as a direct payment to the entities responsible for determining whether to approve the relocation—certainly increased the likelihood that the Raiders' application would be approved. But Oakland has not explained how such a result is anticompetitive. Restrictions **[*29]** on NFL teams' ability to relocate to different cities are *themselves* restraints on competition *favoring the existing cities*, although they may in some circumstances be justified under the rule of reason. *See* L.A. Mem'l Coliseum, 726 F.2d at 1395 ("The competitive harms of Rule 4.3 are plain."). In a market entirely lacking such restraints, no approval from the NFL would have been necessary, and the Raiders' decision to relocate to Las Vegas would have been the end of the story. Oakland has not explained how the relocation fee, which makes approval more likely—only after a team has applied to relocate—and thus brings the process closer to that which would exist in a market lacking competitive restraints, is itself an anticompetitive restraint harming existing host cities.[10] Oakland's position on this issue would go beyond

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[8] Defendants' arguments that Oakland is not a participant in the same market as Defendants or lacks a sufficiently direct relationship to any harm because it is not itself a professional football team neglect the basic principle that markets have at least two distinct classes of participants—sellers and buyers. *See, e.g.*, Reply at 5 (asserting that "the only party 'directly' affected by an agreement to prescribe the number of teams would be a team that sought to join the NFL joint venture").

[9] Oakland's contention that the new host city effectively pays the relocation fee appears to be a dubious proposition, as the timeline set forth in the complaint suggests that the amount of public funding provided for a Las Vegas stadium was set well before the NFL determined the amount of the relocation fee, and that the relocation fee was set in an arbitrary manner such that the amount would have been difficult to predict during the earlier negotiations for public funding.

[10] To the extent that the relocation fee might discourage a team from seeking to relocate, that team (or the entity seeking to attract it to a new location) might experience a cognizable antitrust injury if, as Oakland contends here, the fee is in fact arbitrary and not tied to procompetitive goals. *See* L.A. Mem'l Coliseum, 726 F.2d at 1397 ("To withstand antitrust scrutiny, restrictions on

the dicta of *Los Angeles Memorial Coliseum* indicating that some restraints on team relocation may be *permissible*, and instead asks the Court to hold that such restraints are *required* under the antitrust laws. Oakland cites no authority for such a proposition, and the Court holds that any harm Oakland may have suffered as an existing host city from procedures that tend to encourage NFL approval of teams' requests **[*30]** to relocate neither "flows from that which makes the conduct unlawful" nor "is of the type the antitrust laws were intended to prevent." Oakland's antitrust claims based on the relocation fee are DISMISSED. Although it is not clear how Oakland could amend to cure the defects of this theory, the Court grants leave to attempt to do so if Oakland so chooses.

b. Thirty-Two Team Structure

With respect to the limitation of the league to thirty-two teams, the basic premise that the restriction increases the amount of public funding that teams can demand for stadiums is, at the very least, plausible. Courts have long recognized that restrictions on supply can increase prices beyond competitive levels. *See, e.g., NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 116-17, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)* ("The television plan protects ticket sales by limiting output—just as any monopolist *increases revenues by reducing output*." (emphasis added)); *Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 226 (7th Cir. 1978)*. It is less clear, however, that Oakland was itself harmed by that restriction.

Oakland does not contend that it actually paid the inflated rates of public stadium funding that teams could purportedly obtain as a result of the league's structure.[11] Instead, Oakland argues that it would have been able to host an NFL team if the NFL allowed **[*31]** more teams in the league, asserting in its opposition brief that "in a competitive market, there would now be 33 clubs, with one in Oakland and one in Las Vegas (and probably 35 clubs, with clubs also in St. Louis and San Diego)." Opp'n at 5 (emphasis omitted). Oakland's complaint, however, does not include allegations to that effect, and attorney argument in a brief cannot substitute for allegations of a complaint. *See Udom v. Fonseca, 846 F.2d 1236, 1238 (9th Cir. 1988)* (affirming dismissal, although reversing denial of leave to amend, where a "plaintiff [had] attempt[ed] to expand the scope of his complaint by making allegations in a collateral document not subject to counter by means of an answer or motion to dismiss").

Moreover, even if the complaint had included the conclusory assertion stated in Oakland's opposition, it does not include factual allegations to render such a conclusion plausible. As an incomplete list of issues that might be relevant, the complaint does not address: (1) whether there are additional potential owners willing to establish new teams if the NFL allowed them to do so; (2) whether such potential owners would have based a team in Las Vegas before the Raiders decided to relocate there; (3) whether the **[*32]** Raiders would still have left Oakland for another city if the NFL allowed additional teams; (4) if the Raiders might still have left, whether an additional team would have been established in Oakland to replace the Raiders; or (5) whether Oakland has made any effort to attract an existing team other than the Raiders or to establish a new expansion team to replace the Raiders. As an additional complicating factor, neither Oakland's complaint nor its opposition brief address what sort of structure Oakland believes would be permissible if the current limitation on the number of teams is not—do the antitrust laws require the NFL to admit any team interested in joining? If not, what number would be an allowable limit, and would Oakland have fared differently if the limit had been set at that number?

Accordingly, based on its present allegations, Oakland has not alleged injury-in-fact as a result of the NFL's thirty-two team structure, and its antitrust claims are DISMISSED on that basis. *See Rohnert Park, 601 F.2d at 1045* (remanding for dismissal where a plaintiff city "ha[d] not made a sufficient showing that, absent the alleged antitrust violations by [the defendants], its commercial area would have been selected as **[*33]** a site for shopping center development," and "the question whether [the city] would have benefited but for [the defendants'] actions [was

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team movement should be more closely tailored to serve the needs inherent in producing the NFL 'product' and competing with other forms of entertainment."). Such questions are beyond the scope of this case, where neither the Raiders nor any entity in Las Vegas has challenged the fee.

[11] To the extent that Oakland might have paid such a premium to upgrade the Coliseum when the Raiders returned from Los Angeles in the 1990s, it has not asserted that possible injury as a basis for its claims, and the four-year statute of limitations for such a claim has almost certainly expired. *See 15 U.S.C. § 15b*.

therefore] entirely speculative"). It is conceivable, however, that Oakland could allege such injury. Because it is at least possible that Oakland could plausibly allege that it suffered harm as a result of the NFL's structure, the current complaint's failure to allege non-speculative damages as a result of the thirty-two team limit is not grounds for dismissal with prejudice.

2. Damages Theories and Other Arguments

While the failure to allege antitrust injury discussed above is sufficient to dismiss Oakland's antitrust claims as currently pleaded, the Court addresses several of Defendants' other arguments to determine whether leave to amend would be futile, although the Court declines to resolve certain issues on the present motion. Most of the other arguments reached in this order do not require dismissal with prejudice, but aspects of Oakland's theory of damages appear to be untenable.

Defendants contend that Oakland's interest as a "landlord" is not cognizable under the antitrust laws, based on the plurality opinion in *R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139, 148 (9th Cir. 1989)* (en banc). *E.g.*, Reply at **[*34]** 5-6. That case involved a complex theory of recovery offered by a plaintiff that owned (or at some relevant times held a master lease to) land on which geothermal steam energy could be produced, and alleged that the companies that subleased land from it concealed the true production capacity of the land from the plaintiff in an effort to prevent the plaintiff from itself engaging in geothermal steam production. *See* *R.C. Dick, 890 F.2d at 142-43*. Among other issues, the Ninth Circuit plurality rejected the plaintiff's attempt to limit the geographic market to little more than its own property, held that the plaintiff was not a participant in the market for steam, and held that the plaintiff failed to show an anticompetitive effect on the market for rights to steam-producing property. *Id. at 144, 148-49*. The plurality's reference to "[m]ere injury as a landlord" referred to the plaintiff's attempt to satisfy the requirement of antitrust injury based on the reduced royalties it received from the defendants' operation of a plant that allegedly produced less power than it could have—with the intent, according to the plaintiff, of deceiving the plaintiff as to the opportunities on the land, not of restricting the supply of steam per **[*35]** se. *See* *id. at 148*.

The theory here is more straightforward: Oakland alleges that cities compete to host NFL teams by offering public funding for stadiums that may be leased to the teams, Defendants have artificially restricted the market for such transactions by limiting the number of teams and collectively determining when and where teams may relocate, and teams can therefore demand more favorable deals from the host cities. The Court declines to read *R.C. Dick* as barring all antitrust claims where plaintiff claims damages from its status as a landlord, and instead construes that case as requiring that, for such damages to be viable, the market at issue in the case must be the market for rental transactions, and the plaintiff must show an anticompetitive effect in that market. *See* *id. at 148* (immediately after stating that the plaintiff's "[m]ere injury as a landlord or lessor entitled to royalties" was insufficient, quoting an earlier case for the rule that "'the injured party [must] be a participant in the same market as the alleged malefactors'" (citation omitted)). If, for example, a cartel of all potential renters of a certain type of property conspired to fix a low price at which they were willing **[*36]** to rent, a landlord adversely affected by that agreement could likely recover antitrust damages.

While the Court disagrees with Defendants' position that an antitrust plaintiff's status as a landlord is inherently disqualifying,[12] the principle that landlords might in some circumstances be able to claim antitrust damages for lost or reduced rent does not clearly apply to Oakland's claims here, because Oakland has not specifically alleged damages based specifically on rent (although it is perhaps conceivable that it could amend to do so). *See* Compl. ¶

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[12] It is also not clear that Oakland's status as an "indirect" landlord, with the OACCA as a middleman directly contracting with the Raiders, bars Oakland's claims. Neither party cites authority addressing analogous circumstances where, as was allegedly the case here, an antitrust plaintiff negotiated directly with the defendant despite their contractual relationship running through a third party. Moreover, Oakland alleges that it sought to build a new stadium in partnership with the Raiders and other investors, with no allegation that the OACCA or any other intermediary would be involved in that relationship. At this time, while it remains unclear whether Oakland can amend to cure the more straightforward question of antitrust injury addressed above, Court declines to resolve the issue of whether Oakland's "indirect" relationship with the Raiders bars its antitrust claims.

96. Instead, Oakland claims damages based on sunk investments, lost "tax and [unspecified] other income," and diminution in property value of the Coliseum. *Id.*

The holding of *Rohnert Park*, a Ninth Circuit case that Oakland fails to address in its brief, forecloses the claim for lost municipal investment. There, the plaintiff city Rohnert Park brought antitrust claims based on the development of a regional shopping center in a neighboring city after Rohnert Park had already made investments for such a shopping center within its own boundaries. *Rohnert Park, 601 F.2d at 1042-43*. After acknowledging that a city may bring antitrust claims based only on its propriety interests **[*37]** (and not in a parens patriae capacity) the Ninth Circuit summarily rejected Rohnert Park's argument that its investment by raising and disbursing special assessment funds was a sufficient interest to support an antitrust claim:

> Rohnert Park . . . contends that it acted in a proprietary capacity in raising and disbursing the special assessment funds used to improve the commercial zone. It cites no authority supporting the contention that this is a sufficient proprietary interest under *§ 16*, and we decline to so hold.

Id. at 1044 (footnote omitted). That case is binding authority as to this Court, and Oakland has not offered any explanation for why it does not apply to Oakland's investment of municipal funds in the Coliseum. Oakland therefore cannot recover damages based on investment in stadium development comparable to the municipal investment at issue in *Rohnert Park*.

Oakland also cannot recover damages based on lost tax revenue from the broad scope of economic activity associated with the presence of a professional football team. Defendants rely on the Supreme Court's holding in *Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972)*, that the Clayton Act's authorization of private suits for injury to "business or property" does not allow a state to sue **[*38]** as parens patriae for damages based on general damage to its economy. In reaching that outcome, the Court concluded that where a "State seeks damages for injuries to its commercial interests, it may sue under *§ 4*[, b]ut where, as here, the State seeks damages for other injuries,"—including those based on its "quasi-sovereign interests"—"it is not properly within the Clayton Act." *Id. at 264*. Defendants here, as well as the United States in a statement of interest (dkt. 55) filed pursuant to the attorney general's authority under *28 U.S.C. § 517*,[13] contend that damages based on lost taxes fall in the latter category as an element of the state's sovereign rather than commercial interest.

While Oakland is correct that it has a more personal and proprietary interest in damages based on lost tax revenue than a state has in a parens patriae suit for "injury to its general economy," *see Hawaii, 405 U.S. at 263-64*, lost tax revenue based broadly on "the presence of the Raiders and the economic activity their presence generates," Compl. ¶ 96, is not the sort of injury to "business or property" compensable under the antitrust laws, *see 15 U.S.C. § 15(a)*. Of the factors relevant to antitrust standing, "the **[*39]** directness of the injury," "the risk of duplicative recovery," and "the complexity in apportioning damages," *see Knevelbaard Dairies, 232 F.3d at 987*, most clearly weigh against Oakland's theory, because the taxes Oakland claims to have lost would have been assessed on transactions involving countless third parties, any of whom might (or might not) be entitled to their own claims if, as Oakland contends, the Raiders' relocation arose from violations of the Sherman Act. Oakland cites no case allowing a comparable theory of damages under the Clayton Act, and the Court DISMISSES Oakland's claims to the extent they are based on lost tax revenue based on undefined "economic activity" associated with the Raiders.

The Court does not reach the question of whether lost tax revenue can ever constitute recoverable damages in an antitrust action. Defendants cite no case so holding, and instead rely on an otherwise-inapplicable 1872 decision by

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[13] At least one court has questioned the propriety of such statements and refused to allow a statement of interest—there, after the United State declined to intervene in a qui tam case. *United States ex rel. Ruckh v. Salus Rehab., No. 8:11-CV-1303-T-23TBM, 2017 U.S. Dist. LEXIS 63325, 2017 WL 1495862, at *1 (M.D. Fla. Apr. 26, 2017)*; *see also, e.g., LSP Transmission Holdings, LLC v. Lange, 329 F. Supp. 3d 695, 703 (D. Minn. 2018)* (declining as a matter of discretion to consider a statement of interest filed months after briefing had concluded). The Court declines to address that issue in this instance. The United States' statement in this case does not raise arguments significantly different from those presented in Defendants' briefs, and the outcome of the present motion would not differ if the statement were excluded.

the Supreme Court for the proposition that a "'tax is a demand of sovereignty.'" Mot. at 10 (quoting *In re State Freight Tax, 82 U.S. 232, 278, 21 L. Ed. 146, 4 Brewster's Reports 202 (1872)*, *abrogated on other grounds as recognized by* *Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 181-83, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995))*. Because antitrust damages must be based on "commercial interests," *see* *Hawaii, 405 U.S. at 264*, Defendants argue that the "sovereign" interest in taxation does not qualify. **[*40]** Mot. at 10. While Oakland does not specifically allege such damages here, there could perhaps be circumstances where a tax specifically negotiated as part of an agreement between a local government and a private entity could take on a "commercial" instead of—or as well as—"sovereign" character. *Cf.* *Hemi Grp., LLC v. City of New York, 559 U.S. 1, 30, 130 S. Ct. 983, 175 L. Ed. 2d 943 (2010)* (Breyer, J., dissenting) (concluding that lost tax revenue could, in at least some circumstances, constitute harm to "business or property" under language in the RICO Act similar to that at issue here in the Clayton Act, an issue not reached by the majority). With no such damages alleged in the present complaint, however, the Court declines to resolve that issue on the present motion.

Oakland's remaining categories of damages are "other income that it derives from the presence of the Raiders" and diminution of value of the Coliseum. Compl. ¶ 96. The reference to "other income" is too vague and conclusory to determine whether it encompasses recoverable damages that might establish antitrust injury. As for the value of the Coliseum, Defendants argue only that Oakland lacks a direct ownership interest in the stadium. While the nature of Oakland's ownership interest is unclear from the present **[*41]** complaint, *see* Compl. ¶ 17 (alleging that Oakland is an "indirect owner"), Oakland asserts in its opposition brief that it (along with Alameda County) directly owns the Coliseum, Opp'n at 8, and could presumably amend to so allege. Of course, a damages theory based entirely on diminution of value of the Coliseum after the Raiders' departure would require Oakland to plausibly allege not only that the Raiders would have remained in Oakland but for Defendants' purported antitrust violation, but also that the Raiders would have remained at the Coliseum, rather than a new stadium such as envisioned by the proposal involving Ronnie Lott's investment group, because in the latter scenario the Coliseum would no longer host an NFL team regardless of whether the Raiders relocated to Las Vegas or to a new stadium in Oakland.

Oakland's theory of the relevant market—cities offering or willing to offer "home stadia and other support to major league professional football teams in the geographic United States," Compl. ¶ 88—is somewhat unorthodox. Although *L.A. Memorial Coliseum* considered a somewhat similar market for "[f]ootball stadia," *791 F.2d at 1365*, Oakland cites no case recognizing a market comprised of cities **[*42]** seeking to attract professional sports franchises. Failure to plead a relevant market for a rule of reason antitrust claim warrants dismissal, *Hicks v. PGA Tour, Inc., 897 F.3d 1109, 1120 (9th Cir. 2018)*, and as Defendants note, markets defined by their consumers rather than the products at issue are not generally cognizable, *Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1045 (9th Cir. 2008)*. Oakland's reference to "support to major league professional football teams" raises issues with respect to that rule, although Oakland may be able to amend to allege specific forms of "support" that happen to be unique to NFL teams. As Defendants also note, Oakland's complaint includes only conclusory assertions that other professional sports franchises do not complete with NFL teams for stadiums. *See* Compl. ¶ 89 ("Not only is the entire Host City tied up in the NFL process, a professional baseball team is not a substitute for a professional football team."). Oakland's complaint does not address the test of "whether a hypothetical monopolist could impose a 'small but significant nontransitory increase in price' ('SSNIP') in the proposed market," or whether potential host cities would respond to such an increase by substituting other "products." *See* *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 784 (9th Cir. 2015)*. On the other hand, the massive public subsidies of NFL stadiums and **[*43]** the competition among cities alleged in the complaint tend to suggest a market at least similar to Oakland's proposed definition. While the Court declines to resolve whether Oakland's current allegations support a cognizable relevant market, if Oakland chooses to amend its complaint, it should consider Defendants' arguments regarding this issue.

C. Breach of Contract

Oakland asserts that it can bring a claim for breach of the NFL's relocation policy based on its status as a third-party beneficiary of the policy, a doctrine originating in common law and codified as *section 1559 of the California*

Civil Code.[14] Defendants argue that the relocation policy is not a contract, although they do not dispute that the NFL's bylaws constitute a contract. The Court assumes for the sake of argument that, in vesting the Commissioner with authority to interpret the bylaws and "establish policy and procedure," Compl. Ex. 1 art. 8.5, the bylaws are at least amenable to interpretation under which they bind member teams to the Commissioner's interpretations and policies, such that breach of a policy established under article 8.5 can be enforced as a breach of the bylaws themselves.

Defendants' stronger argument is that Oakland lacks standing as a **[*44]** third-party beneficiary. In order to establish such standing, a plaintiff must establish all of the following elements:

> (1) whether the third party would in fact benefit from the contract, but also (2) whether a motivating purpose of the contracting parties was to provide a benefit to the third party, and (3) whether permitting a third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties.

Goonewardene v. ADP, LLC, 6 Cal. 5th 817, 830, 243 Cal. Rptr. 3d 299, 434 P.3d 124 (2019); *see also* Spinks v. Equity Residential Briarwood Apartments, 171 Cal. App. 4th 1004, 1024, 90 Cal. Rptr. 3d 453 (2009) (addressing the purported beneficiary's burden).[15] Although disputes regarding purported third-party beneficiaries may in some circumstances be questions of fact, Souza v. Westlands Water Dist., 135 Cal. App. 4th 879, 891, 38 Cal. Rptr. 3d 78 (2006), dismissal at the pleading stage is appropriate where it is clear from the terms of the contract and the circumstances alleged in the complaint that the plaintiff was not a third-party beneficiary, *see* Goonewardene, 6 Cal. 5th at 822-37, 842-43 (reversing a contrary decision by the appellate court and reinstating a trial court judgment entered after sustaining a demurrer without leave to amend).

The first element is a relatively low hurdle in this case. As an existing host city, Oakland would benefit from policies that restrict the ability **[*45]** of the Raiders to leave Oakland for a new city. The remaining elements are not as favorable to Oakland's claim.

To show a "motivating purpose" of benefiting host cities, Oakland relies on a passage of the relocation policy providing that:

> each club's primary obligation to the League and to all other member clubs is to advance the interests of the League *in its home territory*. This primary obligation includes, but is not limited to, maximizing fan support, including attendance, in its home territory.

Compl. ¶ 4 (quoting Compl. Ex. 2 at 1). While Oakland is correct that this provision includes a reference to "home territory," it also makes clear on its face that the obligation is owed "to the League and to all other member clubs," with no indication of obligations owed to local governments. *See id.* Some other passages of the policy might, read in isolation, tend to support Oakland's proposed reading. *E.g.*, Compl. Ex. 2 at 1, § A.1 ("[C]lubs are obligated to work diligently and in good faith to obtain and to maintain suitable stadium facilities in their home territories . . . ."). Taken as a whole, however, the policy repeatedly reinforces the conclusion that its overriding motivation is **[*46]** the NFL's business interests.

Oakland argues and alleges that the NFL enacted the relocation policy, including the factors that Oakland claims the NFL failed to consider, in response to the 1984 decision in *Los Angeles Memorial Coliseum* holding the NFL's unconstrained authority to block relocations under article 4.3 to be a violation of the Sherman Act. Compl. ¶ 3; Opp'n at 22. In that case, the Ninth Circuit did not suggest that the NFL owed a duty to host cities, but instead held

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[14] "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." *Cal. Civ. Code § 1559*.

[15] Although Defendants briefly preserve an argument that the NFL's governing documents should be interpreted under New York law, both parties rely primarily on California authority in their arguments regarding Oakland's contract claim, and the Court assumes for the purpose of this order that California law applies.

that "[t]o withstand antitrust scrutiny, restrictions on team movement should be more closely tailored to serve the needs inherent in producing the NFL 'product' and competing with other forms of entertainment." *L.A. Mem'l Coliseum, 726 F.2d at 1397*. Taking as true Oakland's allegation that the Ninth Circuit's decision motivated the NFL to enact its relocation policy to avoid antitrust scrutiny only reinforces the conclusion that it was intended solely to benefit the NFL and its member teams, not existing host cities.

The third element, addressing the parties' expectations, also requires dismissal of Oakland's contract claim. The California Supreme Court explained this element as follows:

> With regard to the third element, we observe that academic **[*47]** commentators have pointed out that the parties to a contract are typically focused on the terms of performance of the contract rather than on the remedies that will be available in the event of a failure of performance [citation], and that our cases have not required a showing that the contracting parties actually considered the third party enforcement question as a prerequisite to the applicability of the third party beneficiary doctrine. [citations] Accordingly, the third element does not focus upon whether the parties specifically intended third party enforcement but rather upon whether, taking into account the language of the contract and all of the relevant circumstances under which the contract was entered into, permitting the third party to bring the proposed breach of contract action would be "consistent with the objectives of the contract and the reasonable expectations of the contracting parties." [citation] In other words, this element calls for a judgment regarding the potential effect that permitting third party enforcement would have on the parties' contracting goals, rather than a determination whether the parties actually anticipated third party enforcement at the time **[*48]** the contract was entered into.
>
> Furthermore, the requirement in the third element that third party enforcement be consistent with "the objectives of the contract" is comparable to the inquiry, proposed in Professor Eisenberg's article, regarding whether third party enforcement will effectuate "'the contracting parties' performance objectives,'" namely "those objectives of the *enterprise* embodied in the contract, read in the light of surrounding circumstances . . . ." [citation]

Goonewardene, 6 Cal. 5th at 830-31 (ellipsis in original).

In *Goonewardene*, the court held that an employee did not satisfy this element with respect to a contract between her employer and its payroll processor, because the employer was itself in a position to sue the payroll processor for any breach that rendered the employer liable for wage and hour violations, and thus, "[s]imply put, permitting an employee to sue [the payroll processor] for an alleged breach of its contractual obligations to [the employer was] not necessary to effectuate the objectives of the contract." *Id. at 836*. The California Supreme Court also discussed one of its previous decisions, where job trainees lacked standing to bring a claim based on the terms of a government contract for **[*49]** the private entity that provided their training program, noting that, among other factors, the existence of an administrative process to resolve disputes between the government and the training company as evidence that the parties did not intend that the contract would be enforced through suits brought by dissatisfied trainees. *Id. at 832* (discussing *Martinez v. Socoma Cos., Inc., 11 Cal. 3d 394, 401-02, 113 Cal. Rptr. 585, 521 P.2d 841 (1974))*.

Here, the section of the policy introducing the factors that Oakland claims Defendants failed to consider makes clear that the factors are intended to inform Defendants' determination of their own best business interests:

> The League has analyzed many factors in making prior business judgments concerning proposed franchise relocations. Such business judgments may be informed through consideration of the factors listed below, as well as other appropriate factors that are considered relevant by the Commissioner or the membership.[16]
> [. . .]

[16] A footnote included here in the policy states that the list of factors was largely "contained in a bill reported by a Senate committee in 1984," but "essentially restate matters that the League has considered important in connection with team location decisions in the past." Compl. Ex. 2 at 3 n.1. The footnote also states that the "factors are also contained in a 'Statement of Principles' relating to franchise location developed by the League in consultation with the U.S. Conference of Mayors." *Id.*

> In considering a proposed relocation, the Member Clubs are making a business judgment concerning how best to advance their collective interests. Guidelines and factors such as those identified below are useful ways to organize data and to inform that business judgment. They are intended to assist the clubs in making **[*50]** a decision based on their judgment and experience, and taking into account those factors deemed relevant to and appropriate with regard to each proposed move.

Compl. Ex. 2 at 3, § C.

The "objectives of the enterprise embodied in the contract," *see* *Goonewardene, 6 Cal. 5th at 831* (citation and emphasis omitted), are the NFL's business interests, not the interests of host cities. Moreover, like in *Martinez*, where an administrative process to resolve disputes between the contracting parties weighed against granting a third-party beneficiary the right to sue, the contract lays out a process to resolve whether a proposed relocation satisfies the NFL teams' business interests: the vote of the NFL's member teams themselves. Oakland's conclusory assertion that "enforcement of the Policies [by a host city against] Defendants is consistent with their objectives and reasonable" because the policy implicates "the investment and distribution of hundreds of millions of dollars of public funds" does not establish either that *Defendants*, as the contracting parties, intended that host cities should be able to sue for breach of the relocation policy, or that allowing such lawsuits would promote *Defendants'* own purposes of protecting **[*51]** their business interests and avoiding antitrust liability. This Court is bound by the test set by the California Supreme Court, which does not consider whether allowing suit by a third party would serve public interests separate from the interests of the contracting parties.

As noted above, Oakland must establish each of the three *Goonewardene* elements to be able to sue for breach of a contract to which it was not a party. Because the face of the relocation policy and Oakland's own allegations indicate both that Defendants did not promulgate the policy to protect host cities and that allowing host cities to enforce the policy is not "consistent with the objectives of the contract and the reasonable expectations of the contracting parties," Oakland's breach of contract claim is DISMISSED. Although this order need not reach Defendants' remaining arguments regarding the contract claim, the issues of whether the relocation policy's statement that teams' "business judgments may be informed through consideration of the factors listed below, as well as other appropriate factors" is a sufficiently definite promise to be enforceable and whether Oakland has plausibly alleged a breach of that **[*52]** provision would likely also support dismissal of Oakland's contract claim, and Oakland should consider those issues in deciding whether or how to pursue this claim in an amended complaint.

D. Quantum Meruit and Unjust Enrichment

Oakland's final claims are captioned as claims for "quantum meruit" and "unjust enrichment." Compl. ¶¶ 147-61. "A quantum meruit or quasi-contractual recovery rests upon the equitable theory that a contract to pay for services rendered is implied by law for reasons of justice. . . . However, it is well settled that there is no equitable basis for an implied-in-law promise to pay reasonable value when the parties have an actual agreement covering compensation." *Hedging Concepts, Inc. v. First All. Mortg. Co., 41 Cal. App. 4th 1410, 1419, 49 Cal. Rptr. 2d 191 (1996)*. Courts interpret claims for "unjust enrichment" in the same manner:

> [U]njust enrichment is "not a cause of action . . . or even a remedy, but rather a general principle, underlying various legal doctrines and remedies. It is synonymous with restitution." *McBride v. Boughton, 123 Cal. App. 4th 379, 387, 20 Cal. Rptr. 3d 115 (2004)*. As such, a claim for unjust enrichment is properly pled as a claim for a contract implied-in-law. It "does not lie when an enforceable, binding agreement exists defining the rights of the parties." *Paracor Fin., Inc. v. Gen. Elec. Capital Corp., 96 F.3d 1151, 1167 (9th Cir. 1996)*. California, however, recognizes an exception to the **[*53]** rule that unjust enrichment does not lie when an enforceable contract exists: "Restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason." *McBride, 123 Cal. App. 4th at 388*.

Boon Rawd Trading Int'l Co. v. Paleewong Trading Co., 688 F. Supp. 2d 940, 956 (N.D. Cal. 2010).

Oakland alleges that the terms of the Raiders' tenancy at the Coliseum—including Oakland's investment in the Coliseum and other Raiders facilities—were governed by a signed lease agreement, which was extended at least once. Compl. ¶¶ 47, 52. Oakland does not address either the rule that implied contract claims do not lie where an enforceable contract exists or the exception for unenforceable contracts, and there is no indication that the lease agreement was unenforceable, that the Raiders breached any term of that express contract, or that Oakland provided any investment or services to the Raiders at any time when an express lease agreement was not in place. Oakland's quantum meruit and unjust enrichment claims are therefore DISMISSED.

IV. CONCLUSION

For the reasons discussed above, Defendants' motion is GRANTED, and Oakland's claims are DISMISSED. If Oakland is able to cure the defects identified in this order, it may **[*54]** file an amended complaint no later than September 9, 2019

IT IS SO ORDERED.

Dated: July 25, 2019

/s/ Joseph C. Spero

JOSEPH C. SPERO

Chief Magistrate Judge

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[Clark v. WorldMark](#)

United States District Court for the Eastern District of California

July 25, 2019, Decided; July 25, 2019, Filed

1:18-cv-01661-LJO-JLT

Reporter

2019 U.S. Dist. LEXIS 124445 *; 2019 WL 3337892

TERINA CLARK & BRYAN CLARK, individually and as Private Attorney Generals on behalf of the general public, Plaintiffs, v. WORLDMARK, THE CLUB, et al., Defendants.

Prior History: *Clark v. WorldMark, The Club, 2019 U.S. Dist. LEXIS 34233 (E.D. Cal., Mar. 1, 2019)*

Core Terms

timeshare, unfair, motion to dismiss, fraudulent, allegations, prong, grounded, particularity, pleaded, cause of action, leave to amend, misrepresentation, misrepresented, violations, licensed real estate broker, motion to strike, entity, fraudulent conduct, amended complaint, materially false, present case, real estate, heightened, immaterial, misleading, unlicensed, purchases, Vacation, courts, sales

Counsel: **[*1]** For Terina Clark, individually and as Private Attorney Generals on behalf of the general public, Bryan Clark, individually and as Private Attorney Generals on behalf of the general public, Plaintiffs: Robert D. Bedinger, LEAD ATTORNEY, US Consumer Attorneys, P.A., El Cajon, CA.

For WorldMark, The Club, a California Corporation, Wyndham Resort Development Corporation, an Oregon Corporation, Wyndham Vacation Ownership, Inc., a Delaware Corporation, Defendants: Elizabeth Marie Treckler, Michael R. Matthias, LEAD ATTORNEYS, Baker & Hostetler LLP, Los Angeles, CA.

Judges: Lawrence J. O'Neill, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: Lawrence J. O'Neill

Opinion

MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DISMISSING IN PART DEFENDANTS' MOTION TO DISMISS WITH LEAVE TO AMEND AND GRANTING DEFENDANTS MOTION TO STRIKE.

(ECF No. 20)

I. INTRODUCTION

This case involves a putative class action initially filed by Plaintiffs Terina and Bryan Clark ("Plaintiffs") on May 10, 2018, in the Superior Court of the State of California in the County of Kern. *See* ECF No. 1 ¶ 3. Defendants WorldMark, The Club ("WorldMark"), Wyndham Resort Development Corporation ("WRDC"), and Wyndham Vacation Ownership, Inc. ("WVO") (collectively "Defendants") **[*2]** were served with the Complaint on November 6, 2018, and removed the case to this Court on December 6, 2018, asserting jurisdiction under the *Class Action Fairness Act of 2005* ("CAFA"), codified in part at *28 U.S.C. § 1332(d)*. *Id.* ¶¶ 1, 4.

Under review is Defendants' motion to dismiss under *Federal Rule of Civil Procedure ("FRCP") 12(b)(6)*, where Defendants argue that Plaintiffs have failed to state a claim upon which relief can be granted. ECF No. 20. Defendants also move to strike portions of the First Amended Complaint ("FAC") under *FRCP 12(f)* claiming that the portions are immaterial, impertinent, and scandalous. *Id.* For the reasons stated below, the Court GRANTS Defendants' motion to strike and GRANTS IN PART and DENIES IN PART Defendants' motion to dismiss with leave to amend.

II. BACKGROUND

A. Facts[1]

Plaintiffs are residents of Bakersfield, California, and citizens of California. ECF No. 18 ¶ 7. Defendant WRDC is incorporated in Oregon and has its principal place of business in Florida. ECF No. 1 ¶ 12. Defendant WVO is incorporated in Delaware and has its principal place of business in Florida. *Id.* ¶ 13. Defendant WorldMark is incorporated in California and has its principal place of business in Washington. ***[*3]*** *Id.* ¶ 14. The putative class in this matter consists of all individuals "who have 1) been sold a timeshare in California by Defendants through individuals or entities not licensed to sell real estate or arrange financing for real estate purchases in California and 2) have been told by Defendants that they have earned 'equity' on the purchase of timeshare points." ECF No. 18 ¶ 34.

Plaintiffs allege that they purchased a timeshare interest sold by Defendants WorldMark and WRDC in 2015 while on vacation in San Diego and purchased "additional timeshare points" in September 2016. *Id.* ¶ 13. On or around April 29, 2017, Plaintiffs received a call from an office operated by Defendants. *Id.* ¶ 15. The individual who spoke with Plaintiffs made "many materially false and misleading statements" and induced Plaintiffs to purchase 1,000 additional WorldMark vacation credit points for $3,450 plus a processing fee of $349. *Id.* ¶ 17. The purchase was financed by an extension of credit by WRDC, bringing the total amount owed by Plaintiffs for their timeshare interest to more than $26,000. *Id.* The contract for the purchase appeared to be intended for California purchasers. *Id.* ¶ 21. The name of the person **[*4]** who signed the contract on Defendants' behalf, Brett Dean, does not appear on any list of current, or recent, holders of a California real estate broker or salesperson license. ECF No. 18 ¶ 22.

Plaintiffs allege that Defendants have consistently represented that they have positive equity in their timeshare interest. *Id.* ¶ 24. On September 8, 2016, Defendants represented that Plaintiffs had $10,089.03 in equity in their timeshare purchases. *Id.* ¶ 25; FAC, Exhibit 2. Plaintiffs claim that the document purporting the amount of equity was created to facilitate the sale of additional WorldMark and WRDC timeshare points to Plaintiffs. *Id.* ¶ 26. Plaintiffs believe the actual market value of their timeshare points in September 2016 was zero or near zero, and Plaintiffs therefore actually had negative equity. *Id.* ¶ 28.

Plaintiffs allege that Defendants engaged in unfair business practices when they unlawfully sold a real estate interest within California through unlicensed individuals who earned commissions on the sales in violation of California law. *Id.* ¶ 38. Additionally, Plaintiffs allege that Defendants engaged in unfair business practices by making materially false representations in connection **[*5]** with the sale of a timeshare interest as to the equity value of their timeshare points. *Id.* ¶ 41. Finally, Plaintiffs allege that Defendants violated the *California Vacation Ownership and Time-Share Act of 2004, Cal. Bus. & Prof. Code § 11210 et seq.* (the "Timeshare Act"), by making materially false and misleading representations about the equity value of Plaintiffs' timeshare points. *Id.* ¶¶ 46-51.

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[1] Unless indicated, all facts are taken from the FAC. The allegations of material fact are taken as true and are construed in the light most favorable to the Clarks for purposes of deciding the motion to dismiss. *Coalition For ICANN Transparency, Inc. v. VeriSign, Inc., 611 F.3d 495, 501 (2010)*.

B. Procedural Background

On December 12, 2018, Defendants filed their first motion to dismiss. ECF No. 4. Plaintiffs filed an opposition on December 31, 2018, ECF No. 6, and a motion to remand to state court on January 1, 2019, ECF No. 7.

On March 1, 2019, the Court denied Plaintiffs' motion to remand the case to state court, holding that Plaintiffs had not demonstrated that CAFA's local controversy exception, *28 U.S.C. § 1332(d)(4)(A)*, applied to the present case. ECF No. 16, at 10. The Court then permitted Plaintiffs to file an amended complaint, stating "Plaintiffs may file any amended complaint clarifying the allegations regarding in-state Defendants' conduct within 30 days." ECF No. 16, at 11. The Court deferred ruling on Defendants' motion to dismiss. ECF No. 16, at 12. The Plaintiffs filed the FAC on March 29, 2019. ECF No. 18.

Defendants now move **[*6]** to dismiss the FAC under *FRCP 12(b)(6)*. ECF No. 20, at 2. Defendants also ask the Court to strike paragraphs 1 through 3 of the FAC under the heading "The Timeshare Industry." ECF No. 20 at 1. The Court has determined that the motion to dismiss is suitable for decision on the papers under *Local Rule 230(g)*. For the reasons stated below, the Court grants in part and denies in part the motion to dismiss with leave to amend and grants the motion to strike portions of the FAC.

III. LEGAL STANDARD

A. Motion to strike portions of the FAC under *Rule 12(f)*

Federal Rule of Civil Procedure 12(f) permits the Court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *Fed. R. Civ. P. 12(f)*. "Redundant allegations are those that are needlessly repetitive or wholly foreign to the issues involved in the action." *Cal. Dep't of Toxic Substances Control v. Alco Pacific, Inc., 217 F. Supp. 2d 1028, 1033 (C.D. Cal. 2002)* (internal quotation marks and citations omitted). Immaterial matter is "that which has no essential or important relationship to the claim for relief or the defenses being pleaded." *Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993)* (internal quotation marks and citations omitted), *rev'd on other grounds*, *510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994)*. Impertinent matter "consists of statements that do not pertain, and are not necessary, to the issues in question." *Id.* A scandalous matter is that which "improperly casts **[*7]** a derogatory light on someone, most typically on a party to the action." *Germaine Music v. Universal Songs of Polygram, 275 F. Supp. 2d 1288, 1300 (D. Nev. 2003)* (internal quotation marks and citations omitted), *rev'd in part on other grounds*, *130 Fed. Appx. 153 (9th Cir. 2005)* (unpublished).

B. Motion to dismiss under *Rule 12(b)(6)*

A motion to dismiss under *Rule 12(b)(6)* challenges the legal sufficiency of the opposing party's pleadings. Dismissal of an action under *Rule 12(b)(6)* is proper where there is either a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. When considering a motion to dismiss for failure to state a claim under *Rule 12(b)(6)*, all allegations of material fact must be accepted as true and construed in the light most favorable to the pleading party. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*. The inquiry is generally limited to the allegations made in the complaint. *Lazy Y Ranch LTD v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008)*.

Under *Rule 8(a)*, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A plaintiff is required to allege "enough facts to state a claim to relief that is plausible on its face." *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the **[*8]** reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly, 550 U.S. at 556*).

While *Rule 8(a)* does not require detailed factual allegations, "it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Iqbal, 556 U.S. at 678*. A pleading is insufficient if it offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly, 550 U.S. at 555*; see also *Iqbal, 556 U.S. at 678* ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Moreover, it is inappropriate to assume that the plaintiff "can prove facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged[.]" *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. In practice, "a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Twombly, 550 U.S. at 562*. In other words, the complaint must describe the alleged misconduct in enough detail to lay the foundation for an identified legal claim.

*Heightened Pleading Standard **[*9]** under Rule 9(b)*

Federal Rule of Civil Procedure 9(b) requires a party alleging fraud to "state with particularity the circumstances constituting [the] fraud[.]" *Fed. R. Civ. P. 9(b)*. This heightened pleading standard requires the party to do more than simply identify a transaction and allege in a conclusory manner that the transaction was fraudulent. *See In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994)* (en banc), *superseded by statute on other grounds*. Rather, the party must set forth in detail "the who, what, when, where, and how" of the alleged fraudulent conduct. *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)* (citation omitted). The purpose of *Rule 9(b)* is to protect defendants from factually baseless claims of fraud as much as it is meant to give defendants notice of the claims asserted against them. *See Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)*. When a party averring fraud fails to meet the heightened pleading standard of *Rule 9(b)*, dismissal of the claim is proper. *See Vess, 317 F.3d at 1107* ("A motion to dismiss a complaint or claim 'grounded in fraud' under *Rule 9(b)* for failure to plead with particularity is the functional equivalent of a motion to dismiss under *Rule 12(b)(6)* for failure to state a claim.").

"Dismissal without leave to amend is proper if it is clear that the complaint could not be saved by amendment." *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1051 (9th Cir. 2008)*. To the extent that the pleadings can be cured by the allegation of additional facts, the Court will afford the plaintiff **[*10]** leave to amend. *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 247 (9th Cir. 1990)* (citations omitted).

IV. ANALYSIS

A. Motion to strike under *Rule 12(f)*

First, the Court grants Defendants' motion to strike paragraphs 1 through 3 of the FAC. Under the subheading "THE TIMESHARE INDUSTRY," these paragraphs start with the following "The timeshare industry has long been notorious for aggressive sales practices and predatory conduct, often directed towards the elderly and those with dreams of vacations that may exceed their financial ability to achieve them." ECF No. 18 ¶ 1. The FAC proceeds to list one verdict and six settlements in unrelated cases where entities have been liable for violations or alleged violations of the Timeshare Act. *Id.* These other cases have no bearing on the Defendants' alleged unlawful conduct in the present case. Paragraph 2 states: "Timeshare companies engage in these deceptive practices because they must hide the truth: nearly all timeshares are worth nothing at all." *Id.* ¶ 2. Lastly, Paragraph 3 of the FAC states, "Purchasers pay for this right to try to reserve a week not only through a high interest mortgage, but also through annual maintenance fees that increase every year. These maintenance fees alone often exceed what a week in the **[*11]** identical or a comparable hotel or condominium rents for on the open market." ECF No. 18, ¶ 3.

Immaterial matter is that which has no essential or important relationship to the claim for relief or the defenses asserted. *Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 974 (9th Cir. 2010)*. Impertinent matter consists of statements that do not pertain, and are not necessary, to the issues in question. *Id.* A pleading is scandalous when it "improperly casts a derogatory light on someone, most typically on a party to the action." *Germaine Music v. Universal Songs of Polygram, 275 F. Supp. 2d 1288, 1300 (D. Nev. 2003)* (internal quotation marks and citations omitted), *rev'd in part on other grounds*, *130 Fed. Appx. 153 (9th Cir. 2005)* (unpublished).

Here, the Court agrees with Defendants that paragraphs 1 through 3 of the FAC are immaterial. These allegations do not pertain to the alleged wrongful conduct by Defendants. They merely serve to paint the Defendants and the industry in which they operate in a negative light. Accordingly, we grant Defendants' motion to strike paragraphs 1 through 3.

B. The Timeshare Act claim (Second Cause of Action) fails to state a claim upon which relief can be granted and does not meet the particularity requirement under *Rule 9(b)*.

The *Vacation Ownership and Timeshare Act of 2004 ("Timeshare Act"), Cal. Bus. & Prof. Code § 11210, et seq.*, prohibits a person or entity subject to the Act from making **[*12]** material misrepresentations in the advertising and promoting of timeshares that materially misrepresent the size, nature, extent, qualities, and characteristics of the offered timeshare plan. *Cal. Bus. & Prof. Code § 11245(a)(1)-(3)*. The California Legislature intended the Timeshare Act to be "interpreted broadly in order to encompass all forms of time-share plans . . . that are created with respect to accommodations that are located in the state or that are offered for sale in the state . . . ." *Cal. Bus. & Prof. Code § 11211(d)*.

The Timeshare Act provides that any timeshare interest owner may bring an action for damages or for injunctive relief for violations under the statute. *Cal. Bus. & Prof. Code § 11285*.

The FAC states that Brett Dean signed the contract for the April 2017 sale of timeshare points on behalf of Worldmark and WRDC. ECF No. 18 ¶ 14; *see also* FAC, Exhibit 1, at 3. In the Addendum to Retail Installment Contract Vacation Owner Agreement, Brett Dean signed as an authorized agent on behalf of "WYNDHAM RESORT DEVELOPMENT CORPORATION AND WORLDMARK, THE CLUB." ECF No. 18; FAC, Exhibit 1, at 3. The Clarks allege that Defendants, through their representative, misrepresented the actual amount of equity in their existing timeshare interest. ECF No. 18 ¶¶ 16, 25-30. As evidence **[*13]** of the misrepresented amount of equity, Plaintiffs attached Exhibit 2, a "Final Summary" webpage dated September 8, 2016, which shows that the Clarks have equity of $10,089.03. ECF No. 18; FAC, Exhibit 2. However, Plaintiffs do not specifically allege that the caller in April 2017 made specific reference to the misrepresented amount of equity. Thus, even when the Court accepts the Clarks' claims as true, Plaintiffs do not establish a prima facie case that the Defendants made a materially false statement or misrepresentation in connection with the promotion or advertising of a timeshare plan. A bare recitation of the elements of the cause of action is insufficient to survive a motion to dismiss. *Iqbal, 556 U.S. at 678*.

Furthermore, the FAC fails adequately to set forth the alleged fraudulent scheme with particularity as required by *FRCP 9(b)*. Defendants contend that Plaintiffs' Timeshare Act claims sound in fraud, and Plaintiffs are therefore required to plead the circumstances of fraud with particularity as required by *Rule 9(b)*. The Court agrees.

Plaintiffs contend that the alleged unlawful activity does not need to be pleaded with specificity. ECF No. 22.[2] While a federal court will examine state law to determine whether **[*14]** the elements of fraud have been pleaded sufficiently to state a cause of action, *Rule 9(b)* is a federally imposed rule that requires the circumstances of the fraud be pleaded with particularity. *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003)*. Therefore, *Rule 9(b)* requires the Clarks' claims of a fraudulent misrepresentation to be pleaded with particularity.

In *Vess*, the plaintiff argued that because fraud was not an essential element of the state law cause of action, *Rule 9(b)* did not apply. *317 F.3d at 1103*. The Ninth Circuit rejected this argument, holding that allegations of fraud must be pleaded with particularity even when fraud is not an essential element of the cause of action. *Id.* The same rule of law applies to the Timeshare Act allegations in the present case.

Generally, allegations of fraud must allege the who, what, when, where and how of the misconduct. *Id. at 1106*. The FAC does not meet this pleading standard. Plaintiffs cast a net that is too wide with regard to who actually made the misrepresentation of equity to the Clarks. Moreover, the Clarks do not claim that the misrepresentation was expressly communicated in the sales call made to them. Instead, Plaintiffs allege that the misrepresentation was contained in the summaries provided to the Clarks. Even assuming the **[*15]** equity amount is misrepresented, Plaintiffs do not allege that such a misrepresentation was a product of Defendants' scheme to defraud the Clarks and other similarly situated persons. Accordingly, the Timeshare Act claim must be dismissed.

C. The Court grants in part and denies in part Defendants' motion to dismiss with respect to the UCL claim (First Cause of Action).

Under California's Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, any person or entity that has engaged, is engaging or threatens to engage in unfair competition may be enjoined in any court of competent jurisdiction. *Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1140 (9th Cir. 2012)* (citing *Cal. Bus. & Prof. Code §§ 17201*, *17203*). Unfair competition includes any "unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Cal. Bus. & Prof. Code § 17200*. A business act or practice need only meet one of three criteria—unlawful, unfair, or fraudulent—to be considered unfair competition under the UCL. *Abramson v. Marriott Ownership Resorts, Inc., 155 F. Supp. 3d 1056, 1066 (C.D. Cal. 2016)* (citing *Daro v. Superior Court, 151 Cal. App. 4th 1079, 1093, 61 Cal. Rptr. 3d 716 (2007))*. Plaintiffs assert the UCL claims under all three of the prongs. ECR No. 18 ¶¶ 37, 41.

Where a UCL claim is grounded in alleged fraudulent conduct, it is subject to the heightened pleading standard of *Rule 9(b)*. *See* *Vess, 317 F.3d at 1103-04*. For example, when a plaintiff relies entirely on a unified course of fraudulent conduct as a basis **[*16]** for a UCL claim, the claim must satisfy the particularity requirements of *Rule 9(b)*. *Kearns, 567 F.3d at 1126-27*. But when a plaintiff's allegations do not rely entirely on a unified fraudulent course of conduct, those aspects of the UCL claim that are not grounded in fraud need not meet the *Rule 9(b)* requirements. *Vess, 317 F.3d at 1106*.

"Unlawful" prong

The UCL's "unlawful" prong "borrows violations of other laws and treats them as independently actionable." *Wilson, 668 F.3d at 1140*. The UCL's coverage is interpreted broadly, embracing anything that can properly be called a business practice and that at the same time is forbidden by law. *Id.* A violation of another law is a predicate for stating a cause of action under the UCL's unlawful prong. *DocMagic, Inc. v. Ellie Mae, Inc., 745 F. Supp. 2d 1119, 1146 (N.D. Cal. 2010)*.

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[2] Plaintiffs cite *People v. Custom Craft Carpets, Inc., 159 Cal. App. 3d 676, 684, 206 Cal. Rptr. 12 (1984)* and *Aicco, Inc. v. Insurance Co. of N. Am., 90 Cal. App. 4th 579, 596, 109 Cal. Rptr. 2d 359 (2001)*. Neither of these cases address whether Plaintiffs are required to plead the alleged fraudulent conduct with particularity in the present case.

First, Plaintiffs claim that it is "unlawful and unfair in California for an entity to sell real estate other than through a licensed real estate broker or sales person and unlawful to permit the unlicensed individual to receive any compensation arising . . . from the sale." ECF No. 18 ¶ 38. Plaintiffs allege that timeshare interests are interests in real property. *Cal-Am Corp. v. Dep't. of Real Estate, 104 Cal. App. 3d 453, 457, 163 Cal. Rptr. 729 (1980)*; *Cal. Bus. & Prof. Code § 11212*. They also assert that a timeshare interest may only be sold by a California licensed real estate broker or agent and since the representative on the sales contract, **[*17]** Brett Dean, is not a licensed real estate broker or salesperson, Defendants violated the law. ECF No. 18 ¶ 22. In addition, Plaintiffs allege that Mr. Dean received a commission on the sale which violates *Cal. Bus. & Prof. Code § 10137*. *Cal. Bus. & Prof. Code § 10137* states "[i]t is unlawful for any licensed real estate broker to employ or compensate, directly or indirectly, any person for performing any of the acts within the scope of this chapter who is not a licensed real estate broker, or a real estate salesperson licensed under the broker . . . ." This contention raises a plausible claim that the Defendants acted unlawfully when Mr. Dean sold the timeshare interest to the Clarks. This allegation is also not connected to any allegations of fraudulent conduct, and therefore does not need to meet the particularity requirements of *Rule 9(b)*.

However, Plaintiffs also appear to be relying on an alleged fraudulent scheme to satisfy the "unlawful" prong of the UCL claim. Specifically, the FAC alleges that "[i]t is *unlawful*, unfair and fraudulent in California to make a material misrepresentation of facts in connection with the promotion of any timeshare interest," and asserts that "Defendants made materially false representations to Plaintiffs in connection **[*18]** with the sale of a timeshare interest" by "stating to Plaintiffs that they had 'equity' in excess of $10,000 arising from their prior timeshare purchases." ECF No. 18 ¶ 41 (emphasis added).

In *Kearns, 567 F.3d at 1127*, the Ninth Circuit held that dismissal of a UCL claim was appropriate because the claims were all grounded in fraud and the plaintiffs failed to plead with particularity. There, William Kearns brought claims against Ford Motor Company ("Ford") on behalf of himself and those similarly situated claiming that Ford acted illegally to increase sales of their Certified Pre-Owned vehicles. *Kearns, 567 F.3d at 1122*. Specifically, Kearns alleged that Ford made false and misleading statements concerning safety and reliability of the Certified Pre-Owned vehicles, and that Ford failed to disclose the lack of oversight it had over the certification process. *Id. at 1123*. On appeal, the Ninth Circuit rejected Kearns's argument that some of his claims should not be subject to *Rule 9(b)* because they were not grounded in fraud. *Id. at 1125*. Because Kearns's claims were grounded in a unified course of fraudulent conduct, he was required to plead the who, what, when, where, and how the misconduct was committed. *Id. at 1126*.

In the present case, the Clarks' claim of unlicensed sales **[*19]** and financing is separate from the alleged fraudulent scheme of misrepresenting the amount of equity held by Plaintiffs. Thus, Plaintiffs' claims under the "unlawful" prong of the UCL are not entirely grounded in fraud and need not be pleaded with particularity. Therefore, Defendants' motion to dismiss is DENIED with respect to the asserted "unlawful" UCL claim based upon unlicensed sales and financing. The motion is GRANTED WITH LEAVE TO AMEND as to any "unlawful" UCL claim based upon the alleged fraudulent scheme of misrepresenting the amount of equity held by Plaintiffs. If Plaintiffs wish to rely on the alleged fraudulent course of conduct to satisfy the "unlawful" prong of the UCL claim, they must meet the heightened pleading standard of *Rule 9(b)* in any amended complaint.

Next, Plaintiffs reassert the allegations from their Timeshare Act claim that Defendants violated California law when Defendants made false or materially misleading statements about the equity value of Plaintiffs' timeshare points. Because the Court dismisses the Timeshare Act claim above, this claim cannot form the basis of the UCL claim.

"Unfair" prong

The UCL does not define the term "unfair" and the California courts **[*20]** are unresolved as to the exact definition under the statute. *Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1169 (9th Cir. 2012)*. The Ninth Circuit Court of Appeals has acknowledged a split in the California courts as to whether a claim under the "unfair" prong may be properly brought by consumers or if the cause of action is limited to competitors. *Id. at 1170*. Prior to the decision in

Cel-Tech Comms. Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999), the California courts held that "unfair" conduct occurs when the practice offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. *Davis, 691 F.3d at 1169* (citing *S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 886, 85 Cal. Rptr. 2d 301 (1999))*. Under this approach, a court must balance the utility of the defendant's conduct against the gravity of the harm to the alleged victim. *Id. Cel-Tech* held that this balancing test provided too little guidance to the courts. *20 Cal. 4th at 185*.

Accordingly, *Cel-Tech* adopted a separate analysis, holding that "unfair" means "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id. at 544*. California courts have been split on whether to apply the *Cel-Tech* approach or the pre-*Cel-Tech* ***[*21]*** balancing test to consumer actions alleging unfair conduct under the UCL. *Davis, 691 F.3d at 1170*. The *Davis* Court declined to decide which approach applied, holding that the plaintiff's claims failed under either alternative. *Id.* This Court holds that the same is true in the present case.

The FAC fails to meet either the *Cel-Tech* approach or the pre-*Cel-Tech* balancing test in pleading unfair conduct under the UCL. Under the *Cel-Tech* approach, the Clarks have not directly alleged or presented facts that plausibly suggest how misrepresenting the amount of equity or employing an unlicensed salesperson violates the policy or spirit of the antitrust laws. Furthermore, under the pre-*Cel-Tech* balancing approach, the FAC offers no more than "It is unlawful and unfair in California for an entity to sell real estate other than through a licensed real estate broker or sales person," ECF No. 18 ¶ 37; and "It is unlawful, unfair and fraudulent in California to make a material misrepresentation of facts in connection with the promotion of any timeshare interest," ECF No. 18 ¶ 41. These bare allegations of unfairness do not establish a claim under the "unfair" prong of the UCL.

"Fraudulent" prong

For the reasons stated above, **[*22]** Plaintiffs have failed to plead with the particularity required by *Rule 9(b)* that Defendants' conduct was fraudulent. For these same reasons, the Court dismisses Plaintiffs' claim under the UCL that Defendants conduct was fraudulent.

In sum, the Court denies in part and grants in part with leave to amend the motion to dismiss with respect to Plaintiffs' UCL claim under the unlawful prong. With respect to the UCL claims under the "unfair" and "fraudulent" prongs, the Court grants the motion to dismiss with leave to amend.

V. CONCLUSION AND ORDER

For the foregoing reasons, Defendants' motion to dismiss is GRANTED IN PART WITH LEAVE TO AMEND and DENIED IN PART. Defendants' Motion to Strike paragraphs 1 through 3 under *Rule 12(f)* of the FAC is GRANTED. If Plaintiffs so choose, they may file an amended complaint within 30 days of the date of this order.

IT IS SO ORDERED.

Dated: **July 25, 2019**

/s/ Lawrence J. O'Neill

UNITED STATES CHIEF DISTRICT JUDGE

Plymouth Cty. Ret. Sys. v. Patterson Cos.

United States District Court for the District of Minnesota

July 25, 2019, Decided; July 25, 2019, Filed

Case No. 18-cv-871 (MJD/SER)

Reporter
2019 U.S. Dist. LEXIS 124014 *; 2019 WL 3336119

Plymouth County Retirement System, individually and on behalf of all others similarly situated, Plaintiff, v. Patterson Companies, Inc., Scott P. Anderson, Ann B. Gugino, R. Stephen Armstrong, and James W. Wiltz, Defendants.

Subsequent History: Adopted by, Modified by, Dismissed by, in part, Motion denied by, in part *Plymouth Cty. Ret. Sys. v. Patterson Cos., Inc., 2019 U.S. Dist. LEXIS 154078, 2019 WL 4277302 (D. Minn., Sept. 10, 2019)*

Motion granted by, in part, Motion denied by, in part *Plymouth Cnty. Ret. Sys. v. Patterson Cos., 2020 U.S. Dist. LEXIS 262709, 2020 WL 13157997 (D. Minn., Sept. 22, 2020)*

Class certification granted by *Plymouth Cty. Ret. Sys. v. Patterson Cos., 2020 U.S. Dist. LEXIS 177505 (D. Minn., Sept. 28, 2020)*

Stay denied by *Plymouth Cty. Ret. Sys. v. Patterson Cos., 2020 U.S. Dist. LEXIS 209182, 2020 WL 6566467 (D. Minn., Nov. 9, 2020)*

Motion granted by *Plymouth County Ret. Sys. v. Patterson Cos., 2022 U.S. Dist. LEXIS 21829, 2022 WL 336592 (D. Minn., Feb. 3, 2022)*

Motion granted by, Costs and fees proceeding at *Plymouth Cnty. Ret. Sys. v. Patterson Co., 2022 U.S. Dist. LEXIS 106386 (D. Minn., June 10, 2022)*

Settled by, Motion granted by, Costs and fees proceeding at *Plymouth Cnty. Ret. Sys. v. Patterson Co., 2022 U.S. Dist. LEXIS 106387 (D. Minn., June 10, 2022)*

Prior History: *In re Benco Dental Supply Co., 2018 FTC LEXIS 18 (F.T.C., Feb. 12, 2018)*

Core Terms

dental, earnings, competitors, sales, email, scienter, fiscal year, prices, attributed, supplies, sales force, buying, allegations, consumable, responded, filings, code of ethics, customer, anticompetitive, misleading, forwarded, dentists, misrepresentation, decrease, stock, Defendants', realignment, compliance, certifications, distributors

Counsel: **[*1]** Lucas F. Olts and Alexi Pfeffer-Gillett, Robbins Geller Rudman & Dowd LLP, Anne M. Lockner, Robins Kaplan LLP, and Lester R. Hooker, Saxena White P.A. (for Plaintiff).

Patrick S. Williams, Aaron G. Thomas, and Jordan Weber, Briggs & Morgan, PA (for Defendants).

Judges: Steven E. Rau, United States Magistrate Judge.

Opinion by: Steven E. Rau

Opinion

REPORT AND RECOMMENDATION

This matter is before the Court on Defendants' Motion to Dismiss the Amended Class Action Complaint. (ECF No. 89). This motion was referred to the undersigned for a report and recommendation under *28 U.S.C. § 636(b)(1)(B)* and *Local Rule 72.1*. (ECF No. 95). This Court recommends the motion be granted in part and denied in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs, led by Plymouth County Retirement System and other institutional investors, seek remedies under the *Securities Exchange Act* against Defendant Patterson Companies, Inc., and various executives of Patterson. Plaintiffs assert Patterson conspired with its principal competitors, Henry Schein, Inc., and Benco Dental Supply Company to boycott Group Purchasing Options ("GPOs") and fix dental supply prices.

GPOs are membership organizations that aggregate the buying power of solo dentists and small group dental practices. (Compl. **[*2]** ¶¶ 3, 42, 44). In aggregating their purchasing power, GPOs provide dentists power to negotiate lower prices on dental supplies. (Compl. ¶ 3). GPOs further save costs by using online sales rather than the door-to-door sales force relied upon by Patterson, Schein, and Benco. (Compl. ¶ 3). These discounts cut into the traditionally "significantly marked-up prices" that Patterson, Schein, and Benco charge independent dentists. (Compl. ¶¶ 3, 41-43). GPOs also introduced competition to Patterson, Schein, and Benco by providing sales opportunities to smaller distributors. (Compl. ¶ 44).

Patterson, a Minnesota company, is "the second largest distributor of dental supplies in the United States." (Am. Class Action Compl. ¶¶ 1, 19, 25) (hereinafter "Compl.").[1] Patterson supplies consumable products and basic and advanced dental equipment to dentists, dental laboratories, and other healthcare professionals. (Compl. ¶ 39). Patterson and its competitors, Schein and Benco, are full-service distributors for the dental supply market. (*See* Compl. ¶ 3). Combined, Patterson, Schein, and Benco control about 85% of the dental supply market. (Compl. ¶¶ 1, 40).

A. Procedural Posture

Plaintiffs initially brought **[*3]** suit on March 28, 2018 against Patterson, Scott Anderson,[2] and Ann Gugino.[3] (ECF No. 1). Afterwards the parties, including various competing plaintiffs, stipulated to the appointment of lead plaintiffs and lead counsel. (ECF Nos. 58, 63, 64). Plaintiffs then filed the operative complaint against Patterson, Anderson, Gugino, Stephen Armstrong,[4] and James Wiltz.[5] (Compl., ECF No. 74). Count One asserts a violation of *Section*

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[1] Patterson distributes its products through three subsidiaries, Patterson Dental, Patterson Animal Health, and Patterson Medical. (Compl. ¶¶ 25, 39). Patterson Dental makes up approximately 60% of Patterson's business, generating sales in excess of $2billion. (Compl. ¶ 39). Unless specifically noted, references to "Patterson" herein are to Patterson and Patterson Dental.

[2] Anderson served as Patterson's CEO and president from April 25, 2010 through June 1, 2017. (Compl. ¶ 26). Prior to that, Anderson served as president of Patterson Dental from June 2006 through April 2010. (Compl. ¶ 26).

[3] Gugino served as Patterson's CFO from November 2014 through her resignation on March 1, 2018. (Compl. ¶¶ 12, 30, 123). Before that, she served as Patterson's vice president of finance and operations and vice president of strategy and planning. (Compl. ¶ 30).

[4] Armstrong served as Patterson's executive vice president, CFO, and treasurer from July 1999 through October 2014. (Compl. ¶ 28).

10(b) of the *Exchange Act* and *Rule 10b-5(b)*. (Compl. ¶¶ 261-70). Count Two asserts a violation of *Section 20(a)* of the Exchange Act. (Compl. ¶¶ 271-77). Plaintiffs propose a class of those who purchased or acquired Patterson stock from June 26, 2013 through February 28, 2018. (Compl. ¶ 255).

Defendants moved to dismiss the complaint. (ECF No. 89). The parties fully briefed the motion. (ECF Nos. 91, 100, 101). The motion was referred to the undersigned, (ECF No. 95), and argued at a motion hearing held May 13, 2019, (ECF No. 103; *see* ECF No. 107). Plaintiffs submitted supplemental authority on June 14, 2019, (ECF No. 110), and Defendants responded, (ECF No. 111). The motion to dismiss is now ripe for determination.

B. Factual Background[6]

Sometime around February 2013, a newly formed **[*4]** GPO in New Mexico announced it had partnered with Patterson "to provide the individual office the same opportunities as the larger corporations." (Compl. ¶ 54). On February 8, 2013, Benco's managing director, Chuck Cohen, forwarded the New Mexico GPO's email announcement to Patterson's president, Paul Guggenheim,[7] stating: "Just wanted to let you know about some noise I've picked up from New Mexico. FYI: Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups (though we do work with corporate accounts) and our team understands that policy." (Compl. ¶¶ 5, 55). Guggenheim forwarded this email to Patterson's head of sales, David Misiak,[8] and Patterson's head of marketing, Tim Rogan.[9] (Compl. ¶¶ 5, 56). Guggenheim then responded to Cohen: "Thanks for the heads up. I'll investigate the situation. We feel the same way about these." (Compl. ¶¶ 5, 56). Cohen then sent a text message to a Benco regional manager: "I just sent Paul [Guggenheim] a note about it. Don't want to call because it might be construed as price fixing." (Compl. ¶¶ 5, 57). Three days later, Patterson informed the New Mexico GPO it would not be partnering with it. (Compl. ¶ 58).

On February **[*5]** 27, 2013, Misiak emailed Anthony Fruehauf, Patterson's mid-Atlantic regional manager, instructing him to reject Atlantic Dental Care, a suspected GPO, even though Fruehauf believed Patterson would "los[e] a big chunk of business." (Compl. ¶ 59). Misiak instructed Fruehauf to inform his sales staff that it was in "their best interest long term . . . not to take our business in that direction." (Compl. ¶ 59). Misiak further stated: "Confidential and not for discussion . . . our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me." (Compl. ¶¶ 6, 59).

After Benco did business with Atlantic Dental Care, Guggenheim emailed Cohen on June 6, 2013 using the same email thread from February 2013. (Compl. ¶ 60). Guggenheim stated:

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5 Wiltz served as Patterson's interim CEO from June through November 2017. (Compl. ¶¶ 32, 213).

6 Because this matter is before the Court on Defendants' *Rule 12(b)(6)* motion, "the pleadings are construed in the light most favorable to the nonmoving party, and the facts alleged in the complaint must be taken as true." *City of Lake Elmo v. 3M Co., 237 F. Supp. 3d 877, 885 (D. Minn. 2017)* (citing *Hamm v. Groose, 15 F.3d 110, 112 (8th Cir. 1994))*. Thus, these facts are derived solely from the complaint or materials embraced by the complaint. *See Illig v. Union Elec. Co., 652 F.3d 971, 976 (8th Cir. 2011)* (noting that, on a motion to dismiss, courts may consider the pleadings themselves, materials embraced by the pleadings, exhibits attached to the pleadings, and matters of public record).

7 Guggenheim served as president of Patterson Dental from April 2010 through June 15, 2016, at which point he was appointed chief innovation officer of Patterson, where he served until June 1, 2017. (Compl. ¶ 35). Guggenheim reported directly to Anderson, Patterson's CEO. (Compl. ¶ 229).

8 Misiak served as Patterson's head of sales from 2010 to until November 1, 2016, when he became president of Patterson Dental. (Compl. ¶ 36). Misiak served as president of Patterson Dental through May 3, 2018. (Compl. ¶¶ 36, 132). Misiak reported directly to Anderson, Patterson's CEO. (Compl. ¶¶ 132, 229).

9 Rogan served as Patterson Dental's head of marketing from 2010 through 2017, when he was appointed as vice president and general manager of North America. (Compl. ¶ 37). Rogan reported directly to Anderson, Patterson's CEO. (Compl. ¶ 229).

> Reflecting back on our conversation earlier this year, could you shed some light on your business agreement with Atlantic Dental Care? . . . I'm wondering if your position on buying groups is still as you articulated back in February? . . . Sometimes these things grow legs without our awareness!

(Compl. ¶¶ 8, 60). Cohen responded on June 10, 2013: "As we've discussed, we don't recognize buying groups." **[*6]** (Compl. ¶¶ 8, 61). Cohen explained how Atlantic Dental Care was not a GPO, even noting that Benco had asked to see various business documents for confirmation. (Compl. ¶ 61). Guggenheim responded: "Sounds good Chuck [Cohen], Just wanted to clarify where you guys stand." (Compl. ¶¶ 8, 62). Guggenheim then forwarded the email conversation to Anderson, Patterson's CEO, with an accompanying message of "FYI." (Compl. ¶¶ 8, 62).

On June 26, 2013, Patterson filed its 2013 Form 10-K with the SEC, for fiscal year ending April 27, 2013. (Compl. ¶¶ 63, 141). The 2013 Form 10-K contained certifications from Defendants Anderson and Armstrong. (Compl. ¶ 141). The 2013 Form 10-K included statements that Patterson was a "market leader with a strong competitive position," that the United States dental products distribution industry was "highly competitive," and Patterson used "competitive pricing" to differentiate itself from competitors. (Compl. ¶ 142). Patterson described the dental supply market as "highly fragmented and competitive," noting that industry consolidation among suppliers, price competition, and new competitors could increase competition. (Compl. ¶ 143). Patterson attributed its success **[*7]** to "value-added, full-service capabilities, using technology to enhance customer service, continuing to improve [their] operating efficiencies, and growing through internal expansion and acquisitions." (Compl. ¶ 144). Patterson indicated the healthcare industry was "experiencing substantial changes which are causing uncertainty in the market and may adversely affect" the dental supply business. (Compl. ¶ 146). The healthcare industry "has undergone significant change driven by various efforts to reduce costs," including "collective purchasing arrangements and consolidation among office-based healthcare practitioners that may enable purchasing at more favorable prices . . . ." (Compl. ¶ 146). Patterson warned that its profit margins, as well as those of its competitors, "may be adversely affected by industry changes." (Compl. ¶ 146).

In August 2013, Neal McFadden,[10] Patterson's division head for special markets, contacted Misiak and Rogan regarding whether to consider doing business with GPOs, asking: "Is it worth it to explore GPO????" (Compl. ¶¶ 7, 64). Rogan responded: "We don't need GPOs in the dental business. Schein, Benco and Patterson have always said no. I believe it is our duty **[*8]** to uphold this and protect this great industry." (Compl. ¶¶ 7, 46, 64).

Patterson issued its fiscal year 2014 first quarter earnings on August 22, 2013 and held an earnings call. (Compl. ¶ 148). Anderson indicated that Patterson's consumable dental supplies sales had experienced "six months of solid growth" attributable to "stability in the dental market." (Compl. ¶ 148).

Misiak emailed Anderson and Guggenheim on September 3, 2013, forwarding an article entitled "GPOs Expand Their Reach" (Compl. ¶ 66). The article described the relationship between a GPO and Burkart—Patterson's competitor and the dental supply market's fourth largest distributor. (Compl. ¶¶ 8, 66). Misiak stated:

> I would not currently classify [GPOs] as a big threat to the business but the GPO noise has been pretty loud from the field. We have said no at every turn, including to Delta Dental. Benco has also crept into a few of these. My guidance has been to politely say no and weather the storm with these. Incredible to me that Burkhart has bit this apple and they are broadcasting it.

(Compl. ¶¶67, 8). Anderson responded that "We need to watch this" and the article "shows how weak Burkhart is." (Compl. ¶¶ 67, 8). The next **[*9]** day, Misiak and McFadden distributed a memo to all of Patterson's regional and branch managers stating that the special markets division would not work with GPOs as a "guiding principle." (Compl. ¶¶ 7, 65).

The Texas Dental Association formed TDA Perks Supplies in October 2013. (Compl. ¶ 78). TDA Perks Supplies, a state-run GPO, planned to sell discounted dental supplies to member dentists via an online sales platform, in collaboration with SourceOne. (Compl. ¶ 78). Sometime thereafter, Benco's regional manager for Texas, Ron

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[10] McFadden served as president of Patterson Dental's special markets division beginning June 2013, when that division was formed. (Compl. ¶¶ 38, 64). McFadden reported directly to Anderson, Patterson's CEO. (Compl. ¶ 229).

Fernandez, called John Hyden, Patterson's regional manager for San Antonio, to discuss whether their companies would attend the Texas Dental Association's annual trade convention in light of its partnership with SourceOne. (Compl. ¶ 81). Hyden discussed the conversation with Clint Edens, his supervisor and Patterson's south central regional manager. (Compl. ¶ 81). Edens emailed Misiak and Rogan, stating that TDA had "flooded the market with advertisements offering 35% savings" and that he was "committed to pulling from the TDA if they do not discontinue competing with us via TDA Perks." (Compl. ¶ 82). Rogan responded: "This one has royally pissed me off." (Compl. **[*10]** ¶ 82). Rogan instructed Edens to generate a presentation for TDA of "[a]ll things Patterson does in state" and to "spin it to our mantra about helping our customers grow and not trying to decrease their supply bill." (Compl. ¶ 82).

On November 20, 2013, Misiak told Andy Goldsmith, a representative from Smile Source, a GPO, that Patterson was "currently not interested but will keep the strategy and Smile Source on the 'idea board' and get back to you should things change." (Compl. ¶ 70). Benco and Schein had similarly rejected doing business with Smile Source in October 2013. (Compl. ¶ 69). That same day, a Patterson sales representative emailed Rogan to inquire how to respond to a GPO that had reached out to her. (Compl. ¶ 71). Rogan responded: "We don't sell to buying groups" and "Let's talk live." (Compl. ¶ 71).

Patterson issued its fiscal year 2014 second quarter earnings on November 21, 2013 and held an earnings call. (Compl. ¶¶ 151-52). Anderson attributed Patterson's performance to "industry-leading technology wrapped by a suite of value-added services." (Compl. ¶¶ 151-52).

On December 13, 2013, Patterson announced it would not attend the Texas Dental Association's 2014 convention. **[*11]** (Compl. ¶¶ 84, 78). On January 6, 2014, Misiak called Dave Steck, Schein's head of sales, to discuss whether Schein was also boycotting the 2014 TDA convention. (Compl. ¶ 85). Less than a week later, Steck emailed Misiak: "I'll be calling you to let you know about our decision on the matter we recently discussed in the next couple of days." (Compl. ¶ 86). The email subject line was "Texas." (Compl. ¶ 86). Misiak forwarded the email to Rogan, adding: "He already told me they were out. Full blown!" (Compl. ¶ 86). Rogan replied to Misiak: "That sucks. You should call him. 'Thought I could trust you' type of conversation." (Compl. ¶ 86).

About five weeks after their previous communications, on December 30, 2013, Smile Source again reached out to Misiak and McFadden indicating it was "odd" that he "never heard back" because Smile Source "purchase[s] over $14MM annually in supplies, and that number continues to double every year. Dr. Goldsmith advised me that you are not interested in working with us." (Compl. ¶ 70).

Per the Complaint, McFadden was omnipresent when it related to Patterson's relationship with GPOs. McFadden informed another GPO, Lighthouse Dental Buying Group, LLC, on February **[*12]** 10, 2014 that "[a]t the advice of our legal department and our executive leadership team I am respectfully declining your offer to participate further in your RFP. Patterson has historically never done business with GPOs and culturally we do not feel it is a long term strategy for our company." (Compl. ¶ 72). On April 23, 2014, McFadden informed Guggenheim that he instructed Patterson sales staff "should pass on [GPOs]" given they are a "slippery slope" and "tout a 20% saving to the dentists on supplies." (Compl. ¶ 72).

Patterson issued its fiscal year 2014 third quarter earnings on February 20, 2014 and held an earnings call. (Compl. ¶ 154). Anderson stated Patterson's "strong growth" was attributed to its "dental team execut[ing] well with equipment and software sales increasing 5.6% from the year earlier level and all major categories posting gains." (Compl. ¶ 154).

Sometime in March 2014, Patterson met with the Texas Dental Association to demand that it end its contractual relationship with SourceOne. (Compl. ¶ 88). Patterson asserted that if the relationship continued, Patterson would no longer attend the Texas Dental Association's convention or advertise in its publications. (Compl. **[*13]** ¶ 88). On April 16, 2014, Cohen forwarded an article from the Texas Dental Association entitled "Texas Private Practices Gain the Volume Purchasing Power of Corporate Practices" to Guggenheim and Tim Sullivan, Schein's president. (Compl. ¶ 91). The article noted that large distributors "rarely provide the best deal" and TDA Perks could save an average of 35% on dental supplies. (Compl. ¶ 91). Cohen commented in the forwarded email: "Thought you'd be interested in this 'essay' from our friends at the TDA. Not only are they our new competitor, but they basically tell their members that dental distributors rip off their dentists. Nice!" (Compl. ¶ 91).

A Patterson sales representative in Atlanta informed McFadden that Smile Source was "really growing." (Compl. ¶ 72). McFadden responded on May 8, 2014, calling Smile Source "very sleazy . . . Basically giving small dentists better buying power. Most dealers are not working with them except small desperate ones. I'm sorry you're experiencing this." (Compl. ¶ 72). About a week later, on May 19, McFadden told another sales representative who inquired about GPOs: "I am electing not to participate with these groups—we have said no already." (Compl. **[*14]** ¶ 72). On June 12, 2014, McFadden asked a former colleague, who now worked with a GPO, via text message: "Is Choice One a GPO or are you all actually acquiring practices? The reason I'm asking is we've signed an agreement that we won't work with GPOs." (Compl. ¶¶ 72, 7).

On June 25, 2014, Patterson filed its 2014 Form 10-K with the SEC, for fiscal year ending April 26, 2014. (Compl. ¶ 156). The 2014 Form 10-K contained certifications from Anderson and Armstrong. (Compl. ¶ 156). The 2014 Form 10-K included statements similar to the 2013 Form 10-K. (Compl. ¶ 156).

On July 18, 2014, the Texas Attorney General sent a civil investigation demand to Patterson regarding Patterson, Schein, and Benco's collective boycott of the Texas Dental Association's GPO and annual convention. (Compl. ¶ 9).

Like in Texas, the Arizona Dental Association ("AZDA") created a GPO in partnership with SourceOne. (Compl. ¶ 92). On July 21, 2014, Mike Wade, Benco's regional manager for Arizona, emailed Chad Bushman, Patterson's regional manager for Arizona. (Compl. ¶ 94). Wade stated:

> I wanted to catch up and get your take on our friends at the AZDA becoming our competitors? I am sure you are hearing plenty from your **[*15]** reps about the AZDA partnership with SourceOne selling supplies. Needless to say we are not real happy and we are looking at pulling our sponsorship including the AZDA meeting. I know that Patterson, Schein and Benco boycotted the [TDA] meeting this year after the TDA did the same thing and wanted to see if we could create the same message here in AZ.

(Compl. ¶ 94). Bushman, copying his supervisor Dan Reinhardt, responded: "Mike, thank you for reaching out. If the AZDA has in fact signed with SourceOne (which it looks like they have) we will be pulling our sponsorship and attendance of the state meeting as they will have positioned themselves as a competitor." (Compl. ¶ 95). Wade replied: "Thanks for the quick reply. We are of the same mindset. It would be gratifying to see every distributor with a local presence make a unified statement on the AZDA's ill-conceived idea to become a distribution competitor." (Compl. ¶ 95).

Later that day, Reinhardt then emailed Edens and Misiak regarding Patterson's boycott of the TDA convention. (Compl. ¶ 96). Misiak responded promptly: "Please discuss live and no more emails on this topic." (Compl. ¶¶ 9, 96). Reinhardt then passed this message along **[*16]** to Bushman regarding the AZDA meeting: "Please discuss live and no further emails." (Compl. ¶ 96). In September 2014, Patterson, Schein, and Benco announced they would not attend AZDA's annual trade show. (Compl. ¶ 98).

On August 21, 2014, Patterson issued its fiscal year 2015 first quarter earnings and held an earnings call. (Compl. ¶ 158). Anderson stated Patterson saw "positive trends" in sales of dental consumables, making Patterson a "proven leader in the dental equipment market" due to "best-in-class technology and basic equipment that is wrapped with Patterson's industry leading after-sales support platform." (Compl. ¶ 158).

On October 11, 2014, a Patterson sales representative received an email from a dentist indicating he was switching from Patterson to the Kois Buying Group. (Compl. ¶ 72). The sales representative forwarded this message to another Patterson customer, adding: "Patterson corporate has concluded 'we will NOT be entertaining participating in any buying group of this nature.'" (Compl. ¶ 72). On October 23, 2014, a Patterson branch manager informed McFadden that a customer indicated they were "trimming back on their orders with Patterson" pending information concerning **[*17]** a new pricing structure from Kois Buying Group. (Compl. ¶ 72). McFadden responded: "As a rule we are trying our best to steer clear of all buying groups. As far as 'Kois Group through Patterson'—that's news to me. Special Markets has had no communications with [Kois]." (Compl. ¶ 72).

In October 2014, the Arizona Attorney General began its own investigation of Patterson and coordinated with the Texas Attorney General. (Compl. ¶ 98).

Patterson issued its fiscal year 2015 second quarter earnings on November 20, 2014 and held an earnings call. (Compl. ¶ 160). Anderson attributed Patterson's success to an "unparalleled suite of value-added services" and "solid execution by [its] industry-leading sales force." (Compl. ¶¶ 160-61). In response to an analyst's question regarding Schein's apparent market share growth, Anderson reported Patterson was "growing faster than the market and taking share" and were "compet[ing] head-to-head with multiple people. We are more than holding our own and gaining share." (Compl. ¶ 162).

Patterson's southeast regional manager emailed McFadden on January 14, 2015 asking about a GPO formed in Florida. (Compl. ¶ 72). McFadden responded: "If he calls I will ask him **[*18]** for financials. — does [the dentist] own all these offices — if not he is a GPO — we don't deal with GPOs." (Compl. ¶ 72). On March 26, 2015, McFadden told a sales representative: "[W]e have said no to Smile Source. It is a direct competitor to ours sales reps. They are a buying club and have agreements with study clubs, state institutions, and everybody they can connect with." (Compl. ¶ 72). On July 29, 2015, McFadden was informed by Bill Neal, Patterson special markets executive, that he met with a GPO named Dentistry Unchained and told them "that we [Patterson] have not elected to participate in these types of programs in the past." (Compl. ¶ 72).

Patterson issued its fiscal year 2015 third quarter earnings on February 19, 2015 and held an earnings call. (Compl. ¶ 164). Anderson attributed growth to "strong core and technology offerings, industry leading service and support, and the trend toward digitization of the dental office," as well as the ability of its "industry-leading sales force to meet the needs of [its] dental customers." (Compl. ¶¶ 164-65).

Patterson, as well as Schein and Benco, continued boycotting state dental associations' conventions and meetings where those state **[*19]** dental associations partnered with SourceOne or other entities to establish GPOs. (Compl. ¶¶ 100-104). In April 2015, Patterson informed the Louisiana Dental Association it would boycott its annual convention unless it abandoned its relationship with SourceOne, which had begun in January 2015. (Compl. ¶ 101). Patterson also did not attend trade meetings of the Colorado Dental Association and Maryland State Dental Association. (Compl. ¶¶ 102, 104).

Patterson issued its fiscal year 2015 fourth quarter earnings on May 21, 2015 and held an earnings call. (Compl. ¶¶ 167-68). Anderson attributed growth and share gains to "technology-oriented sales driven by Patterson's industry-leading sales, technical service and after-sales support." (Compl. ¶ 167). Anderson also attributed the results to "just very strong [and consistent] execution at Patterson and high demand for the portfolio of products [it] sell[s]." (Compl. ¶ 168). Around the same time, Patterson filed its 2015 Form 10-K with the SEC. (Compl. ¶ 170). The 2015 Form 10-K included statements similar to the 2013 Form 10-K and 2014 Form 10-K. (Compl. ¶ 170).

On August 7, 2015, Patterson received a letter from the Texas AG informing it that **[*20]** the Federal Trade Commission began an investigation of the alleged price-fixing scheme between Patterson, Schein, and Benco and that the Texas AG planned to share its own investigative materials with the FTC. (Compl. ¶¶ 72, 110).

Patterson issued its fiscal year 2016 first quarter earnings on August 27, 2015 and held an earnings call. (Compl. ¶¶ 171-72). Anderson attributed "sustained growth in the consumables category" to "stable-to-steadily improving dynamics in the dental market." (Compl. ¶ 171). Anderson discussed that the "continued healthy conditions of the dental market position [Patterson] well for continued growth and market share gains," and noted that the "North American Markets are very stable," including consumables. (Compl. ¶ 172).

On September 1, 2015, SourceOne commenced suit in the United States District Court for the Eastern District of New York against Patterson, Schein, and Benco alleging a violation of the Sherman Act were they "conspired to exclude it from the market and took overt acts in furtherance of that conspiracy by boycotting the Texas and Arizona Dental Associations' annual meetings and by pressuring manufacturers and individual dentists not to do business **[*21]** with SourceOne." *SourceOne Dental, Inc. v. Patterson Cos., Inc., 310 F. Supp. 3d 346, 352-53 (E.D.N.Y. 2018)*; (*see* Compl., at 2).

In September 2015, the Georgia Dental Association ("GDA") contacted Patterson about an RFP for its newly formed buying group. (Compl. ¶ 103). Peter Cousins, Patterson sales manager, responded: "After careful consideration Patterson Dental has made the decision not to respond to the RFP at this time." (Compl. ¶ 103). Frank Capaldo, executive director of the GDA, replied: "I am confused as your immediate prior email indicated you were setting up dates to sit down and talk with us and include your president!" (Compl. ¶ 103). Cousins forwarded Capaldo's email to Fruehauf and McFadden: "The sooner the better on some sort of positioning statement that I can give to the sales team . . . my phone is ringing today b/c Frank took my email reply and relayed it to the board last night." (Compl. ¶ 103). Cousins also told Fruehauf: "I think we just say the company has chosen not to participate in GPOs at this time." (Compl. ¶ 103).

On November 10, 2015, Guggenheim texted Cohen, requesting that the two meet at an upcoming trade convention in New York. (Compl. ¶¶ 9, 72). After receiving no response, Guggenheim texted again two days later. (Compl. ¶ 72). Cohen responded: **[*22]** "Paul, sorry for the delayed response. Spoke with our attorney this week and I think we should pass on any conversations until current antitrust issues are resolved." (Compl. ¶¶ 9, 72).

Patterson issued its fiscal year 2016 second quarter earnings on November 24, 2015 and held an earnings call. (Compl. ¶¶ 174-75). Anderson attributed dental sales growth to "stable-to-steadily improving dynamics in the North American dental market." (Compl. ¶ 174). On the earnings call, Gugino reported "organic sales [in the dental segment] improved 3.1% on a constant currency basis" and "consumables grew 3.3% reflecting continued stability in this end market." (Compl. ¶ 175).

On February 11, 2016, a group of dental practices and dentists sued Patterson, Benco, and Schein in the Eastern District of New York under *Section 1* of the *Sherman Act* alleging they "engaged in conduct that has led to higher prices for dental supplies, eliminating competition between themselves, and thereby keeping their profit margins artificially high." *In re Dental Supplies Antitrust Litig., 2016 U.S. Dist. LEXIS 133410, 2016 WL 5415681, at *1 (E.D.N.Y. Sept. 28, 2016)*; (*see* Compl., at 2).

Patterson issued its fiscal year 2016 third quarter earnings on February 25, 2016 and held an earnings call. (Compl. ¶¶ 177-78). Anderson highlighted "solid growth **[*23]** in the consumables category" due to "stable to steadily improving dynamics in the North American dental market" and that Patterson was "increasingly well-positioned to capitalize on this trend" due to technology leadership and support infrastructure. (Compl. ¶ 177). In response to an analyst's question, Anderson also attributed growth to the "strong execution" of its sales force and that Patterson felt it was "growing faster than the market." (Compl. ¶ 179).

Patterson issued its fiscal year 2016 fourth quarter earnings on May 26, 2016 and held an earnings call. (Compl. ¶¶ 181-83; Aff. of Aaron G. Thomas, Ex. C, ECF No. 92). Sales for Patterson's dental unit, representing approximately 46% of total company sales, were $662.1 million and a 3.3% increase in consumable dental supplies. (Compl. ¶ 181). Anderson stated Patterson was taking market share from its competitors and growth was due to "an era of stability" in the dental market. (Compl. ¶ 183). Anderson further stated, in response to an analyst's question, that growth in consumables was attributable to "really stable, consistent growth throughout our customer base both in our largest customers as well as our midsized and smaller **[*24]** customers." (Compl. ¶ 183).

On June 29, 2016, Patterson filed its 2016 Form 10-K with the SEC. (Compl. ¶ 185). The 2016 Form 10-K contained certifications from Anderson and Gugino. (Compl. ¶ 185). The 2016 Form 10-K discussed Patterson's competition in the dental supply market, noting the "industry is highly competitive" and explained Patterson's strategy of differentiating itself from competition through

> premium customer service with multiple value-added components, a highly qualified and motivated sales force, highly-trained and experienced service technicians, an extensive breadth and mix of products and services, technology solutions allowing customers to easily access our inventory, accurate and timely delivery of product, strategic location of sales offices and fulfillment centers, and competitive pricing.

(Compl. ¶ 185). Patterson touted "competitive strengths" that included broad product offerings at competitive prices, proprietary branded products, and a "[f]ocus on customer relationships and exceptional customer service," including "personal visits by field sales representatives." (Compl. ¶¶ 186-87). Patterson noted it competed with Benco and

Schein. (Compl. ¶ 188). Patterson **[*25]** warned that GPOs "may place [it] at a competitive disadvantage." (Compl. ¶ 190). Patterson noted the formation of GPOs "may shift purchasing decisions to entities or persons with whom we do not have a historical relationship" which may threaten its ability to compete effectively. (Compl. ¶ 190). Patterson noted it was "seeking to obtain access to lower prices demanded by GPO contracts or other contracts, and develop relationships with provider networks and new GPOs" but it "cannot assure that such terms will be obtained or contracts will be executed." (Compl. ¶ 190).

Patterson issued its fiscal year 2017 first quarter earnings on August 25, 2016 and held an earnings call. (Compl. ¶¶ 192-95). Sales for Patterson's dental unit, representing approximately 43% of total company sales were $555 million, a 3.5% decrease. (Compl. ¶ 192). Gugino attributed Patterson's sales decline to strategic "sales force realignment." (Compl. ¶ 194). Anderson responded to an analyst's question, indicating that the sales force realignment was not a reaction to changes in the competitive landscape, but rather about finding effective ways to serve its customers and lead the market. (Compl. ¶ 195).

Patterson issued **[*26]** its fiscal year 2017 second quarter earnings on November 22, 2016 and held an earnings call. (Compl. ¶¶ 197-99). Sales for Patterson's dental unit, representing approximately 43% of total company sales were $601.6 million, flat with the previous year and a 2.5% decrease in consumable dental supplies. (Compl. ¶ 197). Gugino again attributed the decline to the sales force realignment. (Compl. ¶ 199). Patterson's stock dropped $7.95 per share, a 16.7% decline. (Compl. ¶¶ 201, 242-43).

Patterson issued its fiscal year 2017 third quarter earnings on February 23, 2017 and held an earnings call. (Compl. ¶¶ 202-06). Sales for Patterson's dental unit, representing approximately 45% of total company sales were $626.3 million, a 1.8% decrease from the previous year and a 2.8% decrease in consumable dental supplies. (Compl. ¶ 202). Anderson and Gugino attributed the decline to "disruption from [Patterson's] sales force realignment initiative." (Compl. ¶ 204). Anderson touted the "very strong long-term fundamentals" and stability of the consumables market. (Compl. ¶¶ 205-06).

In March 2017, Travis Almquist, Patterson's team lead for products and pricing, emailed his supervisor, Joseph Lepley, Patterson's **[*27]** director of strategic pricing and forwarded a contract from Schein that appeared to show it was instituting a discount program for GPOs. (Compl. ¶ 107). Almquist's email said: "Normally I would send this back to the GM (or have the pricing desk send something) stating that we do not participate in buying groups for multiple reasons, but I wanted your feedback on it since so many things are changing in that MidMarket space." (Compl. ¶ 107). Lepley forwarded the email to Rogan, adding: "Attached is some competitive intel from Schein on a program on Buying Groups . . . Given our recent discussions with Smile Source are we looking at talking with Buying Groups now?" (Compl. ¶ 107).

Patterson issued its fiscal year 2017 fourth quarter earnings on May 25, 2017 and held an earnings call. (Compl. ¶¶ 208-11). Sales for Patterson's dental unit, representing approximately 42% of total company sales were $607.3 million, an 8.3% decrease from the previous year and a 4.3% decrease in consumable dental supplies. (Compl. ¶ 208). Patterson and Anderson attributed the decline to the sales force realignment. (Compl. ¶¶ 210-11). Anderson believed Patterson's sales force would "continue to be a key competitive **[*28]** differentiator." (Compl. ¶ 211).

On June 1, 2017, Anderson "abruptly resigned" as CEO and Chairman of the Board. (Compl. ¶ 236). There was no reason proffered and it was not noted in the earnings call that took place less than one week prior. (Compl. ¶ 236).

On June 28, 2017, Patterson filed its 2017 Form 10-K with the SEC. (Compl. ¶ 213). The 2017 Form 10-K contained certifications from Gugino, Anderson, and James Wiltz, Patterson's interim CEO. (Compl. ¶ 213). The 2017 Form 10-K included statements similar to the 2016 Form 10-K. (Compl. ¶ 214).

On August 17, 2017, IQ Dental Supply, Inc., sued Patterson, Benco, and Schein in the Eastern District of New York under the Sherman Act, state antitrust laws, and common law. *IQ Dental Supply, Inc. v. Henry Schein, Inc., 924 F.3d 57, 62 (2d Cir. 2019)*; (*see* Compl., at 2). IQ alleged Patterson, Benco, and Schein "engaged in [a] campaign to force SourceOne out of business by conspiring to organize a boycott" and a price-fixing conspiracy. *IQ Dental Supply, Inc., 924 F.3d at 61*.

Patterson issued its fiscal year 2018 first quarter earnings on August 24, 2017 and held an earnings call. (Compl. ¶¶ 215-17). Sales for Patterson's dental unit, representing approximately 40% of total company sales were $518.8 million, an 6.5% decrease from the previous year and a 3.6% **[*29]** decrease in consumable dental supplies. (Compl. ¶ 215). Wiltz, in response to an analyst's question, stated that Patterson had not yet seen competition from the online marketplace, specifically referencing Amazon. (Compl. ¶ 217).

Patterson issued its fiscal year 2018 second quarter earnings on November 21, 2017 and held an earnings call. (Compl. ¶¶ 219-22). Sales for Patterson's dental unit, representing approximately 40% of total company sales were $553.6 million, an 8% decrease from the previous year and a 4.4% decrease in consumable dental supplies. (Compl. ¶ 219). In response to analysts questioning Patterson's "leaking market share," Gugino asserted it was due to "a variety of competitors" and could "win[] it back" with competitive prices but also a "value-added business model approach." (Compl. ¶¶ 221-22).

Following its three-year investigation, the FTC filed a formal complaint against Patterson, Benco, and Schein on February 12, 2018, alleging they "entered into an agreement refusing to provide discounts to or compete for the business of buying groups," constituting a *per se* violation of *Section 5* of the *Federal Trade Commission Act*. (Compl. ¶¶ 2, 12, 117).

Once the FTC complaint was filed, **[*30]** several financial investment reports issued drawing attention to the magnitude of the FTC's action. (Compl. ¶ 119-20). A February 13, 2018 report from Jeffries commented that "the FTC move should be taken seriously & could have negative [long term] implications for margin." (Compl. ¶ 120). The report continued, noting that the "core tenets of the FTC's case" were "levied in other lawsuits" against Patterson, "[b]ut the FTC's move here is very serious & much more severe, in our view." (Compl. ¶ 120). Patterson's stock price fell, in one day, from $39.92 per share to $31.21 per share, on a trading volume of 5.5 million shares; a market cap loss of $160 million. (Compl. ¶¶ 12, 121, 246).

On March 1, 2018, Patterson announced their third quarter results from fiscal year 2018, disclosing a 26% drop in earnings. (Compl. ¶¶ 12, 123; Thomas Aff., Ex. B). Patterson announced dental sales had declined 7.7%. (Compl. ¶ 123). Gugino, Patterson's CFO, resigned. (Compl. ¶¶ 12, 123). Reports from financial investment research firms were bleak. (Compl. ¶¶ 125-26). Patterson's stock dropped 24% on March 1, from $31.58 per share to $24.11 on a trading volume of 15 million shares; a market cap loss of **[*31]** approximately $700 million. (Compl. ¶¶ 14, 127, 247-48).

The Texas AG filed a formal complaint against Patterson on April 19, 2018—it had already brought complaints against Benco in 2015 and Schein in 2017. (Compl. ¶ 131). The Texas AG alleged Patterson "participated in a group boycott by dental supply distributors to suppress the entry of a new market participant in the dental supply distribution market" in violation of Texas antitrust laws. (Compl. ¶¶ 15, 131). Benco, Schein, and Patterson all settled with the Texas AG the day the respective complaints were filed against them. (Compl. ¶¶ 15,131). Patterson agreed to cease its anticompetitive conduct, pay $200,000, and provide the Texas AG an ongoing log of all oral and written communications between its senior executives and other dental supply distributors for one year. (Compl. ¶¶ 15,131).

On May 3, 2018, Misiak resigned. (Compl. ¶ 132).

On August 30, 2018, Patterson reported that its earnings missed expectations. (Compl. ¶¶ 15, 133). Mark Walchirk, Patterson's new CEO, explained that Patterson fell short of earnings expectations because of "competitive pricing pressures at the point of sale." (Compl. ¶ 133). In respond to an analyst's **[*32]** question, Walchirk stated that the source of the competitive pricing pressure was a changing customer base that "purchases a larger volume of products, and obviously, commands an improve price position." (Compl. ¶ 134). Patterson's stock fell 5%. (Compl. ¶¶ 15, 134).

On September 7, 2018, Patterson, Benco, and Schein reached an agreement to pay $80 million to settle the consumer antitrust class action pending in the Eastern District of New York entitled *In re Dental Supplies Antitrust Litig.* (Compl. ¶ 135). Patterson expected to contribute $28.5 million towards the settlement. (Compl. ¶ 135).

Throughout the relevant time period, Patterson maintained on its website its "Principles of Business Conduct and Code of Ethics." (Compl. ¶ 224). Patterson expressly incorporated it by reference into its Form 10-K filings. (Compl. ¶ 224). One section is entitled "Competing Ethically," and it states: "Patterson fully complies with the antitrust laws and fair trade practices of the United States and all other applicable jurisdictions." (Compl. ¶ 224). Patterson claimed it instituted "specific guidelines that should be observed by all employees," including:

> (1) "[n]ever discuss pricing policy with competitors"; **[*33]** (2) "[n]ever engage in a joint selling activity with a competitor"; (3) "[n]ever ask a vendor to cease doing business with a competitor"; and (4) "[a]void even the appearance of improper or collusive conduct when meeting with competitors or vendors at trade shows or trade association meetings."

(Compl. ¶ 225).

II. ANALYSIS

A. Legal Standard

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Sletten & Brettin Orthodontics v. Cont'l Cas. Co., 782 F.3d 931, 934 (8th Cir. 2015)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. Facial plausibility of a claim exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 555*). Although a sufficient complaint need not be detailed, it must contain "[f]actual allegations . . . enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555* (citation omitted); *see id.* ("The pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion of a legally cognizable right of action.") (quotations and citation omitted). Additionally, complaints are insufficient if they contain "naked assertions devoid of further factual **[*34]** enhancement." *Iqbal, 556 U.S. at 678* (citing *Twombly, 550 U.S. at 557*) (internal quotation marks omitted).

Section 10(b) of the Securities Exchange Act makes it unlawful "[t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors." *15 U.S.C. § 78j(b)*. "SEC *Rule 10b-5* implements *[§ 10(b)]* by making it unlawful to, among other things, 'make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.'" *Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 36, 131 S. Ct. 1309, 179 L. Ed. 2d 398 (2011)* (quoting *17 C.F.R. § 240.10b-5(b)*). *Section 10(b)* and *Rule 10b-5* claims require the claimant to show:

> (1) a material misrepresentation (or omission); (2) scienter, *i.e.*, a wrongful state of mind; (3) a connection with the purchase or sale of a security; (4) reliance, often referred to in cases involving public securities markets (fraud-on-the-market cases) as 'transaction causation'; (5) economic loss; and (6) 'loss causation,' *i.e.*, a causal connection between the material misrepresentation and the loss.

Horizon Asset Mgmt. Inc. v. H & R Block, Inc., 580 F.3d 755, 760 (8th Cir. 2009) (quoting *Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341-42, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005))*; *In re K-tel Int'l, Inc. Sec. Litig., 300 F.3d 881, 888 (8th Cir. 2002)*. *Section 20(a)* imposes secondary liability on every person **[*35]** "who, directly or indirectly, controls any person liable under any provision of this chapter or any rule or regulation thereunder . . . ." *15 U.S.C. § 78t(a)*.

"The [Private Securities Litigation Reform Act ("PSLRA")] imposes heightened pleading requirements on private securities actions 'to curb perceived abuses' of such actions, including 'nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests and manipulation by class action lawyers.'" *Horizon Asset Mgmt. Inc.,* 580 F.3d at 761 (quoting Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 320, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)). The PSLRA requires a securities plaintiff to satisfy two heightened pleading standards. 15 U.S.C. § 78u-4(b)(3); In re Cerner Corp. Sec. Litig., 425 F.3d 1079, 1083 (8th Cir. 2005).

> First, the plaintiff must plead falsity by specifying each allegedly misleading statement and the reasons why each statement is misleading. 15 U.S.C. § 78u-4(b)(1). If falsity is alleged based upon information and belief, the complaint must state with particularity all facts on which the belief is formed. *Id.* In addition, the plaintiff must plead scienter by "stat[ing] with particularity facts giving rise to a strong inference that the defendants acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2).

In re Cerner Corp. Sec. Litig., 425 F.3d at 1083; Little Gem Life Sci., LLC v. Orphan Med., Inc., 537 F.3d 913, 916-17 (8th Cir. 2008) (quoting In re NVE Corp. Sec. Litig., 527 F.3d 749, 751 (8th Cir. 2008)).

"On a motion to dismiss an action covered by the Reform Act, the Court views factual allegations in the light most favorable to the plaintiff . . . and assumes the **[*36]** truth of particularly pleaded allegations." In re Medtronic Inc., Sec. Litig., 618 F. Supp. 2d 1016, 1022 (D. Minn. 2009) (internal citations omitted), *aff'd sub nom* Detroit Gen. Ret. Sys. v. Medtronic, Inc., 621 F.3d 800 (8th Cir. 2010); Little Gem Life Sci., LLC, 537 F.3d at 917. "The complaint is construed liberally, all factual allegations taken as true, but 'conclusory or catch-all assertions of law and unwarranted inferences' are rejected." Rand-Heart of New York, Inc. v. Dolan, 812 F.3d 1172, 1176 (8th Cir. 2016) (quoting *In re K-tel Int'l, 300 F.3d at 889*). The court may consider the pleadings, materials embraced by the pleadings, and public records. Rand-Heart of New York, Inc., 812 F.3d at 1176.

B. Misrepresentations of Material Fact

To allege a securities-fraud claim, the complaint must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1). "A misrepresentation or omission is material if there is 'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.'" Parnes v. Gateway 2000, Inc., 122 F.3d 539, 546 (8th Cir. 1997) (quoting Basic Inc. v. Levinson, 485 U.S. 224, 231-32, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988)); Detroit Gen. Ret. Sys., 621 F.3d at 805. "The trier of fact is uniquely competent to determine materiality, as that inquiry requires 'delicate assessments of inferences a [reasonable investor] would draw from a given set **[*37]** of facts.'" In re Control Data Corp. Sec. Litig., 933 F.2d 616, 621 (8th Cir. 1991) (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 450, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976)). But "[w]here a reasonable investor could not have been swayed by an alleged misrepresentation, however, a court may determine, as a matter of law, that the alleged misrepresentation is immaterial." Parnes, 122 F.3d at 546.

Here, Plaintiffs allege Defendants proffered various misrepresentations or omissions of material fact. For ease of analysis, these alleged misrepresentations can be grouped into categories: (1) 2013-15 Form 10-K filings; (2) Patterson's code of ethics incorporated into its Form 10-K filings; (3) quarterly earnings reports and accompanying earnings calls; and (4) 2016-17 Form 10-K filings.

1. 2013, 2014, and 2015 Form 10-K Filings

Plaintiffs assert the 2013, 2014, and 2015 Form 10-K filings are all similar. Patterson touted itself as a market leader with a strong *competitive* position, that the dental supply industry was *highly competitive* and *fragmented*, that Patterson used *competitive* pricing to beat out its *competitors*, and new *competitors* increased *competition*, but that Patterson's value-added services, technology, and operational efficiencies placed it in a strong market position. Plaintiffs assert Defendants violated Section 10(b) and Rule 10b-5 by not disclosing their alleged anti-competitive **[*38]** behavior and the ongoing government investigations into that behavior.

"Before liability for non-disclosure can attach, the defendant must have violated an affirmative duty of disclosure." *Kushner v. Beverly Enters., Inc., 317 F.3d 820, 831 (8th Cir. 2003)* (quoting *In re Sofamor Danke Grp., Inc., 123 F.3d 394, 400 (6th Cir. 1997))*; *Basic Inc., 485 U.S. at 239 n.17* ("Silence, absent a duty to disclose, is not misleading under *Rule 10b-5*."). Under Regulation 2-K Item 103, a company must "[d]escribe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant" is subjected, as well as "any such proceedings known to be contemplated by governmental authorities." *17 C.F.R. § 229.103*. "An investigation on its own is not a 'pending legal proceeding' until it reaches a stage when the agency or prosecutorial authority makes known that it is contemplating filing suit or bringing charges." *Richman v. Goldman Sachs Grp., Inc., 868 F. Supp. 2d 261, 272 (S.D.N.Y. 2012)* (quoting *ABA Disclosure Obligations under the Federal Securities Laws in Government Investigations—Part II.C.*) (holding that a Wells Notice issued by the SEC falls "well short of litigation" and thus is not required to be disclosed under Item 103); *In re Lions Gate Entm't Corp. Sec. Litig., 165 F. Supp. 3d 1, 19 (S.D.N.Y. 2016)* (SEC investigation not a "pending legal proceeding" or a "proceeding known to be contemplated by governmental authorities" until the agency brings charges). Courts have likewise **[*39]** held that state investigations are not "pending legal proceedings" subject to Item 103 disclosure. *City of Westland Police & Fire Ret. Sys. v. MetLife, Inc., 928 F. Supp. 2d 705, 718 (S.D.N.Y. 2013)* (Item 103 did not render a duty to disclose more than thirty state investigations into MetLife's compliance with unclaimed property laws).

The Texas AG initiated its investigation in July 2014. The Arizona AG initiated its investigation in October 2014. The FTC started investigating Patterson sometime before August 2015. These investigations dragged on for several years, not materializing into complaints until the FTC brought suit on February 12, 2018. The Texas AG followed by filing suit on April 19, 2018, which was instantly settled by Patterson. There is no indication that the Arizona AG ever commenced suit or an enforcement action. Thus, the only reporting requirement under Item 103 during the class period—June 26, 2013 to February 28, 2018—would be the FTC's complaint. But Patterson had no public statements between February 12, 2018 and February 28, 2018, let alone any to which this duty to disclose attached. Accordingly, something beyond the mere existence of governmental investigations must trigger a disclosure obligation to beget liability for non-disclosure.

Plaintiffs argue that **[*40]** where Defendants touted their success in the "highly competitive" dental supply market, they were required to disclose their anticompetitive scheme to render those statements not misleading. As the Eighth Circuit has noted, "even absent a duty to speak, a party who voluntarily discloses material facts in connection with securities transactions assumes a duty to speak fully and truthfully on those subjects." *Kushner, 317 F.3d at 831* (quoting *Helwig v. Vencor, Inc., 251 F.3d 540, 561 (6th Cir. 2001)* (en banc)). Thus, "[e]ven where a party does not otherwise have an affirmative duty to disclose certain information, once a material topic has been broached, the party has an affirmative duty to disclose sufficient additional information to prevent the original disclosure from being misleading." *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig., 286 F. Supp. 2d 1047, 1057 (D. Minn. 2003)*. This is because "companies can control what they have to disclose under these provisions by controlling what they say to the market." *Matrixx Initiatives, Inc., 563 U.S. at 45*.

This Court is not convinced that merely speaking about competitiveness renders a duty to report all anti-competitive behavior. There is no "duty to disclose 'soft information,' such as a matter of opinion, predictions, or a belief as to the legality of the company's own actions." *Kushner, 317 F.3d at 831*. The "federal **[*41]** securities laws do not require a company to accuse itself of wrongdoing." *In re Citigroup, Inc. Sec. Litig., 330 F. Supp. 2d 367, 377 (S.D.N.Y. 2004)*, *aff'd sub nom Albert Fadem Trust v. Citigroup, Inc., 165 F. App'x 928 (2d Cir. 2006)*. "Disclosure is not a rite of confession, and companies do not have a duty to disclose uncharged, unadjudicated wrongdoing." *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG, 752 F.3d 173, 184 (2d Cir. 2014)* (internal quotations, alterations, and citations omitted). "*Rule 10b-5* was not intended to provide shareholders with an avenue for relief against executives for alleged illegal practices or corporate mismanagement," thus illegal conduct does not establish a *Rule 10b-5* violation unless made in conjunction with a misleading statement. *Galati v. Commerce Bancorp, Inc., 2005 U.S. Dist. LEXIS 26851, 2005 WL 3797764, at *8 (D.N.J. Nov. 7, 2005)*, *aff'd 220 F. App'x 97 (3d Cir. 2007)*. Thus, there was no automatic duty for Defendants to disclose their alleged anticompetitive behavior in the 2013, 2014, and 2015 Form 10-K filings. *But see Utesch v. Lannett Co., Inc., 385 F. Supp. 3d 408, 2019 U.S. Dist. LEXIS 82428, 2019 WL 2136467, at *6-*8 (E.D. Pa. May 15, 2019)* (finding plaintiff appropriately pled a misleading statement where generic drug manufacturer stated it "face[d] strong competition" but allegations showed the market was not competitive as it would have misled a reasonable investor).

2. Code of Ethics

Plaintiffs assert Patterson's code of ethics, incorporated into all of its Form 10-K filings, was a misstatement because it averred compliance with antitrust laws while Defendants conspired with their competitors to violate those same laws. Defendants **[*42]** point this Court to various cases that hold particular companies' ethics codes constituted puffery sufficient to render them immaterial. For example, in *Singh v. Cigna Corp.*, Cigna "published a pamphlet titled 'Code of Ethics and Principles of Conduct'" that included "statements from senior Cigna executives affirming the importance of compliance and integrity." *918 F.3d 57, 61 (2d Cir. 2019)*. The pamphlet stated "'it's so important for every employee . . . to handle, maintain, and report on [Cigna's financial] information in compliance with all laws and regulations,' and that 'we have a responsibility to act with integrity in all we do, including any and all dealings with government officials.'" *Id.* (alterations in original). The Second Circuit concluded that a reasonable stockholder would not consider these statements as important in deciding whether to buy or sell shares of stock because they amounted to "general declarations about the importance of acting lawfully and with integrity." *Id. at 63*.

Unlike *Singh*, however, Patterson's code of ethics went further than simply touting compliance with "all laws and regulations." *See* *In re Signet Jewelers Ltd. Sec. Litig., 389 F. Supp. 3d 221, 2019 U.S. Dist. LEXIS 97959, 2019 WL 2428529, at *8 (S.D.N.Y. June 11, 2019)* ("Cigna's code of conduct statements were not actionable, because they were exceptionally vague **[*43]** and aspirational."). Indeed, it went even further than touting compliance with antitrust laws. Patterson's code of ethics instituted specific guidelines for compliance with antitrust laws: no discussions of policy with competitors, no joint selling with competitors, no asking vendors to boycott a competitor, and avoiding appearances of improper or collusive conduct when meeting with competitors at trade shows. This Court finds the distinction important; this is not a code of ethics that merely aspires to be "open, honest, and direct in all our dealings," or something similarly fuzzy. *Cement & Concrete Workers Dist. Council Pension Fund v. Hewlett Packard Co., 964 F. Supp. 2d 1128, 1135-1140 (N.D. Cal. 2013)* (declining to find such language in a code of ethics to constitute a material statement because doing so would "render every code of ethics materially misleading whenever an executive commits an ethical violation following a scandal"). Rather, this is a code of ethics that outlines specific guidance for compliance with a specific subset of laws.

"Absent a clear allegation that the defendants knew of the scheme and its illegal nature at the time they stated the belief that the company was in compliance with the law, there is nothing further to disclose." *Kushner, 317 F.3d at 831*. Here, there are allegations that various Patterson **[*44]** employees knew their collusive scheme with Benco and Schein was illegal. After letting Reinhardt know of the fallout from the Texas Dental Association boycott—an antitrust investigation by the Texas AG—Misiak informed him to discuss the matter "live" and send no more emails about the proposed Arizona Dental Association boycott. Misiak, alongside McFadden, is a key player in Patterson's misconduct. Misiak reported directly to Anderson and there are allegations showing a line of communication between Misiak, Anderson, and Guggenheim. For example, Misiak emailed Anderson and Guggenheim on September 3, 2013, noting he has told his staff to reject GPOs. Anderson did not refute that plan of action but instead suggested further monitoring. The next day, Misiak and McFadden distributed a memo telling their sales managers not to work with GPOs. Anderson was informed in June 2013 of Guggenheim's conversations with Benco's Cohen concerning an agreement to reject GPOs. While Anderson received only a "FYI" email, there is no indication he repudiated Guggenheim's conduct. Like Misiak, Guggenheim directly reported to Anderson. Thus, starting with the June 2013 discussion forwarded to Anderson, Plaintiffs **[*45]** have sufficiently alleged Anderson knew the incorporated code of ethics statements to be false.

Compared to Anderson, there is no clear allegation that other certifiers of the Form 10-K filings—Armstrong, Gugino, and Wiltz—knew the incorporated code of ethics statements to be false. Rather, their inclusion is based on their certifications as high-ranking members of Patterson. Indeed, these three named defendants only appear in the complaint with respect to quarterly reports, earnings calls, and Form 10-K filings; there are no particular allegations lodged against them with respect to the underlying anticompetitive conduct. As such, this Court concludes the incorporation of the code of ethics into the Form 10-K filings are not attributable to Armstrong, Gugino, and Wiltz as misstatements.

3. Quarterly Earnings and Earnings Calls

In Patterson's various earnings reports and follow-up earnings calls conducted by Anderson and Gugino, Patterson's performance was attributed to various factors, including: the stability or growth of the dental market (FY2014 Q1, FY2015 Q4, FY2016 Q1, FY2016 Q2, FY2016 Q3, FY2016 Q4); industry-leading technology wrapped by a suite of value-added services (FY2014 **[*46]** Q2, FY2015 Q1, FY2015 Q2, FY2015 Q3, FY2015 Q4, FY2016 Q3); a strong sales force (FY2014 3Q, FY2015 Q2, FY2015 Q3, FY2015 Q4, FY2016 Q3); and the digitalization of dental offices (FY2015 Q3). When Patterson's performance faltered in FY2017, Anderson and Gugino, attributed it to a sales force realignment. Anderson emphasized that the sales force alignment was not due to competitive changes to the market, but about effective customer service. Starting in FY2018, with Wiltz at the helm, the decline in Patterson's performance was no longer attributed to sales force realignment, but due to various competitors, but not yet competition from online marketplaces (FY2018 Q1, FY2018 Q2).

"A statement is not material and is mere puffery if it is 'so vague and such obvious hyperbole that no reasonable investor would rely upon them.'" *In re Stratasys Ltd. S'holder Sec. Litig., 864 F.3d 879, 882 (8th Cir. 2017)* (quoting *Parnes, 122 F.3d at 547*). "No reasonable investor would rely on 'soft, puffing statements'—which encompass 'optimistic rhetoric' and 'promotional phrases used to champion the company but devoid of any substantive information.'" *In re Stratasys Ltd. S'holder Sec. Litig., 864 F.3d at 882* (quoting *Parnes, 122 F.3d at 547*). "Optimistic statements are not actionable if they cannot be supported by objective data or otherwise subject to verification by proof." *In re Stratasys Ltd. S'holder Sec. Litig., 864 F.3d at 882* (quotation **[*47]** omitted).

Defendants' statements during these quarterly earnings reports and earnings calls are vague and unverifiable. None of these statements relate to GPOs and, despite the Plaintiffs' desire to read in things left unsaid, they do not relate to Patterson's compliance with ***antitrust law***. These corporate statements amount to little more than corporate gobbledygook self-justifying Patterson's existence and place in the dental supply economy—"industry-leading technology" and "value-added services." These constitute "optimistic rhetoric" and "promotional phrases used to champion the company," but they are "devoid of any substantive information" and constitute puffery.

Certainly, Plaintiffs would have this Court read in added language to some of these earnings statements: the dental market was stable or grew *due to an anticompetitive agreement to keep out GPO competition*; a strong sales force *due to an anticompetitive agreement that kept out GPO competition*; the sales force realignment *was required due to an unraveling anticompetitive agreement*. But this reading would stretch these statements too far, as there is no clear link between the illegal conduct and these statements. *See Menkes v. Stolt-Nielsen S.A., 2005 U.S. Dist. LEXIS 28208, 2005 WL 3050970, at *7 (D. Conn. Nov. 10, 2005)* ("Courts **[*48]** that have determined that corporations had a duty to disclose uncharged illegal conduct in order to prevent other statements from misleading the public have required a connection between the illegal conduct and the statements beyond the simple fact that a criminal conviction would have an adverse impact upon the corporation's operations in general or bottom line.") (collecting cases). The connection is too attenuated here. *In re Axis Capital Holdings Ltd. Sec. Litig., 456 F. Supp. 2d 576, 588 (S.D.N.Y. 2006)* ("The connection between the alleged inaccurate statement and the underlying conduct may not be too attenuated, and, again, must be pled with sufficient specificity."). The statements here are generic descriptions of the state of the market and a recitation of Patterson's supposedly unique operations. *See Menkes, 2005 U.S. Dist. LEXIS 28208, 2005 WL 3050970, at *8*.

4. 2016 and 2017 Form 10-K Filings

The 2016 Form 10-K indicated that Patterson competed with Benco and Schein and that GPOs may place it at a competitive disadvantage. Patterson noted it was seeking to obtain access to lower prices demanded by GPO contracts and develop relationships with GPOs. Although the language is not provided in the complaint, Plaintiffs allege the 2017 Form 10-K contains similar representations. The allegations show Patterson was actually **[*49]** doing the opposite; Patterson was not competing with Benco and Schein, at least with respect to GPOs, and Patterson was not seeking to develop relationships with GPOs, but was seeking to choke off GPOs from the market. The parties appear to agree Patterson made no misrepresentation when it stated that GPOs could put it at a competitive disadvantage.

Defendants argue that there are no misrepresentations in these Form 10-K filings. This Court disagrees. While Patterson added the caveat that it could not guarantee obtaining access to lower prices demanded by GPO contracts or that any such contracts would be executed, it clearly stated it was already in the process of seeking out such contracts. "Seeking to obtain access" does not equal "will seek to obtain access." It indicates present, current action and Defendants cannot paint this as a purely forward-looking statement. By June 2016, Patterson was waist-deep in its alleged anticompetitive agreement; indeed, it was under investigation by the FTC, Texas, and Arizona by that time.

As noted with the code of ethics, there is no clear allegation that the certifiers other than Anderson—Gugino and Wiltz—knew these statements to be false. Rather, **[*50]** their inclusion is based on their certifications as high-ranking members of Patterson. Thus, this Court concludes the 2016 Form 10-K and 2017 Form 10-K are not attributable to Gugino and Wiltz as misstatements.

C. Scienter

"'Rote allegations that the defendants knowingly made false statements of material fact' fail to satisfy the heightened pleading standard of the Reform Act." *Kushner, 317 F.3d at 827-28* (quoting *In re Navarre Corp. Sec. Litig., 299 F.3d 735, 745 (8th Cir. 2002))*. The complaint must "state with particularity facts giving rise to a strong inference that the defendant acted with the requisite state of mind." *15 U.S.C. § 78u-4(b)(2)*. "The required state of mind for private securities fraud actions is 'scienter, *i.e.*, the defendant's intention to deceive, manipulate, or defraud,' or the defendant's 'severe recklessness.'" *Horizon Asset Mgmt. Inc., 580 F.3d at 761* (quoting *In re Ceridian Corp. Sec. Litig., 542 F.3d 240, 244 (8th Cir. 2008))*.

Scienter can be established "(1) from facts demonstrating a mental state embracing an intent to deceive, manipulate, or defraud; (2) from conduct which rises to the level of severe recklessness; or (3) from allegations of motive and opportunity." *Detroit Gen. Ret. Sys., 621 F.3d at 808*; *In re K-tel Int'l, 300 F.3d at 893*. This involves a holistic inquiry looking for "badges of fraud." *In re Navarre Corp. Sec. Litig., 299 F.3d at 745*. Inferences of scienter must be "cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Tellabs, Inc., 551 U.S. at 314*. The question "is whether **[*51]** all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." *Id.*; *Minneapolis Firefighters' Relief Ass'n v. MEMC Elec. Materials, Inc., 641 F.3d 1023, 1029 (8th Cir. 2011)* (quoting *Tellabs, Inc., 551 U.S. at 323-24*).

1. Gugino, Armstrong, and Wiltz

As noted above, Defendants Gugino, Armstrong, and Wiltz are only included in the complaint with respect to their certification of the Form 10-K filings and quarterly earnings reports and calls. Armstrong's sole involvement is his certification of the 2013 and 2014 Form 10-K filings. Wiltz certified the 2017 Form 10-K filing and participated on the FY2018 Q1 earnings call, noting that Patterson had not yet seen competition from the online marketplace such as Amazon. Gugino had the largest role, but she mostly recounted financial information during various earnings calls—unsurprising given her role as Patterson's CFO. On the FY2017 Q1, Q2, and Q3 earnings calls, she attributed poor financial performance to a sales force realignment, but Anderson was the Patterson representative who expanded upon the purpose of the sales force realignment. During the FY2018 Q2 earnings call, Gugino attributed Patterson's "leaking market share" to a "variety of competitors" but that **[*52]** Patterson could rebound with competitive prices and value-added business practices.

Plaintiffs cannot solely rely on Gugino, Armstrong, and Wiltz's positions as officers at Patterson to support an inference of scienter. In re Citigroup, Inc. Sec. Litig., 330 F. Supp. 2d at 382 (citing In re Health Mgmt., Inc., Sec. Litig., 970 F. Supp. 192, 204 (E.D.N.Y. 1997)); In re United Am. Healthcare Corp. Sec. Litig., 2007 U.S. Dist. LEXIS 6362, 2007 WL 313491, at *17 (E.D. Mich. Jan. 30, 2007) (holding that, without more, certifications of the accuracy of quarterly and annual reports do not permit a strong inference of scienter as it is required of all corporate officers and directors and says nothing about the defendants' intent). "[C]orporate officials are not required to be clairvoyant and are responsible only for revealing the material facts reasonably available to them." In re Patterson Cos., Inc. Sec., Derivative & ERISA Litig., 479 F. Supp. 2d 1014, 1032 (D. Minn. 2007) (citing In re Navarre Corp. Sec. Litig., 299 F.3d at 743); Bovee v. Coopers & Lybrand C.P.A., 272 F.3d 356, 361 (6th Cir. 2001) (it is insufficient to "simply rely on the proposition that Defendants must have known or should have known of, and participated in, the fraud"). Absent any direct connection to the underlying anticompetitive actions of Anderson's subordinates, Plaintiffs have not pointed to any "badges of fraud" showing that Gugino, Armstrong, and Wiltz knowingly made false statements of material fact or that they intended to deceive, manipulate, or defraud.[11]

After the poor fiscal performances in FY2017 and the first three quarters of FY2018, Gugino resigned. Plaintiffs argue scienter **[*53]** can be inferred from Gugino's resignation. Absent any other allegation tying Gugino to the underlying anticompetitive actions, her departure does not establish scienter. In re Cornerstone Propane Partners, L.P., 355 F. Supp. 2d 1069, 1093 (N.D. Cal. 2005) (holding that "notable departures are not in and of themselves evidence of scienter" because "[m]ost major stock losses are often accompanied by management departures, and it would be unwise for courts to penalize directors for these decisions").

2. Anderson

As compared to Gugino, Armstrong, and Wiltz, the complaint does contain "badges of fraud" detailing Anderson's knowledge of the alleged anticompetitive behavior: Plaintiffs assert that Anderson was aware of the collusive agreement as early as June 2013, that he communicated with the principle enforcers of the collusive agreement, and that he directly supervised those actors.

Looking at all the facts alleged, Anderson's connection to the anticompetitive conduct perpetrated by his underlings gives rise to a strong inference of scienter. The complaint alleges, at the least, that Anderson knew of an anticompetitive agreement between Patterson, Benco, and Schein, that he allowed that agreement to persist, and that he did nothing to prevent his direct reports from furthering **[*54]** and enforcing that agreement. Specifically, Anderson was apprised early on by Guggenheim that he had been in contact with Benco's Cohen regarding GPOs. Anderson took no action to curtail these missives. Several months later, Guggeheim affirmed to Anderson that Patterson was rejecting GPOs and monitoring how its competitors interacted with GPOs. Rather that reject Guggenheim's handling of GPOs, Anderson doubled down by pointing out the weakness of those entities doing business with GPOs and requested continued monitoring. Buttressing this, Anderson directly supervised Misiak and received reports of how he communicated the anti-GPO position to subordinate sales staff. Moreover, Anderson made statements as to the competitiveness of the market[12] and Patterson while the company was under investigation, suggesting his statements "were made with the requisite scienter." Utesch, 2019 U.S. Dist. LEXIS 82428, 2019 WL 2136467, at *8. Thus, it is reasonable to infer Anderson's scienter; Plaintiffs have pleaded Anderson's repeated statements concerning the competitive nature of the dental supply market, the competitiveness of Patterson, Patterson's competition with Benco and Schein, and that Patterson was seeking business opportunities with GPOs were made **[*55]** with the requisite state of mind.

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[11] This Court will not use the "core operations" theory as urged by Plaintiffs where the Eighth Circuit has not addressed it and noted that it has been rejected by other circuit courts. Elam v. Neidorff, 544 F.3d 921, 929 (8th Cir. 2008).

[12] Ignoring statements certified by Anderson in Patterson's Form 10-K filings, Anderson repeatedly cited the dental supplies market's stability, (Compl. ¶¶ 148, 172, 174, 177, 183), and Patterson's competitiveness, (Compl. ¶¶ 158, 160-62, 164-65, 179), in earnings calls.

Unlike Gugino, Anderson's resignation is accompanied by allegations tying him to the underlying anticompetitive actions. Anderson's resignation was abrupt and not discussed on the earnings call held one week prior. Based on the allegations of the complaint, it is difficult to tie Anderson's resignation to any specific precipitating factor. *See In re UTStarcom, Inc. Sec. Litig., 617 F. Supp. 2d 964, 976 (N.D. Cal. 2009)* ("At the very least, the timing of Defendants' departures might suggest that the Company believed Defendants had been involved in wrongdoing with respect to corporate finances."). Thus, while not much standing alone, Anderson's resignation buttresses the inference of scienter under the holistic approach. *Id.* ("Even though it is also possible to infer, for example, that Defendants left of their own volition or that they were removed for mismanagement unrelated to wrongdoing, the Court finds that the proximity of Defendants' departures to the financial restatements and investigations adds one more piece to the scienter puzzle.") (quotation omitted).

3. Patterson

The "Eighth Circuit has not directly addressed the issue of 'collective scienter,'" but "has done so implicitly." *In re Medtronic Inc., Sec. Litig., 618 F. Supp. 2d at 1035*; *Horizon Asset Mgmt. Inc., 508 F.3d at 767* ("The appropriate standard for considering **[*56]** the pleading of corporate scienter under the PSLRA appears to be an open question in this circuit."). Accordingly, courts in this District have not applied the "collective scienter" doctrine but instead require plaintiffs "establish corporate scienter by adequately alleging the scienter of individual corporate officers." *In re Medtronic Inc., Sec. Litig., 618 F. Supp. 2d at 1035*. "The knowledge and scienter of a corporate officer such as its CEO or CFO may of course be imputed to the corporate entity." *In re St. Jude Med., Inc. Sec. Litig., 836 F. Supp. 2d 878, 896 (D. Minn. 2011)*; *Beaver Cty. Employees' Ret. Fund v. Tile Ship Holdings, Inc., 94 F. Supp. 3d 1035, 1054 (D. Minn. 2015)*. As concluded above, Plaintiffs have adequately pled scienter as to Anderson, Patterson's CEO. This also imputes sufficient scienter to Patterson.

Even if this Court were to consider the "collective scienter" reasoning, the collective action of Patterson's employees satisfies the standard. As discussed, Misiak had a line of communication with Anderson. Misiak and McFadden repeatedly distributed marching orders to their sales managers who then passed on that information to their middle-management and ground-level sales representatives. Sales representatives' requests for guidance on how to proceed with GPOs, even with substantial business opportunities on the line, were repeatedly met with the same answer: "No business with GPOs—just like **[*57]** Benco and Schein." Indeed, there were frequent check-ins with counterparts at Benco and Schein when Patterson employees suspected their competitors of reneging on their plan towards GPOs. Where the "wrongdoing alleged was not a single act of a low-level employee, but rather, an ongoing method of doing business," corporate scienter is sufficiently pled. *In re Faro Techs. Sec. Litig., 534 F. Supp. 2d 1248, 1263 (M.D. Fla. 2007)*.

D. Loss Causation

"Loss causation in a securities fraud case is analogous to the common law's requirement of proximate causation. The plaintiff must show 'that the loss was foreseeable and that the loss was caused by the materialization of the concealed risk.'" *McAdams v. McCord, 584 F.3d 1111, 1114 (8th Cir. 2009)* (citing and quoting *Schaaf v. Residential Funding Corp., 517 F.3d 544, 550 (8th Cir. 2008))*. The securities statutes make fraud actions available "not to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause." *Dura Pharm., 544 U.S. at 345*; *see also 15 U.S.C. § 78u-4(b)(4)* (requiring plaintiffs to prove the defendant "caused the loss"). "A complaint must 'provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind.'" *McAdams v. McCord, 584 F.3d at 1114* (quoting *Dura Pharm, 544 U.S. at 347*).

Defendants point out that the alleged antitrust misconduct was already known to the market prior to the FTC's complaint by reason **[*58]** of the various private lawsuits against Patterson and its collusive competitors. Private lawsuits were filed against Patterson on September 21, 2015, February 11, 2016, and August 17, 2017, well before the February 12, 2018 FTC complaint was filed and made public. Defendants also assert that Patterson's stock "quickly rebounded" following the FTC action's commencement.

This Court is unpersuaded by Defendants' argument that the alleged antitrust misconduct was already known to the market prior to the FTC's complaint. Defendants essentially ask this Court to weigh their truth-on-the-market defense. This a defense that seeks to "rebut the fraud-on-the-market presumption of reliance by proving that 'the market makers were privy to the truth.'" *In re Stellent, Inc. Sec. Litig., 326 F. Supp. 2d 970, 985 (D. Minn. 2004)* (quoting *Basic Inc., 485 U.S. at 248*). This is an intensely fact-specific defense that is rarely appropriate to determine at the motion to dismiss stage. *In re Stellent, Inc. Sec. Litig., 326 F. Supp. 2d at 985-86* (citing *Ganino v. Citizens Utils. Co., 228 F. 3d 154, 167 (2d Cir. 2000))*. As Plaintiffs point out, the FTC complaint provided new information to the market unrevealed by the previous private lawsuits, mainly internal communications, and a financial analyst described the FTC complaint "as very serious [and] much more severe" than the allegations of the private lawsuits.

This Court is more **[*59]** sympathetic to Defendants' arguments concerning the causal connection between the FTC complaint and the stock losses, particularly where Defendants point to data that shows Patterson's stock price was ultimately unaffected in the weeks following the FTC complaint until the March 1, 2018 earnings report was released. (*See* Thomas Aff., Ex. A). As detailed in the various earnings reports above, Patterson's earnings had been dropping for some time before the FTC complaint was revealed. Plaintiffs have not clearly explained how the FTC complaint was the precipitating cause of the stock price fall in March 2018 as compared to the accumulated effects of Patterson's near-continuous declining earnings. To counteract Defendants' argument, Plaintiffs assert that the declining earnings were the result of Patterson's unraveling anticompetitive conduct; essentially, Patterson's previously-inflated financial performance had to normalize to the reality that Patterson was not actually as competitive in the dental supply marketplace as it had continuously touted. Thus, Plaintiffs assert, the stock price drop in March 2018 was due to the materialization of the concealed anticompetitive conduct.

These **[*60]** entangled facts are difficult to resolve in the absence of discovery and would be better suited for resolution on summary judgment where experts can weigh in with their analysis. *See* *Gebhardt v. ConAgra Foods, Inc., 335 F.3d 824, 832 (8th Cir. 2003)* (declining "to attach dispositive significance to the stock's price movements absent sufficient facts and expert testimony, which cannot be considered at this procedural juncture, to put this information in its proper context"). Nonetheless, Defendants' argument may be more relevant to the economic harm analysis than that of loss causation. At this stage in the proceeding, this Court cannot draw appropriate boundaries for stock value consideration and what impact the FTC complaint's revelation of the extent of Patterson's anticompetitive behavior had on Patterson's stock prices as compared to its declining earnings. As the Eighth Circuit has noted, the "causation requirement for damages is not very stringent." *Id. at 831*. Plaintiffs have pleaded a revelation—the February 2018 FTC complaint—followed by the March 2018 earnings call and contemporaneous drop in stock value. At this point in the litigation, this Court concludes Plaintiffs have sufficiently provided Defendants "some indication of the loss" and the causal **[*61]** connection to survive the motion to dismiss.

E. Summary

Plaintiffs have alleged a long-running scheme at Patterson, concocted in the upper echelons of corporate management, to collude with its direct competitors to stifle new entrants to the market to protect its artificially inflated prices charged by reason of unorganized buyers with little power. Because of an FTC complaint, Plaintiffs have provided allegations with a degree of clarity ordinarily unavailable. But those allegations are insufficient to assert securities violations against all Defendants. This Court concludes Plaintiffs have properly pled securities violations against Anderson and Patterson. As to the other named Defendants—Gugino, Armstrong, and Wiltz—Plaintiffs have failed to sufficiently plead their involvement with the underlying misconduct and this Court concludes they should be dismissed as defendants.

Because this Court concludes Plaintiffs have adequately pled a *Section 10(b)* claim against Anderson, their *Section 20(a)* claim survives against him and Patterson. *In re St. Jude Med., Inc. Sec. Litig., 836 F. Supp. 2d at 911*. As noted above, Plaintiffs have sufficiently alleged that Anderson supervised the principle actors in the misconduct and was apprised of their actions. *Lustgraaf v. Behrens, 619 F.3d 867, 873-74 (8th Cir. 2010)*; *Beaver Cty. Employees' Ret. Fund, 94 F. Supp. 3d at 1054-55*.

III. RECOMMENDATION

Based **[*62]** on the foregoing, and all the files, record, and proceedings herein, **IT IS HEREBY RECOMMENDED** that Defendants' Motion to Dismiss the Amended Class Action Complaint, (ECF No. 89), be **GRANTED IN PART and DENIED IN PART** as set forth herein.

Date: July 25, 2019

/s/ Steven E. Rau

Steven E. Rau

United States Magistrate Judge

District of Minnesota

Huu Nguyen v. Nissan N. Am., Inc.

United States Court of Appeals for the Ninth Circuit

June 11, 2019, Argued and Submitted, San Francisco, California; July 26, 2019, Filed

No. 18-16344

Reporter
932 F.3d 811 *; 2019 U.S. App. LEXIS 22296 **; 104 Fed. R. Serv. 3d (Callaghan) 700; 2019 WL 3368918

HUU NGUYEN, individually, and on behalf of a class of similarly situated individuals, Plaintiff-Appellant, v. NISSAN NORTH AMERICA, INC., a California Corporation, Defendant-Appellee.

Subsequent History: As Corrected July 27, 2019.

Rehearing denied by, Rehearing, en banc, denied by *Huu Nguyen v. Nissan N. Am., 2019 U.S. App. LEXIS 26867 (9th Cir. Cal., Sept. 5, 2019)*

Prior History: [1]** Appeal from the United States District Court for the Northern District of California. D.C. No. 5:16-cv-05591-LHK. Lucy H. Koh, District Judge, Presiding.

Nguyen v. Nissan North Am., Inc., 2018 U.S. Dist. LEXIS 93861 (N.D. Cal., Apr. 9, 2018)

Core Terms

damages, clutch, consumer, class certification, replacing, alleged defect, district court, class member, manifested, benefit of the bargain, predominance, theory of liability, cause of action, implied warranty, legal theory, transmission, calculation, hydraulic, alleges, leased

LexisNexis® Headnotes

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

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

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

A district court's order denying class certification is reviewed for abuse of discretion. A district court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law. But, if the district court applied the correct legal standard, then an appellate court will set aside its decision only if its reasoning was illogical, implausible, or without support in inferences that may be drawn from the facts in the record.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN2[] Prerequisites for Class Action, Predominance

In order to certify a class under *Fed. R. Civ. P. 23(b)(3)*, a court must find that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Although uncertain damages calculations do not alone defeat certification, the United States Supreme Court emphasizes that at the class-certification stage, any model supporting a plaintiff's damages case must be consistent with its liability case. Plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability. Uncertainty regarding class members' damages does not prevent certification of a class as long as a valid method has been proposed for calculating those damages.

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

HN3[] Deceptive & Unfair Trade Practices, State Regulation

The California Consumers Legal Remedies Act (CLRA) shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection. *Cal. Civ. Code § 1760*; Class-wide damages calculations under the CLRA are particularly forgiving. California law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation.

Business & Corporate Compliance > ... > Contracts Law > Breach > Breach of Warranty

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > Benefit of the Bargain

HN4[] Breach, Breach of Warranty

The Song-Beverly Act provides that the measure of a buyer's damages in an action shall include the rights of replacement or reimbursement. *Cal. Civ. Code § 1794(b)*. Under California law, the remedies for breach of implied warranty include benefit of the bargain damages.

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > Benefit of the Bargain

HN5[] Foreseeable Damages, Benefit of the Bargain

A benefit-of-the-bargain model of damages is concerned with satisfying the expectancy interest of the defrauded plaintiff by putting him in the position he would have enjoyed if the false representation relied upon had been true; it awards the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive.

Summary:

SUMMARY[**]

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Class Certification

The panel reversed the district court's denial of class certification in an action against Nissan North America pursuant to state and federal warranty laws arising from an allegedly faulty hydraulic clutch system in plaintiff's 2012 Nissan vehicle.

The district court denied plaintiff's motion for class certification on the ground that he failed to satisfy the predominance requirement of *Federal Rule of Civil Procedure 23(b)(3)* due to what the district court viewed as an inappropriate measure of damages.

The panel held that plaintiff's proposed damages model based on the benefit of the bargain is cognizable under California's Consumers Legal Remedies Act, the Song-Beverly Consumer Warranty Act, and the Magnuson-Moss Warranty Act. The panel held that plaintiff sufficiently demonstrated a nexus between his legal theory—that Nissan violated California law by selling vehicles with a defective clutch system that was not reflected in the sale price—and his damages model—the average cost of repair. The panel determined that plaintiff did not seek damages for the faulty performance of the clutch **[**2]** system, which as the district court concluded, would require an individualized analysis that might defeat predominance. Instead, plaintiff's theory was that the allegedly defective clutch was itself the injury, regardless of whether the faulty clutch caused performance issues. The panel concluded that the district court abused its discretion when it denied class certification based on a misconception of plaintiff's legal theory.

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Judges: Before: MARY M. SCHROEDER and MILAN D. SMITH, JR., Circuit Judges, and DOUGLAS L. RAYES,[*] District Judge. Opinion by Judge Milan D. Smith, Jr.

Opinion by: Milan D. Smith, Jr.

Opinion

[*813] M. SMITH, Circuit Judge:

When Plaintiff Huu Nguyen purchased a new 2012 Nissan 370Z as a college graduation present for his son, he was unaware of what he alleges was a potentially catastrophic design defect hidden in the vehicle's hydraulic clutch

[*] The Honorable Douglas L. Rayes, United States District Judge for the District of Arizona, sitting by designation.

system. After the clutch purportedly malfunctioned—and Plaintiff spent more than $700 replacing it—he filed a putative class action against Defendant Nissan North America, Inc. (Nissan), asserting causes of action under state and federal warranty laws.

[*814] The district court denied Plaintiff's motion for class certification, concluding that he failed to satisfy the predominance requirement of *Federal Rule of Civil Procedure 23(b)(3)* due to what it viewed as an inappropriate **[**4]** measure of damages. Because we conclude that, following *Comcast Corp. v. Behrend, 569 U.S. 27, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)*, Plaintiff's proposed damages model is consistent with his theory of liability, we reverse the district court's denial of class certification and remand.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

A. Alleged Defect

This case involves an allegedly faulty hydraulic clutch system in various vehicles manufactured by Nissan (the Class Vehicles).[1]

The typical components of a hydraulic clutch system include a fluid reservoir, a clutch master cylinder (CMC), and a clutch slave cylinder (CSC), which is sometimes referred to as the release bearing.[2] As explained by Plaintiff's expert, Michael Stapleford, P.E., the clutch system is a dry friction system that uses brake fluid in a discrete reservoir to transfer heat from the clutch components through the base of the CSC to the attached transmission front cover and the surrounding atmosphere. Such a system routinely generates heat ranging from 200 to 300 degrees Celsius, with hard use resulting in temperatures as high as 400 degrees Celsius.

Plaintiff alleges that, in reconfiguring the Class Vehicles' factory-installed clutch system in 2007, Nissan failed to properly account for heat **[**5]** transfer and produced a defective aluminum/plastic composite CSC that causes the system to overheat. Consequently, the clutch fluid boils and generates air that causes failure of the clutch pedal, such that it sticks to the floor and prevents a driver from shifting gears. A "sticky" clutch can make it difficult to control a vehicle's speed, presenting both safety and performance issues.

B. Nissan's Response

A consumer complaint submitted as evidence by Plaintiff indicates that the Class Vehicles began to malfunction as early as June 2007, while Nissan's own records identified the issue starting in October of that year. An internal Nissan report suggested that "abnormal high-temperature [during] continued use of partial clutch engagement might be the cause." Emails exchanged between Nissan employees in 2012 further discussed the sticky clutch problem and its potential causes, and in July 2012, a Nissan project engineer wrote,

> This issue is great enough that it warrants a serious look by R&D as to how we can improve the feel, and function of the clutch system. . . . Customers are universally dissatisfied with the feel and performance of the

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[1] Specifically, the Nissan 350Z, model years 2007-09; the Nissan 370Z, model years 2009-15; the Infiniti G35, model years 2007-08; the Infiniti G37, model years 2008-14; and the Infiniti Q60.

[2] A properly functioning hydraulic clutch system is engaged when the driver depresses the clutch pedal, which causes a piston in the CMC to push fluid through the steel hydraulic line to the CSC and against the integrated release bearing, pressurizing the system. This in turn causes the clutch kit (pressure plate, clutch disc, and flywheel) to disengage the engine from the transmission. Releasing the clutch pedal releases the fluid pressure, which allows the gears to engage smoothly and efficiently.

> system even when it is performing as designed. **[**6]** . . . Combine **[*815]** that with the frequent claims of clutch pedal sticking to floor and you've taken a dissatisfaction item and made it into a breakdown item. I think a wholesale approach to a whole new hydraulic system, including a new pedal, is warranted.

Plaintiff claims that "[d]espite its investigations and testing, or even the change to a higher quality hydraulic fluid in the Class Vehicles, Nissan never informed consumers that the clutch system in the Class Vehicles had an inherent defect that made it prone to heat-related problems." In his complaint, Plaintiff asserted that if he and the other putative class members "knew about these defects at the time of sale or lease, [they] would not have purchased or leased the Class Vehicles or would have paid less for them."

C. Plaintiff's 2012 Nissan 370Z

Plaintiff purchased a new 2012 Nissan 370Z from an authorized Nissan dealer in Santa Clara County, California, as a college graduation present for his son, Michael. In March 2014, Michael was driving the 370Z on the freeway when the clutch pedal lost pressure and did not return to its depressed position; Michael had to pull over to the shoulder of the freeway and slow down until the clutch **[**7]** allowed him to shift into second gear. The Nissan dealership replaced the CSC at no charge because the vehicle was still under warranty. When a similar situation developed two years later, however, the 370Z was no longer under warranty, and so Plaintiff had the CSC replaced by an auto repair shop for $721.75.

II. Procedural History

Plaintiff's first amended complaint alleged five causes of action against Nissan: (1) violations of *California's Consumers Legal Remedies Act (CLRA)*; (2) violations of *California's Unfair Competition Law (UCL)*; (3) breach of implied warranty pursuant to the *Song-Beverly Consumer Warranty Act (Song-Beverly Act)*; (4) breach of implied warranty pursuant to the *Magnuson-Moss Warranty Act (Magnuson-Moss Act)*; and (5) unjust enrichment. The district court granted in part Nissan's motion to dismiss, removing Plaintiff's UCL and unjust enrichment claims, and his request for injunctive relief under the CLRA.

Plaintiff moved for class certification pursuant to *Federal Rule of Civil Procedure 23(b)(3)* (or, in the alternative, under *Rule 23(c)(4)* for liability only), seeking to certify (1) a class of "[a]ll individuals in California who purchased or leased, from an authorized Nissan dealer, a new Nissan vehicle equipped **[**8]** with a FS6R31A manual transmission"; and (2) a CLRA subclass of "[a]ll members of the Class who are 'consumers' within the meaning of *California Civil Code § 1761(d)*." Although Nissan opposed class certification for various reasons—including that Plaintiff was not an adequate class representative, that individual issues predominated due to the varying types of automobiles included in the Class Vehicles, and that Nissan's purported knowledge of the defect changed over the course of the class period—a major point of dispute, and the issue on which the district court's eventual order hinged, concerned Plaintiff's damages model.

According to Plaintiff, his "damages model is based on the economic principle of benefit-of-the-bargain and is consistent with [his] theory of liability." Assuming that class members would have either paid less than sticker price or not purchased a defective vehicle at all had the nature of the clutch system been divulged by Nissan, Plaintiff seeks "to recover the difference in value between the non-defective vehicles Nissan promised and the defective vehicles that were delivered based on the cost[] to **[*816]** replace the composite CSC with one that is solid cast-aluminum." Nissan challenges this proposed **[**9]** damages model, citing the report of an expert who, in its words, "rejected the notion that average-cost-of-repair represented the amount that informed consumers would discount the price of the [Class] Vehicles."

The district court agreed with Nissan and denied Plaintiff's motion for class certification. It concluded that "Plaintiff [] failed to satisfy the predominance requirement of *Rule 23(b)(3)*," based on what the court viewed as a "problematic" damages model. The court explained,

> Under the proposed benefit of the bargain model, damages are the difference between the value Nissan represented and the value class members received, measured at the time of purchase. However, the difference between value represented and value received only equals the cost to replace the defective CSC *if* consumers would have deemed the defective part valueless.

(citation omitted). The court reasoned that, under Plaintiff's proposed model, if a class member "derived value from the defective CSC—be it by selling it, repurposing it, or simply driving a ways before replacing it—the class member will have received the full benefit of the bargain *and* the monetary value of the defective part. That is not an appropriate measure **[**10]** of damages." Because the record contained no evidence that the defective clutch was valueless—but *did* contain evidence to the contrary, since "Plaintiff's vehicle was driven for approximately 26,629 miles before the original CSC malfunctioned"—the court rejected Plaintiff's damages model as being an improper measure of the benefit of the bargain. Therefore, the district court concluded that Plaintiff could not satisfy the predominance requirement of *Rule 23(b)(3)*.

We subsequently granted Plaintiff's timely petition for permission to appeal the denial of class certification pursuant to *Rule 23(f)*.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to *28 U.S.C. § 1292(e)* and *Rule 23(f)*. *See* *Chamberlan v. Ford Motor Co., 402 F.3d 952, 955 (9th Cir. 2005)*.

HN1[] "A district court's order denying class certification is reviewed for abuse of discretion." *Civil Rights Educ. & Enf't Ctr. v. Hosp. Props. Tr., 867 F.3d 1093, 1103 (9th Cir. 2017)*. "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *United States v. Hinkson, 585 F.3d 1247, 1259 (9th Cir. 2009)* (en banc) (quoting *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990))*. But, if the district court "applied the correct legal standard," then we will "set aside its decision only if the court's reasoning was 'illogical, implausible, or without support in inferences that may be drawn from the facts in the record.'" *Civil Rights Educ. & Enf't Ctr., 867 F.3d at 1103* (quoting *Jimenez v. Allstate Ins. Co., 765 F.3d 1161, 1164 (9th Cir. 2014))*.

ANALYSIS

The central issue before us is whether Plaintiff's **[**11]** proposed damages model—specifically, a benefit-of-the-bargain model as measured by the average cost of replacing the allegedly defective clutch system—satisfies *Rule 23(b)(3)*'s predominance requirement.

HN2[] In order to certify a class under *Rule 23(b)(3)*, a court must find that "questions of law or fact common to class members predominate over any questions affecting **[*817]** only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*; *see also* *Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1189 (9th Cir. 2001)*, *as amended*, *273 F.3d 1266 (9th Cir. 2001)*. Although uncertain damages calculations do not alone defeat certification, *Yokoyama v. Midland Nat'l Life Ins. Co., 594 F.3d 1087, 1094 (9th Cir. 2010)*, the Supreme Court has emphasized that "at the class-certification stage (as at trial), any model supporting a 'plaintiff's damages case *must be consistent* with its liability case.'" *Comcast, 569 U.S. at 35* (emphasis added) (quoting ABA Section of ***Antitrust Law***, *Proving Antitrust Damages: Legal and Economic Issues* 57, 62 (2d ed. 2010)); *see also* *id. at 38* ("The first step in a damages study is the translation of the *legal theory of the harmful event* into an analysis of the economic impact *of that event*." (quoting Fed. Judicial Ctr., *Reference Manual on Scientific Evidence* 432 (3d ed. 2011))).

Comcast did not alter our holding that individualized **[**12]** damages issues do not alone defeat certification. *See* *Pulaski & Middleman, LLC v. Google, Inc., 802 F.3d 979, 988 (9th Cir. 2015)* ("*Yokoyama* remains the law of this court, even after *Comcast*."); *see also* Jimenez, 765 F.3d at 1168 ("So long as the plaintiffs were harmed by the same conduct, disparities in how or by how much they were harmed did not defeat class certification."). But *Comcast* requires that "plaintiffs [] be able to show that their damages stemmed from the defendant's actions that created the legal liability." Leyva v. Medline Indus. Inc., 716 F.3d 510, 514 (9th Cir. 2013); *see also* Just Film, Inc. v. Buono, 847 F.3d 1108, 1120 (9th Cir. 2017) ("[P]laintiffs must show that 'damages are capable of measurement on a classwide basis,' in the sense that the whole class suffered damages traceable to the same injurious course of conduct underlying the plaintiffs' legal theory." (quoting Comcast, 569 U.S. at 34)). In short, "[u]ncertainty regarding class members' damages does not prevent certification of a class as long as a valid method has been proposed for calculating those damages." Lambert v. Nutraceutical Corp., 870 F.3d 1170, 1182 (9th Cir. 2017), *rev'd on other grounds*, 139 S. Ct. 710, 203 L. Ed. 2d 43 (2019).

I. Plaintiff's Causes of Action

We must first consider Plaintiff's causes of action in order to determine whether they permit recovery based on the benefit of the bargain. Following the district court's partial grant of Nissan's motion to dismiss, Plaintiff was left with three viable causes of action at the time **[**13]** of class certification: claims under the CLRA, the Song-Beverly Act, and the Magnuson-Moss Act.[3]

A. The CLRA

HN3[] The CLRA "shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices **[*818]** and to provide efficient and economical procedures to secure such protection." Cal. Civ. Code § 1760; *see also* Hinojos v. Kohl's Corp., 718 F.3d 1098, 1108 (9th Cir. 2013) ("[T]he CLRA's 'any damage' requirement is a capacious one that includes any pecuniary damage as well as opportunity costs and transaction costs that result when a consumer is misled by deceptive marketing practices."); Wilens v. TD Waterhouse Grp., Inc., 120 Cal. App. 4th 746, 15 Cal. Rptr. 3d 271, 274 (Ct. App. 2003) (noting that "[i]f the consumer suffers damage as a result of an unlawful act" under the CLRA, then "the consumer can bring an action against the defendant for actual damages, punitive damages, injunctive relief or restitution"). We have noted that "[c]lass wide damages calculations under the . . . CLRA are particularly forgiving. California law 'requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation.'" Lambert, 870 F.3d at 1183 (quoting Pulaski, 802 F.3d at 989).

Here, we are satisfied that Plaintiff's proposed benefit-of-the-bargain measure of damages is **[**14]** both cognizable under the CLRA and a reasonable basis of computation. Courts have viewed similar models of recovery favorably in the past. *See, e.g.*, Colgan v. Leatherman Tool Grp., Inc., 135 Cal. App. 4th 663, 38 Cal. Rptr. 3d 36, 42-43 (Ct. App. 2006) (describing a "market approach" for "determin[ing] the amount of actual damages for a CLRA award," which provides that "[o]ne defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction" (quoting Cal. Civ. Code § 3343)); *see also* Astiana v. Kashi Co., 291 F.R.D. 493, 506 (S.D. Cal. 2013) ("A court awarding restitution under the California consumer protection laws has '"very broad" discretion to determine an appropriate remedy award as long as it is supported by the evidence and is consistent with the purpose of restoring to the plaintiff the

[3] The Magnuson-Moss Act incorporates the substantive provisions of state warranty laws. *See* Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1022 (9th Cir. 2008) ("[T]his court's disposition of the state law warranty claims determines the disposition of the Magnuson-Moss Act claims."); Walsh v. Ford Motor Co., 807 F.2d 1000, 1012, 257 U.S. App. D.C. 85 (D.C. Cir. 1986) ("[E]xcept in the specific instances in which Magnuson-Moss expressly prescribes a regulating rule, the Act calls for the application of state written and implied warranty law, not the creation of additional federal law."). Accordingly, we focus only on Plaintiff's causes of action under California law—the CLRA and Song-Beverly Act.

amount that the defendant wrongfully acquired.'" (quoting *Wiener v. Dannon Co., 255 F.R.D. 658, 670 (C.D. Cal. 2009)))*.[4] Nissan has cited no authority, and we are not aware of any, precluding Plaintiff's theory of recovery under the CLRA.

B. The Song-Beverly Act

Plaintiff's damages model is similarly cognizable under ***HN4***[] the Song-Beverly Act, which provides that "[t]he **[**15]** measure of the buyer's damages in an action . . . shall include the rights of replacement or reimbursement." *Cal. Civ. Code § 1794(b)*; *see also id. § 1794(b)(2)* ("Where the buyer has accepted the goods, *Sections 2714* and *2715* of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform."). *California Commercial Code section 2714* provides that "[t]he measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." *Cal. Com. Code § 2714(2)*; *see also S. M. Wilson & Co. v. Smith Int'l, Inc., 587 F.2d 1363, 1375* ***[*819]*** *(9th Cir. 1978)* (explaining that *section 2714(2)* entitles a plaintiff "to recover the monetary equivalent of the benefit of his bargain").[5] Accordingly, "[u]nder California law the remedies for breach of the implied warranty include 'benefit of the bargain' damages." *Ironshore Specialty Ins. Co. v. 23andMe, Inc., No. 14-cv-03286-BLF, 2015 U.S. Dist. LEXIS 64145, 2015 WL 2265900, at *4 (N.D. Cal. May 14, 2015)*.

II. Plaintiff's Theory of Liability

Having determined that recovery based on the benefit of the bargain is cognizable under Plaintiff's causes of action, we must now determine whether this damages model flows from his theory of liability. *See Comcast, 569 U.S. at 35*.

In his motion for class certification, **[**16]** Plaintiff asserted that he

> has alleged, and can prove through common evidence, that the Class Vehicles were sold with defective CSCs. That allegation is susceptible to common proof regarding the design of the CSC, which is substantially the same for all Class Vehicles, and individual factors do not affect whether the Class [V]ehicles were sold with a defective CSC.

(citation omitted). This characterization is crucial. Plaintiff's legal theory is not based on the *performance* of the allegedly defective clutch system, but instead *the system* itself, which he claims is defective. Had Plaintiff alleged that performance problems constituted the defect and caused his and the class members' injuries, then the benefit of the bargain would not be the appropriate measure of damages because, as the district court noted, class members might have received varying levels of value based on if and when they experienced a sticky clutch problem. But Plaintiff's theory is that Nissan knowingly designed a defective clutch system and did not inform consumers of the defect. His expert explained that the CSC "is defectively designed because its wrought aluminum cylinder and plastic base assembly does not provide **[**17]** enough thermal conductivity to effectively transfer heat from the clutch components to the transmission front cover and surrounding air during clutch engagement." This allegedly defective clutch system "is the same or substantially similar in all of the Class Vehicles." Accordingly, as Plaintiff argues, "under [his] theory, the *defect* exists—and must be remedied—whether or not the *symptoms* have manifested yet."

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[4] We further note that Plaintiff's damages model is consistent with the CLRA's safe harbor provision, which requires that a customer "[n]otify the person alleged to have" employed unlawful practices and "[d]emand that the person *correct, repair, replace, or otherwise rectify* the goods or services." *Cal. Civ. Code § 1782(a)* (emphasis added).

[5] *Section 2715* provides for incidental and consequential damages, which are not at issue here.

Both Nissan and the district court mischaracterized Plaintiff's theory as being centered on performance issues, rather than the defective system itself. Nissan argues that Plaintiff's "model assumed that 100% of the vehicles would manifest a clutch assembly defect, and none of them would malfunction but for the design flaw." But this is not accurate; Plaintiff's theory is that the defect was inherent in each of the Class Vehicles at the time of purchase, regardless of when and if the defect manifested. He alleges that Nissan violated the CLRA because it knew about the defective clutch system and failed to disclose it at the point of sale, that "a reasonable person would have considered [the fact of the alleged defect] to be important in deciding whether to purchase or lease Class **[**18]** Vehicles," and thus that Plaintiff and class members "would not have purchased or leased Class Vehicles equipped with transmissions, or would have paid less for them." *See* *Soule v. Gen. Motors Corp., 8 Cal. 4th 548, **[*820]** 34 Cal. Rptr. 2d 607, 882 P.2d 298, 308 n.3 (Cal. 1994)* ("[T]he ordinary consumers of modern automobiles may and do expect that such vehicles will be designed so as not to explode while idling at stoplights, experience sudden steering or brake failure as they leave the dealership, or roll over and catch fire in two-mile-per-hour collisions."). Plaintiff further alleges that, under the Song-Beverly Act, the Class Vehicles "suffered from an inherent defect at the time of sale." Plaintiff correctly contends that "under both causes of action, the sale of the vehicle with the known defect is the liability-triggering event, not when the overheating manifests." *See* *Daniel v. Ford Motor Co., No. 2:11-02890 WBS EFB, 2016 U.S. Dist. LEXIS 65723, 2016 WL 2899026, at *7 (E.D. Cal. May 18, 2016)* ("[A] reasonable jury could conclude that a consumer would demand that the purchase price of a vehicle with a defect be reduced by the cost of remedying that defect."); *Kearney v. Hyundai Motor Co., No. SACV 09-1298 DOC (MLGx), 2010 U.S. Dist. LEXIS 68242, 2010 WL 9093204, at *5 (C.D. Cal. June 4, 2010)* (determining that if "the receipt of a vehicle whose alleged defects reduced the car's value and deprived the consumer of the benefit of the bargain, *even when the alleged **[**19]** defects did not later materialize*," then "the loss was suffered 'at the moment' of purchase" (citing *Cole v. GMC, 484 F.3d 717, 723 (5th Cir. 2007)))*.

Plaintiff's theory is consistent with our opinion in *Wolin v. Jaguar Land Rover North America, LLC*, in which we concluded that "[t]he district court erred when it concluded, without discussion, that certification is inappropriate because [the plaintiffs] did not prove that the defect manifested in a majority of the class's vehicles." *617 F.3d 1168, 1173 (9th Cir. 2010)*. We explained that the plaintiff

> alleges breach of implied warranty because the vehicles were defective and not of merchantable quality at the time they left Land Rover's possession. Common issues predominate such as whether Land Rover was aware of the existence of the alleged defect, whether Land Rover had a duty to disclose its knowledge and whether it violated consumer protection laws when it failed to do so. . . . [W]e have held that proof of the manifestation of a defect is not a prerequisite to class certification.

Id. Moreover, in *Pulaski*, we clarified that a restitution calculation under California law

> need not account for benefits received after purchase [where] the focus is on the value of the service at the time of purchase. Instead . . . the **[**20]** focus is on the difference between what was paid and what a reasonable consumer would have paid at the time of purchase without the fraudulent or omitted information.

802 F.3d at 989.[6] Here, in denying Plaintiff's motion for class certification, the district court focused on potential post-purchase value, suggesting that "the difference between value represented and value received only equals the cost to replace the defective CSC *if* consumers would have deemed the defective part valueless." Given Plaintiff's theory of liability, **[*821]** this conclusion was inconsistent with *Wolin* and *Pulaski*.[7]

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[6] *Pulaski* dealt with claims under the UCL and California's False Advertising Law, not the CLRA. *See* *802 F.3d at 983*. But although "[d]amages under the CLRA on the one hand and restitution under the False Advertising and Unfair Competition Laws on the other hand are different remedies," the CLRA contemplates restitution, and that concept is treated similarly under the three laws. *Colgan, 38 Cal. Rptr. 3d at 58-59*; *see also* *Cortez v. Purolator Air Filtration Prods. Co., 23 Cal. 4th 163, 96 Cal. Rptr. 2d 518, 999 P.2d 706, 713 (Cal. 2000)* (discussing the overlap of "restitution" and "damages").

[7] That conclusion was also inconsistent with the holdings of other circuits, which have described benefit-of-the-bargain recovery much as we did in *Pulaski*. In *Carriuolo v. General Motors Co.*, for example, the Eleventh Circuit cited with approval a Florida state case that asked, "Is a car with defective seatbelt buckles worth less than a car with operational seatbelt buckles? Common

Plaintiff alleges that Nissan concealed the clutch system's defects from consumers, that the defect was material because it adversely affected the "safety and reliability" **[**21]** of the Class Vehicles, and that he did not get what he bargained for—a transmission "fit for [its] intended use." ***HN5***[] A benefit-of-the-bargain model of damages aligns with this legal theory; that measure

> is concerned with satisfying the expectancy interest of the defrauded plaintiff by putting him in the position he would have enjoyed if the false representation relied upon had been true; it awards the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive.

Stout v. Turney, 22 Cal. 3d 718, 150 Cal. Rptr. 637, 586 P.2d 1228, 1232 (Cal. 1978). Plaintiff seeks to recover damages equaling the amount he purportedly overpaid in purchasing a vehicle with a defective clutch; he "is not seeking a full refund for the vehicle purchase, but for the cost of replacing [] a defective component, which is a proxy for [his] overpayment of the vehicle at the point of sale." Whether his proposed calculation of the replacement cost is accurate, whether the clutch was actually defective, and whether Nissan knew of the alleged defect are merits inquiries unrelated to class certification. For now, it is sufficient that Plaintiff has demonstrated the nexus between his legal theory—that Nissan violated California law by selling **[**22]** vehicles with a defective clutch system that was not reflected in the sale price—and his damages model—the average cost of repair.

In response, Nissan maintains that "[t]he manifestation requirement [] impacts the damages analysis." It cites *Cardinal Health 301, Inc. v. Tyco Electronics Corp.*, in which the California Court of Appeal noted that "[u]nless a product actually manifests an alleged defect, the plaintiff **[*822]** has not suffered damages with respect to an implied warranty claim." *169 Cal. App. 4th 116, 87 Cal. Rptr. 3d 5, 33 (Ct. App. 2008)*; *see also* *Hicks v. Kaufman & Broad Home Corp., 89 Cal. App. 4th 908, 107 Cal. Rptr. 2d 761, 772-73 (Ct. App. 2001)* ("If the defect has not manifested itself . . . the buyer has received what he bargained for."). Nissan's argument, however, conflates cases where a defect *causes* an injury, and those, like this one, where the defect itself *is* the injury. As the Court of Appeal has explained, describing the facts of *Anthony v. General Motors Corp., 33 Cal. App. 3d 699, 109 Cal. Rptr. 254 (Ct. App. 1973)*,

> There the plaintiffs did not seek to recover for physical injury or property damage *caused* by the defect in the truck wheels. Rather, they sought to recover the cost of replacing the defective wheels. The primary right alleged to have been violated in *Anthony*, as in the case before us, was the right to take a product free from defect. The defect did not *cause* the plaintiffs' injury; the defect *was* ***[**23]*** the injury.

Hicks, 107 Cal. Rptr. 2d at 771-72.

This distinction is key, and it underscores the fundamental disconnect between Plaintiff's damages theory and Nissan's mischaracterization of what it entails. As we have explained, Plaintiff does not seek damages for the faulty

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sense indicates that it is[.]" *823 F.3d 977, 987 (11th Cir. 2016)* (alteration in original) (quoting ***Collins v. DaimlerChrysler Corp., 894 So. 2d 988, 991 (Fla. Dist. Ct. App. 2004))***. The *Carriuolo* court determined that it confronted a "similar question" that was also "amenable to classwide resolution," explaining that

> a manufacturer's misrepresentation may allow it to command a price premium and to overcharge customers systematically. Even if an individual class member subjectively valued the vehicle equally with or without the accurate [safety information] sticker, she could have suffered a loss in negotiating leverage if a vehicle with perfect safety ratings is worth more on the open market.

Id. The court therefore rejected the defendant's argument that "the liability determination will be highly individualized because the buying and leasing experiences of each proposed class member were not uniform." *Id. at 985*. Instead, the court concluded that "damages should reflect the difference between the market value" of what was promised and what was delivered; "[u]nlike the calculation of an individual consumer's direct pecuniary loss, which would limit the plaintiff to the difference of what she paid and the actual value received, the [applicable] 'benefit of the bargain' model provides a standardized class-wide damages figure because the plaintiff's out-of-pocket payment is immaterial." *Id. at 986*; *see also* *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 856-57 (6th Cir. 2013)* ("Because *all* Duet owners were injured at the point of sale upon paying a premium price for the Duets as designed, even those owners who have not experienced a mold problem are properly included within the certified class.").

performance of the clutch system; such a theory of liability would, pursuant to *Cardinal Health*, *Hicks*, and the district court's analysis, require individualized analysis that might defeat predominance. Instead, Plaintiff's theory is that the allegedly defective clutch is itself the injury, regardless of whether the faulty clutch caused performance issues. Accordingly, Nissan's argument is unavailing.[8]

CONCLUSION

Plaintiff's theory of liability—that Nissan's manufacture and concealment of a defective clutch system injured class members at the time of sale—is consistent with his proposed recovery based on the benefit of the bargain. We conclude that the district court abused its discretion when it denied class certification based on a misconception of Plaintiff's legal theory. We therefore **REVERSE** the district court's denial of class certification and **REMAND** for further proceedings.

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[8] Nissan also argues that the district court's denial of class certification is supported by other grounds in the record, but we observe that at least some of these additional contentions—for example, that Plaintiff's "model misperceives the bargain" because Nissan did not promise that the Class Vehicles were free of defects—are merits arguments, and beyond the scope of our review. *See* *Stockwell v. City and County of San Francisco, 749 F.3d 1107, 1113 (9th Cir. 2014)* ("Under *Rule 23(f)*, the limitation on consideration of the merits to the relevant class certification questions is of jurisdictional significance.").

Admor HVAC Prods. v. Lessary

United States District Court for the District of Hawaii

July 30, 2019, Decided; July 30, 2019, Filed

Civ. No. 19-00068 SOM-KJM

Reporter

2019 U.S. Dist. LEXIS 126744 *; 2019 WL 3430766

ADMOR HVAC PRODUCTS, INC., Plaintiff, vs. ROBERT SONNY LESSARY and HICOUSTIX LLC, Defendants.

Prior History: Admor Hvac Prods. v. Lessary, 2019 U.S. Dist. LEXIS 101595 (D. Haw., June 18, 2019)

Core Terms

Counterclaim, motion to dismiss, allegations, moot, unfair competition, wages, customers, vendors, notice, unfair, countermotion, matters, argues, unfair act, commissions, declaration, judicial notice, converting, preliminary injunction, statutory penalty, misappropriation, notification, consumers, pleadings, practices, failure to pay, competitor, oppression, documents, asserts

LexisNexis® Headnotes

Civil Procedure > Preliminary Considerations > Justiciability > Mootness

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

Civil Procedure > Preliminary Considerations > Justiciability > Ripeness

HN1[] **Justiciability, Mootness**

Mootness and ripeness are properly challenged under Fed. R. Civ. P. 12(b)(1).

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

Civil Procedure > Preliminary Considerations > Jurisdiction > Subject Matter Jurisdiction

HN2[] **Defenses, Demurrers & Objections, Motions to Dismiss**

An attack on subject matter jurisdiction may be facial or factual. A facial attack asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction, while a factual attack disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction. When the challenge is facial, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. In a facial attack on jurisdiction, the court confines the inquiry to allegations in the complaint. In a factual attack on jurisdiction, a court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. In such a challenge, the court need not presume the truthfulness of the plaintiff's allegations. Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.

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

Evidence > Judicial Notice > Adjudicative Facts > Public Records

Civil Procedure > Judgments > Summary Judgment > Motions for Summary Judgment

HN3[] **Motions to Dismiss, Failure to State Claim**

Under *Fed. R. Civ. P. 12(b)(6)*, a complaint may be dismissed for failure to state a claim upon which relief can be granted. The court's review is generally limited to the contents of a complaint. If matters outside the pleadings are considered, the *Fed. R. Civ. P. 12(b)(6)* motion is treated as one for summary judgment. However, the court may take judicial notice of and consider matters of public record without converting a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss into a motion for summary judgment.

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

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

On a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. However, conclusory allegations of law, unwarranted deductions of fact, and unreasonable inferences are insufficient to defeat a motion to dismiss. Dismissal under *Fed. R. Civ. P. 12(b)(6)* may be based on either lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.

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

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

HN5[] **Motions to Dismiss, Failure to State Claim**

To survive a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact). The pleading standard does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. A complaint must state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Immaterial Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Redundant Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Scandalous Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Irrelevant Matters

HN6[] **Motions to Strike, Immaterial Matters**

Under *Fed. R. Civ. P. 12(f)*, the court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter, on its own or upon a motion made by a party. *Fed. R. Civ. P. 12(f)*. Redundant matter is an allegation that includes a needless repetition of other averments or is foreign to the issue. Immaterial matter has no essential or important relationship to the claim for relief or the defenses being pleaded. Impertinent matter consists of statements that do not pertain, and are not necessary, to the issues in question. Scandalous matter improperly casts a derogatory light on someone, most typically on a party to the action. The purpose of *Fed. R. Civ. P. 12(f)* motion is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial. A *Fed. R. Civ. P. 12(f)* motion to strike is a severe measure and is generally viewed with disfavor. Because of this, a motion to strike is not normally granted unless prejudice would result to the movant from the denial of the motion. In considering a motion to strike, the court views the challenged pleadings in the light most favorable to the plaintiffs.

Civil Procedure > Judgments > Summary Judgment > Motions for Summary Judgment

Evidence > Judicial Notice > Adjudicative Facts > Public Records

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

HN7[] **Summary Judgment, Motions for Summary Judgment**

Documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice may be considered without converting the motion to dismiss into a motion for summary judgment. A court may take judicial notice of matters of public record, but it may not take judicial notice of a fact that is subject to reasonable dispute.

Evidence > Judicial Notice > Adjudicative Facts > Public Records

HN8[] **Adjudicative Facts, Public Records**

Typical matters of public record include documents filed with courts and records of government agencies.

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

HN9[] **Motions to Dismiss, Failure to State Claim**

In deciding a *Fed. R. Civ. P. 12(b)(6)* motion, the court's review is generally limited to the complaint, but a court may consider documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice.

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

HN10[] **Motions to Dismiss, Failure to State Claim**

With *Fed. R. Civ. P. 12(b)(6)* motion, declarations can be used to bring materials that are properly considered to the attention of the court. Courts regularly decline to consider declarations and exhibits submitted in support of or opposition to a motion to dismiss if they constitute evidence not referenced in the complaint or not a proper subject of judicial notice.

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

HN11[] **Trade Practices & Unfair Competition, State Regulation**

Haw. Rev. Stat. § 480-2(a) provides that unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful. *Haw. Rev. Stat. § 480-2*, as its federal counterpart in the Federal Trade Commission Act, was constructed in broad language in order to constitute a flexible tool to stop and prevent fraudulent, unfair or deceptive business practices for the protection of both honest consumers and honest businesspersons. Only a consumer, the attorney general or the direct of the office of consumer protection may bring a claim of unfair or deceptive acts or practices. *Haw. Rev. Stat. § 480-2(e)*. However, any person may bring a claim of unfair methods of competition (UMOC) based upon conduct that could also support a claim of unfair or deceptive acts or practices as long as the nature of the competition is sufficiently alleged in the complaint.

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

HN12[] **State Regulation, Claims**

An act is unfair when: [1] it offends established public policy and [2] when the practice is immoral, unethical, oppressive, unscrupulous or [3] substantially injurious to consumers. All three factors need not be alleged to assert that an act is unfair. An unfair act does not require violation of a statute or satisfaction of the elements of an analogous claim. A plaintiff need not prove a claim for tortious interference with prospective business advantage in order to demonstrate a *Haw. Rev. Stat. § 480-2(a)* violation because the evaluation of whether particular, non-statutorily-enumerated conduct is unfair is simply a question of fact that does not require incorporating the elements of an analogous claim.

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

HN13[] **State Regulation, Claims**

The question of whether a practice constitutes an unfair or deceptive trade practice is ordinarily a question of fact.

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

HN14[] **State Regulation, Claims**

The second element of an unfair methods of competition (UMOC) claim requires the plaintiff to demonstrate both an injury in fact to his or her business or property and the nature of competition. The nature of competition element is met by demonstrating how the defendant's conduct negatively affects competition or harms fair competition. The alleged conduct must harm competition itself, not merely a competitor.

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

HN15[] **State Regulation, Claims**

In an unfair competition claim, the elimination of a single competitor, standing alone, does not prove anticompetitive effect. Impact upon the market must be proven.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Actual Controversy

Civil Procedure > Preliminary Considerations > Justiciability > Mootness

HN16[] **Case & Controversy Requirements, Actual Controversy**

The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. A case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted.

Business & Corporate Compliance > ... > Pensions & Benefits Law > ERISA > Civil Penalties

HN17[] **Employee Retirement Income Security Act (ERISA), Civil Penalties**

The notice requirements for continuing health insurance coverage are set forth in *29 U.S.C.S. § 1166*, and, with respect to those requirements, ERISA provides that any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of *section 1166* of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. *29 U.S.C.S. § 1132(c)(1)*. *29 C.F.R. § 2575.502c-1* increases the maximum statutory penalty from $100 per day to $110 per day for violations occurring after July 29, 1997.

Business & Corporate Compliance > ... > Pensions & Benefits Law > ERISA > Civil Penalties

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN18[] **Employee Retirement Income Security Act (ERISA), Civil Penalties**

Whether to impose statutory penalties under *29 U.S.C.S. § 1132* and the amount of those penalties (up to $110 a day) is discretionary. Appropriate factors to be considered include: [1] bad faith or intentional misconduct on the part of the administrator, [2] the length of the delay, [3] the number of requests made and documents withheld, and [4] the existence of any prejudice to the participant or beneficiary. None of these factors is dispositive. The absence or presence of one or even multiple factors is not dispositive. *29 U.S.C.S. § 1132* penalties are meant to be in the nature of punitive damages, designed more for the purpose of punishing the violator than compensating the participant or beneficiary.

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For HICOUSTIX LLC, Robert Sonny Lessary, aka Sonny Lessary, Counter Claimants: Andrea Lux Miyashita, LEAD ATTORNEY, Marr Jones & Wang, Honolulu, HI; Darin Robinson Leong, LEAD ATTORNEY, Law Office of Darin R. Leong LLLC, Honolulu, HI.

Judges: Susan Oki Mollway, United States District Judge.

Opinion by: Susan Oki Mollway

Opinion

ORDER (1) GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM AND (2) GRANTING IN PART AND DENYING IN PART DEFENDANTS' COUNTERMOTION TO STRIKE

I. INTRODUCTION.

Defendants Robert Sonny Lessary and Hicoustix LLC began competing for business with Plaintiff Admor HVAC Products, Inc., while Lessary was an Admor employee. No longer employed by Admor, Lessary and his company, Hicoustix, remain in competition **[*2]** with Admor, which has sued them. Defendants have counterclaimed.

Before the court are Admor's motion to dismiss the Counterclaim, and Defendants' countermotion to strike certain matters raised in Admor's motion to dismiss. ECF Nos. 55, 67.

ORDER (1) GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM AND (2) GRANTING IN PART AND DENYING IN PART DEFENDANTS' COUNTERMOTION TO STRIKE

Defendants' Counterclaim asserts three claims against Admor: (1) unfair competition in violation of *section 480-2 of Hawaii Revised Statutes*, (2) failure to pay commissions/wages pursuant to *chapter 388 of Hawaii Revised Statutes*, and (3) violation of the notice requirements in the *Consolidated Omnibus Budget Reconciliation Act ("COBRA")*. ECF No. 24-1. Admor argues that Defendants' unfair competition claim fails as a matter of law and that their remaining two claims are moot.

Defendants' countermotion argues that Admor's motion to dismiss presents matters outside the pleadings and should be stricken.

The court grants in part and denies in part Defendants' countermotion to strike and excludes certain matters from its consideration of Admor's motion to dismiss.

Defendants have not alleged sufficient facts to state a claim of unfair competition or for statutory damages **[*3]** under COBRA. However, Admor has not established that Defendants' claim for failure to pay is moot. The court therefore grants Admor's motion to dismiss in part, dismisses the unfair competition and COBRA notification claims, and grants Defendants leave to amend the Counterclaim.

II. BACKGROUND.

Admor alleges that Lessary, while an Admor salesperson, began soliciting business for Hicoustix, an Admor competitor, and misappropriated Admor's trade secrets. Admor filed its Complaint against Defendants on February 8, 2019, asserting nine claims: (1) violation of the *Defend Trade Secrets Act, 18 U.S.C. § 1836*; (2) violation of the *Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962*; (3) breach of the duty of loyalty; (4) unfair competition under *15 U.S.C. § 1125(a)*; (5) unfair competition under *section 480-2 of Hawaii Revised Statutes*; (6) tortious interference with prospective business advantage; (7) tortious interference with business relations; (8) conversion; and (9) unjust enrichment. ECF No. 1.

The Complaint seeks several forms of relief, including the "[e]ntry of preliminary and permanent injunctions (1) prohibiting Sonny and Hicoustix from working with any of Admor's customers; (2) prohibiting Sonny and Hicoustix from working with any of Admor's vendors; (3) **[*4]** prohibiting anyone acting in concert with Defendants from working with Admor's customers and vendors; (4) preventing any further use or disclosure of the Trade Secrets by Defendants; (5) preventing Sonny and Hicoustix from using Admor's name, symbols, and logos in association with Hicoustix or any other company, and (6) preventing Defendants from otherwise unfairly competing with Admor." *Id.*, PageID # 40. The Complaint states that Admor has "approximately 2042 active customer/contractors" and "423 vendors." *Id.* at 8-9.

Admor moved for a preliminary injunction "[p]reserving the status quo by preventing Defendants from servicing any and all entities and individuals who were Admor customers and vendors as of April 1, 2018." ECF No. 10, PageID # 60.

On April 5, 2019, Defendants filed a Counterclaim against Admor. ECF No. 24-1. Defendants allege that Lessary had no contractual agreement with Admor containing noncompete, nonsolicitation, or nonacceptance-of-business provisions, and that, while at Admor, Lessary did no work with at least 1,900 of Admor's 2,042 customers or with 400 of Admor's 423 vendors. *Id.*, PageID #s 431-35. The Counterclaim argues that Admor violated *section 480-2 of Hawaii Revised Statutes* by seeking to prohibit Defendants **[*5]** from working with customers and vendors with whom Lessary had done no business and had not engaged in any inappropriate conduct. *Id.* at 435-40. The Counterclaim further asserts a claim for failure to pay Lessary's full commissions and wages and a claim for failure to provide Lessary with COBRA information following his termination from Admor. *Id.* at 440-45.

An evidentiary hearing on Admor's motion for preliminary injunction was held on April 16, 2019.

On April 26, 2019, Admor filed its motion to dismiss the Counterclaim. ECF No. 55. On June 10, 2019, Defendants filed their countermotion to strike along with their opposition to Admor's motion to dismiss. ECF No. 67.

The court issued its Findings of Fact, Conclusions of Law, and Order on June 18, 2019, denying Admor's preliminary injunction motion. ECF No. 69.

III. STANDARDS OF REVIEW.

A. *Rule 12(b)(1)* Motion To Dismiss For Lack Of Subject Matter Jurisdiction.

Admor's motion to dismiss is brought under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. However, Admor raises the issue of mootness, which is a matter of subject matter jurisdiction properly considered under *Rule 12(b)(1)*. *See* *Gemtel Corp. v. Cmty. Redev. Agency, 23 F.3d 1542, 1544, 1544 n.1 (9th Cir. 1994)*; *see also* *Bland v. Fessler, 88 F.3d 729, 732 n.4 (9th Cir. 1996)* (citing *Gemtel* for the principle that ***HN1***[] "mootness and ripeness [are] properly challenged under *Rule 12(b)(1)*"). Therefore, the court treats Admor's motion **[*6]** as having been brought in part under *Rule 12(b)(1)*, which governs dismissal for lack of subject matter jurisdiction.

HN2[] An attack on subject matter jurisdiction "may be facial or factual." *Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)*. A facial attack asserts that "the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction[,]" while a factual attack "disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.*

When the challenge is facial, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Fed'n of African Am. Contractors v. City of Oakland, 96 F.3d 1204, 1207 (9th Cir. 1996)*. In a facial attack on jurisdiction, the court "confin[es] the inquiry to allegations in the complaint." *Savage v. Glendale Union High Sch., Dist. No. 205, Maricopa Cty., 343 F.3d 1036, 1040 n.2 (9th Cir. 2003)*.

Before this court is a factual attack. In a factual attack on jurisdiction, a court "may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Wood v. City of San Diego, 678 F.3d 1075, 1083 n.8 (9th Cir. 2012)* (quoting *Meyer, 373 F.3d at 1039*). In such a challenge, "[t]he court need not presume the truthfulness of the plaintiff's allegations." *Id.* "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the **[*7]** motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Savage, 343 F.3d at 1039 n.2*.

B. *Rule 12(b)(6)* Motion To Dismiss For Failure To State A Claim.

HN3[] Under *Rule 12(b)(6)*, a complaint may be dismissed for failure to state a claim upon which relief can be granted. The court's review is generally limited to the contents of a complaint. *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)*; *Campanelli v. Bockrath, 100 F.3d 1476, 1479 (9th Cir. 1996)*. If matters outside the pleadings are considered, the *Rule 12(b)(6)* motion is treated as one for summary judgment. *Keams v. Tempe Tech. Inst., Inc., 110 F.3d 44, 46 (9th Cir. 1997)*; *Anderson v. Angelone, 86 F.3d 932, 934 (9th Cir. 1996)*. However, the court may take judicial notice of and consider matters of public record without converting a *Rule 12(b)(6)* motion to dismiss into a motion for summary judgment. *Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)*; *Emrich v. Touche Ross & Co., 846 F.2d 1190, 1198 (9th Cir. 1988)*.

HN4[] On a *Rule 12(b)(6)* motion to dismiss, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Fed'n of African Am. Contractors, 96 F.3d at 1207*. However, conclusory allegations of law, unwarranted deductions of fact, and unreasonable inferences are insufficient to defeat a motion to dismiss. *Sprewell, 266 F.3d at 988*; *In re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996)*. Dismissal under *Rule 12(b)(6)* may be based on either "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988)* (citing *Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th Cir. 1984))*.

HN5[] To survive a *Rule 12(b)(6)* motion to dismiss, "[f]actual allegations must be enough to raise a right to relief above the speculative **[*8]** level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (citations omitted); *accord* *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* ("[T]he pleading standard . . . does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." (internal quotation marks omitted)). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555* (internal quotation marks omitted). A complaint must "state a claim to relief that is plausible on its face." *Id. at 570*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*.

C. *Rule 12(f)* Motion To Strike.

HN6[] Under *Rule 12(f)*, the "court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter," on its own or upon a motion made by a party. *Fed. R. Civ. P. 12(f)*.

Redundant matter is an allegation that includes a "needless repetition of other averments or [is] foreign to the issue." *Sligher v. Prospect Mortg., LLC, 789 F. Supp. 2d 1212, 1216 (E.D. Cal. 2011)* (citations omitted); *see also* *Walker-Cook v. Integrated Health Res., LLC, Civ. No. 12-00146 ACK-RLP, 2012 U.S. Dist. LEXIS 137179, 2012 WL 4461159, at *1-2 (D. Haw. Aug. 10, 2012)* **[*9]** . Immaterial matter has "no essential or important relationship to the claim for relief or the defenses being pleaded." *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993) (citations omitted), *rev'd on other grounds*, 510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994). Impertinent matter "consists of statements that do not pertain, and are not necessary, to the issues in question." *Id.* Scandalous matter "improperly casts a derogatory light on someone, most typically on a party to the action." *Guerrero v. Halliburton Energy Servs., Inc., 231 F. Supp. 3d 797, 802 (E.D. Cal. 2017)* (quoting *Germaine Music v. Universal Songs of Polygram, 275 F. Supp. 2d 1288, 1300 (D. Nev. 2003))*. The purpose of a *Rule 12(f)* motion is to "avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983)*. A *Rule 12(f)* motion to strike is a "severe measure and is generally viewed with disfavor." *United States v. 729.773 Acres of Land, 531 F. Supp. 967, 971 (D. Haw. 1982)*; *see also* *Sky-Med, Inc. v. Skydiving Sch., Inc., Civ. No. 13-00193 DKW/BMK, 2014 U.S. Dist. LEXIS 5901, 2014 WL 198801, at *2 (D. Haw. Jan. 16, 2014)*. Because of this, a motion to strike is "not normally granted unless prejudice would result to the movant from the denial of the motion." *729.773 Acres of Land, 531 F. Supp. at 971*. In considering a motion to strike, the court "views the challenged pleadings in the light most favorable to the plaintiffs." *Wailua Assocs. v. Aetna Cas. & Sur. Co., 183 F.R.D. 550, 554 (D. Haw. 1998)* (citing *Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1301 (9th Cir. 1992))*.

IV. ANALYSIS.

A. Defendants' Countermotion To Strike.

Defendants' countermotion seeks to the strike the following matters included **[*10]** in Admor's motion to dismiss:

- Reference to: https://dqydj.com/ income-percentile-calculator/;
- References to exhibits that were made part of the record during the evidentiary hearing on Plaintiff's Motion for Preliminary Injunction that was heard April 16, 2019;
- References to the declarations of Mr. Lessary, Drew Santos, Rogene Gaspar; and
- Declaration of Mark G. Valencia [part of ECF No. 55] and Exhibit "A" attached thereto [ECF No. 55-1].

ECF No. 67, PageID # 1285. Defendants argue that these matters are outside the pleadings, are immaterial, and should not be considered by the court in deciding Admor's motion to dismiss. *Id.* at 1284-85. Concluding that the matters should not be considered in deciding a *Rule 12(b)(6)* motion, the court grants in part Defendants' countermotion to strike. However, because the court may properly consider evidence beyond the complaint under *Rule 12(b)(1)* when deciding whether an issue is moot, the court denies the countermotion with respect to evidence relevant to Admor's mootness arguments.

1. Online "Income Percentile Calculator."

Admor cited a website as support for the following sentence in its motion to dismiss: "This case involves an employee, Defendant Robert Sonny Lessary, who was unsatisfied **[*11]** with earning more than $200,000 in annual compensation, or more than about 97 percent of all working Americans." ECF No. 55, PageID # 1017. The website is a personal finance and investing blog called "DQYDJ," and the web page referenced by Admor is titled "Income Percentile Calculator for the United States in 2018." *See* PK, *Income Percentile Calculator for the United States in 2018*, DQYDJ, https://dqydj.com/income-percentile-calculator (last visited Jul. 26, 2019). Lessary's income percentile has "no essential or important relationship" to any arguments in Admor's motion to dismiss and the relief sought therein. *See Fantasy*, 984 F.2d at 1527. The court strikes the website as immaterial to the motion to dismiss.

Admor requests that the court take judicial notice of the website as a "matter of public record." ECF No. 68, PageID # 1296. ***HN7***[] "[D]ocuments attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice" may be considered "without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003)* (citations omitted). A court "may take judicial notice of 'matters of public record,'" but it "may not take judicial notice of a fact that is 'subject to reasonable **[*12]** dispute.'" *Lee, 250 F.3d at 689* (quoting *MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986)*; *Fed. R. Evid. 201(b)*).

HN8[] Typical matters of public record include documents filed with courts and records of government agencies. *See Dent v. Holder, 627 F.3d 365, 371-72 (9th Cir. 2010)*; *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992)*. This web page was written by "PK," who describes himself as someone who "founded DQYDJ in 2009 to educate and learn from others in finance and investing. By day he writes prose and code in Silicon Valley." This description does not convince the court that the website is akin to court documents or government records. The information on the website is subject to reasonable dispute, and the court declines to take judicial notice of it.

2. Evidence from the Hearing on Admor's Motion for Preliminary Injunction.

In its arguments under *Rule 12(b)(6)*, Admor references exhibits and declarations that were submitted as evidence during the evidentiary hearing on Admor's motion for preliminary injunction on April 16, 2019. *See, e.g.*, ECF No. 55, PageID #s 1018-20. As stated above, ***HN9***[] in deciding a *Rule 12(b)(6)* motion, the court's review is generally limited to the complaint, but a court may consider documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice. Evidence from the April 16 evidentiary hearing does not fall into any **[*13]** of these categories and therefore will not be considered. The Counterclaim references Admor's motion for preliminary injunction, but does not reference any exhibits or declarations submitted in support of that motion.

Admor states that "the Court may consider matters outside of the pleadings, convert the Motion to Dismiss to one for summary judgment, provide Lessary with a reasonable opportunity to submit evidence showing past commissions were not in fact paid, the COBRA notice has not in fact been provided, Lessary has in fact suffered out-of-pocket losses as a result of the COBRA notice, and that lack of notice was intentional." ECF No. 68, PageID # 1297. It is unclear whether Admor is requesting that the court convert its motion to dismiss into a motion for summary judgment or merely reminding the court that it has the ability to do so.

The court sees no reason to convert Admor's motion to dismiss into one for summary judgment. Admor argues that, under *Rule 12(b)(6)*, the Counterclaim fails to state a claim upon which can be granted. Evidence from subsequent proceedings is unnecessary for the court to determine whether or not the Counterclaim states a claim. Moreover, Admor is free to file a motion **[*14]** for summary judgment if it so chooses. The court notes that the deadline for the filing of dispositive motions is November 6, 2019, which is several months from now. ECF No. 27, PageID # 454.

3. Declaration of Mark G. Valencia and the Attached Exhibit.

Admor attaches to its motion a declaration of its counsel. ECF No. 55. The declaration attaches Exhibit A, which is a letter dated April 25, 2019, from Admor's counsel to Defendants' counsel. ECF No. 55-1. The letter discusses Defendants' claims that Admor failed to pay Lessary commissions and wages and that Admor violated COBRA notice requirements.

HN10[] With a *Rule 12(b)(6)* motion, "[d]eclarations can be used to bring materials that are properly considered to the attention of the court." *Gerritsen v. Warner Bros. Entm't Inc., 112 F. Supp. 3d 1011, 1020 (C.D. Cal. 2015)* (citing *In re Silicon Graphics, Inc. Sec. Litig., 970 F. Supp. 746, 758-59 (N.D. Cal. 1997))*. However, courts "regularly decline to consider declarations and exhibits submitted in support of or opposition to a motion to dismiss . . . if they constitute evidence not referenced in the complaint or not a proper subject of judicial notice." *Id. at 1021* (citing *City of Royal Oak Ret. Sys. v. Juniper Networks, Inc., 880 F. Supp. 2d 1045, 1060 (N.D. Cal. 2012))* (other citations omitted). The declaration and exhibit attached to Admor's motion to dismiss were not referenced in the Counterclaim and are not "matters of public record" to be judicially noticed. The court **[*15]** declines to consider these attachments with respect to Admor's *Rule 12(b)(6)* arguments.

However, the declaration and exhibit are directly relevant to Admor's mootness arguments under *Rule 12(b)(1)*. Admor argues that Defendants' claims of failure to pay and insufficient COBRA notification have become moot, as evidenced by the letter. ECF No. 55, PageID #s 1028-31. In addressing a factual attack on jurisdiction under *Rule 12(b)(1)*, a court "may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Wood, 678 F.3d at 1083 n.8*. Therefore, the court considers these attachments in determining whether Defendants' failure to pay and COBRA notification claims are moot.

B. Admor's Motion To Dismiss.

1. Count I: Unfair Competition.

In Count I of the Counterclaim, Defendants assert a claim of unfair competition under *section 480-2 of Hawaii Revised Statutes.* ECF No. 24-1, PageID # 435. Admor's Complaint seeks to prohibit Defendants from working with all of Admor's customers and vendors. Admor argues that Defendants' unfair competition claim fails as a matter of law because "the mere act of filing the Verified Complaint and seeking relief allowed by law" is not unfair competition. *See* ECF No. 55, PageID # 1021.

HN11[] *Section 480-2(a)* provides that "[u]nfair methods **[*16]** of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." The Hawaii Supreme Court has explained that "*HRS § 480-2*, as its federal counterpart in the *[Federal Trade Commission] Act*, was constructed in broad language in order to constitute a flexible tool to stop and prevent fraudulent, unfair or deceptive business practices for the protection of both honest consumers and honest businesspersons." *Haw. Comm. Fed. Credit Union v. Keka, 94 Haw. 213, 228, 11 P.3d 1, 16 (2000)* (citation and alteration omitted)). Only "a consumer, the attorney general or the direct of the office of consumer protection" may bring a claim of unfair or deceptive acts or practices. *HRS § 480-2(e)*. However, "any person may bring a claim of unfair methods of competition [("UMOC")] based upon conduct that could also support a claim of unfair or deceptive acts or practices as long as the nature of the competition is sufficiently alleged in the complaint." *Haw. Med. Ass'n v. Haw. Med. Serv. Ass'n, Inc., 113 Haw. 77, 113, 148 P.3d 1179, 1215 (2006)*.

Defendants bring a UMOC claim, which requires proof of "(1) a violation of HRS Chapter 480; (2) an injury to the plaintiff's business or property that flows from the defendant's conduct that negatively affects competition or harms fair competition; and (3) proof of damages." *Field, Tr. Of Estate Of Aloha Sports Inc. v. Nat. Collegiate Athletic Ass'n, 143 Haw. 362, 372, 431 P.3d 735, 745 (2018)* (citing *Gurrobat v. HTH Corp., 133 Haw. 1, 21, 323 P.3d 792, 812 (2014))*.

Admor's arguments go to **[*17]** the first two elements. The court concludes that Defendants sufficiently plead the first element, but not the second.

a. Unfair Act.

The first element of a UMOC claim requires proof of an unfair or deceptive act, and Defendants argue that Admor committed an unfair act. *See* ECF No. 67, PageID #s 1275-76. ***HN12***[] An act is unfair when "[1] it offends established public policy and [2] when the practice is immoral, unethical, oppressive, unscrupulous or [3] substantially injurious to consumers." *Hungate v. Law Office of David B. Rosen, 139 Haw. 394, 411, 391 P.3d 1, 18 (2017)* (quoting *Keka, 94 Haw. at 228, 11 P.3d at 16*) (alterations in original). All three factors need not be alleged to assert that an act is unfair. *See id.* ("Hungate need not allege that Deutsche Bank's actions meet all three of these factors to assert an unfair act or practice."). An unfair act does not require violation of a statute or satisfaction of the elements of an analogous claim. *See* *Field, 143 Haw. at 373, 431 P.3d at 746* (concluding that plaintiff need not "prove a claim for tortious interference with prospective business advantage in order to demonstrate a *HRS § 480-2(a)* violation" because "the evaluation of whether particular, non-statutorily-enumerated conduct is unfair is simply a question of fact that does not require incorporating the elements of an analogous claim").

Admor argues **[*18]** that the Counterclaim does not plead an unfair or deceptive act because Admor's Complaint "credibly accuses [Defendants] of trade secret misappropriation, breach of the duty of loyalty, and unfair competition," and Admor was permitted to seek an injunction of Defendants' unlawful practices. *See* ECF No. 55, PageID #s 1023-26. Admor is correct that its unfair competition and trade misappropriation claims against Defendants allow for injunctive relief. *Section 480-13(a)(2) of Hawaii Revised Statutes* provides that "any person who is injured in the person's business or property by reason of anything forbidden or declared unlawful by this chapter . . . [m]ay bring proceedings to enjoin the unlawful practices[.]" *HRS § 480-13(a)(2)*. The Defend Trade Secrets Act provides, "In a civil action brought under this subsection with respect to the misappropriation of a trade secret, a court may . . . grant an injunction . . . to prevent any action or threatened misappropriation . . . [.]" *18 U.S.C. § 1836(b)(3)(A)(i)*.

However, Defendants are not alleging that Admor committed an unfair act by filing claims and seeking to prevent Defendants from engaging in unlawful practices or misappropriation. The Counterclaim more narrowly alleges that, at the time the Complaint was filed, Admor (1) knew **[*19]** that Lessary had not conducted any business with 1,900 of Admor's 2,042 customers and 400 of Admor's 423 vendors, (2) was unaware of whether Lessary had misappropriated or engaged in inappropriate conduct with any of those customers and vendors, and (3) believed that preventing Lessary from working with 2,042 customers and 423 vendors would limit Defendants' ability to compete with Admor. *See* ECF No. 24-1, PageID #s 435-36. The Counterclaim further alleges that there was no noncompete, nonsolicitation, or nonacceptance-of-business contract in place. *See id.* at 431-32. In other words, Defendants allege that Admor attempted to limit competition by prohibiting Defendants from *lawfully* doing business with over 2,000 customers and vendors.[1]

There does not appear to be Hawaii case law directly addressing the issues presented here. Defendants argue that Admor's actions offend public policy because the Hawaii Legislature, through the passage of *chapter 480 of Hawaii Revised Statutes*, "has recognized a strong public policy in favor of competition." ECF No. 67, PageID # 1278 (quoting *Cieri v. Leticia Query Realty, Inc., 80 Haw. 54, 59, 905 P.2d 29, 34 (1995)* ("The genesis of Hawai'i's consumer protection statute is in federal ***antitrust law***. Although the federal arsenal of antitrust laws is comprised of several differently **[*20]** worded statutes of varying scope that have generated volumes of case law, *all of the acts have a common focus on trade, commerce, and business, and all share a concern for the preservation of unrestrained economic competition and free trade*." (emphasis added))). Defendants also argue that Admor's actions "have been substantially injurious to consumers because they have caused Mr. Lessary to refrain from expanding Hi[]coustix's business, thereby limiting the pool of providers from whom consumers may obtain products." *Id.* at 1280.

Importantly, ***HN13***[] "the question of whether a practice constitutes an unfair or deceptive trade practice is ordinarily a question of fact." *Hungate, 139 Haw. at 410, 391 P.3d at 17* (quoting *Balthazar v. Verizon Haw., Inc., 109 Haw. 69, 72 n.4, 123 P.3d 194, 197 n.4 (2005)*). It is therefore up to the fact-finder to determine whether Admor committed an unfair act by seeking to prohibit Defendants from working with customers and vendors with whom Defendants never did business and never did anything unlawful. Defendants' unfair competition claim does not fail to allege an unfair act as a matter of law.

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[1] Admor states that "the request for injunctive relief has been limited to precluding Defendants from serving contractors and vendors that were actually misappropriated. This was based on information learned after the Complaint and Motion for Preliminary Injunction were filed." ECF No. 55, PageID # 1027. Admor narrowed the scope of its requested preliminary injunction in its Proposed Findings of Fact and Conclusions of Law for the preliminary injunction proceedings. However, Admor has not amended its Complaint. Therefore, the scope of the permanent injunction sought in the Complaint remains unchanged.

Defendants also argue that "'an unfair act' is committed whenever 'the unfair method is being employed under circumstances which involved flagrant oppression of the weak by the strong,'" and Admor, a large **[*21]** company, has flagrantly oppressed Lessary, an individual. ECF No. 67, PageID #s 1276-77 (quoting *Cunha v. Ward Foods, Inc., 804 F.2d 1418, 1433 (9th Cir. 1986))*. The "flagrant oppression" standard does not appear to apply to the first element of a UMOC claim. *Cunha* quoted *Ailetcher v. Beneficial Finance Company of Hawaii, 2 Haw. App. 301, 632 P.2d 1071 (1981)*, which was abrogated by *Hac v. University of Hawai'i, 102 Haw. 92, 73 P.3d 46 (2003)*. *Ailetcher* had quoted *Ai v. Frank Huff Agency, Ltd., 61 Haw. 607, 607 P.2d 1304 (1980)*, which was overruled by *Robert's Hawaii School Bus, Inc. v. Laupahoehoe Transportation Company, Inc., 91 Haw. 224, 982 P.2d 853 (1999)*, which, in turn, was superseded by statute.

In *Ai v. Frank Huff Agency, Ltd.*, the Hawaii Supreme Court applied the "flagrant oppression" standard to determine whether plaintiffs had standing to sue for damages under the "public interest requirement" in *section 480-13 of Hawaii Revised Statutes.* *See* *61 Haw. at 614-15, 607 P.2d at 1309*. *Section 480-13* has since been amended, and no longer includes the public interest requirement. *See* *HRS § 480-13*; *Davis v. Four Seasons Hotel Ltd., 122 Haw. 423, 441, 228 P.3d 303, 321 (2010)* (explaining that *Ai* addressed the "now-repealed public interest requirement"). The Hawaii Supreme Court has not mentioned the "flagrant oppression" standard in its recent cases analyzing the first element of a UMOC claim. *See, e.g.,* *Field, 143 Haw. at 373, 431 P.3d at 746*; *Hungate, 139 Haw. at 410-11, 391 P.3d at 17-18*. In any event, because this court concludes that Defendants sufficiently allege an unfair act, the court need not decide this issue.

b. Nature of Competition.

HN14[] The second element of a UMOC claim requires the plaintiff to demonstrate both "an injury in fact to his or her business or property" and the "nature of competition." *Field, 143 Haw. at 372-73, 431 P.3d at 745-46* (citing *Gurrobat v. HTH Corp., 133 Haw. 1, 21, 323 P.3d 792, 812 (2014))* **[*22]** . The nature of competition element is met "by demonstrating how the defendant's conduct negatively affects competition or harms fair competition." *Id. at 373, 431 P.3d at 746* (citation omitted). The alleged conduct must harm "competition itself, not merely a competitor." *Sky-Med, Inc. v. Skydiving Sch., Inc., Civ. No. 13-00193 DKW/BMK, 2014 WL 12600271, at *3 (D. Haw. May 1, 2014)*.

Admor argues that, although Defendants have alleged harm to themselves, they have not alleged sufficient facts going to the nature of competition. ECF No. 55, PageID #s 1026-28. According to Admor, the Counterclaim's only allegation going to the nature of competition is the following:

> 70. Admor's actions have reduced competition in the market by limiting Mr. Lessary's and Hicoustix's ability to compete.

Id. at 1027 (citing ECF No. 24-1, PageID # 439).

Admor ignores several other factual allegations in the Counterclaim. The Counterclaim alleges that Admor's actions have caused Defendants to refrain from expanding their product offerings and from obtaining warehouse space, and have prevented Defendants from being able to stock and sell various products. ECF No. 24-1, PageID # 439. The Counterclaim goes on to allege that "[a]s a result of Admor's actions," "Mr. Lessary has greatly limited the amount of sales of Service Partners products, which generally require stock in a warehouse space," and "contractors have refrained **[*23]** from conducting business with Mr. Lessary and Hicoustix." *Id.* at 440.

Whether these allegations are sufficient to allege the nature of competition is a close call. Although the Counterclaim can be fairly read as alleging that the contractors and vendors that work with Hicoustix were harmed by Admor's conduct, it is unclear whether harm to customers alone can satisfy the nature of competition element. Other courts have focused on the presence of other competitors in the market when determining whether conduct has harmed competition. *See* *Sky-Med, 2014 WL 12600271, at *2* ("Although Plaintiff alleges that Defendant's goal is to put Plaintiff out of business, the elimination of a single competitor does not establish anticompetitive effect."); *GSI Tech. v. United Memories, Inc., Case No. 5:13-cv-01081-PSG, 2014 U.S. Dist. LEXIS 54371, 2014 WL 1572358, at *3 (N.D. Cal. Apr. 18, 2014)* (***HN15***[] "[T]he elimination of a single competitor, standing alone, does not prove anticompetitive effect. Impact upon the market must be proven." (quoting *Kaplan v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir. 1979)))*.

The Counterclaim does not describe Hicoustix's or Admor's competitors or the nature of the market affected. At the hearing on July 1, 2019, Defendants' counsel explained that, given the limited market for the products sold by Admor and Hicoustix, the elimination of Hicoustix would essentially **[*24]** create a monopoly for Admor. This court cannot glean that from the Counterclaim, and Defendants' counsel conceded at the hearing that that allegation was not set forth in the Counterclaim. As a result, the court dismisses Defendants' unfair competition claim, but grants leave to amend to provide additional facts regarding the nature of competition.

2. Count II: Failure to Pay Wages/Commissions.

Count II of the Counterclaim asserts a claim under *chapter 388 of Hawaii Revised Statutes* based on Admor's alleged failure to pay Lessary the full amount of wages and commissions that he was due. ECF No. 24-1, PageID #s 440-42. The Counterclaim alleges that "Admor has failed to pay commissions/wages to Mr. Lessary in excess of $16,000," and that "[p]ursuant to *Haw. Rev. Stat. § 388-10*, Admor is liable to Mr. Lessary 'in addition to the wages legally proven to be due, for a sum equal to the amount of unpaid wages and interest at a rate of six per cent per year from the date that the wages were due.'" *Id.* at 442 (quoting *HRS § 388-10(a)(1)*).

Admor argues that this claim is moot because, after receiving the Counterclaim, "Admor reviewed Sonny's commission schedule, made a correction, and delivered a check for the full amount of his commissions." ECF No. 55, PageID # 1028. In the letter **[*25]** accompanying the check, Admor stated that it had "determined that an unintentional error was made in the calculation of Mr. Lessary's commissions," and enclosed "a check payable to Mr. Lessary in the amount of $18,886.90, along with the supporting calculations." ECF No. 55-1, PageID # 1036.

HN16[] "The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel v. Thompson, 415 U.S. 452, 459 n.10, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974)*. A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt, 455 U.S. 478, 481, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (1982)* (quoting *U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 396, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980)*. "The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted." *Bayer v. Neiman Marcus Group, Inc., 861 F.3d 853, (9th Cir. 2017)* (quoting *Ruiz v. City of Santa Maria, 160 F.3d 543, 549 (9th Cir. 1998))*.

Even if Admor paid Lessary the amount owed to him, effective relief may still be granted. *Section 388-10(a) of Hawaii Revised Statutes* provides:

> (a) Civil. Any employer who fails to pay wages in accordance with this chapter without equitable justification or violates this chapter or the administrative rules adopted under this chapter shall be liable:
>
> > (1) To the employee, in addition to the wages legally proven to be due, for a sum equal to the amount of unpaid wages and interest at a rate of six per cent per year **[*26]** from the date that the wages were due; and
> > (2) For a penalty of not less than $500 or $100 for each violation, whichever is greater. The penalty shall be deposited into the labor law enforcement special fund.

In addition to the wages due, Lessary may be entitled to additional damages such as interest. Thus, the claim that Admor failed to pay Lessary commission and wages under *chapter 388 of Hawaii Revised Statutes* is not moot.

3. Count III: Violation of COBRA's Notice Requirements.

Finally, Count III asserts a claim against Admor under COBRA based on Admor's alleged failure to "provide Mr. Lessary with any COBRA paperwork or information following his termination." ECF No. 24-1, PageID #s 442-43.

The Counterclaim alleges that "Admor is liable to Mr. Lessary and each of his three minor children pursuant to [the *Employment Retirement Income Security Act ("ERISA")], 29 U.S.C. § 1132(c)(1)(A)*, *29 U.S.C. § 1166* and *29 C.F.R. § 2575.502c-1* for civil penalties of $110 per day, per person, for each day that Admor failed to provide each participant and beneficiary with notice of their right to elect continuing coverage pursuant to . . . *29 U.S.C. § 1161(a)*." ECF No. 24-1, PageID # 445.

Admor argues that this claim is moot, that the Counterclaim fails to allege facts going to Lessary's mental anguish, and **[*27]** that Lessary lacks standing over the claims of his children. ECF No. 55, PageID #s 1029-31.

At the hearing on July 1, 2019, Defendants' counsel conceded several aspects of the COBRA notification claim. Defendants' counsel explained that Defendants now seek only statutory penalties, and no longer seek damages for medical expenses or mental anguish. Defendants also concede that Lessary lacks standing over his children's claims.

The court concludes that the claim is not moot, but that the Counterclaim fails to alleged sufficient facts going to Defendants' claim for statutory penalties.

a. Mootness.

Admor argues that Defendants' COBRA claim is moot because "Admor has agreed to pay for any unpaid medical expenses incurred due to the failure to receive a timely COBRA notice." ECF No. 55, PageID # 1029. In support, Admor cites the letter dated April 25, 2019, from Admor's counsel to Defendants' counsel, which states that "Kaiser has recently sent a COBRA notice to Mr. Lessary[,] and Admor intends to pay any medical expenses incurred by Mr. Lessary as a result of not previously receiving the COBRA notice." ECF No. 55-1, PageID # 1036.

Relief may still be granted on Defendants' COBRA claim. ***HN17***[] The **[*28]** notice requirements for continuing health insurance coverage are set forth in *29 U.S.C. § 1166*, and, with respect to those requirements, ERISA provides:

> Any administrator (A) who fails to meet the requirements of *paragraph (1)* or *(4) of section 1166* of this title . . . with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request *may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper*.

29 U.S.C. § 1132(c)(1) (emphasis added); *see also* *29 C.F.R. § 2575.502c-1* (increasing the maximum statutory penalty from $100 per day to $110 per day for violations occurring after July 29, 1997). At this stage in the proceedings, the court cannot determine whether an award of these statutory penalties is warranted **[*29]** and, if so, what the amount of such penalties should be. As a result, this claim is not moot.

b. Statutory Penalties.

HN18[] "Whether to impose statutory penalties [under *§ 1132*] and the amount of those penalties (up to $110 a day) is discretionary." *Hemphill v. Estate of Ryskamp, 619 F. Supp. 2d 954, 975 (E.D. Cal. 2008)*. "Appropriate factors to be considered include [1] bad faith or intentional misconduct on the part of the administrator, [2] the length of the delay, [3] the number of requests made and documents withheld, and [4] the existence of any prejudice to the participant or beneficiary." *Moon v. Rush, 69 F. Supp. 3d 1035, 1046 (E.D. Cal. 2014)* (quoting *Hemphill, 619 F. Supp. 2d at 967*) (modification omitted). None of these factors is dispositive. *Honey v. Dignity Health, 27 F. Supp. 3d 1113, 1124 (D. Nev. 2014)* ("The absence or presence of one or even multiple factors is not dispositive.").

"*Section 1132* penalties are 'meant to be in the nature of punitive damages, designed more for the purpose of punishing the violator than compensating the participant or beneficiary.'" *Moon, 69 F. Supp. 3d at 1046* (quoting *Scott v. Suncoast Beverage Sales, Ltd., 295 F.3d 1223, 1232 (11th Cir. 2002))*.

The Counterclaim does not allege that Admor's conduct stemmed from bad faith or intentional misconduct. The Counterclaim states that "Mr. Lessary, individually and/or through his legal counsel, requested COBRA paperwork or information following his termination," and that "[t]o date, Admor has failed to provide the requested COBRA paperwork or **[*30]** information despite requests for same." ECF No. 24-1, PageID # 444. Nothing in the Counterclaim suggests that Lessary was prejudiced by the delay. In short, the Counterclaim does not allege facts demonstrating Defendants' entitlement to statutory penalties.

The COBRA notification claim is dismissed. It is not clear that amendment of the Counterclaim would be futile, and this court allows Defendants to amend their Counterclaim.

V. CONCLUSION.

The court grants Defendants' countermotion to strike, except with respect to material relevant to Admor's mootness arguments. The court grants Admor's motion to dismiss in part, dismissing the unfair competition and COBRA notification claims. The remainder of Admor's motion is denied.

Defendants are granted leave to amend their Counterclaim consistent with this order. That is, Defendants may file amended unfair competition and COBRA notification claims, and may add other claims. This document must be complete in itself; it may not incorporate by reference anything previously filed with this court. Any amended counterclaim must be filed no later than August 12, 2019.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, July 30, 2019.

/s/ Susan Oki Mollway

Susan Oki **[*31]** Mollway

United States District Judge

First Priority Emergency Vehicles, Inc. v. REV Ambulance Grp. Orlando, Inc.

United States District Court for the District of New Jersey

July 30, 2019, Decided; July 30, 2019, Filed

Case No. 3:18-cv-9805-BRM-DEA

Reporter

2019 U.S. Dist. LEXIS 126616 *; 2019-2 Trade Cas. (CCH) P80,867; 2019 WL 3423571

FIRST PRIORITY EMERGENCY VEHICLES, INC., Plaintiff, v. REV AMBULANCE GROUP ORLANDO, INC., d/b/a MCCOY MILLER EMERGENCY VEHICLES, MARQUE EMERGENCY VEHICLES, and ROAD RESCUE EMERGENCY VEHICLES, Defendant.

Notice: NOT FOR PUBLICATION

Subsequent History: Dismissed by, in part *First Priority Emergency Vehicles, Inc. v. REV Ambulance Grp. Orlando, Inc., 2020 U.S. Dist. LEXIS 74170 (D.N.J., Apr. 28, 2020)*

Core Terms

ambulances, termination, Dealer, Rescue, motion to dismiss, relevant market, products, alleges, interchangeable, manufacturers, license, sales, emergency vehicle, leave to amend, contends, parties, brand, promissory estoppel, fair dealing, modification, antitrust claim, trademarks, factual allegations, advertising, violations, antitrust, consumer, argues, notice, Amend

Counsel: **[*1]** For FIRST PRIORITY EMERGENCY VEHICLES, INC., Plaintiff: THOMAS N. RYAN, LEAD ATTORNEY, LADDEY, CLARK & RYAN, LLP, SPARTA, NJ.

For REV AMBULANCE GROUP ORLANDO, INC., doing business as MCCOY MILLER EMERGENCY VEHICLES, MARQUE EMERGENCY VEHICLES, ROAD RESCUE EMERGENCY VEHICLES, Defendants: DOUGLAS ROBERT WEIDER, LEAD ATTORNEY, GREENBERG TRAURIG, LLP, FLORHAM PARK, NJ.

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

Opinion by: BRIAN R. MARTINOTTI

Opinion

MARTINOTTI, DISTRICT JUDGE

Before this Court is a Motion to Dismiss filed by Defendant REV Ambulance Group Orlando, Inc. d/b/a McCoy Miller Emergency Vehicles, Marque Emergency Vehicles, and Road Rescue Emergency Vehicles ("REV" or "Defendant") seeking to dismiss Plaintiff First Priority Emergency Vehicles, Inc.'s ("First Priority" or "Plaintiff") Amended Complaint pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. (ECF No. 18.) First Priority filed an Opposition to Defendants' Motion to Dismiss (ECF No. 24.) Also before this Court is First Priority's Cross-Motion for Leave to Amend its antitrust claims. (ECF No. 25.) REV filed an Opposition to First Priority's Cross-Motion for Leave to Amend. (ECF No. 30.) Having reviewed the submissions filed in connection with the motion and having declined **[*2]** to hold oral argument pursuant to *Federal Rule of Civil Procedure 78(b)*, for the reasons set forth below and for good cause appearing, Defendant's Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART** and First Priority's Cross-Motion for Leave to Amend the Amended Complaint is **GRANTED**.

I. BACKGROUND

A. Factual Background

For the purposes of this Motion to Dismiss, the Court accepts the factual allegations in the Amended Complaint as true and draws all inferences in the light most favorable to the plaintiff. *See* *Phillips v. Cty. of Allegheny, 515 F.3d 224, 228 (3d Cir. 2008)*. Furthermore, the Court also considers any "document *integral to or explicitly relied upon* in the complaint." *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997)* (quoting *Shaw v. Dig. Equip. Corp., 82 F.3d 1194, 1220 (1st Cir. 1996))*.

First Priority is a New Jersey corporation with its principal place of business in Manchester, New Jersey. (ECF No. 17 ¶ 6.) REV is a Florida corporation with its principal place of business in Florida. (*Id.* ¶ 7.) REV does business under a variety of names, including McCoy Miller Emergency Vehicles ("McCoy Miller"), Marque Emergency Vehicles ("Marque"), Road Rescue Emergency Vehicles ("Road Rescue"), and Wheeled Coach Vehicles ("Wheeled Coach"), among others. (*Id.*)

First Priority "provides a range of expertise that encompasses design, manufacturing, uplifting, service, fleet management and infrastructure **[*3]** installment." (*Id.* ¶ 11.) For over twenty years, First Priority has also sold and serviced new and remounted ambulance vehicles, remounted ambulances, and parts for ambulances. (*Id.* ¶ 12.) There are three "major categories" of ambulance vehicles in the United States: Type I is based upon a heavy truck chassis and is used primarily for advanced life support and rescue work; Type II is a van-based ambulance with few modifications, except for a raised roof; and Type III is a van chassis that has a custom made rear compartment with the same use as Type I ambulances. (*Id.* ¶ 13.) REV owns seven of the twenty-one Type I, II, and III ambulance brands marketed in the United States and "controls more than 50% of the [United States] market for new ambulances." (*Id.* ¶ 14.)

On September 12, 2002, First Priority entered into a written agreement with Road Rescue, the Road Rescue Dealer Agreement ("RR Agreement"). (*Id.* ¶ 15.) The RR Agreement had a term of one year, expiring on October 1, 2003, and was renewable "for one year periods thereafter by written agreement of both parties at the time of annual review." (*Id.* ¶ 16.) The RR Agreement granted First Priority the right to sell Road Rescue-branded **[*4]** products throughout New Jersey, requiring First Priority to use its "best efforts" to meet or exceed certain sales goals. (*Id.* ¶¶ 16-17.) Specifically, the RR Agreement required First Priority to: aggressively promote, market, and sell the products; use its best efforts to manufacture and deliver Defendant's products; purchase a demonstrator vehicle; establish and maintain a place of business and a sales office in New Jersey; and maintain all applicable licenses and insurance, among other things. (*Id.* ¶ 17.) This relationship has continued "despite the fact the parties have never prepared a formal written renewal of the RR Agreement." (*Id.* ¶ 18.) Additionally, First Priority contends that, on multiple occasions, representatives from First Priority and Road Rescue "discussed their mutual understanding" that First Priority would remain a dealer of Defendant's products so long as it performed adequately and Defendant "would provide [First Priority] a reasonable time to cure the claimed deficiency before terminating the relationship." (*Id.* ¶ 19.)

On October 10, 2010, Road Rescue assigned its rights and obligations under the RR Agreement to Wheeled Coach. (*Id.* ¶ 22.)[1] On March 30, 2011, First **[*5]** Priority and SJC Industries Corporation ("SJ Industries") entered into a Dealer Sales and Service Agreement (the "SJC Agreement") for an ambulance dealership franchise that

[1] On or about December 3, 2015, Wheeled Coach changed its name to REV Ambulance Group Orlando, Inc. (ECF No. 17 ¶ 22.)

included the right to sell ambulances in New Jersey. (*Id.* ¶ 24.)[2] On May 8, 2013, SJC Industries assigned its rights and obligations under the SJC Agreement to Wheeled Coach. (*Id.* ¶¶ 26.)[3]

First Priority alleges that REV provided it with "poor quality" vehicles. (*Id.* ¶¶ 28-41.) Specifically, First Priority alleges: in 2012, Brick Township purchased two Marque-branded ambulances from REV but refused delivery because the vehicles "did not meet specifications" thereby requiring Brick Township to purchase vehicles from a competing brand (*id.* ¶ 29); in 2013, a client, Fairview, claimed it was dissatisfied with the ambulance vehicles due to electrical issues (*id.* ¶ 30); in 2013, a client, Hopatcong, was forced to purchase a demonstrator vehicle because of excessive delays in production (*id.* ¶ 31); in 2013, a client experienced an electrical fire in the Road Rescue vehicle and has since refused to purchase REV products (*id.* ¶ 32); in 2013, a client, Beach Haven, "changed its entire fleet from [] Road Rescue to a different **[*6]** brand due to numerous quality issues" (*id.* ¶ 33); between 2012 and 2013, a client, University Hospital, grew dissatisfied due to delays in production and delivery and has since refused to do business with REV (*id.* ¶ 34); a client, Maplewood, refuses to purchase Road Rescue products due to their poor quality (*id.* ¶ 35); clients South Orange, Roxbury, and Lakewood EMS have each grown so dissatisfied with Road Rescue vehicles that they refuse to purchase any products from REV (*id.* ¶¶ 36-38); in 2015, REV refused to honor a warranty with a client, Hightstown, which is now unlikely to do any further business with REV (*id.* ¶ 39); and between 2016 and 2017, clients Ocean Township and Atlantic Ambulance purchased vehicles that "experienced quality issues" to the extent that each client now refuses to purchase REV products. (*id.* ¶¶ 40-41).

First Priority alleges it made these quality and service issues well known to REV, which subsequently "failed to follow through on correcting the deficiencies." (*Id.* ¶¶ 42-43.) Specifically, on December 21 and 22, 2016, First Priority's Vice President, Ken Clark ("Clark"), e-mailed REV representative Enrique Gimenez ("Gimenez") expressing First Priority's **[*7]** "frustration at REV's conduct in shipping incomplete ambulances of poor quality and its failure to support" First Priority. (*Id.* ¶ 43.) Thereafter, at REV's annual dealer summit in February 2017, REV's Vice President of Marketing and Sales, Scott Barnes ("Barnes"), told Clark that "REV wanted to get its Road Rescue brand in New Jersey back on track," yet provided "no such support." (*Id.* ¶ 44.)

On or about March 28, 2017, during a meeting between First Priority representative Zach Yeager ("Yeager") and REV representative Irina Hot ("Hot"), REV "revealed its plan to limit competition by restricting its dealers' ability to continue to sell ambulances from brands not affiliated" with it. (*Id.* ¶ 46.) Specifically, REV "indicated that it intended to convert all of its dealers of its ambulance brands toward being either 'factory owned' or REV only dealers." (*Id.*) Under this new policy, REV's ambulance dealers would be prohibited from offering products services to clients that were not manufactured by REV. (*Id.*) During this meeting, First Priority "expressed its reluctance to become a REV-exclusive dealer in light of the quality problems its customers had been experiencing." (*Id.* ¶ 47.)

Between **[*8]** April 2016 and November 2017, REV reduced the percentage of its multi-line dealers by 59% - from sixty-nine to thirty-six - whereas it increased the number of factory-owned and REV-exclusive dealers by twenty-five percent - from 197 to 222. (*Id.* ¶ 47.) By the end of 2017, 86% of REV dealers were either factory-owned or REV-exclusive dealers. (*Id.*)[4]

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[2] The SJC Agreement includes many similar clauses to the RR Agreement, including First Priority's obligation to actively and effectively sell vehicles, promote the purchase of such vehicles, and maintain an adequate staff and insurance. (ECF No. 17 ¶ 25.)

[3] The Amended Complaint notes that, following the execution of the SJC Agreement, "three of the five ambulance brands [First Priority] sold and serviced were owned by [REV]: (1) Road Rescue; (2) McCoy Miller; and (3) Marque." (ECF No. 17 ¶¶ 27.) First Priority also sold and serviced two other brands of ambulance vehicles, Demers and Braun, which were unaffiliated with REV. (*Id.*)

[4] First Priority further alleges that, in an effort to "economically coerce [it]" and others similarly situated to become "REV only" dealers, REV introduced a new line of "economically" priced Type I and III ambulance vehicles called "Frontline." (*Id.* ¶ 49.) The Frontline ambulances are "priced significantly below the wholesale cost of REV's other similar vehicles and have only been offered to REV only dealers." (*Id.*) Additionally, REV requires its Frontline dealers to sell those vehicles exactly at the MSRP. (*Id.*)

In a June 30, 2017 letter from Barnes to First Priority's Alex Cherepakhov ("Cherepakhov"), REV terminated its business relationship with First Priority, stating in pertinent part:

> As you know, First Priority is a REV dealer for the McCoy Miller, Marque, and Road Rescue brand of emergency vehicles in the state of New Jersey pursuant to a Retail Sales and Service Agreement between the parties (the "Dealer Agreement and Dealer Relationship"). However, as a result of First Priority's failure to perform in accordance with the Dealer Agreement, this letter shall serve as REV's official notice of termination of the Dealer Agreement and Dealer Relationship effective sixty (60) days from First Priority's receipt.
>
> Pursuant to the Dealer Agreement, First Priority obligated itself to meet its mutually agreed upon sales objectives and has failed **[*9]** to do so. For example, the sales objective for all three brands for fiscal year 2017 was 18 vehicles and First Priority has only sold 1 vehicle thus far. In fiscal year 2015 and 2016, First Priority only sold a total of 5 and 3 vehicles respectively. The inadequacy of these sales numbers are highlighted by the fact that in 2015 and 2016 a comparable dealer sold 40 and 30 vehicles respectively. First Priority's repeated failure to meet its mutually agreed upon sales objective cannot persist. Accordingly, as a result of First Priority's failure to perform in accordance with the requirements outlined in the Dealer Agreement, REV is terminating the Dealer Agreement and Dealer Relationship effective sixty (60) days from receipt of this notice.

(*Id.* ¶ 50.)

Contrary to REV's termination letter, First Priority contends specific sales goals were never "mutually agreed upon" and the only discussion of such goals took place in November 2016 "when [REV] intimated that [First Priority] must sell 13 Road Rescue vehicles in 2017." (*Id.* ¶¶ 51-52.)

On August 3, 2017, David Rapaport ("Rapaport"), a First Priority representative, emailed Leslie Fischer ("Fischer"), a REV representative, acknowledging receipt **[*10]** of the termination letter and requesting "a schedule of the [number] of vehicles sold by [First Priority] from 2012 to 2016 against the performance target for each year." (*Id.* ¶ 54.) On August 8, 2017, Fischer replied to Rapaport's e-mail attaching data sheets for Marque and McCoy Miller brand ambulances, First Priority's 2017 sales objectives, and First Priority's sales against performance targets. (*Id.* ¶ 55.)

On August 21, 2017, Jeffery Goldstein ("Goldstein"), First Priority's outside counsel, sent a letter to Barnes asserting, among other things: the termination letter is procedurally defective under the New Jersey Fair Practices Act ("NJFPA") because it fails to identify with specificity the particular agreement it claims to be terminating and the grounds for the termination; the termination letter is substantively flawed as the requirements listed in the letter constitute "unreasonable standards of performance;" REV lacks good cause for the termination; REV committed prior breaches to the agreement; REV "manipulated the system" to cause First Priority's alleged breaches; REV has established and enforced the performance objectives in a discriminatory manner; and the NJFPA does **[*11]** not permit a franchisor to terminate a franchise for any reason "other than the franchisee's substantial breach of legitimate current obligations." (*Id.* ¶ 56.) Goldstein further requested that REV agree to extend the termination effective date from sixty to ninety days to "allow the parties to engage in a meaningful discussion about the future of the parties' business." (*Id.*)

Thereafter, on September 14, 2017, Rapaport sent a letter to Barnes claiming that First Priority "objected promptly to [the] wrongful termination" of the agreements and indicating that First Priority "has removed all REV Ambulance brand signs from its facilities and has ceased selling and or servicing REV Ambulance vehicles." (*Id.* ¶ 57.) Rapaport further noted the termination "has inflicted significant costs" on First Priority. (*Id.*) These costs include First Priority's purchase of a Wheeled Coach Van demo vehicle and a Road Rescue Ambulance demo vehicle from REV - for $64,551 and $154,871, respectively - and $221,718 in "incurred floor plan interest," which was continuing to accrue at a rate of $40.18 per day. (*Id.*)

REV did not reply to Rapaport's September 14, 2017 letter. (*Id.* ¶ 58.) On October 5, 2017, Rapaport **[*12]** sent Barnes a second letter, requesting REV take possession of the two demo vehicles and reimburse First Priority for the purchases, and that REV reimburse First Priority for the cost of keeping the vehicles on the floor plan "after the wrongful termination." (*Id.* ¶ 59.) REV repurchased the Wheeled Coach Van demo vehicle but refused to repurchase the Road Rescue Ambulance demo vehicle. (*Id.* ¶ 60.)

B. Procedural History

On May 29, 2018, First Priority filed a Complaint (the "Complaint") against REV asserting causes of action for violations of the NJFPA, breach of contract and of the implied covenant of good faith and fair dealing, and violations of state and federal ***antitrust law***. (ECF No. 1.) On November 9, 2018, First Priority filed an Amended Complaint (the "Amended Complaint") against REV asserting causes of action for violations of the NJFPA (Count One), breach of contract and of the implied covenant of good faith and fair dealing (Count Two), violation of *Section 1 of the Sherman Act*, *15 U.S.C. § 1* (Count Five), violations of *Section 2 of the Sherman Act*, *15 U.S.C. § 2* (Count Six), violations of the *Clayton Act, 15 U.S.C. § 14* (Count Eight), violations of New Jersey State Antitrust Laws (Count Nine), and promissory estoppel (Count Ten). **[*13]** (ECF No. 17.)[5]

On November 29, 2018, REV filed a Motion to Dismiss the Amended Complaint. (ECF No. 18.) On January 23, 2019, First Priority filed an Opposition to REV's Motion to Dismiss the Amended Complaint. (ECF No. 24.) On the same date, First Priority filed a Cross-Motion for Leave to Amend the antitrust claims in the Amended Complaint, complete with a Supplemental Proposed Second Amended Complaint with changes highlighted. (ECF No. 25.) On February 4, 2019, REV filed an Opposition to First Priority's Cross-Motion to Amend (ECF No. 29), and on February 13, 2019, First Priority filed a Reply Brief to REV's Opposition to its Cross-Motion to Amend. (ECF No. 30).

II. LEGAL STANDARDS

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

In deciding a motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, a district court is "required to accept as true all factual allegations in the complaint and draw all inferences in the facts alleged in the light most favorable to the [plaintiff]." *Phillips v. Cty. of Allegheny, 515 F.3d 224, 228 (3d Cir. 2008)*. "[A] complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (citations omitted). However, the plaintiff's "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic **[*14]** recitation of the elements of a cause of action." *Id.* (citing *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986))*. A court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan, 478 U.S. at 286*. Instead, assuming the factual allegations in the complaint are true, those "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555*.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 570*). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for misconduct alleged." *Id.* This "plausibility standard" requires the complaint allege "more than a sheer possibility that a defendant has acted unlawfully," but it "is not akin to a probability requirement.'" *Id.* (quoting *Twombly, 550 U.S. at 556*). "Detailed factual allegations" are not required, but "more than an unadorned, the defendant-harmed-me accusation" must be pled; it must include "factual enhancements" and not just conclusory statements or a recitation of the elements of a cause of action. *Id.* (citing *Twombly, 550 U.S. at 555, 557)*.

"Determining whether a complaint states a plausible **[*15]** claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal, 556 U.S. at 679*. "[W]here

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[5] The Amended Complaint does not include a count three, four, or seven. (ECF No. 17.)

the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id. at 679* (quoting *Fed. R. Civ. P. 8(a)(2)*). However, courts are "not compelled to accept 'unsupported conclusions and unwarranted inferences,'" *Baraka v. McGreevey, 481 F.3d 187, 195 (3d Cir. 2007)* (quoting *Schuylkill Energy Res. Inc. v. Pa. Power & Light Co., 113 F.3d 405, 417 (3d Cir. 1997))*, nor "a legal conclusion couched as a factual allegation." *Papasan, 478 U.S. at 286*.

While, as a general rule, the court may not consider anything beyond the four corners of the complaint on a motion to dismiss pursuant to *Rule 12(b)(6)*, the Third Circuit has held that "a court may consider certain narrowly defined types of material without converting the motion to dismiss [to one for summary judgment pursuant to *Rule 56*]." *In re Rockefeller Ctr. Props. Sec. Litig., 184 F.3d 280, 287 (3d Cir. 1999)*. Specifically, courts may consider any "document *integral to or explicitly relied upon* in the complaint." *Burlington Coat Factory, 114 F.3d at 1426* (quoting *Shaw, 82 F.3d at 1220*).

B. Motion to Amend

Amendments of pleadings are governed by *Federal Rules of Civil Procedure 15* and *16*. A motion to amend a pleading that is filed before the deadline for amendments of pleadings has passed in a *Rule 16* Scheduling Order will be governed by *Federal Rule of Civil Procedure 15(a)* only. Pursuant to **[*16]** *Rule 15(a)*, a "party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." *Fed. R. Civ. P. 15(a)*.

"The grant or denial of leave to amend is a matter committed to the sound discretion of the district court." *Arab African Int'l Bank v. Epstein, 10 F.3d 168, 174 (3d Cir. 1993)*. The Third Circuit has adopted a liberal approach under *Rule 15* to the amendment of pleadings to ensure that "a particular claim will be decided on the merits rather than on technicalities." *Dole v. Arco Chem Co., 921 F.2d 484, 487 (3d Cir. 1990)* (internal citations omitted). The burden is generally on the party opposing the amendment to demonstrate why the amendment should not be permitted. *Foman v. Davis, 371 U.S. 178, 180, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*. Leave to amend a pleading may be denied where the court finds: (1) undue delay; (2) undue prejudice to the non-moving party; (3) bad faith or dilatory motive; or (4) futility of amendment. *Shane v. Fauver, 213 F.3d 113, 115 (3d Cir. 2000)*.

III. DECISION

REV contends First Priority's NJFPA claim should be dismissed because First Priority does not have a license to grant use of REV trademarks, First Priority's antitrust claims should be dismissed for failure to allege a relevant market, First Priority's Sherman Act claims should be dismissed as the alleged conduct is not actionable under the statute, First Priority's breach of contract **[*17]** and implied covenant of good faith claims should be dismissed, and First Priority's promissory estoppel claim fails as a matter of law because express contracts cover the subject matter of the dispute. (ECF No. 18-1 at 8-26.) First Priority argues each of its claims are adequately pled, and in the alternative, requests this Court grant leave to amend the Amended Complaint should it be inclined to grant REV's Motion to Dismiss with respect to the antitrust causes of action. (ECF No. 25-1 at 10-36.) This Court addresses each argument in turn.

A. First Priority's NJFPA Claims

Count One of the Amended Complaint alleges a violation of the NJFPA and seeks damages stemming therefrom as well as attorney's fees as allowed by law. (ECF No. 17 ¶¶ 62-84.) "The protections of the NJFPA [] apply only to a 'franchise.'" *Ocean City Express Co., Inc. v. Atlas Van Lines, Inc., 194 F. Supp. 3d 314, 322 (D.N.J. 2016)*. The NJFPA defines a franchise as:

> [A] written agreement for a definite or indefinite period, [1] in which a person grants to another person a license to use a trade name, trade mark, service mark, or related characteristics, and [2] in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise.

N.J. Stat. Ann. § 56:10-3(a).

"In other words, **[*18]** a franchise under the NJFPA requires the franchisor's grant of a license to the franchisee and a community of interest between the parties in the relevant market." Atlas Van Lines, 194 F. Supp. 3d at 322 (citing Colt Indus., Inc. v. Fidelco Pump & Compressor Corp., 844 F.2d 117, 119 (3d Cir. 1988)).

The New Jersey Supreme Court has held that "not every grant of permission to use a trademark in the sale of goods or services is a license within the meaning of the [NJFPA]." Instructional Sys., Inc. v. Comput. Curriculum Corp., 130 N.J. 324, 614 A.2d 124, 138 (N.J. 1992). Rather, the "term 'license' as used in the context of the [NJFPA] constitutes a more narrowly-defined type of entitlement." Id. at 139. Specifically, the term "license" means "to use as if it is one's *own*" and "implies a proprietary interest." *Id.* (quoting Finlay & Assocs., Inc. v. Borg-Warner Corp., 146 N.J. Super. 210, 369 A.2d 541, 549 (N.J. Law. Div. 1976)). "At a minimum, the term 'license' means that the alleges franchisee must use the name of the franchisor 'in such a manner as to create a reasonable belief on the part of the consuming public that there is a connection between the . . . licensor and licensee by which the licensor vouches, as it were, for the activity of the licensee." Instructional Sys., 614 A.2d at 138 (quoting Neptune T.V. & Appliance Serv., Inc. v. Litton Sys., Inc., 190 N.J. Super. 153, 462 A.2d 595, 599 (N.J. App. Div. 1983)).

Here, the Amended Complaint does not explicitly allege that any language in either the RR or SJC Agreement creates a trademark right pursuant to the NJFPA. On the contrary, the RR Agreement indicates: (1) First Priority "shall not use the name of Road Rescue **[*19]** or Road Rescue trademarks in its corporate business name;" (2) First Priority shall "purchase and sell all products in its own name, for its own account and at its own risk;" (3) absent prior written approval - which has not been alleged in the Amended Complaint - First Priority may not use Road Rescue trademarks "in any fashion;" and (4) "nothing contained in [the RR Agreement] shall be deemed to create a[] . . . franchise." (RR Agreement (ECF No. 18-3, Ex. A).) Similarly, the SJC Agreement indicates that dealers have the "right to use such trademarks and trade names as registered by SJC from time to time" but only "with prior written approval of SJC." (SJC Agreement (ECF No. 18-4, Ex. B).)

Rather than maintain the language of the respective agreements create explicit licenses, First Priority contends its "allegations are sufficient to create a reasonable belief on the part of the consuming public that there is a connection between the trade name licensor and licensee by which the licensor vouches." (ECF No. 25-1 at 17.) In support of this contention, First Priority highlights its allegations that: (1) it was listed on REV's website as being an authorized dealer for the McCoy Miller **[*20]** and Road Rescue marks; (2) REV's McCoy Miller and Road Rescue marks were displayed on its website during all applicable times; (3) First Priority used REV's McCoy Miller and Road Rescue marks in its sales literature; and (4) REV's McCoy Miller and Road Rescue marks were displayed on First Priority's headquarters building in New Jersey since 2008. (ECF No. 17 ¶ 66.)

None of First Priority's allegations imply a proprietary interest in REV's trademarks sufficient to determine it held a license pursuant to the NJFPA.[6] Indeed, the relevant case law interpreting the NJFPA compels this conclusion. For instance, in *Finlay*, the Law Division determined that no license existed as, *inter alia*, plaintiff's business did not operate under the name of any alleged franchisor, but used only its own name, and the written agreement itself included "no requirement of economic dependency except to the extent plaintiff by its own choice elected to concentrate on the line of merchandise it preferred for whatever business reasons." Finlay, 369 A.2d at 546.[7] The

[6] This conclusion is further supported by the fact that the RR and SJC Agreements explicitly provide that the right to use trademarks and tradenames was subject to prior written approval of the respective contractors and First Priority has failed to allege such written approval was provided. (ECF No. 18-3, Ex. A; ECF No. 18-4, Ex. B.)

[7] Similarly, in *Colt Indus.*, the Third Circuit determined that no license existed because, *inter alia*, the plaintiff had been prohibited from using the defendant's trade name as part of its own. Colt Indus., 844 F.2d at 120. As here, the plaintiff in *Colt Indus*. "could use [defendant's] name only in a limited sense and that [defendant's] brand name could not be used in [plaintiff]'s business

Finlay court further held that the "[m]ere furnishing of advertising materials as contemplated by the [] agreement, and allowing plaintiff to have its name placed on certain **[*21]** items, if it wished, as advertising . . . for their own benefit does not fulfill the letter or intent of the [NJFPA]." *Id.* The court elaborated that an entity's distribution of "advertising materials of another's products . . . or participating in advertising or listing advertisements that certain individuals or businesses sell certain products, is not what is meant by a license" pursuant to the NJFPA. *Id.* Here, First Priority did not operate under any of REV's trademark names and did not allege an exclusive relationship with REV. As in *Finlay*, First Priority merely sold and advertised certain REV products, and as such, its relationship was insufficient to create a franchisor-franchisee license agreement.

Furthermore, the facts in the Appellate Division's holding in *Neptune* are distinguishable and therefore do not provide persuasive support to First Priority's position. Specifically, the *Neptune* plaintiff was designated an "authorized service source" for the defendant, and services it performed were billed directly to and paid by the defendant. *Neptune, 462 A.2d at 597*. Moreover, the plaintiff was "authorized to represent and hold itself out as an authorized [defendant] **[*22]** service source in its advertising, letterheads, calling cards and service vehicle markings" such that plaintiff gave its "imprimatur to [plaintiff]'s business enterprise" and plaintiff's services were quality controlled and endorsed by defendant itself. *Id. at 598-99*. Here, although First Priority alleges that REV's McCoy Miller and Road Rescue marks were displayed on its website and physical headquarters, the relationship did not rise to the level of that in *Neptune* as First Priority was never granted a license and did not have the same level of corporate entanglement as in *Neptune*.[8] Accordingly, REV's Motion to Dismiss Count One is **GRANTED** and Count One is **DISMISSED WITHOUT PREJUDICE**.

B. First Priority's Antitrust Claims - Relevant Market

REV contends each of First Priority's antitrust claims - Counts Five (*15 U.S.C. § 1*), Six (*15 U.S.C. § 2* - attempt to monopolize), Seven (*15 U.S.C. § 2* - monopolization), Eight (*15 U.S.C. § 14*), and Nine (New Jersey state antitrust violations, *N.J. Stat. Ann. § 56:9, et seq.*) - because First Priority has not met its burden of alleging a relevant market. (ECF No. 18-1 at 14-17.) First Priority argues the allegations in its Amended Complaint satisfy the "reasonable interchangeability" standard and that as such, REV's Motion to Dismiss should **[*23]** be denied.

In antitrust actions, plaintiffs have the "burden of defining the relevant market." *Queen City Pizza v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)* (citing *Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 726 (3d Cir. 1991))*.[9] "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Queen City, 124 F.3d at 436* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 375, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*. Furthermore, the test for determining interchangeability of use is not "reasonably interchangeable by a particular plaintiff, but 'commodities reasonably interchangeable by consumers for the same purpose.'" *Queen City, 124 F.3d at 436* (quoting *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956))*. The relevant market is legally insufficient, and thus dismissal is appropriate, when a plaintiff "fails to define

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name." *Id.* In justifying its holding, the Third Circuit noted that if such an agreement "constitutes a license to use a trademark, then any business selling a brand name product would . . . necessarily be considered as holding a license." *Id.*

[8] Similarly, this Court is also unpersuaded by First Priority's argument that the holding in *McPeak v. S-L Distrib. Co., No. 12-348, 2014 U.S. Dist. LEXIS 123728, 2014 WL 4388526 (D.N.J. Sept. 5, 2014)* supports a finding that First Priority had a proprietary interest in REV's trademarks. In *McPeak*, the court identified several factors relevant to showing that a proprietary interest in the trademarks were licensed, including, among others, the use of the defendant's marks on business cards, invoices bearing defendant's names and marks, and a representation that plaintiff's salespersons were employees or agents of defendant. *2014 U.S. Dist. LEXIS 123728, [WL] at *9*. None of these factors apply to First Priority.

[9] Importantly, the Third Circuit has also held that although defining a proper market can be a fact intensive inquiry requiring discovery, *see* *Eastman Kodak Co. v. Image Tech. Servs, Inc., 504 U.S. 451, 482, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*, there is no "*per se* prohibition against dismissal of antitrust claims for failure to plead a relevant market under *Fed. R. Civ. P. 12(b)(6)*." *Queen City, 124 F.3d at 436*.

its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor." *Queen City, 124 F.3d at 436* (citing *TV Commc'ns Network, Inc. v. Turner Network Television, 964 F.2d 1022, 1025 (10th Cir. 1992))*. The New Jersey Antitrust Act has incorporated the "reasonable interchangeability" standard applicable to federal antitrust claims by virtue of statute. *See* *N.J. Stat. Ann. § 56:9-18* (the *New Jersey Antitrust Act* "shall be construed in harmony with ruling judicial interpretations **[*24]** of comparable Federal antitrust statutes and to effectuate, insofar as practicable, a uniformity in the laws of those states which enact it").

In the Amended Complaint, First Priority defines the relevant market as the "manufacture of ambulances," explaining:

> 92. The relevant market for purposes of the antitrust claims in this case is the manufacture of ambulances. REV has, through acquisitions and the use of prolific explicit and de facto exclusive dealing agreements and demands, unreasonably injured competition in this relevant market. REV, in carrying out this wrongful conduct, has also attempted to monopolize and monopolized the market for ambulance manufacturers.
>
> 93. The relevant market for the manufacture of ambulances recognizes that ambulances are not reasonably interchangeable with other non-ambulance vehicles. Consumers do not believe or act as though non-ambulance vehicles can be used for the same purposes, taking into account their price, use and qualities.
>
> 94. Ambulances by federal regulation must include certain life safety equipment and meet certain safety standards that are not included in ordinary vehicles. Therefore, non-ambulance vehicles cannot be used as **[*25]** ambulances to transport patients. Ambulance manufacturers have equipment, knowledge and training that is unique to the manufacturing and regulatory requirements of the ambulance market and that is not possessed by manufacturers of other vehicles.
>
> 95. Ambulance vehicles are not interchangeable with other vehicles, and their function is unique. From the perspective of a consumer (both an ambulance dealer as well as the end-user of ambulances - municipalities, hospitals), such vehicles are not interchangeable with other vehicles. This latter observation means that there is a very low cross-elasticity of demand between ambulances and other vehicles. Further, ambulances do not have multiple uses. There simply is no reasonable interchangeability. No other products are capable of performing the same function as an ambulance.
>
> 96. The relevant economic market encompasses all economic substitutes for ambulances; there simply are not any. Again, ambulance vehicles are functionally distinct from other vehicles. Ambulance manufacturers offer a unique product and services associated therewith that other manufacturers cannot.
>
> 97. The complicated and demanding regulatory overlay permeating the ambulance **[*26]** market includes, but is not limited to, three federal regulatory organizations that enact ambulance "standards." KKK which is a federal ambulance standard, CAAS (Commission on Accreditation of Ambulance Standards) and NFPA (National Fire Protection Agency). KKK has been in effect since 1974 and are observed by state Health Departments, CAAS is fairly new and is still organizing, and NFPA is a Fire standard that started getting involved in Ambulance standards in the mid-2000's as more and more Fire Depts have gotten involved in emergency medical matters.
>
> 98. There is no substitute for an ambulance. Emergency patients cannot be transported by Fire Truck or other emergency vehicle.

(ECF No. 17 ¶¶ 92-98.)

First Priority alleges that the New Jersey ambulance market - from the consumer point-of-view - is broken down into several categories, including hospital-based EMS systems, municipal based EMS systems, volunteer EMS systems, and commercial EMS providers. (*Id.* ¶ 100.) First Priority further alleges the "[r]elevant patterns of trade, including purchasing patterns" support its definition of the relevant market as consumers "do not consider other vehicles to be substitutes of ambulances," and **[*27]** from the "supply-side, manufacturers of other vehicles do not have the ability to easily start manufacturing and selling ambulances in the . . . market." (ECF No. 17 ¶¶ 101-02.)

REV contends the relevant market, as defined in the Amended Complaint, lacks all interchangeable economic substitutes because it does not include used ambulances. (ECF No. 18-1 at 16-17.) REV argues the proposed relevant market lacks all substitutes "by First Priority's own admission" (*Id.* at 16), as the Amended Complaint alleges that "approximately 84 ambulance companies in the state of New Jersey went out of business by the end of 2016" thereby "result[ing] in a flood of used ambulances in good condition being thrown onto the market, substantially impacting the ability to sell new ambulances." (ECF No. 17 ¶ 53.) Accordingly, REV argues that the proposed market must fail as a matter of law.

Here, the relevant market proposed in the Amended Complaint is insufficient as a matter of law. As conceded in the Amended Complaint, the relevant market does not encompass all reasonably interchangeable substitutes, nor does it adequately distinguish between the role of used versus new ambulances in the subject market. Accordingly, **[*28]** REV's Motion to Dismiss Counts Five, Six, Seven, Eight, and Nine of the Amended Complaint is **GRANTED** and Counts Five, Six, Seven, Eight, and Nine are **DISMISSED WITHOUT PREJUDICE**. Additionally, this Court determines that none of the four grounds precluding a Motion to Amend - undue delay, undue prejudice to the non-moving party, bad faith or dilatory motive, or futility of amendment - are present in this case, and therefore, First Priority's Motion for Leave to Amend the Amended Complaint is **GRANTED**.[10]

C. First Priority's Breach of Contract/Implied Covenant of Good Faith and Fair Dealing Claims

REV argues First Priority does not have a cognizable breach of contract claim or breach of implied covenant of good faith and fair dealing claim, Count Two, because the termination was in accordance with express contractual provisions. (ECF No. 18-1 at 21-24.) First Priority counters that dismissal of its breach of contract and implied covenant of good faith and fair dealing causes of action is unwarranted because it has pled oral modifications to the contract which created an understanding that, among other things, if First Priority performed adequately, REV would provide a reasonable time to cure **[*29]** before terminating the relationship. (ECF No. 25-1 at 27-34.)

REV contends its termination of the RR and SJC Agreements with First Priority conformed with the explicit contractual terms of the respective agreements. The RR Agreement's termination provision provides, in pertinent part:

> Notwithstanding anything contained in this Agreement to the contrary, Road Rescue shall have the right to terminate this Agreement upon occurrence of any of the following events:
>
> . . .
>
> (F) Failure to meet established sales and performance quota, as described in *Section 2* - Items A & B[: ten vehicle sales per year, taking into account, among other things, present performance, potential performance, the competition and economic conditions that are affecting the market].
>
> (G) Either party may terminate without cause by written notice to the other party giving at least thirty (3) days prior to the effective date specified by such notice. Road Rescue shall not be required to accept any order placed by Dealer for delivery after the effective date of termination. Once termination notice is given, Road Rescue may, at its option and before effective termination date, sign a new dealer for said territory.

(ECF No. 18-3, Ex. A **[*30]** at 8-9.)

Meanwhile, the SJC Agreement's termination provision provides, in pertinent part, that SJC may terminate the SJC Agreement on thirty days' notice for the breach of any contractual provision, which includes First Priority's obligation to meet or exceed sales criteria. (ECF No. 18-4, Ex. B at 8-10.) The sales criteria for the relevant time period were

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[10] REV also contends that First Priority's Sherman Act causes of action - Counts Five and Eight - should be dismissed as the "alleged conduct is not actionable under the statute" as it fails to allege a "concerted action" between REV and another party. (ECF No. 18-1 at 17-21.) As this Court has already granted REV's Motion to Dismiss First Priority's antitrust claims for failure to adequately define a relevant market, it need not consider REV's additional claims concerning these causes of action. Nevertheless, in light of First Priority's allegations that First Priority has been harmed by REV's "exclusive dealing, recent mergers to take over competitors, and terminations of dealers for no legitimate reason," this Court finds that First Priority's antitrust claims have pled concerted actions between REV and third-parties so as to constitute actionable conduct pursuant to the applicable antitrust statutes. (ECF No. 17 ¶ 112.)

thirty-six McCoy Miller ambulances and ten Marque ambulances, and the SJC Agreement indicates that such goal is binding on the dealer absent any written amendment. (*Id.* at 6-10.) Accordingly, REV argues First Priority has failed to state a cognizable claim for breach of contract and breach of implied covenant of fair dealing and good faith as its termination comported with the applicable contractual termination provisions.

While First Priority does not dispute that it failed to sell the volume of ambulances required by the RR and SJC Agreements, it alleged that the agreements were orally modified to require, among other things, a notice of deficiency and a commensurate reasonable opportunity to cure, stating in pertinent part:

> 88. Furthermore, on multiple occasions, the parties' representatives discussed their mutual understanding that for their **[*31]** relationship to continue, [First Priority] would simply need to perform adequately, and, if [First Priority] was not performing adequately, [REV] would provide [First Priority] a reasonable time to cure the claimed deficiency before the relationship would be terminated. Similarly, REV had an obligation to discuss and determine reasonable performance standards with [First Priority], the substance of which are the subject to the covenant of good faith and fair dealing, and the agreement. To the extent REV failed to reasonably discuss and agree upon such standards, REV violated the covenant of good faith and fair dealing, and the agreement. And, to the extent that REV, after execution of the agreement, agreed not to enforce or require such standards - but used an alleged failure to meet any such standards - REV violated the covenant of good faith and fair dealing, and the agreement.

(ECF No. 17 ¶ 88.)

First Priority contends that the parties made an oral modification via course of dealing and course of performance, and as such, this Court should not be guided exclusively by the terms in the contract. (ECF No. 25-1 at 28-31.) Indeed, the parties agree that such a modification is permitted **[*32]** - even where the contract explicitly requires a written amendment - pursuant to the laws of Indiana,[11] which the parties agree govern the RR Agreement, and Minnesota,[12] which the parties agree govern the SJC Agreement. Citing *Hamlin v. Steward, 622 N.E.2d 535, 539 (Ind. App. 1993)*, REV contends that such a modification constitutes a new contract, which necessitates all the requisite elements of the formation of a new contract, and First Priority "does not allege that any benefit accrued to REV [] from the alleged modification or that First Priority incurred any detriment from the alleged modification." (ECF No. 29 at 14-15.)

REV's argument is unpersuasive. First Priority has adequately met its pleading obligation under the federal rules by alleging the parties' written contracts were modified by their course of dealings and oral agreements. Voluminous case law from both Indiana and Minnesota confirms that modifications to a contract may be implied by the subsequent conduct of the parties and need not be in writing, even where so stipulated in the contract. *Sees v. Bank One, Ind., N.A., 839 N.E.2d 154, 161 (Ind. 2005)*; *Larson v. Hill's & Refrig. Of Bemidji, Inc., 400 N.W.2d 777, 781 (Minn. Ct. App. 1987)*. As such, First Priority's failure to explicitly allege the benefit accrued to REV and the legal detriment incurred by it as consideration for the modification is not fatal to its claims. **[*33]** Accordingly, REV's Motion to Dismiss Count Two is **DENIED**.

D. First Priority's Promissory Estoppel Claim

REV argues this Court should dismiss First Priority's promissory estoppel claim because it is a quasi-contract claim which is "unavailable" where an express contract covers the subject matter of the dispute. (ECF No. 18-1 at 24-25.) Relying on *Lano Equip., Inc. v. Clark Equip. Co., 399 N.W.2d 694, 698 (Minn. Ct. App. 1987)*, First Priority contends that its promissory estoppel claim is adequately pled and its reliance on REV's representations caused it substantial and definite harm. (ECF No. 25-1 at 34-36.)

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[11] *Ind. Code 26-1-2-202* (Final written expression; parol or extrinsic evidence).

[12] *Minn. Stat. § 336.2-202* (Final written expression; parol or extrinsic evidence).

Here, First Priority alleges REV "promised" it a "reasonable time to cure" any "claimed deficiency before the relationship would be terminated," and that First Priority relied upon the representation to its detriment. (ECF No. 17 ¶¶ 161-64.) However, under the laws of Minnesota and Indiana,[13] the application of the doctrine of promissory estoppel is an equitable quasi-contract remedy available only when there is not an adequate remedy at contract law. *See* *Olson v. Synergistic Techs. Bus. Sys., Inc., 628 N.W.2d 142, 149 (Minn. 2001)*; *see also* *Indiana Bureau of Motor Vehicles v. Ash, Inc., 895 N.E.2d 359, 367 (Ind. Ct. App. 2008)* (holding that promissory estoppel is a quasi-contractual remedy permitting recovery in the absence of a contract to prevent unjust enrichment). Furthermore, the decision in *Lano* - the primary authority **[*34]** relied upon by First Priority - does not stand for the proposition that promissory estoppel may be applied alongside a breach of contract claim, but only that a party is precluded from denying the existence of a long term contractual relationship where a contract had expired but was informally renewed. *Lano, 399 N.W.2d at 698-99*. Indeed, the decision in *Lano* did not deal with the application of promissory estoppel whatsoever. Accordingly, REV's Motion to Dismiss Count Ten is **GRANTED** and Count Ten is **DISMISSED WITHOUT PREJUDICE**.

IV. CONCLUSION

For the reasons set forth above, REV's Motion to Dismiss is **GRANTED** with respect to Counts One, Five, Six, Seven, Eight, Nine, and Ten and **DENIED** with respect to Count Two, and First Priority's Cross-Motion for Leave to Amend the Amended Complaint is **GRANTED**.

Date: July 30, 2019

/s/ Brian R. Martinotti

HON. BRIAN R. MARTINOTTI

UNITED STATES DISTRICT JUDGE

ORDER

THIS MATTER is opened to this Court by Defendant REV Ambulance Group Orlando, Inc.'s d/b/a McCoy Miller Emergency Vehicles, Marque Emergency Vehicles, and Road Rescue Emergency Vehicles ("REV" or "Defendant") Motion to Dismiss Plaintiff First Priority Emergency Vehicles, Inc.'s ("First Priority" or "Plaintiff") **[*35]** Amended Complaint pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. (ECF No. 18), and First Priority's Cross-Motion for Leave to Amend its antitrust claims (ECF No. 25). First Priority opposed REV's Motion to Dismiss (ECF No. 24) and REV opposed First Priority's Cross-Motion for Leave to Amend (ECF No. 30). Having reviewed the submissions filed in connection with the motion and having declined to hold oral argument pursuant to *Federal Rule of Civil Procedure 78(b)*, for the reasons set forth in the accompanying Opinion and for good cause shown,

IT IS on this 30th day of July 2019,

ORDERED that REV's Motion to Dismiss is **GRANTED** with respect to Counts One, Five, Six, Seven, Eight, Nine, and Ten; and it is further

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[13] While the parties agree that Minnesota and Indiana law apply to the SJC and RR Agreements, respectively, REV invokes New Jersey law in contending that First Priority's promissory estoppel claim should be dismissed. (ECF No. 18 at 24-25.) Any disagreement between the parties as to the controlling law is immaterial, as dismissal of the promissory estoppel claim is also warranted under New Jersey law. *See* *Freightmaster USA, LLC v. FedEx, Inc., No. 14-3229, 2015 U.S. Dist. LEXIS 41519, 2015 WL 1472665, at *6 (D.N.J. Mar. 31, 2015)* (holding that a promissory estoppel claim is a quasi-contract claim that is unavailable where there is a remedy at contract law); *see also* *Suburban Trans. Serv., Inc. v. Beach Holdings, LLC, Inc., 716 F.2d 220, 226-27 (3d Cir. 1983)* (same).

ORDERED that REV's Motion to Dismiss is **DENIED** with respect to Count Two; and it is finally

ORDERED that First Priority's Cross-Motion for Leave to Amend the Amended Complaint is **GRANTED**.

/s/ Brian R. Martinotti

HON. BRIAN R. MARTINOTTI

UNITED STATES DISTRICT JUDGE

LexisNexis

Gardiner v. St. Croix Dist. Governing Bd. of Dirs.

Superior Court of the Virgin Islands, Division of St. Croix

July 30, 2019, Decided

SX-12-CV-084

Reporter
2019 VI SUPER 59U *; 2019 V.I. LEXIS 87 **; 2019 WL 3814427

WALTER G. GARDINER, INDIVIDUALLY AND AS A MEMBER OF HEALTHQUEST, LLC, D/B/A VIRGIN ISLANDS KIDNEY CENTER AND THE CARIBBEAN KIDNEY CENTER, Plaintiffs, vs. ST. CROIX DISTRICT GOVERNING BOARD OF DIRECTORS INDIVIDUALLY AND COLLECTIVELY IN THEIR OFFICIAL CAPACITY, GOVERNOR JUAN F. LUIS HOSPITAL AND MEDICAL CENTER, A CORPORATION OF THE VIRGIN ISLANDS, JEFF NELSON, CEO, CFO, COO, AND DR. COLERIDGE T. FRANKLIN, JR. AND JOHN DOES 1-10, Defendants.

Prior History: *Gardiner v. St. Croix Dist. Governing Bd. of Dirs., 859 F. Supp. 2d 728, 2012 U.S. Dist. LEXIS 45372 (D.V.I., Mar. 30, 2012)*

Core Terms

antitrust, unfair competition, terminating, Bylaws, due process, defamatory, privileged, fair dealing, implied covenant of good faith, hospital privileges, conditionally, allegations, defamation, criminal activity, patients, entity, notice

Headnotes/Summary

Summary

Counsel: [1]** SCOT MCCHAIN, ESQ., ILP & McChain Miller Nissman Law Group, LLC, St. Croix, USVI, *For Plaintiff.*

CHIVONNE A.S. THOMAS, ESQ., Hamilton, Miller & Birthisel, St. Croix, USVI, *For Defendant.*

Judges: HAROLD W. L. WILLOCKS, Administrative Judge of the Superior Court.

Opinion by: HAROLD W. L. WILLOCKS

Opinion

MEMORANDUM OPINION

WILLOCKS, Administrative Judge

[*1] ¶1 **THIS MATTER** is before the Court on the Motion to Dismiss (hereinafter "Motion") of Defendants St. Croix District Government Board of Directors, Governor Juan F. Luis Hospital and Medical Center, Jeff Nelson, Dr.

Franklin, Jr., and John Does 1-10 (hereinafter collectively "Defendants"), filed on April 30, 2012. In response, the Plaintiffs Walter G. Gardiner, individually and as a member of HealthQuest, LLC, Virgin Islands Kidney Center, and Caribbean Kidney Center (hereinafter collectively "Plaintiffs"), filed a Motion in Opposition (hereinafter "Opposition"), on June 18, 2012.

BACKGROUND

[*2] ¶2 Plaintiff Walter G. Gardiner's (hereinafter "Dr. Gardiner"), is a medical doctor and founder of HealthQuest, LLC d/b/a/ the Caribbean Kidney Center, also now known as the Virgin Islands Kidney Center. (*Id.*) Dr. Gardiner was also previously employed **[**2]** by Governor Juan F. Luis Hospital (hereinafter "JFL"). (Compl. ¶ 3.) As an employee of JFL, Dr. Gardiner was subject to the Medical Staff Bylaws (hereinafter "Bylaws"). (Opp'n 11). According to the Bylaws "[a] practitioner against whom an adverse recommendation or action has been taken shall be given special notice." (Ex. A 44.) Moreover, "[a] practitioner shall have thirty (30) calendar days following the receipt of the notice to file a written request for a hearing." (*Id.*)

[*3] ¶3 On February 23, 2012, a nurse at JFL asked Dr. Gardiner for a written order so that she may comply with his directions. (Compl. $10.) As a result, Dr. Gardiner became upset and slammed a binder containing medical charts on the countertop of the nurse's workstation. (Compl. ¶ 11.) Following the incident, Dr. Franklin, chairman of the Medical Executive Committee (hereinafter "MEC"), contacted Dr. Gardiner to discuss the incident and informed him that the matter would be discussed at the St. Croix District Governing Board meeting. (Mot. 2.) Subsequently, at the board meeting, Dr. Franklin read a letter detailing the incident that took place on February 23, 2012. (*Id.*) The Motion states that Dr. Gardiner attended **[**3]** the meeting and was given an opportunity to speak in order to address the incident. (*Id.*)

[*4] ¶4 On February 29, 2012, the Defendants terminated Dr. Gardiner's employment as a Staff Physician II as well as his hospital privileges at JFL. (Compl. ¶¶ 2, 3.) On March 9, 2012, the Plaintiffs filed the proceeding Complaint. In the Complaint, the Plaintiffs allege that the Defendants termination of Dr. Gardiner's privileges at JFL was improper and have prevented him from offering a full range of hemodialysis service. (Compl. ¶ 6.) Moreover, because Dr. Gardiner is incapable of treating his hemodialysis patients without access to the hospital he is being forced to refer his patients to JFL physicians. (*Id.*) The Plaintiffs' Complaint asserts seven claims including: 1) Wrongful Termination; 2) Violation of the Virgin Islands' Antitrust Statute; 3) Tortious Interference with Prospective Economic Advantage; 4) Breach of Implied Covenant of Good Faith and Fair Dealing; 5) Defamation; 6) Unfair Competition and; 7) Violation of the Virgin Islands Criminally Influenced and Corrupt Practice Act.

LEGAL STANDARD

[*5] ¶5 Under *Rule 12(b)(6)* of the Virgin Islands Rules of Civil Procedure, a party may seek to dismiss a claim due **[**4]** to "failure to state a claim upon which relief can be granted."[1] In ruling on a *12(b)(6)* motion, a court determines whether the claim has been adequately stated in the pleadings.[2] The court must accept all well-pleaded allegations as true and view them in a light most favorable to the pleader.[3] According, to the Supreme Court of the Virgin Islands the court must:

> [f]irst, take note of the elements a plaintiff must plead to state a claim in order for the court to be aware of each item the plaintiff must sufficiently plead. Secondly, the court must identify allegations that are mere conclusions and not entitled to the assumption of the truth. Finally, the court must "assume the veracity of well-pleaded

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[1] *Smith v. Law Office of Kari A. Bentz P.C., No. ST-17-CV-116, 2017 V.I. LEXIS 111, at *3-4 (V.I. S. Ct. 2017)*.

[2] *Id.*

[3] *Id.*

factual allegations and then determine whether they are plausible to entitle relief. However, since the Supreme Court adopted the Virgin Islands Rules of Civil Procedure the plausibility requirement is now omitted.[4]

DISCUSSION

Count I: Wrongful Termination of Hospital Staff Privileges

[*6] ¶6 The Defendants argue that the Plaintiffs have not presented facts that plausibly show that the Defendants denied **[**5]** Dr. Gardiner his right to procedural due process. (Mot. 5.) In addition, the Defendants assert that the Supreme Court has found due process to be flexible and require such procedural protection as the situation demands. (*Id.*) Moreover, Article VII of the Bylaws provides for a fair hearing following an adverse action or recommendation and that there are situations in which a post-deprivation hearing is appropriate. (*Id.*)

[*7] ¶7 The Plaintiffs allege that the Court can draw a reasonable inference from the Complaint that Dr. Gardiner's due process rights were violated because he was terminated without a hearing. (Mot. 3.) In addition, the Plaintiffs claim that the three cases the Defendants cite in support of a post-deprivation were all decided by summary judgment once discovery had occurred rather than during an earlier stage when a *12(b)(6)* motion is appropriate. (*Id.*) Therefore, this case should proceed in order to properly determine whether Dr. Gardiner's due process rights were violated. (*Id.*)

[*8] ¶8 *Rule 8* of the Virgin Islands Rules of Civil Procedure states "that the Virgin Islands is a notice pleading jurisdiction, therefore an approach that dismisses a case based on failure to allege specific facts that if established would **[**6]** plausibly entitle the pleader to relief is not applicable."[5] Rather, a complaint need only present a short, plain statement of the cause of action and the basis for the claim for relief.[6]

[*9] ¶9 Here, the Complaint states that the Defendants violated Dr. Gardiner *Fourteenth Amendment* right to due process by terminating his hospital privileges without having an opportunity to address the allegations against him first. As such, the Plaintiffs have sufficiently informed the Defendants of the claims against them in a manner that makes them more than just conclusory. Therefore, given that the Virgin Islands is a notice pleading jurisdiction, the Complaint has sufficiently met the requirements of *Rule 8*. Thus, the Court must deny the Defendants' Motion to Dismiss for failure to state a claim in regard to Count 1 of the Plaintiffs' Complaint.

Count II: Violation of Virgin Islands Antitrust Statute

[*10] ¶10 To succeed on a claim under *Title 11 of the Virgin Islands Code § 1518*, a plaintiff must show that the defendant "[b]y contract, combination, or conspiracy with one or more other persons unreasonable restrain trade or commerce."[7]

[*11] ¶11 The Defendants contend that the accusation that they, on behalf of a single corporate entity, acted **[**7]** to unreasonably restrain trade must fail as a matter of law because unilateral conduct under the *Sherman Act* does not violate ***antitrust law***. (Mot. 8-9.) Moreover, since courts in the Virgin Islands have held that *11 V.I. Code § 1518*

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[4] *Smith v. Law Office of Kari A. Bentz P.C., No. ST-17-CV-116, 2017 V.I. LEXIS 111, at *3-4 (V.I. S. Ct. 2017)*, *see also* *Mills-Williams Mapp, 67 V.I. 574, 585 (V.I. 2017)*.

[5] *V.I.R. Civ. Proc. 8*.

[6] *Id.*

[7] *11 V.I.C. § 1503(2)*.

must be applied in a manner consistent with the *Sherman Act* and other federal antitrust laws, the claim must be dismissed. (Mot. 7.) In addition, the Defendants also assert that as an instrumentality of the Government of the Virgin Islands, JFL is immune from antitrust claims. (Mot. 9.)

[*12] ¶12 In response, the Plaintiffs' contend that the Complaint clearly states what actions were taken by the Defendants and other outsiders identified as John Does 1-10. (Mot. 8.) Therefore, the conduct by the Defendants was not unilateral. (*Id.*) The Plaintiffs' claim that the issue as to whether JFL is a semi-autonomous corporation of the government and thus immune to antitrust actions has yet to be determined, therefore it is an issue that is not appropriate for determination under a *12(b)(6)* motion. (Mot. 9.)

[*13] ¶13 The Complaint states that JFL conspired with outsiders who were interested in investing or purchasing the hospital and thus had an interest in ensuring that JFL maintains a monopoly. **[**8]** (Opp'n. 8.) The Plaintiffs also acknowledge that while the John Doe Defendants are unknown through discovery they can be identified. (*Id.*)

[*14] ¶14 The hospital as a government entity is funded by the Government of the Virgin Islands and cannot accept gifts, grants, or loans on its own behalf.[8] Rather the Legislature has vested the Virgin Islands Government Hospitals and Health Facilities Corporation Board of Directors with the power to secure funds from private individuals and then disburse the funds to the local District Boards.[9] In addition, legislative approval is required in order to sell the property to private investors.[10] Therefore, even in a light most favorable to the Plaintiff, it is unlike that the Defendants engaged in conduct that would violate *§ 1508*.

[*15] ¶15 Moreover, while the question of whether JFL is exempt from antitrust actions is an issue of first impression, the Court finds consistent with previous case law that the Legislature did not intend to subject JFL to lawsuits. From inception JFL, formerly St. Croix Hospital, has been owned by the Government.[11] Later, the Legislature enacted the Virgin Islands Government Hospitals and Health Facilities Corporation Act (hereinafter "Corporation **[**9]** Act").[12] Under the Corporation Act, the Virgin Islands Health Facilities Corporation (hereinafter "VIHHFC"), was established as a public corporation to manage JFL and other health care facilities.[13] In addition, the VIHHFC was given power to "sue and be sued" in its own name.[14] However, the Corporation Act did not vest JFL with that same power, as JFL has consistently been referenced as a government-owned hospital that is a facility of the Government and therefore generally not subject to suits. Furthermore, if the Legislature had intended for JFL to be subject to suits then it could have recognized the hospital as a public corporation, as actions may be brought against any public corporation in the Virgin Islands within the scope of its authority. Additionally, the Legislature could have vested the hospital with the power to "sue and be sued" as the Legislature has with other government entities.[15] Moreover, case law also indicates that JFL is not its own entity that is capable of being sued

[8] *19 V.I.C. § 245(b)*.

[9] *19 V.I.C. § 262*.

[10] *19 V.I.C. § 247(d)*.

[11] *Juan F. Luis Hosp. & Med. Ctr., & Gov't of the V.I. ex rel. Governor Juan F. Luis Hosp. & Med. Ctr. v. Titan Med. Group, LLC, 69 V.I. 873, 2018 V.I. Supreme LEXIS 33, at *11 (V.I. 2018)*.

[12] 1994 V.I. ALS 6012.

[13] *Id.*

[14] *Id. See also* *Cyprian v. Butcher, 53 V.I. 224, 2010 V.I. LEXIS 30, at *4 (V.I. S. Ct. 2010)* ("the clause to 'sue and be sued' when applied to a governmental entity 'must be liberally construe' such that it encompasses 'the natural and appropriate incidents of legal proceedings' ").

[15] *Id.*

as the hospital has always been named alongside the Government, the VIHHFC or the individual doctors when subject to lawsuits.[16]

[*16] ¶16 Accordingly, JFL as a facility of the Government **[**10]** is immune from antitrust claims. Thus, the Defendants' Motion to Dismiss regarding Count II of the Plaintiffs' Complaint shall be granted. Moreover, since the individual Defendants cannot engage in an antitrust violation on behalf of the hospital, Count II of the Plaintiffs' Complaint is dismissed.

Count III: Tortious Interference with Prospective Economic Advantage

[*17] ¶17 To prevail on interference with prospective business relations claim, a plaintiff must demonstrate:

> (1) the existence of a professional or business relation that is reasonably certain to produce an economic benefit for the plaintiff; (2) intentional interference with that relationship by the defendant; (3) that was accomplished through improper means or for an improper purpose; and (4) that the defendant's interference damaged the plaintiff.[17]

[*18] ¶18 The Defendants allege that the Plaintiffs have not presented any facts demonstrating that the Defendants intentionally or improperly interfered with Plaintiffs' prospective patients. (Mot. 11.) However, the Plaintiffs contend that the facts in the Complaint are sufficient because it states that "due to the Defendants terminating Dr. Gardiner's **[**11]** hospital privileges, he will no longer be able to provide full service to his patients." (Opp'n 10.) Moreover, "revoking Dr. Gardiner's hospital privileges following the incident that took place on February 23, 2012, was inherently improper and therefore intentional." (*Id.*)

[*19] ¶19 The Plaintiffs' Complaint alleges that by wrongfully terminating Dr. Gardiner's hospital privileges the Defendants interfered with his existing and future business prospects. (Compl. 15.) However, the Complaint fails to identify any business relationship between Dr. Gardiner and a third party that the Defendants knew of and in which they improperly interfered with. (*Id.*) Therefore, in accordance with *Rule 8* of the V.I.R. of Civ. Pro. the Complaint lacks the necessary facts required to presume the claim as being true.[18] Thus, the Court must grant the Defendants' Motion in regard to the Plaintiffs' tortious interference with prospective business relationships and as a result, Count III of the Plaintiffs' Complaint is dismissed.

Count IV: Breach of Implied Covenant of Good Faith and Fair Dealing

[*20] ¶20 An implied covenant of good faith and fair dealing is a common law principle that's generally included in every contract.[19] Moreover, **[**12]** the covenant is not explicitly bargained for by the parties but rather implied covenant that "neither party will do anything which will injure the right of the other to receive the benefits of the agreement."[20] As such, this Court in *Merchant Commercial Bank v. Oceanside Village, Inc.*, determined that the soundest rule for the Virgin Islands for breach of implied covenant of good faith and fair dealing requires that a party "take action that deprives another party of the benefits for which it had bargained."[21] Thus, to successfully bring a

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[16] *Id.*

[17] *Donastorg v. Daily News Publishing Co., Inc., 63 V.I. 196, 2015 V.I. LEXIS 105, at *145 (V.I. S. Ct. 2015)*.

[18] *V.I.R. Civ. Pro. 8(a)(2)*.

[19] *Merchants Commercial Bank v. Oceanside Village. Inc., 64 V.I. 3, 2015 V.I. LEXIS 146, at *40 (V.I. S. Ct. 2015)*.

[20] *Id.*

[21] *Merchants Commercial Bank v. Oceanside Village, Inc., 64 V.I. 3, 2015 V.I. LEXIS 146, at *40 (V.I. S. Ct. 2015)*.

claim for breach of implied covenant of good faith and fair dealing the plaintiff must set forth a plausible breach of said covenant.[22]

[*21] ¶21 The Defendants assert that the Plaintiffs have failed to cite any facts that plausibly establish that the Defendants breached the covenant of good faith and fair dealing. (Mot. 12.) Moreover, the Defendants contend that the Bylaws provide for a hearing after an adverse action at the request of the affected party, thus the Plaintiffs have not stated any facts that plausibly establish that the Defendants conspired **[**13]** to deny him his right to due process. (*Id.*)

[*22] ¶22 The Plaintiffs assert that "the facts in the Complaint present a plausible argument that Defendants acted with bad motives or intentions to deny him the benefit of the bargain initially intended by the parties." (Opp'n. 11.)

[*23] ¶23 Here, the Plaintiffs have not pleaded facts when assumed to be true would establish that the Defendants breaching the implied covenant of good faith and fair dealing by denying Dr. Gardiner due process under the Hospital's bylaws. Rather, the Complaint states that "Dr. Gardiner was entitled to a fair proceeding and due process under the Hospital's [b]ylaws, which constitute a contract between the parties" and that the "covenant was breached when the Defendants denied Dr. Gardiner due process." (Compl. 16.) However, the Bylaws state that "[a] practitioner shall have thirty (30) calendar days following his receipt of notice pursuant to Section 1.3 to file a written request for a hearing" and "[a] practitioner who fails to request a hearing within thirty (30) days waives any right to such a hearing or to an appellate review." (Def. Ex. A, Art. VII § 1.4.) Therefore, Dr. Gardiner was not denied his right to due process under the Bylaws but **[**14]** rather failed to request a hearing as he was entitled to do so under the Bylaws. Thus, Defendants' Motion to Dismiss Count IV of the Plaintiffs' Complaint shall be granted and Count IV of the Plaintiffs' Complaint will be dismissed.

Count V: Defamation Against Dr. Franklin

[*24] ¶24 In order to prevail on a claim for defamation the plaintiff must show that:

> (1) the existence of a false and defamatory statement concerning another; (2) the existence of an unprivileged publication of a false and defamatory statement to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) "either the actionability of the statement irrespective of special harm or the existence of special harm caused by the publication."[23]

[*25] ¶25 The Defendants argue that the Plaintiffs have failed to allege which statements in the letter ready by Dr. Franklin were false and defamatory. (Mot. 13.) Moreover, because Dr. Franklin is chairman of the board and the letter was read at a MEC meeting, the statement is conditionally privileged. (*Id.*)

[*26] ¶26 In response, the Plaintiff argues that the Complaint specifically identifies the false and defamatory statements **[**15]** made by Dr. Franklin in previous sections of the Complaint. (Opp'n. 11-12.) Therefore, by incorporating all the proceeding paragraphs, the Plaintiffs have sufficiently identified which statements in Dr. Franklin's letter were defamatory. (*Id.*) In addition, the Plaintiffs claim that the statements made by Dr. Franklin are not conditionally privileged because *Title 19 of the Virgin Islands Code § 248(h)*, only protects members of a peer review committee "for acts to be done with due diligence in the furtherance of the purpose for which the committee was established." (*Id.*)

[*27] ¶27 According to the Plaintiffs by incorporating the paragraphs prior to Count V they have sufficiently alleged a claim for defamation. (Opp'n. 11-12.) Paragraph eighty-six of the Complaint states that "at the board meeting a letter was read from Dr. Franklin outlining the incident." (Compl. 11.) Subsequently, paragraphs 125 and 126 of the Complaint state that "Dr. Franklin made defamatory statements about Dr. Gardiner to a third party" and "these

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[22] *Id.*

[23] *Donastorg v. Daily News Publishing Co., Inc., 63 V.I. 196, 2015 V.I. LEXIS 105, at * 20-21 (V.I. S. Ct. 2015)*.

statements as alleged above were false and injuries to Dr. Gardiner." (Compl. 16.) Given these allegations, the Complaint satisfies prong two and three of the defamation claim by stating **[**16]** that Dr. Franklin read the letter at the board meeting and that as a result, "Dr. Gardiner has suffered a loss of reputation, customer good will [sic], and loss of patient confidence." (Compl. 16.) However, the Complaint does not satisfy prong one and three because it fails to identify which statements in Dr. Franklin's letter outlining the incident were false and defamatory or how Dr. Franklin reading the letter at the MEC meeting constituted at least negligence.[24] Therefore, in considering the Complaint as a whole the Plaintiff has failed to satisfy all the prongs necessary to assert a claim for defamation.[25]

[*28] ¶28 Further, the Court finds that the letter read by Dr. Franklin is conditionally privileged. This Court has stated that a statement can avoid liability for publication if the conditional privilege applies and the privilege is not abused.[26] Moreover, a statement is conditionally privileged "if the circumstances induce a correct or reasonable belief that (a) there is information that affects a sufficiently important interest of the publisher, and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest."[27]

[*29] ¶29 **[**17]** Here, the statement was conditionally privileged because Dr. Franklin was the chairman of the MEC, which is tasked with maintaining the professionalism of JFL. Dr. Franklin read the letter at a MEC board meeting where Dr. Gardiner's conduct was being reviewed. As the chairman of the MEC, the letter affected an important interest of JFL. In addition, it was also necessary for Dr. Franklin to read the letter to the other board members in order for them to review Dr. Gardiner's conduct as a JFL employee. Therefore, the letter read by Dr. Franklin at the MEC meeting was conditionally privileged. Thus, the Court must dismiss Count V of the Plaintiffs' Complaint.

Count VI: Unfair Competition

[*30] ¶30 The laws of the Virgin Islands prohibit unfair competition under Title 11 *§ 1503*, also known as the Virgin Islands Anti-Monopoly Law.[28] Moreover, *§ 1503* states in relevant part that:

> "every person shall be deemed to have committed a violation of this chapter who shall … [l]ease or make a sale or contract for … services … where the effect of such lease, sale or contract for such sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in **[**18]** any line of commerce."[29]

[*31] ¶31 The Defendants claim that the Plaintiffs have failed to allege any facts that the Defendant, were engaged in unfair competition, and that the Plaintiffs are merely restating their antitrust claim under a different name. (Mot. 13.) Nevertheless, the Defendants assert that as an instrumentality of the Government, the Defendants are immune from antitrust actions. (Mot. 16.)

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[24] *Donastorg Daily News Publishing Co., 2015 V.I. LEXIS at *20-21*; *see also* Complaint at 16.

[25] *Id.*

[26] *Reynolds v. Rohn, No. SX-13-CV-188, 2015 V.I. LEXIS 103 at *28 (V.I. Super. 2015)*.

[27] *Rohn, No. SX-13-CV-188, 2015 V.I. LEXIS 103 at *28*; *see also* *19 V.I.C. § 248(h)* (stating "Where shall be no civil liability for any member of a per review committee, ethics committee, or quality assurance committee, … for any acts done with due diligence in the furtherance of the purpose for which the peer review committee, ethics committee, or quality assurance committee was established.")

[28] *Virgin Islands Port Authority v. Virgin Islands Taxi Ass'n., 979 F. Supp. 344, 349 (D.V.I. 1997)*.

[29] *11 V.I.C. § 1503(4)*.

[*32] ¶32 The Plaintiffs argue that although unfair competition is prohibited under the *Virgin Islands Anti-Monopoly Act* and the Defendants are a semi-autonomous corporate entity of the Virgin Islands Government the unfair competition claim is still valid due to the Defendants unfairly restricting the Plaintiff from serving his clients at JFL. (Opp'n 13.)

[*33] ¶33 The Defendants are correct in their assertion that unfair competition is prohibited under *§ 1503* of the *Virgin Islands Antimonopoly Law*.[30] Therefore the Plaintiffs' are merely restating their antitrust claim because unfair competition is a subset of the ***antitrust law***. Thus, for the reasons described above, the Court will grant the Defendants' Motion to Dismiss for failure to state a claim for unfair competition and Count IV of the Plaintiffs' Complaint **[**19]** will be dismissed.

Count VII: Criminally Influenced and Corrupt Practice Act

[*34] ¶34 *Title 14 Virgin Islands Code § 605* states that:

> "[i]t is unlawful for any person employed by, or associated with, any enterprise, as that term is defined herein, to conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of criminal activity. It is unlawful for any person, through a pattern of criminal activity, to acquire or maintain, directly or indirectly, any interest in, or control of, any enterprise or real property. It is also unlawful for any person who has received any proceeds derived, directly or indirectly, any of those proceeds, in the acquisition of any title to, or any right, interest, or equity in, real property, or in the establishment or operation of any enterprise. Finally, it is unlawful for any person to conspire or attempt to violate, either directly or through another or others, the provisions of *section 605* … .[31]

[*35] ¶35 Moreover, criminal activity under *Title 14 of the Virgin Islands Code § 605* "means to engage in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person to engage in the crimes, offenses, violations or the prohibited conduct **[**20]** as described by the laws within the jurisdiction including any federal criminal law … ."[32]

[*36] ¶36 The Defendants argue that the Plaintiffs only claim under the *Virgin Islands Criminally Influenced and Corrupt Organization Act* was the alleged improper termination of Dr. Gardiner's hospital privileges. (Mot. 17.) Aside from this accusation, the Plaintiffs have not stated any conduct on behalf of the Defendants that were illegal or conspiratorial in nature. (*Id.*) Therefore, the Plaintiffs have failed to allege any facts that suggest criminal activity or establish an intent on behalf of the Defendants to destroy the Plaintiffs' business. (*Id.*) In addition, the Defendants also allege that the Plaintiffs' intra-conspiracy claim cannot stand where a corporation is acting in concert with its officers and employees. (*Id.*)

[*37] ¶37 In response, the Plaintiffs claim that the Complaint details the use of "email communication, cellphone communication, landlines, facsimile transmission, and the U.S. mail" to construct unwarranted disciplinary actions against Dr. Gardiner. (Opp'n 13.) Additionally, the Plaintiffs allege that due to the involvement of the John Doe Defendants the conspiracy included separate **[**21]** outside actors. (*Id.*) Thus, the conspiracy did not just entail JFL. (*Id.*)

[*38] ¶38 Here, the Plaintiffs have alleged that the Defendants are in violation of *§ 605* and therefore they are entitled to relief under *§ 607*. However, to be in violation of *§ 605* the Defendants must be engaged in a pattern of criminal activity.[33] Count VII of the Plaintiffs' Complaint only consists of conclusory statements that the Defendants

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[30] *Id.*

[31] *14 V.I.C. § 607*.

[32] *Id. at 605*.

were engaged in a pattern of racketeering activity that affects interstate and foreign commerce. This statement lacks any further factual advancement and the Plaintiffs fail to state what actions by the Defendants constituted a pattern of racketeering. Consequently, the Court needs not address the issue of inter-corporation conspiracy and will grant Defendants' Motion to Dismiss for failure to state a claim under the *Criminal Conspiracy and Corrupt Practices Act*.

CONCLUSION

[*39] ¶39 After careful consideration of the above, the Court must grant Defendants Motion to Dismiss in regard to Counts II, III, IV, V, VI, and VII of the Plaintiffs' Complaint. However, Count I of the Plaintiffs' Complaint still remain. An Order consistent with the Memorandum Opinion shall follow.

DONE and so ORDERED this 30th [22] day of July, 2019**.

/s/ Harold W. L. Willocks

HAROLD W. L. WILLOCKS

Administrative Judge of the Superior Court

Dated: 07/30/19

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[33] *14 V.I.C. § 605*.

In re Capacitors Antitrust Litig.

United States District Court for the Northern District of California

July 30, 2019, Decided; July 31, 2019, Filed

MDL Case No. 17-md-02801-JD; Case No. 14-cv-03264-JD

Reporter

2019 U.S. Dist. LEXIS 232309 *; 2019 WL 13166174

IN RE CAPACITORS ANTITRUST LITIGATION

Subsequent History: Supplemental opinion at *In re Capacitors Antitrust Litig., 2019 U.S. Dist. LEXIS 232308, 2019 WL 12872866 (N.D. Cal., Oct. 28, 2019)*

Settled by *In re Capacitors Antitrust Litig. This Document Relates to: Direct Purchaser Class Action, 2020 U.S. Dist. LEXIS 263113, 2020 WL 13210652 (N.D. Cal., July 10, 2020)*

Adopted by *In re Capacitors Antitrust Litig., 2020 U.S. Dist. LEXIS 125627, 2020 WL 4000973 (N.D. Cal., July 15, 2020)*

Prior History: *In re Capacitors Antitrust Litig., 106 F. Supp. 3d 1051, 2015 U.S. Dist. LEXIS 68615 (N.D. Cal., May 26, 2015)*

Core Terms

capacitors, Objecting, settlement, purchases, parties, Settling, shipped, second round, viable, sales, commerce, first round, proceedings, contends, pricing, argues, Sherman Act, entity, reasonably foreseeable, class member, negotiated, delivery, pursued, round, Antitrust, encompass, accuracy, domestic, products, shipment

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For Kemet Electronics Corporation, Defendant (3:14cv3264): Jacob R. Sorensen, Roxane Alicia Polidora, LEAD ATTORNEYS, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA USA; Lindsay A. Lutz, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman, **[*12]** Four Embarcadero Center 22nd Floor, San Francisco, CA USA; Laura Christine Hurtado, Lee Brand, Pillsbury Winthrop Shaw Pittman LLP, Four Embarcadero Center 22nd Floor, San Francisco, CA USA.

For Nippon Chemi-Con Corporation, a Japanese corporation, Defendant (3:14cv3264): Charles F. Rule, Daniel J. Howley, LEAD ATTORNEYS, Crystal Marissa Johnson, Joseph J. Bial, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC USA; Eric Richard Sega, PRO HAC VICE;ATTORNEY TO BE NOTICED, Paul, Weiss, Rifkind, Wharton, Garrison LLP, Washington, DC USA; Quynh K Vu, Steven Shea Kaufhold, Kaufhold Gaskin LLP, San Francisco, CA USA.

For Nichicon Corporation, a Japanese corporation, Defendant (3:14cv3264): Brian Joseph Smith, PRO HAC VICE;ATTORNEY TO BE NOTICED, K L Gates, LLP, Chicago, IL USA; Daniel William Fox, K&L Gates LLP, San Francisco, CA USA; Gina Alyse Johnson, KL Gates LLP, Chicago, IL USA; John Edward Susoreny, PRO HAC VICE;ATTORNEY TO BE NOTICED, Chicago, IL USA; Lauren Norris Donahue, Chicago, IL USA; Michael Edward Martinez, K&L Gates LLP, Chicago, IL USA; Philip S. Van Der Weele, PRO HAC VICE;ATTORNEY TO BE NOTICED, K&L Gates LLP, Portland, OR USA.

For Nichicon (America) Corporation, **[*13]** Defendant (3:14cv3264): Brian Joseph Smith, PRO HAC VICE;ATTORNEY TO BE NOTICED, K L Gates, LLP, Chicago, IL USA; Daniel William Fox, K&L Gates LLP, San Francisco, CA USA; Gina Alyse Johnson, KL Gates LLP, Chicago, IL USA; John Edward Susoreny, Lauren Norris Donahue, Lauren Britt Salins, Scott M Mendel, Steven M Kowal, Chicago, IL USA; Michael Edward Martinez, K&L Gates LLP, Chicago, IL USA; Philip S. Van Der Weele, PRO HAC VICE;ATTORNEY TO BE NOTICED, K&L Gates LLP, Portland, OR USA.

For Avx Corporation, Defendant (3:14cv3264): Bruce Douglas Sokler, LEAD ATTORNEY, Mintz Levin Cohn Ferris Glovsky and Popeo, Ste 900, Washington, DC USA; Evan Nadel, LEAD ATTORNEY, Mintz Levin, San Francisco, CA USA; Robert Gil Kidwell, Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, Washington, DC USA.

For Rubycon Corporation, a Japanese corporation, Defendant (3:14cv3264): Djordje Petkoski, LEAD ATTORNEY, David Higbee, Shearman & Sterling LLP, Washington, DC USA; Deke Shearon, Shearman and Sterling LLP, New

York, NY USA; John F. Cove, Jr., Shearman & Sterling LLP, San Francisco, CA USA; Mark G. Weiss, Shearman and Sterling LLP, Washington, Dc, Dc; Michael Brett Burns, Hunton and Williams, LLP, San Francisco, **[*14]** CA USA; Ryan A Shores, Shearman & Sterling LLP, United Sta, Washington, DC USA.

For Rubycon America Inc., Defendant (3:14cv3264): Djordje Petkoski, LEAD ATTORNEY, David Higbee, Shearman & Sterling LLP, Washington, DC USA; John F. Cove, Jr., Shearman & Sterling LLP, San Francisco, CA USA; Mark G. Weiss, Shearman and Sterling LLP, Washington, Dc, Dc; Michael Brett Burns, Hunton and Williams, LLP, San Francisco, CA USA; Ryan A Shores, Shearman & Sterling LLP, United Sta, Washington, DC USA.

For Matsuo Electric Co, Ltd., a Japanese corporation, Defendant (3:14cv3264): Felix T. Woo, LEAD ATTORNEY, FTW Law Group, Los Angeles, CA USA; Bonnie Lau, Morrison & Foerster LLP, San Francisco, CA USA.

For Kenji Kasahara, Defendant (3:14cv3264): Representative Director of Toshin Kogyo Co., LTD, Tsukas Bldg. 2-15-4, Uchikanda, Chiyoda-Ku, Tokyo, Japan.

For Vishay Intertechnology, Inc., Defendant (3:14cv3264): Andrew J. Pinkston, LEAD ATTORNEY, PRO HAC VICE, Pepper Hamilton, Philadelphia, PA USA; Benjamin J. Eichel, LEAD ATTORNEY, PRO HAC VICE, Pepper Hamilton, LLP, Philadelphia, PA USA; Eric Patrick Enson, LEAD ATTORNEY, JONES DAY, Los Angeles, CA USA; Frank H. Griffin, LEAD ATTORNEY, Pepper Hamilton, **[*15]** Philadelphia, PA USA; Jeffrey Alan LeVee, LEAD ATTORNEY, Jones Day, Los Angeles, CA USA; Benjamin Jesse Eichel, Pepper Hamilton LLP, Philadelphia, PA USA; Rachel Hadass Zernik, Jones Day, Los Angeles, CA USA.

For Rohm Co., Ltd., a Japanese corporation, Defendant (3:14cv3264): Ashish Sudhakaran, Mallory Ann Jensen, Megan Louise Havstad, Michael Frederick Tubach, O'Melveny and Myers LLP, San Francisco, CA USA.

For Rohm Semiconductor U.S.A., Llc, Defendant (3:14cv3264): Kenneth Ryan O'Rourke, LEAD ATTORNEY, Wilson Sonsini Goodrich & Rosati, P.C., Washington, DC USA; Michael Frederick Tubach, LEAD ATTORNEY, Ashish Sudhakaran, Mallory Ann Jensen, Megan Louise Havstad, O'Melveny & Myers LLP, San Francisco, CA USA.

For United Chemi-Con Corporation, Defendant (3:14cv3264): Charles F. Rule, Daniel J. Howley, Joseph J. Bial, LEAD ATTORNEYS, Crystal Marissa Johnson, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC USA; Eric Richard Sega, Paul, Weiss, Rifkind, Wharton, Garrison LLP, Washington, DC USA; Quynh K Vu, Steven Shea Kaufhold, Kaufhold Gaskin LLP, San Francisco, CA USA.

For Hitachi Aic Incorporated, Defendant (3:14cv3264): Chul Pak, Jonathan M. Jacobson, LEAD ATTORNEYS, Wilson **[*16]** Sonsini Goodrich and Rosati, New York, NY USA; G. Theodore Serra, LEAD ATTORNEY, Wilson Sonsini Goodrich Rosati P.C., Washington, DC USA; Jacqueline Hsiang Liu, LEAD ATTORNEY, Wilson Sonsini Goodrich and Rosati, United Sta, San Francisco, CA USA; Justin Andrew Cohen, Marc Emanuele Foto, Foto, LEAD ATTORNEYS, Wilson Sonsini Goodrich Rosati, United Sta, New York, NY USA; Takeyoshi Ikeda, Washington, DC USA.

For Nissei Electronic Co. Ltd., Defendant (3:14cv3264): Lauren Michiko Ige, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC USA; Margaret E. O'Grady, Wilmer Hale, LLP, Boston, MA USA; Mark D. Flanagan, WilmerHale, Palo Alto, CA USA.

For Nitsuko Electronics Corporation, Defendant (3:14cv3264): Ashley Marie Bauer, Belinda S Lee, Sarah Meyers Ray, LEAD ATTORNEYS, Cameron James Clark, Latham & Watkins LLP, San Francisco, CA USA.

For Shinyei Kaisha, Defendant (3:14cv3264): Gaspare J. Bono, LEAD ATTORNEY, Dentons US LLP, Washington, DC USA; Andrew S. Azarmi, Dentons US LLP, San Francisco, CA USA.

For Chip-Tech, Ltd., Plaintiff (3:17md2801): C. Andrew Dirksen, LEAD ATTORNEY, Cera LLP, Boston, MA USA; Joseph J. DePalma, LEAD ATTORNEY, Lite DePalma Greenberg, LLC, Newark, NJ USA; Daniel **[*17]** R. Karon, PRO HAC VICE;ATTORNEY TO BE NOTICED, Karon LLC, Cleveland, OH USA; Eric L. Cramer, Ruthanne Gordon, Berger Montague PC, Philadelphia, PA USA; James W. Anderson, Vincent J. Esades, HEINS MILLS & OLSON, P.L.C., Minneapolis, MN USA; James Gerard Beebe Dallal, Joseph Saveri Law Firm, San Francisco, CA USA; Jason Scott Hartley, Hartley LLP, San Diego, CA USA; Jessica N. Servais, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN USA; Joseph R. Saveri, Joseph Saveri Law Firm, Inc., San Francisco, CA USA; Michael C

Dell'Angelo, IV, BERGER MONTAGUE PC, United Sta, Philadelphia, PA USA; Ryan James McEwan, Joseph Saveri Law Firm, Inc., San Francisco, CA USA; Solomon B. Cera, Cera LLP, San Francisco, CA USA; Steven J. Greenfogel, Lite DePalma Greenburg, LLC, Philadelphia, PA USA.

For Indirect Purchaser Plaintiffs, Plaintiff (3:17md2801): Adam J. Zapala, LEAD ATTORNEY, Cotchett Pitre & McCarthy LLP, Burlingame, CA USA; Brian P. Murray, LEAD ATTORNEY, Lee Albert, Glancy Prongay & Murray LLP, New York, NY USA; Daniel E. Gustafson, LEAD ATTORNEY, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN USA; Elizabeth Tran Castillo, LEAD ATTORNEY, Cotchett, Pitre and McCarthy, Burlingame, CA USA; **[*18]** Steven Noel Williams, LEAD ATTORNEY, Joseph Saveri Law Firm, San Francisco, CA USA; W. Joseph Bruckner, LEAD ATTORNEY, Lockridge Grindal Nauen P.L.L.P, Minneapolis, MN USA; Brian D. Clark, PRO HAC VICE;ATTORNEY TO BE NOTICED, Lockridge Grindal Nauen P.L.L.P, Minneapolis, MN USA; Brian Douglas Penny, Goldman Scarlato & Penny, P.C., Conshohocken, PA USA; Daniel C. Hedlund, Gustafson Gluek PLLC, Minneapolis, MN USA; Devon Paul Allard, Elizabeth R. Odette, Heidi M Silton, The Miller Law Firm, PC, Rochester, MI USA; Hollis L. Salzman, Robins Kaplan LLP, New York, NY USA; Kellie Lerner, Robins Kaplan LLP, Robins Kaplan Llp 399 Park Avenue Suite 3600, New York, NY USA; Richard Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA USA; Sharon S. Almonrode, Simeon Andrew Morbey, The Miller Law Firm, P.C., Rochester, MI USA.

For Direct Purchaser Plaintiffs, Plaintiff (3:17md2801): Joseph R. Saveri, LEAD ATTORNEY, Demetrius Xavier Lambrinos, Joseph Saveri Law Firm, Inc., San Francisco, CA USA; Steven Noel Williams, LEAD ATTORNEY, James Gerard Beebe Dallal, Kyle Paul Quackenbush, Joseph Saveri Law Firm, San Francisco, CA USA; Alfred Luke Smith, Radice Law Firm PC, Unit 102-R, Philadelphia, **[*19]** PA USA; Andrew Michael Purdy, PRO HAC VICE;ATTORNEY TO BE NOTICED, Herrera Purdy LLP, Newport Beach, CA USA; Anupama K Reddy, Joseph Saveri Law Firm, United Sta, San Francisco, CA USA; Bruce Lee Simon, Pearson Simon & Warshaw, LLP, San Francisco, CA USA; Christopher Kar-Lun Young, Joseph Saveri Law Firm, Joseph Saveri Law Firm 601 California Street, United Sta, San Francisco, CA USA; Gerard A Dever, Gregory Asciolla, Fine Kaplan and Black, RPC, Philadelphia, PA USA; John Daniel Radice, Radice Law Firm, Long Beach, NJ USA; Karin Elizabeth Garvey, Labaton Sucharow LLP, New York, NY USA; Kenneth Bruce Pickle, Jr., Radice Law Firm, PC, Brooklyn, NY USA; Matthew Duncan, Matthew Perez, Fine, Kaplan and Black, RPC, Philadelphia, PA USA; Matthew Sinclair Weiler, Schneider Wallace Cottrell Konecky et al, Schneider Wallace Cottrell Konecky Et Al 2000 Powell Street Suite 1400, Emeryville, Emeryville, CA USA; Nicomedes Sy Herrera, Herrera Purdy LLP, Oakland, CA USA; Paul Costa, Fine, Kaplan and Black, Philadelphia, PA USA; Rachel Ellen Kopp, SPECTOR ROSEMAN & KODROFF, P.C., Philadelphia, PA USA; Stuart George Gross, Gross & Klein, LLP, San Francisco, CA USA; William G. Caldes, Spector Roseman **[*20]** & Kodroff, P.C., Philadelphia, PA USA.

For Digi-Key Corporation, Plaintiff (3:17md2801): Ruth Strandness Shnider, LEAD ATTORNEY, Stinson Leonard Street LLP, Minneapolis, MN USA; Todd Anders Noteboom, LEAD ATTORNEY, Stinson Leonard Street LLP, Hennepin, Minneapolis, MN USA; Victoria Lee Smith, LEAD ATTORNEY, Stinson Leonard Street LLP, Kansas City, MO USA; Judith A. Zahid, Zelle LLP, San Francisco, CA USA.

For Autorama, Inc., Bhrac, Llc, Beverly Hills Leasing Llc, Cetacea Sound, Inc., Computing Solutions, Inc., Michael W. Davis, Timothy Duffy, Scot Dunlap, Mike Fisher, Gossett Motor Cars, Inc., Fredrick P. Hege, Jr., David C. Keller, John E. Mcdowell, Marta Michaud, Garth Russell, M.D., Todd Stowater, Sean G Tarjoto, Jamie Thaemert, We 3 Gossett, Llc, Johnny Walker, Plaintiffs (3:17md2801): Daniel Stewart Robinson, LEAD ATTORNEY, Robinson Calcagnie, Inc., Newport, CA USA.

For Avnet, Inc., Plaintiff (3:17md2801): Robert William Turken, LEAD ATTORNEY, Lori P. Lustrin, Scott N. Wagner, Bilzin Sumberg Baena Price and Axelrod LLP, Miami, FL USA; Adrian K Felix, Miami, FL USA; Ilana Arnowitz Drescher, Bilzin Sumberg Baena Price and Axelrod, Miami, FL USA.

For David A Bennett, Plaintiff (3:17md2801): **[*21]** Alexander Michael Schack, LEAD ATTORNEY, Law Offices of Alexander M. Schack, San Diego, CA USA.

For Michael Brooks, Plaintiff (3:17md2801): Joel Cary Meredith, LEAD ATTORNEY, Meredith & Associates, Philadelphia, PA USA; Krishna Brian Narine, LEAD ATTORNEY, Meredith Narine, Philadelphia, PA USA; Matthew

Dickinson Heaphy, LEAD ATTORNEY, Saveri and Saveri, San Francisco, CA USA; Richard Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA USA.

For Cae Sound, Plaintiff (3:17md2801): Mark Francis Ram, LEAD ATTORNEY, Cotchett Pitre & McCarthy LLP, Burlngame, CA USA; Matthew Dickinson Heaphy, LEAD ATTORNEY, Saveri and Saveri, San Francisco, CA USA; Guido Saveri, Saveri & Saveri, Inc., San Francisco, CA USA.

For Chip-Tech, Ltd., Plaintiff (3:17md2801): Joseph J. DePalma, LEAD ATTORNEY, Lite DePalma Greenberg, LLC, Newark, NJ USA; Andrew Michael Purdy, PRO HAC VICE;ATTORNEY TO BE NOTICED, Herrera Purdy LLP, Newport Beach, CA USA; Daniel R. Karon, PRO HAC VICE;ATTORNEY TO BE NOTICED, Karon LLC, Cleveland, OH USA; Eric L. Cramer, Ruthanne Gordon, Berger Montague PC, Philadelphia, PA USA; James W. Anderson, Vincent J. Esades, HEINS MILLS & OLSON, P.L.C., Minneapolis, MN USA; James Gerard Beebe **[*22]** Dallal, Joseph Saveri Law Firm, San Francisco, CA USA; Jason Scott Hartley, Hartley LLP, San Diego, CA USA; Solomon B. Cera, Cera LLP, San Francisco, CA USA.

For Dependable Component Supply Corp., Plaintiff (3:17md2801): C. Andrew Dirksen, LEAD ATTORNEY, Cera LLP, Boston, MA USA; Michael C Dell'Angelo, IV, BERGER MONTAGUE PC, United Sta, Philadelphia, PA USA; Solomon B. Cera, Cera LLP, San Francisco, CA USA; Steven J. Greenfogel, Lite DePalma Greenburg, LLC, Philadelphia, PA USA.

For Everett Ellis, Plaintiff (3:17md2801): Daniel Stewart Robinson, LEAD ATTORNEY, Robinson Calcagnie, Inc., Newport, CA USA; Richard Lombardo, LEAD ATTORNEY, Shaffer Lombardo Shurin, Kansas City, MO USA; William Robert Pointer, II, Duncan Firm, United Sta, Little Rock, AR USA.

For Flextronics International USA, Inc., Plaintiff (3:17md2801): Elizabeth Erin Collins, LEAD ATTORNEY, Charles E. Tompkins, Williams, Montgomery and John Ltd., Washington, DC USA; Eric Richard Lifvendahl, L&G Law Group LLP, Chicago, IL USA; Joseph Franklin Bozdech, Williams Montgomery & John, Ltd., Chicago, IL USA; Lesley Elizabeth Weaver, Bleichmar Fonti & Auld LLP, Oakland, CA USA; Whitney E. Street, Block & Leviton LLP, San Francisco, **[*23]** CA USA.

For Troy Gibson, Charles Rusher, Jennifer Rusher, David Standridge, Plaintiffs (3:17md2801): Brett Ashley Emison, LEAD ATTORNEY, Langdon Emison, United Sta, Lexington, MO USA; Daniel Stewart Robinson, LEAD ATTORNEY, Robinson Calcagnie, Inc., Newport, CA USA; James Kent Emison, Langdon and Emison, United Sta, Lexington, MO USA.

For Scott Huffman, Plaintiff (3:17md2801): Brett Ashley Emison, LEAD ATTORNEY, Langdon Emison, United Sta, Lexington, MO USA; James Kent Emison, Langdon and Emison, United Sta, Lexington, MO USA.

For In Home Tech Solutions, Inc., Plaintiff (3:17md2801): Alexander Dewitt Singh Kullar, LEAD ATTORNEY, Steyer Lowenthal Boodrookas Alvarez Smith LLP, San Francisco, CA USA; W. Joseph Bruckner, LEAD ATTORNEY, Elizabeth R. Odette, Simeon Andrew Morbey, Lockridge Grindal Nauen P.L.L.P, Minneapolis, MN USA; Aaron M. Sheanin, Robins Kaplan, Mountain View, CA USA; Allan Steyer, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA USA; Michael Harrison Pearson, Pearson Simon & Warshaw, LLP, Sherman Oaks, CA USA.

For The Aasi Beneficiaries Trust, by And Through Kenneth A. Welt, Liquidating Trustee, Plaintiff (3:17md2801): Jerry Robert Goldsmith, LEAD ATTORNEY, **[*24]** Ilana Arnowitz Drescher, Bilzin Sumberg Baena Price and Axelrod, Miami, FL USA; Adrian K Felix, Miami, FL USA; Judith A. Zahid, Zelle LLP, San Francisco, CA USA; Lori P. Lustrin, Robert William Turken, Bilzin Sumberg Baena Price and Axelrod, LLP, Miami, FL USA; Scott N. Wagner, PRO HAC VICE;ATTORNEY TO BE NOTICED, Bilzin Sumberg Baena Price & Axelrod LLP, Miami, FL USA.

For Toy-Knowlogy Inc., Plaintiff (3:17md2801): Eric B. Fastiff, LEAD ATTORNEY, Lieff Cabraser Heimann & Bernstein LLP, San Francisco, CA USA; Mark Francis Ram, LEAD ATTORNEY, Cotchett Pitre & McCarthy LLP, Burlngame, CA USA; Steven Noel Williams, LEAD ATTORNEY, Joseph Saveri Law Firm, San Francisco, CA USA.

For Walker Component Group, Inc., Plaintiff (3:17md2801): Daniel C. Girard, LEAD ATTORNEY, Jordan S Elias, Girard Sharp LLP, San Francisco, CA USA; Joseph R. Saveri, Joseph Saveri Law Firm, Inc., San Francisco, CA USA.

For Steve Wong, Plaintiff (3:17md2801): Jack Wing Lee, LEAD ATTORNEY, Minami Tamaki LLP, San Francisco, CA USA; Daniel R. Shulman, Gray, Plant, Mooty, Mooty & Bennett, P.A., Minneapolis, MN USA.

For Eiq Energy Inc., Plaintiff (3:17md2801): Austin B Cohen, LEAD ATTORNEY, Levin Fishbein Sedran and Berman, **[*25]** Phila., Philadelphia, PA USA; Joseph R. Saveri, Joseph Saveri Law Firm, Inc., San Francisco, CA USA.

For Benchmark Electronics DE Mexico S. DE R.L. DE C.V., Benchmark Electronics Huntsville Incorporated, Benchmark Electronics Inc, Benchmark Electronics Manufacturing Solutions (Moorpark) Incorporated, Benchmark Electronics Manufacturing Solutions Incorporated, Benchmark Electronics Phoenix Incorporated, Benchmark Electronics Tijuana S. DE R.L. DE C.V., Plaintiffs (3:17md2801): Amy Abdo, LEAD ATTORNEY, Victoria Ann Stazio, Fennemore Craig PC - Phoenix, AZ, Phoenix, AZ USA; Ilana Arnowitz Drescher, LEAD ATTORNEY, Ilana Arnowitz Drescher, Bilzin Sumberg Baena Price and Axelrod, Miami, FL USA; Robert William Turken, LEAD ATTORNEY, Bilzin Sumberg Baena Price and Axelrod LLP, Miami, FL USA; Adrian K Felix, Miami, FL USA; Lori P. Lustrin, Bilzin Sumberg Baena Price and Axelrod, LLP, Miami, FL USA; Scott N. Wagner, PRO HAC VICE;ATTORNEY TO BE NOTICED, Bilzin Sumberg Baena Price & Axelrod LLP, Miami, FL USA.

For Arrow Electronics, Inc., Plaintiff (3:17md2801): Anne M. Nardacci, LEAD ATTORNEY, Philip J Iovieno, Boies Schiller Flexner LLP, Albany, NY USA; Kyle Smith, William Anthony Isaacson, LEAD **[*26]** ATTORNEYS, Boies Schiller & Flexner, LLP-DC, Washington, DC USA; Meredith Lys Schultz, Pascual Oliu, LEAD ATTORNEYS, Boies Schiller Flexner, LLP-Fort Lauderdale, Fort Lauderdale, FL USA; Philip J. Iovieno, LEAD ATTORNEY, Boies Schiller & Flexner LLP, Albany, NY USA; Stuart H. Singer, LEAD ATTORNEY, Boies, Schiller & Flexner, LLP, Fort Lauderdale, FL USA; Corey Patrick Gray, Boies Schiller Flexner, Broward, Fort Lauderdale, FL USA; Kyle N. Smith, Boies, Schiller and Flexner LLP, Washington, DC USA; Sean Phillips Rodriguez, Boies Schiller Flexner LLP, San Francisco, CA USA; William A. Isaacson, Boies Schiller Flexner LLP, Washington, DC USA.

For Plexus Corp., Plaintiff (3:17md2801): David B Esau, LEAD ATTORNEY, Amanda R Jesteadt, Carlton Fields Jorden Burt PA, West Palm Beach, FL USA; Kristin Alexandra Gore, LEAD ATTORNEY, Carlton Fields PA, West Palm Beach, FL USA.

For Jaco Electronics Incorporated, Vermont Street Acquisition Llc, Plaintiffs (3:17md2801): Robert William Turken, Scott N. Wagner, LEAD ATTORNEYS, Bilzin Sumberg Baena Price and Axelrod LLP, Miami, FL USA.

For Panasonic Corporation, a Japanese corporation, Panasonic Corporation of North America, Defendants (3:17md2801): Jeffrey **[*27]** L. Kessler, LEAD ATTORNEY, A. Paul Victor, David L. Greenspan, Martin C. Geagan, Jr., Molly Donovan, Rebecca Lara Litman, Winston & Strawn LLP, New York, NY USA; Frank S. Restagno, New York, NY USA; Ian L Papendick, PRO HAC VICE;ATTORNEY TO BE NOTICED, Winston & Strawn LLP, San Francisco, CA USA; Kevin B. Goldstein, Winston & Strawn LLP, Chicago, IL USA; Matthew Robert DalSanto, Winston and Strawn LLP, San Francisco, CA USA; Patrick Stephen Opdyke, Winston and Strawn LLP, United Sta, New York, NY USA..

For Matsuo Electric Co, Ltd., Defendant (3:17md2801): Bonnie Lau, LEAD ATTORNEY, Margaret Anne Brammer Webb, Stephen Kam, Morrison & Foerster LLP, San Francisco, CA USA; David D. Cross, PRO HAC VICE;ATTORNEY TO BE NOTICED, Morrison & Foerster LLP, Washington, DC USA.

For Elna Co. Ltd., Elna America Inc., Defendants (3:17md2801): Christopher William Johnstone, Wilmer Cutler Pickering Hale & Dorr LLP, Palo Alto, CA USA; Christopher Matthew Megaw, Washington, DC USA; Heather S. Nyong'o, Wilmer Cutler Pickering Hale and Dorr LLP, San Francisco, CA USA; Lauren Michiko Ige, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC USA; Margaret E. O'Grady, Wilmer Hale, LLP, Boston, MA USA..

[*28] For Nippon Chemi-Con Corporation, Defendant (3:17md2801): Crystal Marissa Johnson, Joseph J. Bial, LEAD ATTORNEYS, Paul, Weiss, Rifkind, Wharton and Garrison LLP, Washington, DC USA; Farrah Robyn Berse, Theodore V. Wells, Jr., LEAD ATTORNEYS, Johan E Tatoy, Sara E Hershman, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY USA; Roberto Finzi, LEAD ATTORNEY, New York, NY USA; Steven Shea Kaufhold, LEAD ATTORNEY, Kaufhold Gaskin LLP, San Francisco, CA USA; Eric Richard Sega, Paul, Weiss, Rifkind, Wharton, Garrison LLP, Washington, DC USA; Quynh K Vu, Kaufhold Gaskin LLP, San Francisco, CA USA.

For Vishay Polytech Co. Ltd., Defendant (3:17md2801): Kelly Marie Ozurovich, LEAD ATTORNEY, Los Angeles, CA USA; Eric Patrick Enson, JONES DAY, Los Angeles, CA USA; John M. Majoras, Jones Day, Washington, DC USA.

For Holystone International, Defendant (3:17md2801): Eric Patrick Enson, Jeffrey Alan LeVee, LEAD ATTORNEYS, JONES DAY, Los Angeles, CA USA; Kelly Marie Ozurovich, LEAD ATTORNEY, Los Angeles, CA USA.

For Fpcap Electronics (Suzhou) Co., Ltd., Defendant (3:17md2801): Daniel William Fox, LEAD ATTORNEY, K&L Gates LLP, San Francisco, CA USA; Scott M Mendel, LEAD ATTORNEY, Chicago, IL USA; **[*29]** Brian Joseph Smith, K L Gates, LLP, Chicago, IL USA.

For Sanyo North America Corporation, Defendant (3:17md2801): Ian L Papendick, LEAD ATTORNEY, PRO HAC VICE, Winston & Strawn LLP, San Francisco, CA USA; Jeffrey L. Kessler, Martin C. Geagan, LEAD ATTORNEYS, Winston & Strawn LLP, New York, NY USA; Matthew Robert DalSanto, LEAD ATTORNEY, Winston and Strawn LLP, San Francisco, CA USA; Kevin B. Goldstein, PRO HAC VICE;ATTORNEY TO BE NOTICED, Winston & Strawn LLP, Chicago, IL USA; Michael Paul Toomey, Winston and Strawn LLP, Chicago, IL USA.

For Sanyo Electric Co., Ltd, Defendant (3:17md2801): Ian L Papendick, LEAD ATTORNEY, PRO HAC VICE, Winston & Strawn LLP, San Francisco, CA USA; Jeffrey L. Kessler, LEAD ATTORNEY, Martin C. Geagan, Jr., Winston & Strawn LLP, New York, NY USA; Kevin B. Goldstein, PRO HAC VICE;ATTORNEY TO BE NOTICED, Winston & Strawn LLP, Chicago, IL USA; Michael Paul Toomey, Winston and Strawn LLP, Chicago, IL USA.

For Shizuki Electric Co., Inc., Defendant (3:17md2801): Allison Ann Davis, Kelly Michelle Gorton, Sanjay Mohan Nangia, LEAD ATTORNEYS, Monder Khoury, Davis Wright Tremaine LLP, San Francisco, CA USA; Kaley Louise Fendall, Davis Wright Tremaine LLP, Portland, **[*30]** OR USA; Paul C Southwick, Davis Wright Tremaine LLP, Ste 2400, Multnomah, Portland, OR USA.

For Shinyei Technology Co., Ltd., Defendant (3:17md2801): Claire M Maddox, Gaspare J. Bono, LEAD ATTORNEYS, Dentons US LLP, Washington, DC USA; Leslie Ann Barry, Dentons US LLP, United Sta, Washington, DC USA.

For Schuten Electronics, Inc., Defendant (3:17md2801): Brent W Johnson, Kit A. Pierson, LEAD ATTORNEYS, Cohen Milstein Sellers and Toll PLLC, Washington, DC USA; Matthew W Ruan, LEAD ATTORNEY, Cohen Milstein Sellers & Toll, New York, NY USA.

For Avx Corporation, Defendant (3:17md2801): Alexandra G. Calistri, LEAD ATTORNEY, PRO HAC VICE, Mintz Levin Cohn Ferris Glovsky and Popeo, P.C., Chrysler Center, New York, NY USA; Evan Nadel, LEAD ATTORNEY, Mintz Levin, San Francisco, CA USA; Robert Gil Kidwell, LEAD ATTORNEY, Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, Washington, DC USA; Shawn N Skolky, LEAD ATTORNEY, PRO HAC VICE, Mintz Levin Cohn Ferris Glovsky and Popeo, P.C., Washington, DC USA; Ralph A. Campillo, Sedgwick LLP, Los Angeles, CA USA; Stephen Michael Chippendale, McKenna Long and Aldridge LLP, Washington, DC USA.

For Holy Stone Polytech Co. Ltd., Defendant (3:17md2801): Eric Patrick **[*31]** Enson, LEAD ATTORNEY, JONES DAY, Los Angeles, CA USA.

For Holy Stone Holdings Co. Ltd., Defendant (3:17md2801): Eric Patrick Enson, LEAD ATTORNEY, JONES DAY, Los Angeles, CA USA; Kelly Marie Ozurovich, LEAD ATTORNEY, Los Angeles, CA USA.

For Nissei Electronic Co. Ltd., Defendant (3:17md2801): Mark D. Flanagan, LEAD ATTORNEY, WilmerHale, Palo Alto, CA USA; Adam R. Fox, Squire, Sanders & Dempsey, LLP, Los Angeles, CA USA; Adam Robert Prescott, Wilmer Hale, LLP, United Sta, Washington, DC USA; Christopher William Johnstone, Wilmer Cutler Pickering Hale & Dorr LLP, Palo Alto, CA USA; Lauren Michiko Ige, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC USA; Margaret E. O'Grady, Wilmer Hale, LLP, Boston, MA USA.

For Nitsuko Electronics Corporation, Defendant (3:17md2801): Ashley Marie Bauer, Belinda S Lee, LEAD ATTORNEYS, Cameron James Clark, Katherine Maureen Larkin-Wong, Latham & Watkins LLP, San Francisco, CA USA.

For Rubycon America Inc., Defendant (3:17md2801): Djordje Petkoski, LEAD ATTORNEY, David Higbee, Shearman & Sterling LLP, Washington, DC USA; John F. Cove, Jr., Shearman & Sterling LLP, San Francisco, CA USA; Leslie Kostyshak, Hunton amd Williams LLP, Washington, DC USA; **[*32]** Mark G. Weiss, Shearman and Sterling LLP, Washington, Dc, Dc; Michael Brett Burns, Hunton and Williams, LLP, San Francisco, CA USA; Robert A. Caplen, Hunton and Williams LLP, Washington, DC USA; Ryan A Shores, Todd M. Stenerson, Shearman & Sterling LLP, United Sta, Washington, DC USA.

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Judges: Jeffrey L. Bleich, Special Master.

Opinion by: Jeffrey L. Bleich

Opinion

SPECIAL MASTER'S REPORT AND RECOMMENDATION

Introduction

This matter arises from a motion by Class Counsel for the Direct Purchaser Plaintiffs ("DPPs") seeking Court approval of DPPs' proposed settlement allocation. Two members of the DPP class, Cisco Systems, Inc. ("Cisco") and Aptiv Services US, LLC fka Delphi Automotive LLP ("Aptiv") (collectively "Objecting Members") oppose that motion, and filed **[*34]** a separate motion for an order approving their proposed settlement claims. The issues raised by the Objecting Members were presented to the Court on March 21, 2019, and the Court then referred this matter to the Special Master pursuant to *Fed. R. Civ. P. 53(a)(1)(C)* on April 10, 2019. The parties have since narrowed their arguments, and this Report recommends the following resolution of those issues still in dispute.

Facts and Procedural History

The parties to this dispute are participants in a multidistrict litigation ("MDL") matter which alleges that various capacitor manufacturers artificially raised, fixed, or stabilized the prices of capacitors in violation of U.S. federal ***antitrust law***. Capacitors are a common electronic component that are used to even out the flow of electrical energy, and so are contained in most electrical products.

Two sets of capacitor manufacturers, Hitachi Chemical Co., Ltd., Hitachi AIC, Inc., and Hitachi Chemical Co. America, Ltd. ("Hitachi Chemical defendants" or "Hitachi"); and Soshin Electic Co., Ltd. and Soshin Electronics of America, Inc. ("Soshin defendants" or "Soshin") (collectively, "Settling Defendants") are defendants in this action. Both are Japan-based entities that **[*35]** sold capacitors to DPPs, among others, in the United States. Hitachi and Soshin agreed to settle the civil claims filed by all DPPs in this action against them for $66 9 million ("the Second Round Settlement").[1] By order dated June 23, 2018, the Court granted approval of that settlement between DPPs and Settling Defendants.[2]

DPPs consist of plaintiffs that purchased capacitors directly from any of the defendants between January 1, 2002, and December 31, 2013, and also met one of two conditions. Either, these plaintiffs were situated inside the U.S. and were billed or invoiced by Settling Defendants for the capacitors, or they were located outside of the U.S., but purchased the capacitors for shipment directly to the U.S. MDL Dkt. No. 249. The Court's order provides that the Settlement Class extends to all such persons "in the United States that purchased Capacitors (including through controlled subsidiaries, agents, affiliates, or joint-ventures) directly from any of the Defendants, their subsidiaries, agents, affiliates or joint ventures from January 1, 2002 through July 22, 2015."[3] MDL Dkt. No. 249, Para. 4; Dkt. No. 1989-2, Para. bb; Dkt. No. **[*36]** 1989-3, Para. Z.

The parties' settlement agreement includes a release, the effect of which is at issue in this proceeding. That release applies to the following claims:

> [A]ny and all manner of claims . . . that [Settlement Class Members], or any one of them, whether directly, representatively, derivatively, or in any other capacity ever had, now have, or hereafter can, shall or may have against [Defendants] alleged in the Action . . . whether such claims are known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen. . . regardless of legal theory. . . , or claims that have been, could have been, or in the future might have in law or equity. . . arising out of, resulting from, or in any way related to any conduct regardless of where it occurred at any time prior to the Effective Date, concerning the purchase, pricing, selling, discounting, marketing, manufacturing, and/or distributing Capacitors in the United States and its territories or for delivery in the United States and its territories. The Released Claims also include, but are not limited to, all claims asserted or which could have been asserted in the Action relating to or arising out of the facts. **[*37]** . . alleged in the Action, including but not limited to, claims arising under federal or state antitrust, unfair competition, unfair practices, price discrimination, unitary pricing, trade practice, or civil conspiracy law, including without limitation the Sherman Act, *15 U.S.C. Sec. 1, et seq.*, but excluding. . . (c) claims based on purchases of Capacitors excluded by the Foreign Trade Antitrust Improvement Act, *15 U.S.C. Sec. 6a*.

Dkt. No. 1989-2, Para 12; Dkt. No. 1989-3, Para. 14.

As required by the Court's order granting approval of the Settlements, Class Counsel completed a notice plan and a process for allocating settlement proceeds among the DPPs. Members of the Settlement Class submitted their claims seeking their requested portion of the Settlement Funds. Class Counsel's designated Claims Administrator thereafter evaluated and processed the submitted claims forms. This process included reviewing all submissions

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[1] Hitachi had already entered into a plea agreement previously with the U.S. Department of Justice admitting to price-fixing in the sale of their capacitors. *United States v. Hitachi Chemical Co., Ltd.*, No. 16-cr-00180-JD, Dkt. No. 22.

[2] The Court's order approving the settlement relates only to DPPs, as distinct from other classes of plaintiffs in this action. MDL Dkt. No. 249.

[3] The Court's order notes that this definition is for settlement purposes only, and has no binding effect on the Court, the DPPs, or on the Indirect Purchaser Plaintiffs in any other context. The Special Master has therefore applied that definition accordingly.

and advising the claimants of any denials or adjustment to the submitted claims. Class Counsel thereafter prepared a proposed allocation and submitted its motion on November 8, 2018, requesting Court approval of that allocation. Under the proposed allocation, after deducting attorneys' fees and costs, there would **[*38]** be $43,485,000 plus accrued interest available for distribution on a pro rata basis. MDL Dkt. No. 381 at 6.

A. Objecting Members' Claims Relating to Incorporated Capacitors

Cisco and Aptiv ("Objecting Members"), are both members of the DPP Class, and filed objections to Class Counsel's motion.

Cisco principally designs, builds, and sells networking equipment which includes many components that contain capacitors. Cisco contends that Class Counsel improperly released and excluded a substantial portion of its claims totaling $191,759,460.10.[4] Specifically, Cisco claims that of the total claims submitted, Class Counsel disallowed $154,050,329.40 in losses.

Aptiv manufactures automotive parts including vehicle electronics and systems that likewise rely on internal capacitors. Aptiv contends that Class Counsel improperly released and excluded portions of its claims totaling $198,910,686.94.[5] Aptiv contends that Class Counsel disallowed $48,567,508.65 in incorporated capacitor losses.

Both Objecting Members base their objections/motions principally on Class Counsel's determination to disallow distribution of settlement funds for alleged losses due to the purchase of so-called "incorporated **[*39]** capacitors." An "incorporated capacitor," simply put, is a foreign-made capacitor that has been incorporated inside a finished product before it is shipped to its original purchaser in the United States.

Aptiv and Cisco have somewhat different claims regarding their application for compensation for incorporated-capacitor purchases.

Aptiv asserts that all of its claims for incorporated capacitors relate to capacitors that it purchased outside the U.S. from the Settling Defendants which were then shipped to an Aptiv entity outside the U.S. for incorporation into an Aptiv product, before then being shipped to the U.S. for sale.[6]

Cisco claims that some of its incorporated capacitors were acquired in the U.S. in the same way *(i.e.*, through sales to a Cisco entity that incorporated them overseas before final shipment to the U.S.). But Cisco also claims that it purchased some of Defendants' capacitors through contracts with third parties who incorporated them into their products for shipment to Cisco in the U.S. for sale in the U.S. Tr. at 54:13-55:12. Cisco contends that regarding this latter set of purchases, all of them are "direct purchases" because Cisco stands in the shoes of the third **[*40]** parties who incorporated the capacitors for sale in the U.S. Specifically, Cisco relies on its assignments from these third parties, and asserts that these parties granted Cisco assignments because they had acquired the capacitors at Cisco's direction for ultimate shipment to Cisco in the United States. Accordingly, Cisco claims its position with respect to this latter category is indistinguishable from a Cisco entity acting as an intermediary, because Cisco both directed the purchase of capacitors and stands in the shoes of these third-party entities. *Id.*

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[4] Cisco's initial claim in its Opposition was $199,426,277.79. This figure was revised in its Motion. That motion states that the total is $191,759,460.10. MDL Dkt. No. 473 at 11 n. 10. In its Reply Brief, Cisco further reduced the final figure in dispute from $154,050,329.40 to $142,070,717.01 based on its decision to exclude Quanta purchases from its second-round settlement claim. MDL Dkt. No. 496 at 8 n. 3.

[5] Aptiv initially claimed "at least $180,576,936.74" in its Opposition to Class Counsel's motion. MDL Dkt. No. 391, at 7-9. It revised this figure during the course of briefing this matter, and in its final motion for approval of its settlement claims, it claims $146,111,638.53 for foreign purchases, and $2,367,303.69 for additional U.S. Purchases (relating to the NCC/UCC dispute discussed *infra)*. MDL Dkt. No. 473 at 13. Combined with its approved claims, Aptiv claims $198,910,686.94 in total qualifying purchases.

[6] Transcript of May 31, 2019 Hearing before the Special Master ("Transcript" or "Tr."), at 53:1720: "[A]ll 190 million at issue from Aptiv are coming directly to Aptiv. There is no third-party manufacturer at issue at all for all of Aptiv's purchases. Full Stop."

B. Related Proceedings Involving Flextronics

The genesis of the parties' dispute over the status of incorporated capacitors stems — at least in part — from similar claims in a prior round of settlements, and from a related set of Orders issued to resolve motions by another party to the MDL proceedings, Flextronics. Because the parties disagree about the holding and relevance of the Flextronics proceedings, those proceedings are addressed here.

Prior to the current settlements with Soshin and Hitachi, DPPs — including Aptiv and Cisco — entered into a settlement agreement with different defendants ("First Round Settlement"). While the **[*41]** allocation process was moving forward in the First Round Settlement process, Aptiv and Cisco presented claims to recover settlement funds relating to incorporated-capacitor purchases from those First Round Defendants. Aptiv and Cisco initially requested that — to the extent they could not reach agreement with Class Counsel on those claims — funds be held back for resolution of those claims later.

While those First Round Settlement discussions were ongoing, the Court issued an initial order ("FTAIA I Order") regarding claims by an opt-out plaintiff, Flextronics, regarding Flextronics' own claims for incorporated capacitor purchases, which appear to have influenced the parties' resolution of the First Round Settlement.

The principal issues in Flextronics' motion were: (1) whether certain sales of incorporated capacitors qualified as "import trade or commerce" and are therefore actionable under the Sherman Act; and (2) whether, even if such sales were deemed to involve non-import trade or commerce, they nonetheless produce actual and reasonably foreseeable domestic effects on U.S. commerce to qualify for an exception to the bar on non-import commerce in the Foreign Trade Antitrust Improvements **[*42]** Act ("FTAIA").

In its FTAIA I Order, the Court rejected Flextronics' theory for claiming that its incorporated capacitor purchases were actionable. However, it found that such claims were not necessarily barred as a matter of law, and the Court reserved the issue of whether Flextronics' incorporated capacitors claims were potentially actionable under the Sherman Act and/or FTAIA. Specifically, the Court ruled that plaintiff's initial theory of liability (which was based on a global pricing model), was insufficient to state a cause of action. The Court, however, invited Flextronics to present facts in the second round of proceedings on that motion that would establish liability. In doing so, the Court thus left the door open for Flextronics to pursue its claims under a different theory.

Following the FTAIA I Order, Cisco and Aptiv withdrew their request for First Round Settlement funds to be held back. Instead, they entered into a First Round Settlement and release that did not include compensation for their incorporated capacitor claims. In doing so, however, Objecting Members expressly reserved the right to pursue such claims against other Defendants.

After the First Round Settlement **[*43]** was completed, the Court issued its second order on Flextronics' incorporated capacitor claims ("FTAIA II Order"), which were presented on motion for summary judgment. In that proceeding, Flextronics offered a new theory by which it claimed that its purchases of capacitors for units built outside the U.S. for sale in the U.S. were actionable under the Sherman Antitrust Act and were not precluded by the FTAIA. On September 20, 2018, the Court issued its FTAIA II Order, finding that Flextronics had, in fact, made a colorable claim that its incorporated capacitor purchases were actionable, and survived summary judgment.

Although the FTAIA II Order was expressly limited to the facts presented by Flextronics in that case, Aptiv and Cisco claimed that those facts were sufficiently analogous to their own incorporated capacitor claims that they too should be entitled to compensation through the Second Round Settlement. After extensive discussion and debate, Class Counsel and Objecting Members were unable to reach an agreement on this dispute, and it was thereafter presented to the Court for resolution.

C. Issues Resolved and Those Still in Dispute

Although the Objecting Members take issue with **[*44]** various aspects of Class Counsel's allocation motion, their principal contention is that Class Counsel's proposed allocation improperly excludes a large set of valid claims for incorporated capacitors that they timely presented, documented, and released as part of the settlement. The specifics of this dispute have evolved somewhat over the past year, and narrowed in the most recent filings and oral arguments.

1. <u>Resolved Disputes</u>

Accuracy of Claims and Fairness of Claims Review Process: In their respective pleadings, Class Counsel disputed the accuracy of Objecting Members' showing regarding actual incorporated capacitor purchases, while Objecting Members complained that Class Counsel's requirements of proof were unduly onerous. Class Counsel's Motion to approve the Second Round Settlement Allocation noted that some parties had unresolved disputes relating to claims that had been disallowed as inadequately substantiated. Originally, Class Counsel proposed that the Special Master be appointed to address these claims on a case-by-case basis and that Objecting Members with unresolved issues be given an opportunity to present proof of qualifying purchases to the Special Master. MDL Dkt. **[*45]** No. 381 at 3:5-7.[7] Class Counsel also contended that claims of assignments were inadequate, but that those assignments should be disregarded for purposes of allocation, regardless of their adequacy.[8]

In their written objections to the Class Counsel's motion, Objecting Members claimed they had submitted raw purchase data at that time adequately supporting over $531.39 million (MDL Dkt. No. 391 at 1), which included $199.43 million in incorporated capacitor claims by Cisco and $180.58 million in such claims by Aptiv.[9] Objecting Members also argued that Class Counsel's standard of proof of claims was unduly onerous and "betrays the purpose of a fair claims process." MDL Dkt. No. 391 at 11. Class Counsel objected that Cisco failed to support its claims that it received assignments. MDL Dkt. No. 396 at 5-9. Class Counsel further claimed that Cisco and Aptiv failed to provide sufficient back-up documentation. *Id.* at 9-10.

Mercifully, the parties have agreed to certain stipulations that will spare the Special Master from reviewing — and determining the adequacy of— each and every submission for an incorporated capacitor claim, or the fairness of the process by which the Claims Administrator considered **[*46]** and rejected certain methods of proof. Specifically, the parties agreed in January "that the data included in the spreadsheets that [Objecting Members] submitted are accurate" for their Second Round claims. On that basis, Objecting Members assert that the Special Master need not adjudicate the accuracy of their claims, and they also no longer press the claim that Class Counsel's administrative process was unduly exacting, or uniquely disadvantaged them as DPPs. Tr. at 107.

At oral argument, Class Counsel raised the issue whether the Objecting Members voided the stipulation by reducing their actual claims significantly in their post-stipulation briefing. Tr. at 45. Although the Special Master appreciates that the scope of the claims has varied significantly over time, the argument lacks merit. Certainly, if Objecting Members had sought to add *new* claims, those additional claims would not be subject to a prior stipulation. But they would not void that prior stipulation either. In this case, Objecting Members have not even included new claims. Instead, they have chosen to pursue only a subset of the total claims at issue as a matter of law, thereby reducing their total claims. Their shift **[*47]** in position therefore does not go to the accuracy of the data to which the parties stipulated, but only to Objecting Members' litigation judgment about which claims they can successfully establish as a matter of law.

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[7] Class Counsel also requested that the Court proceed with allocation relating to all other non-objecting parties and reserve a "Hold Back Fund" for unresolved claims by potential objecting parties. MDL Dkt. No. 381 at 3:14-16.

[8] Specifically, Class Counsel argued that if an "indirect purchaser" held assignments from a direct purchaser, those should not be held back for payment, but should be resolved separately by the assignor and assignee. MDL Dkt. No. 381 at 7:26-28. Class Counsel proposed that the funds be distributed based on each claimant's pro rata share of capacitors directly purchased from Defendants during the relevant time period. *Id.* at 4:10-14.

[9] Class Counsel correctly observed that these figures changed substantially between the time of Objecting Members' filing of objections to Class Counsel's Allocation Motion, and Objecting Members' own motion to approve their Second Round claims. Class Counsel in both its pleadings and at oral argument refer to this disparity as further proof of the lack of certainty and reliability in Objecting Members' submissions.

The stipulation is not, however, comprehensive. Based on the (notably contentious) correspondence between counsel, there appears never to have been an agreement about what, if any, portion of Aptiv's claims relating to Nippon Chemi-Con ("NCC") were duplicative of United Chemi-Con ("UCC") data. Class Counsel claims that Aptiv is effectively demanding $2,307,540 in duplicative claims. MDL Dkt. No. 489 at 15. Aptiv contends that there was no double-counting. Accordingly, this one issue is not determined to be subject to the stipulation and, depending on the outcome of other issues, would require separate review to determine the accuracy of these claims.

Adequacy of Class Counsel: In their Opposition to Class Counsel's motion and in their subsequent motions, Objecting Members appeared to contend that Class Counsel had failed to adequately represent their interests as members of the DPP class. In their Opposition to Class Counsel's motion, Objecting Members claimed that Class **[*48]** Counsel had failed to "meet their fiduciary duty of candor owed to Aptiv as a member of the class" (MDL Dkt. No. 391 at 2 n. 1), suggested Class Counsel had "inherent conflicts . . . in resolving intra-class disputes about claims that may be in and out of a class" *(id*. at 4 n.2), and contended that in light of the FTAIA II Order, "as a fiduciary to Objecting Members, Class Counsel have an obligation to ensure and fight for the inclusion of these [FTAIA] claims." *Id.* at 6. In their own motion, Objecting Members asserted that "[t]he instant dispute demonstrates an intra-class conflict. . . because Class Counsel inadequately represents Objecting Members and similarly situated class members." MDL Dkt. No. 473 at 6 n.7. At oral argument, Objecting Members did not assert that Class Counsel had behaved in a manner that had uniquely prejudiced them (Tr. 27-28), or that there was an irreconcilable conflict in Class Counsel's continued representation, nor did they request any particular relief with respect to Class Counsel's continued representation going forward. Tr. at 104-07. Again, the Special Master is grateful to the parties for limiting their claims such that these issues are not presented to the Court.

[*49] *Prior Admissions, Representations, and Reliance:*

In their respective pleadings and at oral argument, the parties cast various aspersions on one another for past statements. Class Counsel initially claimed Objecting Members had previously acknowledged that incorporated capacitors did not qualify for compensation in the DPP proceedings during the First-Round Settlements. MDL Dkt. No. 396 at 10-12. Class Counsel has since acknowledged that positions taken in the First Round Settlements do not bind the parties in this round. Tr. at 102 (Mr. Williams: "[T]he first round sort of stood on its own, and it's over, and we're now in the second round, and they have the right to bring the arguments they're bringing, and that's why we're here, to try to resolve them."). Objecting Members claimed that Class Counsel had misleadingly caused them to believe it would pursue incorporated capacitor claims and had acknowledged their legitimacy. MDL Dkt. No. 391 at 1 ("Class Counsel improperly deny portions of Objecting Members' claims for capacitors incorporated into finished products sold in the US. . . in spite of. . . Class Counsel's own assertions that such claims are recoverable."). Objecting Members **[*50]** now acknowledge this is not one of their contentions. Tr. at 75 ("Mr. Sasse: We're not resting on any representation made by class counsel directly to Cisco and Aptiv. And that may be a full stop answer to your question.").

2. <u>Issues As Yet Unresolved</u>

The issues now in dispute have reduced to four discrete issues.

First, whether the claims for incorporated capacitors were actually released as part of the settlement such that they need to be compensated if viable.

Second, whether based on the Court's FTAIA decisions and other precedents, Objecting Members have stated a sufficiently viable claim for relief for incorporated capacitor claims under the Sherman Act or the FTAIA to warrant compensating these claims in the allocation process.

Third, whether this class-wide allocation process is an inappropriate mechanism for resolving claims for the incorporated capacitor purchases at issue because it does not allow for a proper individualized showing, and whether Cisco and Aptiv's claims should be denied for their failure either to object to the settlement or to opt out and pursue a remedy as Flextronics has.

And fourth, whether — even if such claims theoretically warrant compensation and are appropriate **[*51]** for this proceeding — Objecting Members have failed to provide the Court or Class Counsel with proof of particular elements to support such a claim. This includes, for example, failure to establish that the Settling Defendants in this action knew or should have known that the capacitor sales at issue were intended for a U.S. market at the time of sale.

Special Masters' Findings of Fact and Conclusions of Law

A. Release Language

The parties agree that a foundational question concerns whether incorporated capacitor claims are even included in the Settlement's release provisions with Hitachi and Soshin. Class Counsel asserts that regardless of whether the Objecting Members' incorporated capacitor claims would be legally viable, those claims were not included in the settlement or release, and thus Objecting Members are not prejudiced by the proposed allocation in this proceeding. The scope of the release is ultimately a question of contract interpretation and requires addressing each aspect of the disagreement over the meaning of the release language.[10]

Class Counsel argues that the plain language of the release[11] demonstrates that incorporated **[*52]** capacitors are not covered because that language refers only to: (1) "capacitors" (rather than "incorporated capacitors"); (2) "directly shipped to or billed to the United States" (rather than non-U.S. purchases); and (3) sold in a manner not excluded from liability by the FTAIA. Class Counsel contends that none of these three requirements applies to Objecting Members' incorporated capacitor claims. Class Counsel also contends that the Objecting Members' contemporaneous conduct further demonstrates that Objecting Members did not believe the release covered incorporated capacitor claims.

1. "Capacitors" versus "Incorporated Capacitors"

The first point of disagreement is whether the term "capacitors" in the settlement agreement refers only to raw capacitors billed or shipped to the U.S. or whether it may encompass capacitors that were purchased for delivery to the U.S. once they were incorporated into another product.

Class Counsel contends that the plain language of the release makes clear that it refers only to raw capacitors. The release, it points out, refers to "capacitors" but contains no reference to "incorporated capacitors." Tr. at 32:11-33:8. Class Counsel argues this is because **[*53]** the parties only contemplated releasing claims associated with the sale of raw or unincorporated capacitors. Accordingly, Class Counsel argues that as a matter of contract interpretation, the Court should not insert the word "incorporated" where it does not belong.

Objecting Members respond that the language of the release and their course of dealings shows just the opposite. They note that the release is extremely broad and does not expressly or implicitly exclude their claims related to incorporated capacitors. Objecting Members argue that incorporated capacitors are still "capacitors"; they were purchased in their original state for ultimate shipment to the U.S. Accordingly, they maintain, the settlement agreement does not need to refer to incorporated versus non-incorporated capacitors, because that distinction does not bear on whether a claim exists, or to whom the capacitor is shipped or billed at the time of its original purchase.

On this issue, the Objecting Members' position is more persuasive. If the release, for example, referred only to "unincorporated" or "raw" capacitors, that would be dispositive for Class Counsel. But the release refers only to the purchase of "capacitors," **[*54]** and does not draw a distinction beyond that. Because the term is not modified in

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[10] The Special Master notes that the district court in a separate MDL action recently recognized the obligation of counsel to ensure that class members not release their claims without compensation in the context of a settlement. *See In re Cathode Ray Tube (CRT) Antitrust Litigation*, MDL No. 1917, Case No. 3:07-cv-05944-JST ("CRT"), Dkt. No. 5362 (Order Denying JPPs' Mot. Pursuant to *Fed. R. Civ. Proc. 62.1*) at 1 (N.D. Cal. Nov. 8, 2018).

[11] Although there are separate releases in this matter, the operative language for these parties is identical.

some way, in the context of a broad release, the natural reading is that it applies to any and all sales of these defendants' aluminum, tantalum, or film capacitors. Indeed, it seems unlikely, that having submitted such claims in the First Round, and having expressly reserved their right to make claims for incorporated capacitors in this subsequent round, Objecting Members would deliberately omit those claims from the release and undermine their basis for receiving compensation for them in the Second Round settlement. At the very least, one would expect the parties to use more specific language if their intention was indeed to exclude these claims from the release.

2. "Shipped To" or "Billed To" the United States

Class Counsel argues next that the release is expressly limited to capacitors "shipped to" or "billed to" the U.S., and therefore capacitors acquired by foreign agents of Cisco and Aptiv on behalf of Cisco and Aptiv outside the U.S. for incorporation into finished U.S. products do not qualify. Tr. at 73:24-74:5. Class Counsel notes that the release specifically refers to acts "concerning the purchase, **[*55]** pricing, selling, discounting marketing manufacturing and/or distributing of Capacitors in the United States and its territories or for delivery in the United States and its territories." MDL Dkt. No. 489 at 4 (quoting Hitachi release at para. 14). Class Counsel maintains that incorporated capacitor sales do not meet this requirement because — by definition — they are not sold directly into the United States, but are sold and shipped to an entity outside the U.S. to be incorporated into a finished good.

Objecting Members argue that Class Counsel simply misreads the releases and thus the scope of compensable claims. In their view, the releases expressly encompass their incorporated capacitor purchases. Specifically, they contend the release extends to acts "concerning the **purchase, pricing**, selling, discounting, **marketing**, manufacturing **and/or distributing of Capacitors in the United States** and its territories **or for delivery in the United States** and its territories." MDL Dkt. No. 473 (quoting Dkt. No. 1989-2, Para. 2; Dkt. No. 1989-3, Para. 14) (emphasis added). Objecting members contend that they priced and marketed all of their purchases of capacitors in their U.S. headquarters, including **[*56]** capacitors that were incorporated into products for import into the United States.

The plain language of the release better supports Objecting Members' interpretation. The settlement and release encompass capacitors negotiated for purchase from the U.S. or for delivery to the U.S. in the manner that Objecting Members allege for incorporated capacitors. As noted, Objecting Members claim they negotiated the price and sale of the Settling Defendants' capacitors from the United States, and that they also arranged for distribution and delivery of these products into the U.S. in finished goods. The natural reading of this provision does not preclude claims for a capacitor that was sold to a U.S. entity to be incorporated into a finished product on its way to the U.S. In addition, this comports with other rulings already issued by the Court in this matter. As the Court has already found in its FTAIA II Order, incorporated capacitor purchases can be a form of transaction that qualifies as import trade or import commerce under the Sherman Act, or that satisfies the domestic effects exception to the FTAIA. Accordingly, Class Counsel's arguments are not persuasive on this point.

3. Exception for **[*57]** Claims Excluded by the FTAIA

Alternatively, Class Counsel relies on Section C of the release, which specifically excludes any claims based on purchases of capacitors that are not allowed under the FTAIA. The language upon which Class Counsel relies is as follows:

> The Released Claims also include, but are not limited to, all claims asserted or which could have been asserted in the Action relating to or arising out of the facts. . . alleged in the Action, including but not limited to, claims arising under federal or state antitrust, unfair competition, unfair practices, price discrimination, unitary pricing, trade practice, or civil conspiracy law, including without limitation the Sherman Act, *15 U.S.C. Sec. 1, et seq.*, **but excluding. .. (c) claims based on purchases of Capacitors excluded by the Foreign Trade Antitrust Improvement Act, *15 U.S.C. Sec. 6a***.

Dkt No. 1989-2, Para 12; Dkt. No. 1989-3, Para. 14 (emphasis added).

Class Counsel contends that Objecting Members did not release their claims for incorporated capacitors without compensation, because such claims are excluded by the FTAIA, and thus excluded from the release. Class

Counsel suggests that Section C should also be read in light of the provisions limiting the released **[*58]** claims to purchases and deliveries in the United States.

Objecting Members argue that Class Counsel's argument about the FTAIA proves too much. At the time of this settlement, the FTAIA I Order had left open the possibility that incorporated capacitor cases *could* be viable under the FTAIA (albeit not under a global pricing theory). Objecting Members had, in fact, reserved all of their claims for the Second Round and submitted claims for incorporated capacitors. Tr. at 38. This would suggest that there was no agreement that their incorporated capacitor claims were excluded under the FTAIA. Objecting Members moreover contend that their purchases were functionally indistinguishable from the transactions alleged by Flextronics in the FTAIA proceedings. Aptiv asserts that its method of purchasing incorporated capacitors was not different from that of Flextronics — *i.e.*, like Flextronics, its overseas subsidiary capacitors bought on Aptiv's behalf that it incorporated into a finished product for shipment to Aptiv in the U.S. to sell. Likewise, Cisco claims its subsidiaries either operated in that same way through Cisco subsidiaries, or that Cisco acquired assignments from other parties (including **[*59]** Flextronics) that it engaged outside the U.S. who operated as their subsidiaries would. Thus, Objecting Members contend that the parties' conduct and this Court's decisions demonstrate that the claims presented here do not fall under Section C's exception to the release, and are thus released.

Objecting Members have the better argument in this instance, as well. At the time the release language was negotiated, the parties were aware of the dispute about whether incorporated capacitor claims were barred by the FTAIA. Objecting Members had reserved those claims for the Second Round, and the Court in its FTAIA I Order had acknowledged the potential viability of some incorporated capacitor claims depending on the facts. Thus, it would be reasonable to assume that Objecting Members believed that the release encompassed actions that relied upon FTAIA claims, and that Section C would not exclude from release their incorporated capacitor claims which were viable under the FTAIA.[12]

4. Course of Dealings

Lastly, in support of their interpretation of the release, Class Counsel looks to the course of dealings between the parties, and their understanding at the time the release was signed. Class **[*60]** Counsel emphasizes that the notice and claim form negotiated with the Settling Defendants by DPPs did not refer to incorporated capacitors. Moreover, as of July 2018 when the release was executed, there had been no determination that Objecting Members' claims for incorporated capacitors would be allowed under the FTAIA and no indication that Class Counsel would pursue them. Moreover, Class Counsel claims the Court itself had raised concerns in proceedings with the Indirect Product Purchaser (IPP) class, about the workability of including incorporated capacitor claims in a class context. Tr. at 34. If anything, the FTAIA I Order that had been issued at this time emphasized the individualized nature of these claims, and suggested they had a limited prospect for success in any case. Class Counsel contends that until the FTAIA II Order came out two months later, in September, Objecting Members did nothing to suggest they believed their incorporated capacitor claims were genuinely DPP class claims eligible for compensation in the Second Round Settlement and subject to its release. Thus, Class Counsel argues that Objecting Members had no reasonable expectation that these claims were at issue **[*61]** and could be resolved in this settlement, and thus never objected to, opted out of, or raised concerns about the release's application to incorporated capacitors claims at the time the release was negotiated and executed.

Class Counsel makes a valid point that Objecting Members' attitude regarding their incorporated capacitor claims appears to have changed significantly after the FTAIA II Order was issued. As Class Counsel notes, if Objecting Members had been committed to ensuring that they would be compensated for such claims at the time of the

[12] The parties devote substantial briefing to the application of the "identical factual predicate" doctrine articulated in *Hesse v. Sprint Corp., 598 F.3d 581, 590 (9th Cir. 2010)*. Objecting Members urge that since their incorporated capacitor claims arise from the same factual predicate — *i.e.*, price-fixing by Settling Defendants in their capacitor sales to Objecting Members — then their claim would be interpreted as released even if they had not presented the claim and even if it were not presentable in a class action. Class Counsel urges a more narrow reading of the doctrine that would exclude claims that lack a "common interest" with the other class members. The Special Master need not resolve this dispute because it finds that the release does in fact encompass incorporated capacitor claims.

settlement and release, they had several options available to them to express that expectation. They could have opted out of the settlement to pursue these claims; they could have negotiated for language that expressly included incorporated capacitor claims in the settlement and release; or — in Cisco's case — they could have pursued compensation through separate negotiations or proceedings with their third-party contractors. However, while Class Counsel's arguments may go to the appropriateness of the approach Objecting Members have selected to resolve their claims, it does not prove that they understood their claims to be outside the scope **[*62]** of the settlement. There are a number of strategic and tactical reasons why Objecting Members might not take the actions Class Counsel suggests that have nothing to do with their assumptions about the scope of the settlement and release. Moreover, the Court's FTAIA I Order — while expressing skepticism about incorporated capacitor claims — did not foreclose DPPs from pursuing such claims. Rather, it found them sufficiently meritorious to allow Flextronics to bring forward facts and new legal theories in support of those claims in the FTAIA II proceeding. It therefore seems unlikely that — again — Objecting Members would abandon that claim without doing so expressly or with some clear strategic reason for doing so. Accordingly, the Special Master is not persuaded by the parties' course of conduct that the release reflects the parties' intention to exclude incorporated capacitor claims from the scope of the release.

Accordingly, the Special Master finds that incorporated capacitor claims were encompassed within the Second Round Settlement Release agreement.

B. <u>Viability of an Incorporated Capacitor Claim</u>

Objecting Members urge that the Court's FTAIA II Order defines qualifying capacitor **[*63]** purchases in a manner that requires that they receive compensation for their incorporated capacitor purchases. MDL Dkt. No. 391 at 4; MDL Dkt. No. 473 at 8-10. They further contend that these claims must be compensated in this proceeding not only because the Second Round Settlement Release includes incorporated capacitor claims, but also because the FTAIA II Order demonstrates that these are viable claims. MDL Dkt. No. 391 at 5-7. They have refined these arguments further in their Motion for an Order Approving their Second Round Settlement Claims.

Objecting Members observe that the Court's FTAIA I Order held that DPPs' claims for incorporated capacitors were not barred as a matter of law, and that the FTAIA II Order found that incorporated capacitors "may be subject to the Sherman Act as 'import trade or commerce'. . . [and] might also come within the FTAIA's domestic effects exception." MDL Dkt. No. 472 at 7 (quoting FTAIA II Order at 7-9).[13] Objecting Members argue that their claims are functionally indistinguishable from those presented by Flextronics in the FTAIA proceedings, and thus are no less viable in these proceedings. They note that like Flextronics, they make claims for incorporated **[*64]** capacitors where the defendants knew a substantial portion of the capacitors purchased on their behalf would be sold in the United States. Their fact pattern is thus substantially similar to that of Flextronics, in that: (1) the Objecting Members negotiated prices directly with the Settling Defendants; (2) the Objecting Members either purchased or directed the purchase of capacitors based on these prices; and (3) Defendants knew or should have known that a substantial share of the capacitors being purchased were destined for finished products that would be sold in the U.S. MDL Dkt. No. 329.

Class Counsel argues that the FTAIA Orders do not support Objecting Members' claims, and if anything, demonstrate the inappropriateness of this procedure for resolving their claims. First, Class Counsel notes that the Court based its decision in the FTAIA II Order on a specific factual showing in the context of a summary judgment hearing. The Court's decision reveals how this type of claim is inherently fact-specific and not readily susceptible to class-treatment. Tr. at 15. Class Counsel further argues that the Court itself emphasized to Objecting Members at a prior hearing that the FTAIA decision **[*65]** was fact-based and limited to Flextronics.[14] Indeed, Class Counsel

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[13] Like the Court, Objecting Members rely on various Ninth Circuit authorities that reach similar conclusions, including ***United States v. Hsiung, 778 F.3d 738, 748-58 (9th Cir. 2015)***, and five district court decisions in this Circuit. MDL Dkt. No. 473 at 7.

[14] Tr. at 23 (quoting the Court): "I held for Flextronics, not you or anyone else, that they were entitled to do that set of claims. . . . I did not articulate a general principle that was based on what I did for Flextronics on its evidentiary showing. So I'm not sure why you think this is a broad proposition that applies to every potential claimant."

explains that it is precisely this fact-bound nature of such claims that make them inappropriate for class treatment, and why Class Counsel chose not to pursue such claims on behalf of the DPPs. Class Counsel explains that in light of the FTAIA I Order, it deliberately limited the class to parties who purchased capacitors "shipped to" and "billed to" the U.S. precisely to avoid these sorts of factual differences. MDL Dkt. No. 489 at 12. Class Counsel further relies on the Court's own order certifying the DPP class as commending Class Counsel's determination to "accept the Court's prior FTAIA ruling and to limit their case only to those categories of transactions the Court ruled were properly in the case." *Id.* at 12 (citing MDL Dkt. No. 385 at 6-7).

While the Special Master is sympathetic to Class Counsel's arguments that the Objecting Members have not at this juncture provided evidence comparable to that offered by Flextronics, that Flextronics itself might not prevail at trial (it merely survived summary judgment), and that Objecting Members may have an even weaker case than Flextronics (or for that matter other DPPs who did not **[*66]** present claims for incorporated capacitors), these issues go to the value of the claims, not their viability. Class Counsel has discretion to evaluate claims in a manner that recognizes that some categories of claims are more compelling than others, and to treat them accordingly. However, in the context of a class settlement, class members need not prove they would prevail at trial — a point on which both parties ultimately agreed at the hearing on this matter. Tr. at 19-20. Rather, the claim need only be viable. Accordingly, Class Counsel may choose to apply a lower recovery rate to these sorts of claims based on their value relative to other categories of claims, but this is different from determining that the claims are not viable at all.

Likewise, Class Counsel's contention that this category of claim is too fact-specific to be subject to class-wide relief goes to the appropriateness of the process Objecting Members pursued rather than the viability of the claim. The FTAIA II Order establishes that incorporated capacitor claims of the type alleged here are potentially viable. The Court's order granting class certification did not expressly foreclose incorporated capacitor claims **[*67]** and indeed those claims were made by class members in both the first and second settlement rounds following certification. Accordingly, while the process that Objecting Members have selected to vindicate their claims may diminish the value of those claims, it does not bear on whether those claims are ultimately viable as a matter of law for DPPs.

Accordingly, without judging their merits, the Special Master finds that incorporated capacitor claims alleged by Objecting Members that are sufficiently analogous to those that survived summary judgment in the FTAIA II proceeding, are viable. The Special Master addresses separately the effect of the procedural posture on those claims.

C. Appropriateness of Procedural Posture

Class Counsel makes a compelling argument that even if Objecting Members (and some other DPPs) have potentially viable incorporated capacitor claims and even if those claims are released in this settlement, it is Class Counsel's prerogative not to pursue them, if doing so would be damaging to the Class as a whole.

Class Counsel argues that Objecting Members chose the wrong process by which to address their incorporated capacitor claims, and that Class Counsel is within its **[*68]** discretion not to pursue them in future rounds or to allocate funds to them now to the detriment of the class as a whole. Class Counsel suggests that other DPPs may have incorporated capacitor claims that they did not bring because they were too individualized, and that they sacrificed those claims for the advantages of gaining class-wide relief. Class Counsel commends Flextronics as having made an appropriate choice that was equally available to the Objecting Members to opt out from the class and make a particularized showing to establish that the transaction affected import commerce and/or had a domestic effect in the United States. Objecting Members, Class Counsel complains, want to have it both ways. If they wished to pursue these claims, they should either have objected to the settlement or opted out so that they could make their showing to the Court as Flextronics did.

Class Counsel also condemns Cisco's approach of seeking to recover claims on behalf of Foxconn, Jabil, Celestica, and Flextronics based on assignments obtained post-litigation. Class Counsel notes that how Cisco and these companies wish to divvy up any settlements is a separate matter for them, and that Cisco is **[*69]** needlessly complicating this proceeding by demanding that it receive other parties' allocation in the first instance.

Objecting Members respond, essentially, that the approach they've pursued is the least worst option among a number of imperfect choices. Given their millions of dollars in "raw" capacitor claims and the uncertainty of the Court's treatment of incorporated capacitor claims, no option was ideal. Objecting Members point out that they have been consistent. They brought incorporated capacitor claims in the First Round, they preserved their right to do so in the Second Round, and they appropriately pressed those claims after receiving the Court's FTAIA II Order. Accordingly, their actions are neither incompatible with participation in the class nor a surprise to Class Counsel. They contend that they did not have to object to the settlement because, by its terms, the settlement did not exclude incorporated capacitor claims; if anything, they read the release to encompass such claims. Likewise, they maintain that they should not be forced to opt out of the class to pursue those claims. They urge that it would be unfair to deny them the efficiencies of class treatment merely **[*70]** because they have an additional sub-category of direct purchase claims that — while distinct — are still claims for capacitors that were ultimately shipped to the United States. Finally, they contend it is irrelevant whether they pursued these claims when other class members did not. Other class members were free to bring such claims in this round or pursue them in future rounds, and their decisions going forward will likely depend on the quality of those claims, their resources, and other such factors. Out of a sense of fairness, they have suggested procedures by which other DPPs would be able to make Second Round claims for incorporated capacitors as well.[15]

Finally, with respect to assignments, Cisco contends that its approach is neither inefficient nor improper. It notes that as the holder of assignments from Foxconn, Celestica, Jabil, and Flextronics, Cisco stands in their shoes and so is the appropriate party to obtain relief for losses they incurred. Paying these claims directly to Cisco is thus appropriate and more efficient than Class Counsel's approach of paying the wrong party and then requiring Cisco to obtain those funds through a private process.

While there is merit in **[*71]** both parties' positions, this simply confirms that — in fact — this issue requires a choice among various imperfect processes for resolving these claims. There is obviously some tension in having incorporated capacitor claims brought in the DPP class because the volume of these claims may swamp the recovery of plaintiffs who do not have such claims. But incorporated capacitor claims are not inherently antagonistic to those of other class members. The volume of both types of claims may vary by plaintiff. To the extent that incorporated capacitors are a subcategory of DPP claims, any member of the class is equally capable of pursuing them. Requiring them to either opt out to preserve those claims, or remain in the class and forego those claims, does not seem necessary. And, to the extent that there was any ambiguity about the scope of the release or the availability of such claims in this proceeding, all plaintiffs were equally capable of pursuing them as Objecting Members did, or to object earlier to demand greater clarity.

Moreover, the choice that Objecting Members made is not cost-free. As noted, had Objecting Members chosen a different path, they would have been entitled to seek **[*72]** full recovery of their claims (rather than a portion of a settlement) and they would not be subject to Class Counsel's discretion in allocating settlement proceeds towards those claims. As noted, Class Counsel has discretion to take into account the percentage of recovery for categories of claims where the law is well-settled versus those where the merits are more iffy and attenuated.

Accordingly, the Special Master finds that Objecting Members' incorporated capacitor claims may proceed with these claims through the settlement allocation process.

D. Sufficiency of Objecting Members' Showing

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[15] To prevent prejudice to other Second Round claimants with significant incorporated capacitor claims, Objecting Members have proposed that the Court direct that the claim deadline for the Second Round be reopened and merged with the upcoming Third Round for the Nichicon and Rubycon settlements. MDL Dkt. No. 473 at 15 n. 14. They propose sending updated information to all Second and Third Round claimants advising them of the opportunity to include incorporated capacitor claims. *Id.* Because the Third Round claims are not before the Special Master and this is a matter of Court administration for the Court and the parties, the Special Master defers on this suggestion.

Having determined that incorporated capacitor claims are encompassed in the settlement release, that — with one exception[16] — the accuracy of Objecting Members' incorporated capacitor claims are not in dispute, that such claims are legally viable, and that they may be pursued through the settlement allocation process, issues nonetheless remain regarding Objecting Members' showing with respect to the appropriateness of a pro rata allocation of these claims from the settlement proceeds.

Under the stipulation, Class Counsel may have agreed to accept the extent of damages claimed (excluding the NCC/UCC claims), **[*73]** but as Class Counsel noted at hearing, that does not equate to agreeing that the Objecting Members have made a sufficient showing that they would have a reasonable chance of prevailing on such a claim. In fact, Class Counsel argues that Objecting Members have as yet failed to provide essential information demonstrating at least one key element of their claim. Specifically, Class Counsel contends Objecting Members would need to establish that these Settling Defendants were actually aware that Objecting Members intended the capacitors they purchased through Aptiv's non-U.S. entities, Cisco's non-U.S. entities, or Jabril, Celestica, Foxconn, or Flextronics were for finished products to be delivered to the United States. Class Counsel also suggests that while the parties may have stipulated to the Objecting Members' calculation of the losses they sustained from over-priced capacitors, Class Counsel has not stipulated to the percentage of sales that Settling Defendants *reasonably anticipated would go to the United States*. This concern raises two separate issues — the applicable legal standard regarding Defendants' state of knowledge, and the quality of evidence required to establish what **[*74]** the Defendants did or should have known about the percentage of sales that would be shipped to the United States.

The parties disagree about the law regarding an FTAIA defendant's state of mind Class Counsel argues that the evidence provided to it by Cisco does not demonstrate that anyone other than Cisco and Aptiv was aware of where these items would ultimately be delivered. Tr. at 67. Class Counsel states that "the test of the FTAIA is whether it would be expected by that defendant that [the sale] would have an impact [in the U.S.]. I don't see anything in. . . the November 12, 2018 [declaration] that says why any defendant would have any expectation about anything. . . . There isn't anything that supports any intent of what the defendants would have been anticipating in terms of an impact in the U.S." Tr. at 67. Although Objecting Members provided records of large volumes of incorporated capacitor products acquired by Cisco and Aptiv (or their agents) being shipped to the U.S., those records do not concern the state of knowledge of defendants at the time of sale. In response, Objecting Members' position at the hearing was simply, "[T]here's no mens rea requirement under the FTAIA. **[*75]** Full stop." Tr. at 72.

On the issue of the relevant legal standard, the Special Master finds that Class Counsel is essentially correct. As the Court noted in the FTAIA II decision, "the domestic effects exception states that conduct involving non-import trade or commerce with foreign nations is subject to the Sherman Act only if. . . the conduct had a 'direct, substantial *and reasonably foreseeable effect'* on U.S. domestic commerce. FTAIA II Order at 10 (quoting *15 U.S.C. Sec. 6a(1) (2012)*) (emphasis added).

The exact type of knowledge possessed by, or attributed to, a defendant required by the FTAIA is not well-settled (like many other aspects of the FTAIA). *See, e.g.*, Comment, *From Sea to Shining Sea: A New Approach to Interpreting the Foreign Trade Antitrust Improvements Act*, 64 Emory L.J., 869, 897-905 (2015). The FTAIA was a legislative response designed largely to codify *United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416, 444 (2d Cir. 1945)*. The U.S. Supreme Court in *Hartford Fire Ins. Co. v. California, 509 U.S. 764, 774-76, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993)*, appeared to adopt the intent standard established in *Alcoa*, that Sherman Act liability "applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Id. at 796*. Other lower courts have subsequently adopted this standard as well. *See, e.g., Carrier Corp. v. Outokumpu Oyj, 673 F.3d 430, 438 (6th Cir. 2012)*. Other courts however have applied an objective standard to the knowledge requirement in the FTAIA, observing that this element is satisfied **[*76]** only if a direct and substantial effect on U.S. commerce would have been foreseeable to a reasonable person. In *Animal Science Products, Inc. v. China Minmetals Corp., 654 F.3d 462, 471 (3rd Cir. 2011)*, the Third Circuit vacated and remanded a case that had dismissed an FTAIA action based on lack of evidence of defendants' intent, holding that the

[16] Namely, the dispute about duplicative claims for NCC and UCC is the exception.

standard for "reasonably foreseeable" was "whether the alleged domestic effect would have been evident to a reasonable person making practical business judgments."

While the Court need not resolve this issue in the settlement context, it is clear that Objecting Members need to come forward with at least *some* showing in order to establish the scope of Settling Defendants' liability, and hence the reasonable value of their claims. Notably, in the Court's FTAIA II decision, the plaintiff Flextronics "presented evidence that defendants sold capacitors to Flex Affiliates knowing that the capacitors would be incorporated into goods that were intended to be (and were) shipped to the U.S." FTAIA II Order at 8 (quoting Dkt. No. 1722-3 at 20 n.20).[17] Accordingly, there is a *mens rea* requirement under the FTAIA in that, at the very least, it must be reasonably foreseeable to a defendant that its sale of goods at artificially inflated prices **[*77]** will be shipped to the United States where it will have an effect on U.S. commerce.

Objecting Members may be able to make a fair argument based on existing evidence that — given the massive volume of capacitor purchases for eventual delivery into the United States presented here — it should have been reasonably foreseeable that some percentage of sales were destined to the U.S. At the hearing, Objecting Members argued that Cisco's business partners would certainly know what's in the public record about the percentage of Cisco's business that comes into the United States, and stated that — if necessary — Cisco could make a showing as strong as Flextronics did in the FTAIA II summary judgment proceeding. Tr. at 67-68.

In this respect, Objecting Members have an imperfect vehicle for resolving this dispute, but it is the vehicle they chose. While Objecting Members could likely establish that Settling Defendants knew that some percentage of capacitor sales to Cisco, Aptiv, Flextronics, Jabil, Celestica, and Foxconn were probably destined for the United States market, what percentage was reasonably foreseeable is likely harder to prove and is subject to an uncertain standard. **[*78]** Objecting Members argue that Settling Defendants had constructive notice that establishes subjective intent because of various indicia that a product was intended for shipment to the U.S., including the voltage, certain NHTSA requirements, or the PPAP test. Tr. at 56-57. Even if this is so, Class Counsel generally should not be put to the burden of conducting a summary judgment-like proceeding. Here, Class Counsel would be required to consider Objecting Members' evidence of the state of mind of Defendants concerning the percentage of their sales that were likely to be shipped to the U.S., because that percentage bears upon the amount to which Objecting Members would ultimately be entitled.

The evidentiary challenge here is not insignificant. It is not in the record — let alone established — that all capacitors in products shipped to the U.S. are differentiated based on whether a product will be subject to NHTSA requirements, the PPAP test, U.S. voltage requirements, or some other unique signature feature. Moreover, past dealings may be relevant even under an objective standard. For example, if the percentage of purchases that went to the United States varied substantially from year **[*79]** to year, the Settling Defendants may not be in a position to reasonably estimate the impact of their sales outside the United States that would ultimately have a direct effect on U.S. commerce. In short, that may not be reasonably foreseeable to a Settling Defendant such that Class Counsel would deem the claim viable.

Class Counsel has an obligation to the class not to simply accept a ballpark guess as to the actual dimensions of Objecting Members' adequately documented claims for incorporated capacitors. Although Class Counsel has stipulated to the accuracy of the numbers presented by Objecting Members for final sales of incorporated capacitors, it is also fair to acknowledge that this number has jumped around quite a bit during the course of these proceedings. As Class Counsel correctly recounted, Cisco's incorporated capacitor claims alone jumped from $81 million in July 2017, to $429 million in October 2017, to $488 million in February 2018, to $493 million in April 2018, to $199 million in November 2018, to $142 million in March 2019. In fact, the Special Master notes that while Cisco's opening brief on its Motion originally sought $154,050,329.40 in supplemental commerce for

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[17] The *Hsiung* case from the Ninth Circuit, on which the Court relies, cites with approval other cases noting that *defendants'* conduct must be "directed at a U.S. import market,' even if the defendants did not engage in importation of products into the United States." ***Hsiung, 778 F.3d at 755 n.8*** (quoting *Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 471 & n. 11 (3rd Cir. 2011))*.

incorporated **[*80]** capacitors, it reduced that figure to $142,070,717.01 in its Reply Brief. MDL Dkt. No. 496 at 8 n.3. This drop of over $12 million between February 8, 2019 and March 1, 2019 in the same pleading does not afford Class Counsel much confidence in the reliability of the figures regarding what Settling Defendants reasonably should or should not have known about the ultimate destination of various capacitor sales. Those numbers matter, however, because any overpayment to Objecting Members would come at the expense of compensating other DPP class members.

Based on these circumstances and the preceding rulings, the Special Master recommends that Objecting Members be allowed — within 20 days of any final order by the Court approving this Report — to present their best evidence to Class Counsel of the percentage of their respective incorporated capacitor claims that Settling Defendants either knew or should reasonably have foreseen being shipped to the United States. Class Counsel may then determine in the interest of the entire class whether the evidence is sufficient, which may include disallowing some percentage of that claim, or applying a uniform discount to this category of claims, or some **[*81]** other method to account for the uncertain value of this category of claims relative to claims for unincorporated capacitors. If the Court determines that this is in the interest of judicial efficiency, any hearing on the reasonableness of this final figure would be subject to the Special Master's review.

Conclusion

The Objecting Members' incorporated capacitor claims are deemed to be subject to the Second Round settlement and release, and are viable, and compensable through the allocation process. The amount of those claims is subject to proof regarding the scope of such claims that were reasonably foreseeable to the Settling Defendants, and may be further discounted based on their relative viability and in the interest of fairness to the class as a whole. Issues of reopening any claims dates in this round is referred back to the Court. The Objecting Members should provide the further information required in the Findings of Fact and Conclusions of Law set forth above, including any adjustments based on the NCC/UCC dispute, to Class Counsel within 20 days of a Court order approving this Report. The Special Master is available to resolve any further disputes regarding that process if they **[*82]** arise and at the discretion of the Court. Dated: 7/30/19

/s/ Jeffrey L. Bleich

Jeffrey L. Bleich

Special master

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Patt v. Antech Diagnostics, Inc.

United States District Court for the Central District of California

July 30, 2019, Decided; July 30, 2019, Filed

8:18-cv-01689-JLS-DFM

Reporter
2019 U.S. Dist. LEXIS 213021 *; 2019 WL 6654078

Jill Patt, D.V.M. et al. v. Antech Diagnostics, Inc.

Subsequent History: Motion granted by, in part, Motion denied by, in part, Claim dismissed by, Motion denied by *Patt v. Antech Diagnostics, 2020 U.S. Dist. LEXIS 160220, 2020 WL 5076970 (C.D. Cal., May 18, 2020)*

Core Terms

lab results, unfair, Plaintiffs', consumer, testing, antitrust, allegations, prong, business practice, Sherman Act, misrepresentation, fraudulent, Clayton Act, unfair competition, inaccuracy, violations, deception, covenant, omission, antitrust violation, defendant's conduct, monopoly power, market share, good faith, representations, conspiracy, quotation, disclose, marks, fair dealing

Counsel: **[*1]** ATTORNEYS PRESENT FOR PLAINTIFF: Not Present.

ATTORNEYS PRESENT FOR DEFENDANT: Not Present.

Judges: Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE.

Opinion by: JOSEPHINE L. STATON

Opinion

CIVIL MINUTES — GENERAL

PROCEEDINGS: (IN CHAMBERS) ORDER GRANTING DEFENDANT'S MOTION TO DISMISS (Doc. 16)

Before the Court is a Motion to Dismiss filed by Defendant Antech Diagnostics, Inc. (Mot., Doc. 16.) Plaintiffs Jill Patt and Little Critters Vet, LLC opposed. (Opp., Doc. 22.) Defendant replied. (Reply, Doc. 23.) After considering the briefs, holding oral argument, and taking the matter under submission, for the following reasons, the Court GRANTS Defendant's Motion.

I. Background

Plaintiff Dr. Jill Patt, D.V.M. is a veterinarian and Plaintiff Little Critters is the corporate entity through which she operates her veterinary practice. (Compl., Doc. 1 ¶¶ 1-2.) Both are citizens of Arizona. (*Id.* ¶¶ 1-2, 4.) Defendant is a California corporation that provides laboratory testing services. (*Id.* ¶¶ 3, 8.) Plaintiffs allege that Defendant wields substantial market share because it has only one competitor in the national market for veterinary lab diagnostic services, provides such services to over 19,000 animal hospitals throughout **[*2]** North America, and receives daily up to 45,000 samples for testing. (*Id.* ¶¶ 47-48.)

Plaintiffs allege that Defendant "represents that its lab results are of high quality and can be trusted because, among other things, it claims to employ high quality staff." (*Id.* ¶¶ 3, 8.) Plaintiffs claim that Defendant's website represents that:

> No one better understands the importance of quality patient care and the value of accurate, dependable diagnostic testing than VCA ANTECH . . . Dependable testing is more than technology; accurate and dependable results rely on highly skilled and trained technicians. Each and every ANTECH Laboratory Technician is under daily QA/QC programs designed to ensure accurate results while receiving annual mandatory testing to insure their skills and knowledge are second to none.

(*Id.* ¶ 11.) Plaintiffs allege that Dr. Patt relied on such representations in choosing to enter a contract with Defendant. (*Id.*)

On July 6, 2017, Dr. Patt entered a contract for laboratory testing services with Defendant (the "Services Agreement"). (*Id.* ¶ 11.) Among other terms, the Services Agreement requires that: with limited exception, Dr. Patt direct all of Little Critters's laboratory testing **[*3]** needs to be exclusively performed by Defendant; Dr. Patt purchase an annual minimum amount of $24,000 in services; and Defendant issue to Dr. Patt a $12,000 loan, with 7% annual interest, to be partially forgiven on an annual basis if Dr. Patt fulfills the corresponding year's minimum purchase. (*Id.* ¶¶ 15-17.) The Services Agreement has a term of six years. (*Id.* ¶ 15.)

In December 2017, Dr. Patt allegedly began to have concerns with the accuracy of Defendant's lab results. The Complaint chronicles several instances over the ensuing six months where Dr. Patt alleges she was furnished inaccurate lab results. (*Id.* ¶¶ 21-22, 29-30.) Plaintiffs allege there are "[m]any more documented false lab results" in addition to those examples. (*Id.* ¶ 22.) The Complaint also describes Dr. Patt's effort to raise her concerns regarding the alleged inaccurate test results with Defendant. (*Id.* ¶¶ 21-23, 26.) In response to her concerns, Defendant would sometimes, but not always, furnish corrected results. (*Id.* ¶¶ 23-24.)

Plaintiffs allege that Defendant "does not disclose and actively conceals the high level of incorrect lab results that it generates." (*Id.* ¶ 10.) Plaintiffs further allege that Dr. Patt **[*4]** would not have entered into the Services Agreement if she had known that Defendant provides false lab results. (*Id.*) Likewise, Plaintiffs claim that reasonable veterinarians would not enter into similar agreements if they knew "the significant amount of false lab results that [Defendant] reports to veterinarians." (*Id.* ¶ 68.) Plaintiffs allege that Defendant's inaccuracies are primarily driven by human error due to poor working conditions and labor cost-cutting measures that undermine accurate testing efforts and protocols. (*Id.* ¶¶ 32-35.)

Along with raising concerns regarding the accuracy of Defendant's test results, Plaintiffs allege that Dr. Patt repeatedly requested to modify the Services Agreement and that such requests went unanswered. (*Id.* ¶ 26.) On August 15, 2018, Defendant sent Dr. Patt a demand letter for breach of contract. (*Id.* ¶¶ 37-38; Exhibit B to Compl., Doc. 10-2.) Defendant's letter asserts that Dr. Patt breached the Services Agreement by failing to exclusively utilize Defendant for her testing needs. (Exhibit B to Compl. at 1.) The letter asserts damages of $298,704.76. (*Id.* at 2.) Plaintiffs allege that Defendant has threatened or filed similar suits against other veterinarians. **[*5]** (Compl. ¶¶ 36-44.)

Plaintiffs filed the instant action on September 19, 2018, bringing four causes of action: one each under the respective "fraudulent," "unlawful," and "unfair" business practices prongs of the California Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.* ("UCL"), as well as a common law claim for breach of the implied covenant of good faith and fair dealing. (Compl. ¶¶ 60-86.) Plaintiffs' UCL claim of unlawful business practices is predicated on allegations that Defendant's conduct amounts to state and federal antitrust violations under *15 U.S.C §§ 1-2* ("Sherman Act"), *15 U.S.C §§ 14* ("Clayton Act"), and *Cal. Bus. & Prof. Code §§ 16720*, *16726-16727* ("Cartwright Act"). (Compl. ¶¶ 73-78.)

II. Legal Standard

In deciding a motion to dismiss under *Rule 12(b)(6)*, courts must accept as true all "well-pleaded factual allegations" in a complaint. *Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. A court must draw all reasonable inferences in the light most favorable to the non-moving party. *See Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010)*. Yet, "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986))*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 570*). "A claim has facial plausibility when the plaintiff **[*6]** pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly, 550 U.S. at 556*). A plaintiff must not merely allege conduct that is conceivable; "[w]hen a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotation marks omitted).

III. Discussion

The facts of this case resemble a run-of-the-mill contract dispute. Plaintiffs contracted to pay Defendant for certain services. At some point, Plaintiffs became unsatisfied with and ceased to purchase those services. Defendant threatened suit for breach and Plaintiffs now bring suit to vindicate their own injuries caused by Defendant's allegedly inadequate performance. Plaintiffs' legal theories, however, are anything but ordinary. Plaintiffs brings no claims for express breach or nonperformance; rather, Plaintiffs claim fraud, antitrust violations, and breach of an implied covenant. The Court examines each in turn.

A. UCL Claims

"The UCL prohibits, and provides civil remedies for, unfair competition, which it defines as 'any unlawful, unfair **[*7]** or fraudulent business act or practice.'" *Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 320, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)* (quoting *Cal. Bus. & Prof. Code § 17200*). "Its purpose 'is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.'" *Id.* (quoting *Kasky v. Nike, Inc. 27 Cal. 4th 939, 949, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (2002))*. "The UCL's scope is broad. By defining unfair competition to include any *unlawful* [] business act or practice, the UCL permits violations of other laws to be treated as unfair competition that is independently actionable." *Kasky, 27 Cal. 4th at 949* (internal quotation marks omitted) (emphasis original). Moreover, "[b]y defining unfair competition to include also any *unfair or fraudulent* business act or practice, the UCL sweeps within its scope acts and practices not specifically proscribed by any other law." *Id.* (internal quotation marks and citations omitted) (emphasis original).

Plaintiffs bring three causes of action under the UCL: one count under each of the statute's three prongs. Specifically, Plaintiffs assert that Defendant's conduct violates the UCL as follows:

> (1) Defendant's conduct is *unlawful* because it violates certain antitrust statutes;
>
> (2) Defendant's conduct is *fraudulent*, even if otherwise lawful, because it misrepresents the quality of Defendant's services; and
>
> (3) Defendant's conduct is **[*8]** *unfair*, even if otherwise not violative of the UCL.

(Opp. at 2-18.)

1. Unlawful Business Practices

"With respect to the unlawful prong of section 17200, it is clear that "[v]irtually any state, federal, or local law can serve as the predicate." Friedman v. AARP, Inc., 855 F.3d 1047, 1052 (9th Cir. 2017) (citing People ex rel. Lockyer v. Fremont Life Insurance Co., 104 Cal.App.4th 508, 128 Cal. Rptr. 2d 463 (2002)). Here, Plaintiff avers predicate violations of multiple antitrust statutes, namely the federal Sherman Act and Clayton Act, as well as analogous portions of California's Cartwright Act.

i. Sherman Act

a. *Section 1*

Section 1 of the Sherman Act prohibits any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. "To state a claim under Section 1, a plaintiff must allege facts that, if true, will prove: (1) the existence of a conspiracy, (2) intention on the part of the co-conspirators to restrain trade, and (3) actual injury to competition. Coalition for ICANN Transparency, Inc. v. VeriSign, Inc., 611 F.3d 495, 501-02 (9th Cir. 2010) (citing Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir.2008)). A conspiracy exists where "defendants 'ha[ve] a conscious commitment to a common scheme designed to achieve an unlawful objective.'" County of Tuolumne v. Sonora Community Hospital, 236 F.3d 1148, 1155 (9th Cir. 2001) (quoting Monsanto Co. v. Spray-Rite Services Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)).

Plaintiffs do not adequately allege the existence of a conspiracy or intention on the part of any co-conspirators to restrain trade. The Complaint charges only one defendant and identifies no other parties accused of misconduct. Unless the Court accepts **[*9]** that the exclusivity provision of the Services Agreement amounts to a conspiracy between Plaintiffs and Defendant to restrain trade—which the Court doubts is Plaintiffs' intended allegation—there is no adequate allegation of conspiracy. Accordingly, Plaintiffs fail to state a claim under Section 1 of the Sherman Act.

b. *Section 2*

In contrast to Section 1, violations of Section 2 of the Sherman Act turn on the conduct of a single entity in its exercise of monopoly power to restrain competition. "There are three essential elements to a successful claim of Section 2 monopolization: (a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal 'antitrust' injury." Allied Orthopedic Appliances Inc. v. Tyco Health Care Group. LP, 592 F.3d 991, 998 (9th Cir. 2010).

As to the first factor, Plaintiffs argue that Defendant wields over 50% market share in the relevant market and that such share is "sufficient to raise the specter of monopolization" in the present circumstances. (Opp. at 11 (citing Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1438 (9th Cir. 1995)).) Sidestepping the question of whether claims of a certain level of market share may serve as a proxy for allegations of actual monopoly power, however, Plaintiffs allege no facts to support a plausible inference that Defendant holds worrying market share in the first place. A lone **[*10]** allegation that Defendant has one major competitor does not say anything about those entities' relative size, scope of operations and services, or other indicia of market share. Similarly, Plaintiffs' references to the bare the numbers of contracting facilities and daily receipt of samples by Defendant mean little absent contextualizing facts about competitors and the overall market. Thus, Plaintiffs do not adequately plead that Defendant has monopoly power, or even adequate market share to suggest such power.

As to the third factor, the Court finds that Plaintiffs do not sufficiently allege causal antitrust injury. "Antitrust injury is made up of four elements: "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." Glen Holly Entertainment, Inc. v. Tektronix, Inc., 352 F.3d 367, 372 (9th Cir. 2003) (internal quotation marks omitted). Plaintiffs do not argue that they suffered anticompetitive prices—the prototypical injury antitrust laws are designed to prevent—but instead argue that the pervasive inaccuracy of Defendant's test results is a degradation of quality "of the type the antitrust laws were designed to prevent . . . [M]onopolistic **[*11]** companies often allow the quality of the goods and services they provide to degrade in order to reap supracompetitive profits because they have no incentive to compete on quality they way firms do in a typical market." (Opp. at 14 (citing *Telex Corp. v. International Business Machines Corp., 510 F.2d 894, 913 (10th Cir. 1975))*.)

Assuming without deciding that Plaintiffs correctly state the law as to their type of alleged injury, they do not adequately plead facts from which one could infer that such injury was caused by or otherwise flowed from Defendant's monopoly power. Particularly, the Complaint lacks any allegations that the quality of Defendant's testing is any less than would be found in a competitive environment. Indeed, Plaintiffs allege neither an industry-standard rate of erroneous lab results, nor the degree to which Defendant's lab results deviated from such a rate. Plaintiffs do not even allege the precise rate of inaccuracy, and Plaintiffs' counsel was unable to state such a figure when requested by the Court at oral argument. Moreover, even assuming an actual deficit from competitive-level quality, Plaintiffs must allege facts that show how such a deficit arose by way of Defendant's exercise of monopoly power. As pleaded, the Complaint alleges that Defendant's allegedly **[*12]** poor quality of services is due to efforts to cut labor costs—a hallmark of corporations that are looking to stay viable in a *competitive* marketplace.

As noted above, the Complaint largely indicates that Plaintiffs were dissatisfied with a service they purchased and are piggybacking antitrust claims onto a simple contract dispute. Plaintiffs' alleged facts offer no reason to believe that the quality of Defendant's services—if even if assumed to be less than a competitive marketplace would warrant—is directly traceable to anti-competitive conduct rather than any of the myriad reasons that competitive firms offer products and services that ultimately do not live up to a particular consumer's standards. Plaintiffs' argument suggests that any consumer dissatisfied with the quality of a product or service purchased from a company possessing significant market share could state a claim for antitrust violation. That is not the law. Viable antitrust claims require plausible allegations of particular anti-competitive conduct as the source of an antitrust-type injury. Without facts to build a bridge from Defendant's supposed monopoly power to Plaintiffs' alleged injuries in receiving diminished-quality **[*13]** services, Plaintiffs allegations are merely consistent with Defendant's holding of such power and stop short of the line of plausible entitlement to relief. *Iqbal, 556 U.S. at 678*.[1]

ii. Clayton Act

As codified at *15 U.S.C. § 14*, the Clayton Act prohibits price manipulation and monopolization of "goods, wares, merchandise, machinery, supplies, or other commodities." Defendant argues that its testing *services* at issue here are not covered by the statute. (Mot. at 16; Reply at 15-16.) Plaintiffs insist the Clayton Act applies to Defendant's testing because the Services Agreement contemplates the use of certain sample collection and shipping vessels, which are goods. (Opp. at 16-17.)

The Ninth Circuit has adopted the "'dominant nature' standard to determine if transactions are for sale of services or goods." *May Department Store v. Graphic Process Co., 637 F.2d 1211, 1215 (9th Cir. 1980)*. Under that standard, courts acknowledge that "[v]irtually no transfer of an intangible in the nature of a service, right, or privilege can be accomplished without the incidental involvement of tangibles . . . [Therefore,] in such circumstances[,] the dominant nature of the transaction must control in determining whether it falls within the provisions of the Act." *Tri-State Broad. Co. v. United Press International, Inc., 369 F.2d 268, 270 (5th Cir. 1966)*.

Here, any tangible testing supplies are plainly incidental to Defendant's **[*14]** testing *services*, which form the core of the Services Agreement and the instant dispute. Accordingly, Plaintiffs do not state a claim for a Clayton Act violation.

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1 Because the Court finds that Plaintiffs' allegations are insufficient as to the essential elements of monopoly power and antitrust injury, the Court declines to address the element of willfulness.

iii. Cartwright Act

Like *Section 1* of the Sherman Act, which requires a "combination" or "conspiracy" to restrain trade, *Section 16720* of the Cartwright Act requires restraint be carried out by "a combination of capital, skill or acts by two or more persons." *Cal. Bus. & Prof. Code § 16720*. Hence, because "the Cartwright Act and the federal Sherman Act share similar language and objectives, California courts often look to federal precedents under the Sherman Act for guidance." *Fisherman's Wharf Bay Cruise Corp. v. Superior Court of San Francisco, 114 Cal. App. 4th 309, 334, 7 Cal. Rptr. 3d 628 (2003)* (collecting cases). Similarly, "*Section 16727*, added to the Cartwright Act in 1961, was patterned after *section 3* of the federal Clayton Act, and cases interpreting [the] Clayton Act *section 3* are applicable when construing *section 16727*." *Morrison v. Viacom, Inc., 66 Cal. App. 4th 534, 541, 78 Cal. Rptr. 2d 133, 137 (1998)*. Therefore, Plaintiffs' failure to state claims under either the Sherman Act or Clayton Act dooms their respective claims under the Cartwright Act.

Because they do not sufficiently allege the elements of their asserted predicate statutory violations, Plaintiffs UCL claim for unlawful business practices is dismissed.

2. Fraudulent Business Practices

Plaintiffs allege that Defendant made deceptive and misleading **[*15]** claims regarding the "accuracy and dependability of its lab results." (Compl. ¶ 69.) Under the UCL, such claims "are governed by the 'reasonable consumer' test. *Williams v. Gerber Products Co., 552 F.3d 934, 938 (9th Cir. 2008)* (citing *Freeman v. Time, Inc., 68 F.3d 285, 289)*. "Under the reasonable consumer standard, [Plaintiffs] must 'show that members of the public are likely to be deceived.'" *Id.* (quoting *Freeman, 68 F.3d at 288*); *see also Kasky, 27 Cal. 4th at 951*. Plaintiffs posits two inverse theories of deception: first, that Defendant deceptively *affirmatively misrepresented* the accuracy of its lab results; second, that Defendant *deceptively omitted* the inaccuracy of its lab results. (Opp. at 2-7.) Distinct standards govern each theory. *See e.g.*, *Elias v. Hewlett-Packard Co., 950 F. Supp. 2d 1123, 1132-36 (N.D. Cal. 2013)* (employing separate analyses for distinct theories of deception by affirmative misrepresentation and deception by omission).

i. Affirmative Misrepresentation

Plaintiffs allege that Defendant's marketing materials contain the following statements:

> No one better understands the importance of quality patient care and the value of accurate, dependable diagnostic testing than VCA ANTECH . . . Dependable testing is more than technology; accurate and dependable results rely on highly skilled and trained technicians. Each and every ANTECH Laboratory Technician is under daily QA/QC programs designed to ensure **[*16]** accurate results while receiving annual mandatory testing to insure their skills and knowledge are second to none.

(Compl. ¶ 8.) Plaintiffs aver that these representations were "intended to and did create the false impression that [Defendant] manages its laboratory technician staff in such a way as to insure accurate and dependable test results." (*Id.; see also* Opp. at 6-7.) Defendant contends that such statements cannot be misleading as a matter of law because they amount to mere nonactionable puffery. (Mot. at 8-10; Reply at 5-7.)

"To be actionable as an affirmative misrepresentation, a statement must make a 'specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact.'" *Vitt v. Apple Computer, Inc., 469 F. App'x 605, 607 (9th Cir. 2012)* (quoting *Coastal Abstract Services v. First American Title Insurance Co., 173 F.3d 725, 731 (9th Cir.1999))*. "[P]roduct superiority claims that are vague or highly subjective often amount to nonactionable puffery, [whereas] misdescriptions of specific or absolute characteristics of a product are actionable." *Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1145 (9th Cir. 1997)* (internal quotation marks and citations omitted). Whether an alleged misrepresentation is an absolute statement of fact or mere puffery is a question of law appropriate for decision on a motion to dismiss. *Cook, Perkiss & Liehe, Inc. v. Northern California Collection Service, Inc., 911 F.2d 242, 245 (9th Cir. 1990)*.

Defendant cites a number of persuasive opinions **[*17]** demonstrating a virtual consensus among courts in the Ninth Circuit that generalized claims of dependability, reliability, or accuracy are mere nonactionable puffery. *See Shields v. Alere Home Monitoring, Inc., 2015 U.S. Dist. LEXIS 156148, 2015 WL 7272672, at *10 (N.D. Cal. Nov. 18, 2015)* (finding "accurate and reliable" to be nonactionable puffery); *Annunziato v. eMachines, Inc., 402 F. Supp. 2d 1133, 1140 (C.D. Cal. 2005)* ("reliability"); *Long v. Hewlett-Packard Co., 2007 U.S. Dist. LEXIS 79262, 2007 WL 2994812, at *7 (N.D. Cal. July 27, 2007)*, *aff'd*, *316 F. App'x 585 (9th Cir. 2009)* ("reliable"); *Tietsworth v. Sears, 720 F. Supp. 2d 1123, 1136 (N.D. Cal. 2010)* ("designed and manufactured for years of dependable operation"); *Summit Technology, Inc. v. High-Line Medical Instruments, Co., 933 F. Supp. 918, 931 (C.D. Cal. 1996)* ("reliable"); *Elias, 950 F. Supp. 2d 1123, 1133 (N.D. Cal. 2013)* ("ultra-reliable"). Plaintiffs, however, cite only to *Rutledge v. Hewlett-Packard Co., 238 Cal. App. 4th 1164, 1176, 190 Cal. Rptr. 3d 411 (2015)*, which is not on point. That case addressed whether certain representations of reliability triggered a duty to disclose a latent defect under an *omission* theory of misrepresentation, not whether such representations were themselves actionable *affirmative* misrepresentation. *Id.* Considering the weight of authority favoring Defendant's position, the Court concludes that Defendant's representations that it provides "accurate, dependable diagnostic testing" and implements protocols designed to "ensure accurate results" are nonactionable puffery and therefore cannot be said to deceive a reasonable consumer as a matter of law.[2]

ii. Omission

"For an omission to be actionable **[*18]** under the [] UCL, 'the omission must be contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose.'" *Elias, 950 F. Supp. 2d at 1134* (quoting *Daugherty v. American Honda Motor Co., 144 Cal. App. 4th 824, 835, 51 Cal. Rptr. 3d 118 (2006))*. "[A] failure to disclose a fact one has no affirmative duty to disclose is [not] 'likely to deceive' anyone within the meaning of the UCL." *Daugherty, 144 Cal. App. 4th at 838*. "A failure to disclose a fact can constitute actionable fraud or deceit in four circumstances: (1) when the defendant is the plaintiff's fiduciary; (2) when the defendant has exclusive knowledge of material facts not known or reasonably accessible to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations that are misleading because some other material fact has not been disclosed." *Collins v. eMachines, Inc., 202 Cal. App. 4th at 255-56 (2011)* (citing *LiMandri v. Judkins, 52 Cal. App. 4th 326, 336, 60 Cal. Rptr. 2d 539 (1997))*.

Here, the parties primarily dispute the "materiality" of Defendant's alleged omissions. "A misrepresentation is judged to be 'material' if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." *Engalla v. Permanente Medical Group, Inc., 15 Cal. 4th 951, 977, 64 Cal. Rptr. 2d 843, 938 P.2d 903 (1997)* (internal quotation marks omitted); *see also Collins, 202 Cal. App. 4th at 256*.

Plaintiffs claim that "[Defendant] does **[*19]** not disclose and actively conceals the high level of incorrect lab results that it generates." (Compl. ¶ 10.) Allegedly, such "representations regarding the accuracy and dependability of its

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[2] Defendant's representation that "[e]ach and every ANTECH Laboratory Technician is under daily QA/QC programs designed to ensure accurate results" is not mere puffery *per se*. *See Annunziato, 402 F. Supp. 2d at 1140-41 (C.D. Cal. 2005)* (finding representation of use of the "most stringent quality control tests" to be actionable because it "is a specific factual assertion which could be established or disproved through discovery"). Here, however, Plaintiffs do not allege misrepresentation as to the existence or extent of Defendant's daily programming. Rather, they allege misrepresentation as to the inferable *outcome* of such programming, *i.e.*, accurate test results, which is nonactionable. For example, in *Tietsworth*, the court found an assertion that products were "designed, manufactured and tested *for years of dependable operations*," to be mere puffery. *720 F. Supp. 2d at 1137* (emphasis added). Defendant's assertion that certain programming is implemented *to ensure accurate results* is likewise nonactionable.

lab results and its concealment of the significant amount of false lab results that it reports to veterinarians . . . induced reasonable veterinarians, including [Dr. Patt], to enter into Exclusive Agreements with [Defendant] which they otherwise would not have entered into." (*Id.* ¶ 68.) Plaintiffs' materiality arguments, however, put the cart before the horse because Plaintiffs have not sufficiently alleged the "fact" that is supposedly omitted, *i.e.*, the "significant amount" or "high level" of incorrect lab results provided by defendant. Plaintiffs argue that they are not required to allege a certain threshold number or rate of inaccuracy at the pleading stage to allege materiality. (Opp. at 3-4 (citing *Herron v. Best Buy Co., 924 F. Supp. 2d 1161, 1174 (E.D. Cal. 2013)*.) But this argument is inapposite. Even assuming that Plaintiffs are not required to clear some numerical or rate threshold of materiality, Plaintiffs are still required to put forth some facts to support their claims that the occurrence of inaccurate lab results are "significant" and at a "high level" **[*20]** such that a reasonable consumer would be misled by nondisclosure.

Put simply, Plaintiffs have not provided any facts indicating why a reasonable consumer would not enter into a contract for Defendant's services knowing the *particular* number or rate of nondisclosed inaccuracies alleged by Plaintiffs, whatever that may be. Yet, Plaintiffs allege that such particular level is critical to the question of materiality. The Complaint does not merely allege that a reasonable consumer would not enter a contract for Defendant's services knowing the possibility of *any* or a *de minimis* number of inaccuracies—as Plaintiffs' brief seems to imply. Rather, the Complaint indicates that a reasonable consumer would be misled by the Defendant's nondisclosure of some *significant* amount or *high* rate of error. The pleading, however, provides no indication of the error quantity or rate that Plaintiffs allege to be materially significant. Without doing so, the Complaint does not fairly notice Defendant of the misconduct with which it is charged. *Twombly, 550 U.S. at 556*.

The Complaint does contain an allegation that Dr. Patt herself would not have contracted for Defendant's services "if she had known that it provides false lab results"—which **[*21]** is fairly read to include *any* or a *de minimis* number of inaccuracies. This allegation, however, does not cure the aforementioned deficiency because Dr. Patt does not necessarily stand in for the reasonable consumer. Her tolerance for error is apparently zero, but there are no allegations that reasonable consumers share her sentiments. To the contrary, as discussed above, Plaintiffs allege that reasonable consumers would be dissuaded by some elusive "high" and "significant" non-zero rate of error, but Plaintiffs then fail to sufficiently allege their self-described threshold.

Because they do not sufficiently allege deceptive misrepresentation, either by affirmation or omission, Plaintiffs UCL claim for fraudulent business practices is dismissed.

3. Unfair Business Practices

Under the UCL, "a practice may be deemed unfair even if not specifically proscribed by some other law." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. Relying on *Cel-Tech*, Plaintiffs argue that Defendant's conduct is "unfair" under the UCL because it "violates the same policy or spirit as ***antitrust law*** violations, even [if] falling short of meeting every element of an antitrust violation." (Opp. at 18.) *Cel-Tech*, however, expressly limited itself to antitrust disputes ***[*22]*** *between direct competitors*. *20 Cal. 4th at 187 n. 12*. Although there is some ambiguity as to the appropriate legal test to apply to allegations of unfair fraud or unfair and antitrust conduct affecting *consumers*, courts have consistently reached the same result in both of those contexts: holding "that where the unfair business practices alleged under the unfair prong of the UCL overlap entirely with the business practices addressed in the fraudulent and unlawful prongs of the UCL, the unfair prong of the UCL cannot survive if the claims under the other two prongs of the UCL do not survive." *Hadley v. Kellogg Sales Co., 243 F. Supp. 3d 1074, 1104-05 (N.D. Cal. 2017)*; *see also* *Chavez v. Whirlpool Corp., 93 Cal. App. 4th 363, 375, 113 Cal. Rptr. 2d 175 (2001)* ("If the same conduct is alleged to be both an antitrust violation and an 'unfair' business act or practice for the same reason—because it unreasonably restrains competition and harms consumers— . . . a separate inquiry into essentially the same question under the unfair competition law would only invite conflict and uncertainty and could lead to the enjoining of procompetitive conduct."); *LiveUniverse, Inc. v. MySpace, Inc., 304 F. App'x 554, 557 (9th Cir. 2008)* ("Where . . . the same conduct is alleged to support both a plaintiff's federal antitrust claims and state-law unfair competition claim, a finding that the conduct is not an antitrust violation precludes a finding of unfair **[*23]** competition."); *DocMagic, Inc.*

v. Ellie Mae, Inc., 745 F. Supp. 2d 1119, 1147 (N.D. Cal. 2010); Punian v. Gillette Co., 2016 U.S. Dist. LEXIS 34164, 2016 WL 1029607, at *17 (N.D. Cal. Mar. 15, 2016) (dismissing claims under the UCL's unfair prong that "overlap entirely" with insufficient claims of deception under the fraudulent prong); In re Actimmune Marketing Litigation, 2009 U.S. Dist. LEXIS 103408, 2009 WL 3740648, at *14 (N.D. Cal. Nov. 6, 2009), *aff'd*, 464 F. App'x 651 (9th Cir. 2011) (Where "[p]laintiffs suggest no other theory by which defendants' conduct could be considered unfair, but non-fraudulent, . . . [and] plaintiffs have not pled defendants' fraudulent conduct with sufficient specificity[,] . . . plaintiffs' claims under the unfair prong of the UCL must be dismissed as well.")

Accordingly, because Plaintiffs' claims for fraud and consumer antitrust violations are deficient, and they advance no other theory of "unfairness" under the UCL, Plaintiffs' claim under the unfair prong of the UCL is likewise dismissed.

B. Claim of Breach of Covenant of Good Faith and Fair Dealing

"Under California law, every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. R Power Biofuels, LLC v. Chemex LLC, 2016 U.S. Dist. LEXIS 156727, 2016 WL 6663002, at *17 (N.D. Cal. Nov. 11, 2016) (internal quotation marks omitted). Such duty "is circumscribed by the purposes and express terms of the contract." Carma Developers (Cal.), Inc. v. Marathon Dev. California, Inc., 2 Cal. 4th 342, 373, 6 Cal. Rptr. 2d 467, 826 P.2d 710, (1992). Therefore, the "implied covenant of good faith and fair dealing is limited to assuring compliance with the *express terms* of the contract, and cannot be extended to create **[*24]** obligations not contemplated by the contract." Pasadena Live, LLC v. City of Pasadena, 114 Cal. App. 4th 1089, 1094, 8 Cal. Rptr. 3d 233 (2004) (citation omitted) (emphasis original). It does "not [] protect some general public policy interest not directly tied to the contract's purpose." Kheradpezhouh v. Fagan, 2018 Cal. App. Unpub. LEXIS 6373, 2018 WL 4443252, at *6 (Cal. Ct. App. Sept. 18, 2018) (unpublished).

"The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another." Carma Developers, 2 Cal. 4th at 372. That is, the covenant applies where one party had opportunity under the contract to make a choice affecting another party and made that choice in bad faith. Thus, a claim for breach of the covenant must show that the defendant's conduct amounts to "a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement." Careau & Co. v. Security Pacific Business Credit, Inc., 222 Cal. App. 3d 1371, 1395, 272 Cal. Rptr. 387 (1990).

Plaintiffs' breach claim fails for two reasons. First, as discussed above, Plaintiffs do not allege that error-free testing was an express term of the contract. Nor do they allege that an error rate less than some industry standard **[*25]** or other benchmark was an express term of the contract. Indeed, Plaintiffs do not allege nonperformance or substantial nonperformance by Defendant. Thus, Plaintiffs do not allege that they were deprived of an express contractual right, as required for this claim. Second, even if Plaintiffs were deprived of a contract benefit, they make no allegations that such deprivation was the product of Defendant's willful and deliberate action. To the contrary, Plaintiffs specifically allege that their injuries were caused by poor oversight and management, amounting at most to mistake, bad judgment, or negligence. Hence, Plaintiffs' allegations are merely consistent with Defendant's liability for breach of the implied convent of good faith and fair dealing but stop short of a plausible claim for entitlement to relief. Iqbal, 556 U.S. at 678. Accordingly, this claim is dismissed.

C. Leave to Amend and Standing

Rule 15(a)(2) indicates that a court should "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2); see also AmerisourceBergen Corp. v. Dialysist West, Inc., 465 F.3d 946, 951 (9th Cir. 2006); Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003) (indicating that the Rule 15(a)(2) policy is to be applied with "extreme liberality"). *Rule 15*'s "liberality does not apply when amendment would be futile." *Ebner v. Fresh, Inc., 838 F.3d 958, 968 (9th Cir. 2016)*. But nothing in the record here indicates "that the complaint could not be **[*26]** saved by any amendment." *Jackson v. Carey, 353 F.3d 750, 758 (9th Cir. 2003)*. Therefore, Plaintiffs are granted leave to cure the deficiencies described herein through amendment of the Complaint.

Such leave is granted as to both Plaintiffs on all claims. Defendant argues that Little Critters lacks standing to bring at least some of the claims at issue because Plaintiffs do not allege (1) Little Critters's reliance on an alleged misrepresentation, as necessary to support a fraudulent business practices claim, or (2) facts to establish that Little Critters is privy to the Services Agreement, as required to sustain a claim for breach of covenant of good faith and fair dealing.[3] (Mem. at 19-20.) Plaintiffs respond that their allegations show Little Critters (1) suffered from Defendant's alleged misrepresentations the same as Dr. Patt and (2) is either a party or third-party beneficiary to the Services Agreement with standing to sue. (Opp. at 21-22.) Having dismissed all claims as to both Plaintiffs on other grounds and granted leave to amend, the Court declines to address Little Critters's standing at this juncture. Assuming without deciding that Defendant's construction is correct on the facts currently alleged, the Court does not find that any such **[*27]** standing issues are necessarily incurable by amendment. Defendant may renew its standing arguments if and when Plaintiffs file an amended pleading.

IV. Conclusion

For the foregoing reasons, Defendant's Motion is GRANTED in its entirety. Plaintiffs are GRANTED leave to file an amended pleading, consistent with this Order and the Local Rules.

End of Document

[3] Defendant insinuates that Little Critters has no standing to bring *any* of the asserted claims but does not provide argument why Little Critters would not have standing to bring an unlawful business practices claim predicated on an antitrust violation, which would not require reliance on a misrepresentation or privity of contract.

Tera Grp, Inc. v. Citigroup, Inc.

United States District Court for the Southern District of New York

July 30, 2019, Decided; July 30, 2019, Filed

No. 17 Civ. 4302 (RJS)

Reporter

2019 U.S. Dist. LEXIS 128107 *; 2019-2 Trade Cas. (CCH) P80,864; 2019 WL 3457242

TERA GROUP, INC., et al., Plaintiffs, VERSUS CITIGROUP, INC. et al., Defendants.

Prior History: *Tera Grp., Inc. v. Citigroup, Inc., 2018 U.S. Dist. LEXIS 169625 (S.D.N.Y., Sept. 28, 2018)*

Core Terms

trading, allegations, platform, clearing, conspiracy, motion to dismiss, customers, pleaded, swap, buy-side, rulebook, audit, alleged conspiracy, unjust enrichment, all-to-all, anonymous, factors, splitting, boycott, factual allegations, communications, liquidity, give-up, parties, business relationship, interdealer, execute, prior agreement, transactions, offering

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For Barclays PLC, Barclays Bank PLC, Barclays Capital Inc., Defendants: James Ellis Brandt, Lawrence Edward Buterman, LEAD ATTORNEYS, Latham & Watkins LLP (NY), New York, NY; Jessica Danielle Rostoker, Latham & Watkins LLP, New York, NY.

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Judges: RICHARD J. SULLIVAN, United States Circuit Judge.

Opinion by: RICHARD J. SULLIVAN

Opinion

MEMORANDUM AND ORDER

RICHARD J. SULLIVAN, Circuit Judge:

Plaintiffs Tera Group, Inc., Tera Advanced Technologies, LLC, and TeraExchange, LLC (collectively, "Tera") bring this action against twelve financial institutions (collectively, "Defendants")[1], alleging that Defendants conspired to "block [Tera's] electronic [credit default swap] trading platform . . . from successfully entering the market" in violation of the Sherman Act and state ***antitrust law***. (Doc. No. 1 ¶¶ 1, 159-77.) Tera also brings claims for unjust enrichment and tortious interference with business relations. (*Id.* ¶¶ 178-83.) Now before the Court is Defendants'

[1] The Defendants include Citigroup, Citibank, Citigroup Global Markets Inc., and Citigroup Global Markets Limited ("Citi"); Bank of America Corporation, Bank of America N.A., and Merrill Lynch ("Bank of America"); Barclays PLC, Barclays Bank, and Barclays Capital Inc. ("Barclays"); BNP Paribas, S.A. and BNP Paribas Securities Corp. ("BNP Paribas"); Credit Suisse Group AG, Credit Suisse AG, Credit Suisse International, and Credit Suisse Securities (USA) LLC ("Credit Suisse"); Deutsche Bank AG and Deutsche Bank Securities Inc. ("Deutsche Bank"); Goldman Sachs Group, Goldman Sachs & Co., Goldman Sachs Bank USA, Goldman Sachs Financial Markets, L.P., and Goldman Sachs International ("Goldman Sachs"); HSBC Holdings plc, HSBC Bank plc, HSBC Bank USA, N.A., and HSBC Securities (USA) Inc. ("HSBC"); JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., J.P. Morgan Securities LLC, and J.P. Morgan Securities plc ("JP Morgan"); Morgan Stanley, Morgan Stanley Bank, N.A., Morgan Stanley & Co., Morgan Stanley Capital Services LLC, Morgan Stanley Derivative Products Inc., and Morgan Stanley Bank International Limited ("Morgan Stanley"); Royal Bank of Scotland plc, The Royal Bank of Scotland Group plc, and RBS Securities Inc. ("RBS"); UBS Securities LLC ("UBS") and UBS AG, and the affiliates and subsidiaries of these organizations that participated in the CDS market. As discussed in further detail below, the Court previously dismissed all claims with respect to Defendants UBS AG and RBS in its September 28, 2018 Opinion and Order.

joint motion to dismiss all claims. (Doc. No. 96.) For the reasons stated below, the motion to dismiss Tera's Sherman Act claim and *Donnelly Act* claim is granted as to HSBC, Deutsche Bank, Goldman Sachs, Morgan Stanley, and Bank of America and denied with respect to the remaining Defendants, **[*5]** while the motion to dismiss Tera's unjust enrichment and tortious interference with business relations claims is granted as to all Defendants.

I. BACKGROUND

A. Facts[2]

1. Credit Default Swaps and the Pre-Dodd-Frank Environment

A credit default swap ("CDS") is a widely-traded financial instrument that functions like a tradable insurance contract, deriving its value from the risk associated with a specified credit event.[3] (Compl. ¶ 2.) A CDS can be either single-name (based on a single debt instrument issued by one underlying reference entity) or a CDS index (referencing a basket of underlying single-name reference-entities). (*Id.* ¶ 64.) Together, Defendants control approximately ninety-five percent of the CDS market, with JP Morgan, Bank of America, and Citigroup together comprising forty percent of all CDS dealing in the United States. (*Id.* ¶ 3.) Defendants generate significant profit by creating and selling CDS contracts to the "buy-side," which includes mutual funds, insurance companies, hedge funds, and other investors. (*Id.* ¶ 4.)

As the exclusive market-makers for CDS, Defendants dictated the structure of the CDS market, establishing two distinct tiers. (*Id.* ¶ 5.) Defendants traded **[*6]** CDS among themselves using anonymous interdealer platforms and maintained exclusive access to the price at which CDS was trading. (*Id.*) The buy-side, meanwhile, was relegated to trading exclusively through a "Request for Quote" ("RFQ") system — an opaque, over-the-counter protocol that kept information about CDS pricing solely in the hands of Defendants. (*Id.* ¶¶ 5-6.) Under the inefficient RFQ protocol, a customer who wanted to buy a CDS had to contact a Defendant directly, disclose their identity, specify the terms of the CDS they wanted, and then receive a price quote from that Defendant. (*Id.* ¶ 6.) According to Tera, this cumbersome procedure empowered Defendants to set CDS prices and create grossly inflated "bid/ask" spreads that generated massive profits. (*Id.*)

2. Dodd-Frank Transforms the CDS Landscape

On July 21, 2010, in the wake of the 2008 financial crisis, Congress passed the *Dodd-Frank Wall Street Reform and Consumer Protection Act*, which enacted a sweeping overhaul of the U.S. financial system. (*Id.* ¶ 62.) *Title VII of the Dodd-Frank Act* was intended to reform the swaps market through increased price transparency. (*Id.* ¶ 7; *7 U. S .C. §§ 2(a)(1)(A)*, *2(h)*.) To this end, Dodd-Frank sought **[*7]** to end the RFQ-only model by requiring CDS and other swaps to be traded on a regulated electronic exchange called a Swap Execution Facility ("SEF"), which would allow market participants to make bids and offers on CDS in the same manner that they would trade common stock. (*Id.* ¶ 7.) Like other public exchanges, SEFs are regulated by the CFTC, thereby "introducing a layer of oversight into a previously-unregulated market." (*Id.* ¶ 63.) Because customers could choose which swaps they wanted to buy or sell based on available competitive bids and offers prior to entering a transaction, the new system would promote pre-trade price transparency relative to the RFQ-only model. (*Id.*) Dodd-Frank's other reforms to the swaps market included creating "post-trade" price transparency by requiring that (1) market participants promptly report the details of their transactions to a centralized recordkeeping entity known as a Swap Data Repository ("SDR"), (2) swap

[2] The following facts are taken from the Complaint (Doc. No. 1 ("Complaint" or "Compl.")), and are assumed true for purposes of this motion. *See* *ATSI Cominc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007)*. In ruling on the motion, the Court has also considered Defendants' memorandum of law (Doc. No. 97 ("Mem.")), Defendant HSBC's supplemental memorandum of law (Doc. No. 98 ("HSBC Mem.")), Plaintiffs' memorandum of law in opposition to Defendants' motion (Doc. No. 116 ("Opp'n")), Plaintiffs' supplemental memorandum of law in opposition to HSBC's memorandum (Doc. No. 117 ("Opp'n to HSBC")), Defendants' reply (Doc. No. 123 ("Reply")), Defendant HSBC's supplemental reply (Doc. No. 125 ("HSBC Reply")), Plaintiffs' notice of supplemental authority (Doc. No. 135), and Defendants' response to Plaintiffs' notice of supplemental authority (Doc. No. 136).

[3] As used here, the term "CDS" refers to both the singular and plural form.

values be reported continuously for the duration of the trade, and (3) swap transactions be cleared through a central Derivatives Clearing Organization ("DCO"), which removed the risk of a counterparty defaulting. (*Id* ¶¶ 67-69.)

Under Dodd-Frank, **[*8]** regulation of the CDS market was divided, with the CFTC maintaining authority over CDS indices while the SEC regulates single-name CDS. (*Id.* ¶ 65.) The CFTC's SEF execution mandate went into effect on February 26, 2014 for CDS indices, which made up seventy-six percent of total CDS transaction volume in the first half of 2014. (*Id.*) The SEC, meanwhile, "has yet to mandate SEF execution and central clearing" for single-name CDS. (*Id.* ¶ 66.) Nevertheless, a significant volume of single-name CDS have been executed on SEFs and centrally cleared through clearinghouses since 2013. (*Id)*

3. Tera Develops an All-to-All CLOB Platform for CDS

Seeking to capitalize on the opportunity presented by Dodd-Frank's reforms, a group of experienced former Wall Street traders founded TeraExchange. (*Id.* ¶¶ 8, 70.) Tera secured millions of dollars from outside investors and spent several years developing a CDS trading platform that used a central limit order book ("CLOB") to enable anonymous electronic trading among all market participants ("all-to-all trading"). (*Id.* ¶¶ 8, 71.) Tera maintains that it was "the first SEF to offer an anonymous all-to-all CLOB to the CDS market." (*Id.*)

TeraExchange offered unique **[*9]** features to the market, including sophisticated charting capabilities and arbitrage opportunities as the only anonymous all-to-all CLOB licensed to list CDS indices. (*Id.* ¶¶ 10, 76.) Its product involved sophisticated back-end technologies, including connectivity to clearinghouses and other intermediaries, as well as a front-end execution management system that enabled advanced order management and analytics. (*Id.* ¶¶ 73-74.) In addition to maintaining connectivity to industry-standard credit hubs, TeraExchange also "developed a proprietary embedded pre-trade credit confirmation tool, TeraCheck," which market participants could use to pre-screen orders and receive credit confirmation in real time prior to execution. (*Id.* ¶ 75.)

After the CFTC finalized its SEF registration rules, TeraExchange devoted resources to making its platform compliant and received a temporary SEF certification on September 9, 2013. (*Id.* ¶ 78.) In granting the certification, the CFTC reviewed and commented on TeraExchange's rulebook, a document required by the CFTC "that sets out protocols for how trades are initiated, routed, and executed on the platform." (*Id.*)

Tera thereafter developed an "aggressive marketing **[*10]** plan," seeking liquidity from Defendants and other market participants such as inter-dealer brokers ("IDBs") and hedge funds, and garnering "overwhelming" market response. (*Id.* ¶ 9.) An April 2014 survey by IPC Systems Inc. reported that fifty percent of market participants surveyed stated that they had already connected or planned to connect to the TeraExchange platform, while *The Wall Street Letter* nominated TeraExchange for three of its 2013 Institutional Trading Awards. (*Id.* ¶¶ 9, 79.) IDBs, banks, and large buy-side CDS trading firms were among the market participants that signed up to use TeraExchange, while the top CDS clearinghouses agreed to clear CDS and other derivatives executed on the platform. (*Id.* ¶¶ 9, 80-81, 84.) Many of Tera's prospective customers had signed end-user license agreements and were in "simulation" with the platform, meaning that "they were in the process of testing and integrating TeraExchange with their own systems." (*Id.* ¶ 80.)

In particular, IDBs — which serve as Defendants' intermediaries in CDS trading — were eager to use TeraExchange to satisfy Dodd-Frank's "cross border" SEF requirement for swap trades. (*Id.* ¶ 87.) Under that requirement, all swap **[*11]** trades involving "U.S. persons" had to be executed through a CFTC-registered SEF, regardless of whether the trading was domestic or international. (*Id.*) Accordingly, any IDB handling trades for a foreign branch or affiliate of a U.S. bank "had to execute those trades on a SEF or become a SEF themselves." (*Id.*) TeraExchange offered IDBs a cost-effective way to execute those trades and fulfill the cross-border SEF requirements in exchange for a fee. (*Id.* ¶ 88.) Because it was an independent platform, Tera was not a competitor to the IDBs and therefore offered an attractive solution relative to interdealer SEFs. (*Id.*) Recognizing this opportunity, Tera made significant marketing efforts; by January 2014, Tera announced agreements with twelve international IDBs. (*Id.* ¶ 89.)

In conjunction with its agreements with large proprietary trading firms, which agreed to be CDS market makers on TeraExchange, Tera had "the necessary commitments to ensure liquidity in CDS on its all-to-all CLOB, and customers were eager to begin executing CDS trades on TeraExchange." (*Id.* ¶¶ 83-84.) Market observers took note of the interest in the platform and predicted that SEFs would fundamentally shift the CDS **[*12]** market. (*Id.* ¶ 85.) By late 2013, investors increased their estimate of TeraExchange's valuation to exceed $50 million, even before a single trade had taken place on the platform. (*Id.* ¶ 86.)

4. Defendants Launch their Boycott

On June 13, 2014, the world's first anonymous swap transaction on any all-to-all CLOB was executed on TeraExchange. (*Id.* ¶ 11.) The trade took place between Annaly Capital Management, Inc. and Mitsubishi UFJ Financial Group and was cleared by BNP Paribas's clearing division, also known as a futures commissions merchant ("FCM"). (*Id.* ¶¶ 11, 91.) Tera alleges that the June 13 trade demonstrated TeraExchange's viability and represented a threat to Defendants' "supracompetitive profits" in the CDS market. (*Id.* ¶¶ 12, 91.)

Immediately afterward, according to Tera, Defendants "began working together to shut down TeraExchange."[4] (*Id.* ¶ 13.) After observing that buy-side customers were trading on TeraExchange, BNP Paribas's FCM "notified the bank's trading desk of the transgression." (*Id.* ¶ 92.) BNP Paribas's trading desk then contacted the parties to the transaction, threatening them with loss of access to clearing services, execution services for other asset classes, and **[*13]** general market research if they continued to use the platform. (*Id.*) Word of the threat spread to other market participants, leading them to "avoid TeraExchange for fear of risking similar reprisals." (*Id.* ¶ 93.) The Mistubishi UFJ trader who was a counterparty to the June 13 trade immediately stopped responding to Tera, and Mitsubishi UFJ never attempted to execute another trade on the platform despite previously expressing interest. (*Id.*) A BNP Paribas official later told Annaly Capital to abstain from using the platform, citing unknown temporary "operational issues" that were never reported to Tera. (*Id.* ¶ 94.) According to Tera, Annaly Capital was never given a green light to resume using TeraExchange. (*Id.*)

The next business day, June 16, 2014 — despite the fact that the trade had never been publicly announced — BNP Paribas, Citi, JP Morgan, and UBS "almost simultaneously called and told TeraExchange that they would not clear any trades executed on TeraExchange until they conducted an 'audit' of TeraExchange's Rulebook." (*Id.* ¶ 95.) Although many Defendants had previously expressed interest in trading on or providing liquidity to the platform, they too blocked trading on the **[*14]** platform pending a rulebook "audit," even though some had already been reviewing the document for lengthy periods. (*Id.* ¶¶ 96, 98-99.) None of these audits were ever completed, and the rulebook, which was largely standardized and mirrored those of other SEFs, had already been reviewed by the CFTC, which granted TeraExchange a temporary certification. (*Id* ¶¶ 96-97.) Other rationales given by Defendants for delaying or refusing to conduct business with TeraExchange included the need to review the end-user license agreement and other core documents. (*Id.* ¶ 101.) But while Tera promptly provided the requested documents, Defendants never completed their reviews and consistently refused to direct any of their CDS business to the platform or allow their buy-side customers to trade on TeraExchange. (*Id.)*

5. Defendants Use their Control Over CDS Clearing to Block Trades on Tera

Tera also alleges that Defendants controlled the CDS clearing business in their capacity as owners of ICE Clear, the largest clearinghouse for CDS, and in their roles as the dominant clearing members at ICE Clear, CME, and LCH.Clearnet. (*Id.* ¶¶ 110-111.) As clearing members of CDS clearinghouses, Defendants were gatekeepers **[*15]** to the clearinghouse and also controlled the pre-trade mechanisms of clearing by providing pre-trade credit checks. (*Id.* ¶¶ 106-107.) Defendants allegedly leveraged this control over CDS clearing and took advantage of Dodd-Frank's central clearing requirement to carry out their boycott of TeraExchange by (1) using their internal clearing divisions, known as FCMs, to block buy-side customers from using the platform by refusing to participate in the pre-

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[4] Plaintiffs also allege that this is not the first time Defendants have been accused of conspiring to block an independent electronic CDS platform to maintain supracompetitive CDS trading profits, as the U.S. Department of Justice and the European Commission both investigated Defendants' conduct in the CDS market in 2011. (Compl. 11 16.) Furthermore, as discussed in greater detail below, in September 2015, Defendants paid $1.86 billion to settle a class action lawsuit brought by investors who alleged that Defendants fixed prices on CDS transactions and blocked the launch of the Credit Market Derivatives Exchange ("CDMX"), an electronic exchange and clearinghouse for CDS. (*Id.*)

trade credit check process or clear trades for transactions executed on TeraExchange, and (2) quoting TeraExchange customers "obscenely high clearing fees" while simultaneously offering to clear similar trades for lower fees or for free if they traded on other SEFs that adhered to the RFQ protocol. (*Id.* ¶¶ 105, 116.) Defendants directed their FCMs, which were in regular communication with one another, to block trades on TeraExchange even though doing so required the FCMs to forgo fees they would otherwise earn for clearing CDS transactions. (*Id.* ¶¶ 109, 113.) As a result, market participants began to "waver in their support for TeraExchange's platform" and were unable to find FCMs to clear their trades because of the alleged coordination **[*16]** between Defendants. (*Id.* ¶¶ 117-119.)

6. Defendants Prohibit IDBs from Using Tera

Tera had enlisted a dozen international IDBs to use its platform to fulfill their cross-border requirements under Dodd-Frank; however, because the IDBs served as brokers on behalf of their clients, those clients — which included Defendants — had to consent to their use of TeraExchange to execute trades. (*Id.* ¶¶ 120-121.) Tera alleges that Defendants engaged in delay tactics and ultimately refused to give their permission for the IDBs to use TeraExchange. (*Id.*) They did so using similar pretexts, including the excuse that a given Defendant had not yet approved Tera's rulebook (even though one Defendant, Citi, acknowledged that the refusal was "more of an internal policy rather than a regulatory one"). (*Id.* ¶ 121, 123.) Numerous IDBs told Tera that Defendants were inexplicably refusing to consent to their use of the platform and that they were ultimately forced to back out of their agreements with Tera as a result. (*Id.* ¶¶ 122-126.) In refusing this consent, multiple Defendants referred to TeraExchange as a "Trojan Horse," presumably implying that it posed a covert threat to their highly profitable RFQ-based **[*17]** business, (*Id.* ¶ 126.)

7. Defendants Forcibly Maintain a Two-Tiered Market Structure

Tera alleges that Defendants jointly used a variety of techniques to enforce their boycott and maintain the status quo in the CDS market. First, Defendants agreed to collectively insist on the practice of "name give-up," or post-trade name disclosure, as a means of surveilling who was conducting trades on all-to-all SEFs. (*Id.* ¶¶ 127, 129.) Although name give-up was necessary in the pre—central clearing era to enable parties to manage counterparty risk, it no longer serves a practical purpose in the post-Dodd-Frank era, (*Id.* ¶¶ 128-133.) Whereas anonymous trading would have opened up the CDS market and encouraged competition, enforcing name give-up discouraged the use of all-to-all CLOBs and contributed to an information asymmetry, as buy-side customers were forced to reveal their trading positions, and thus elements of their trading strategies, to Defendants and other customers. (*Id.* ¶¶ 133, 140.)

Recognizing the importance of preserving name give-up, Defendants allegedly agreed to "keep the practice in place by making their provision of liquidity to a trading platform conditional on the use of the practice" **[*18]** and boycotting any platform that refused to require it. (*Id.* ¶ 134.) They also ensured name give-up by insisting on the use of a service known as MarkitWIRE, operated by MarkitSERV — a company whose top officers included former Goldman Sachs and Deutsche Bank officials. (*Id.* ¶¶ 135, 137.) MarkitWIRE is a trade processing service that offers counteiparties a "last look" at a trade, revealing their identities and permitting an opportunity to terminate the transaction. (*Id.* ¶ 136.) Buy-side firms expressed opposition to the use of MarkitWIRE because it is inefficient relative to straight-through processing and enables Defendants to control information flow and preserve the traditional market structure. (*Id.* ¶¶ 137-138.) Nevertheless, Tera alleges that numerous SEFs, including all the largest inderdealer SEFs, caved to this "collective pressure" from Defendants to adhere to name give-up, resulting in "no meaningful volume on the few order-book platforms built by SEFs to date." (*Id.* ¶ 139.)

Defendants further enforced their boycott by placing transgressors — those who attempted to introduce or use anonymous trading — into what Tera terms the "penalty box." (*Id.* ¶¶ 142-144.) With respect **[*19]** to interdealer SEFs — the platforms used by Defendants to trade CDS among themselves — Defendants threatened to withdraw liquidity from any interdealer SEF that considered permitting buy-side entities to trade anonymously on their platforms. (*Id.*) Interdealer SEFs reported receiving "heated phone calls" and other "collective threats" from Defendants pressuring them not to introduce trade anonymity to the buy-side. (*Id.* ¶¶ 144-146.) As to buy-side customers, the "penalty box" meant refusing to trade with the investor in any venue and withholding other key banking services if they attempted to engage in anonymous all-to-all trading, effectively cutting them off from the ability to trade any derivatives. (*Id.* ¶ 147.) According to Tera, the financial media widely reported Defendants' threatened retaliation, contributing to a chilling effect in the CDS market. (*Id.* ¶¶ 148, 150.)

8. Tera is Forced Out of the Market

Though Tera had obtained commitments from numerous non-traditional liquidity providers and stood ready to inject increased price competition into the CDS market, the alleged collective boycott and pressure placed on IDBs, the buy-side, and other market participants starved the platform **[*20]** of the liquidity it needed to survive, (*Id.* ¶¶ 119, 152.) No further trading occurred on TeraExchange after its initial trade on June 13, 2014. (*Id.* ¶ 151.)

B. Procedural History

Tera filed its complaint in this action on June 8, 2017. (Doc. No. 1.) On the same day, Tera filed a Statement of Relatedness seeking to designate this case as related to *In re Credit Default Swaps Antitrust Litigation*, 13-md-2476 (DLC) (hereinafter "*In re CDS*"), a previously-settled multidistrict litigation before Judge Cote that involved allegations of exclusionary conduct in the CDS market during 2008-2013 against the same set of bank defendants. (Doc. No. 3.)[5] On June 12, 2017, Defendants responded with a letter addressed to Judges Cote and Engelmayer, arguing that the case was not related to the closed *In re CDS* case, but rather to *In re Interest Rate Swaps Antitrust Litigation*, 16-md-2704 (PAE) (hereinafter "*In re IRS*") — an ongoing case before Judge Engelmayer. (Doc. No. 16.) *In re IRS* concerns allegations against the same group of Defendants (as well as additional non-bank defendants) involving a parallel antitrust conspiracy in the interest rate swap ("IRS"), rather than CDS, market.[6] (*Id.*) Tera responded **[*21]** on June 15, 2017, objecting to Defendants' request in light of the differences between IRS and CDS products and markets, and reaffirming their position that the case should be designated as related to the closed *In re CDS* case that was previously assigned to Judge Cote. (Doc. No. 18.) Ultimately, neither Judge Cote nor Judge Engelmayer accepted the case as related and it was subsequently assigned to my docket.

The Court set a briefing schedule and stayed discovery on July 7, 2017. (Doc. No. 63.) Defendants filed their joint motion to dismiss all claims and a memorandum of law in support thereof on September 11, 2017. (Doc. Nos. 96, 97.) That same day, HSBC filed a supplemental memorandum of law in support of the joint motion to dismiss (Doc. No. 98), RBS filed a motion to dismiss for lack of personal jurisdiction and for failure to state a claim with respect to RBS (Doc. Nos. 101, 102), and UBS AG filed a motion to dismiss for lack of personal jurisdiction (Doc. Nos. 104, 105). Tera filed oppositions on October 11, 2017. (Doc. Nos. 116, 117, 118, 119.) On November 3, 2017, Defendants filed a joint reply (Doc. No. 123), alongside replies by RBS (Doc. No. 124), HSBC (Doc. **[*22]** No. 125), and UBS AG (Doc. No. 126) in further support of their respective motions, at which point the motions were fully briefed.

On September 28, 2018, the Court issued an opinion and order granting RBS and UBS AG's motions. (Doe. No. 134.) The Court found that Tera failed to allege that either UBS AG or RBS engaged in conduct in, or directed at, the United States and thus failed to establish specific personal jurisdiction over either entity. (*Id.* at 3-5.) The Court further found that Tera failed to specify any activities by any affiliate or subsidiary of RBS in the Complaint. (*Id.* at 6.) Accordingly, the Court dismissed all claims with respect to RBS and UBS AG, while reserving decision on the motions of the remaining Defendants. (*Id.*) On October 25, 2018, Tera submitted a notice of supplemental authority in opposition to the joint motion to dismiss (Doc. No. 135), to which Defendants responded on November 7, 2018 (Doc. No. 136). The Court now turns to the remaining Defendants' joint motion to dismiss the Complaint.

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[5] The parties in *In re CDS* reached a settlement resolving all claims, to which Judge Cote granted preliminary approval in October 2015 and final approval in April 2016. (Doc. No. 3 at 2.)

[6] On July 28, 2017, Judge Engelmayer issued an opinion and order in which he granted defendants' motion to dismiss *Sherman Act Section 1* claims covering the period 2008-2012, denied the motion with respect to the period spanning 2013-2016, granted the motion to dismiss tortious interference with business relations and unjust enrichment claims except as to claims made by class plaintiffs, limited plaintiffs' state law claims to the 2013-2016 period, and dismissed all claims against HSBC and the two non-bank defendants. *See* *In re IRS, 261 F. Supp. 3d 430, 500 (S.D.N.Y. 2017)*. Discovery in that case remains ongoing while the parties brief class certification. (*See* Case No. 16-md-2704 (PAE), Doc. No. 828.)

II. LEGAL STANDARD

To withstand a motion to dismiss under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, a complaint must "provide the grounds upon which [the] claim rests." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007)*; *see also* *Fed. R. Civ, P. 8(a)(2)* ("A pleading that states a claim for relief must **[*23]** contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . ."), To meet this standard, plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

In reviewing a *Rule 12(b)(6)* motion to dismiss, a court must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the plaintiff. *ATSI Commc'ns, 493 F.3d at 98*. That tenet, however, "is inapplicable to legal conclusions." *Iqbal, 556 U.S. at 678*. Thus, a pleading that offers only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do," *Twombly, 550 U.S. at 555*. If the plaintiffs "have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Id. at 570*.

III. DISCUSSION

A. Sherman Act Claim

Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. To plead a violation of *Section 1*, a plaintiff must allege facts showing (1) "a combination or **[*24]** some form of concerted action between at least two legally distinct economic entities," and (2) "that the agreement constituted an unreasonable restraint of [interstate] trade." *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 542 (2d Cir. 1993)*. With respect to the first element, "[t]he crucial question" is "whether the challenged conduct 'stems from independent decision or from an agreement, tacit or express.'" *Starr v. Sony BMG Music Entm't, 592 F.3d 314, 321 (2d Cir. 2010)* (quoting *Theatre Enters., Inc. v. Paramount Film Distrib, Corp., 346 U.S. 537, 540, 74 S. Ct. 257, 98 L. Ed. 273 (1954)* (alterations omitted)). Agreements may be "vertical," meaning that they involve "persons at different levels of the market structure," or — as alleged by Tera here — "horizontal," meaning that they are "between competitors at the same level of the market structure." *United States v. Topco Assocs., 405 U.S. 596, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*.

To plead the second element, a plaintiff may allege either a *per se* unlawful agreement or one that violates the "rule of reason," which requires courts to apply a totality-of-the-circumstances test to determine if a practice constitutes an unreasonable restraint on competition. *See* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. A group boycott — the conduct alleged by Tera here — constitutes a *per se* violation of the Sherman Act. *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*.

To plausibly allege a conspiracy under *Section 1*, plaintiffs must set forth "enough factual matter (taken as true) to suggest that an [illegal] agreement was made." *Twombly, 550 U.S. at 556*. Thus, while there is no **[*25]** "probability requirement at the pleading stage," plaintiffs must plead "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* "'The ultimate existence of an 'agreement' under ***antitrust law*** . . . is a legal conclusion, not a factual allegation.'" *Mayor & City Council of Balt. v. Citigroup, Inc., 709 F.3d 129, 135-36 (2d Cir, 2013)*.

Direct evidence of a conspiracy is not required. Plaintiffs may rely on "indirect or circumstantial evidence, that is, 'inferences that may fairly be drawn from the behavior of the alleged conspirators.'" *In re IRS, 261 F. Supp. 3d 432, 461 (S.D.N.Y. 2017)* (quoting *Anderson News, LLC v. Am. Media, Inc., 680 F.3d 162, 183 (2d Cir. 2012))*. Typically, a "horizontal agreement among competitors, the sort of pact alleged here, is . . . based on claims of parallel conduct by the alleged co-conspirators." *Id. at 461-62*. "Examples of parallel conduct allegations that might be sufficient under *Twombly*'s standard include parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties." Citigroup, 709 F.3d at 137 (internal quotation marks and citation omitted).

Yet, "as the Supreme Court held in *Twombly*, 'alleging parallel conduct alone is insufficient, even at the pleading stage.'" In re IRS, 261 F. Supp. 3d at 462 (quoting Citigroup, 709 F.3d at 136). Rather, to withstand a motion to dismiss, **[*26]** plaintiffs must also place the allegations "in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." Twombly, 550 U.S. at 557. Courts have interpreted this additional obligation as a requirement that plaintiffs plead "plus factors" or other circumstantial evidence that, combined with parallel conduct, demonstrate "circumstances under which . . . the inference of rational independent choice [is] less attractive than that of concerted action." In re IRS, 261 F. Supp. 3d at 463 (quoting In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 323 (3d Cir. 2010)). The three "plus factors" the Second Circuit has previously recognized as supporting a plausible inference of conspiracy are "(1) 'a common motive to conspire,'; (2) 'evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators'; and (3) `evidence of a high level of interfirm communications.'" Gelboim v. Bank of Am. Corp., 823 F.3d 759, 781 (2d Cir. 2016) (quoting Twombly v. Bell Atl. Corp., 425 F.3d 99, 114 (2d Cir. 2005), *rev'd on other grounds*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929). "[T]hese plus factors are neither exhaustive nor inclusive, but rather illustrative of the type of circumstances which, when combined with parallel behavior, might permit a jury to infer the existence of an agreement." Citigroup, 709 F.3d at 136 n.6.

Before turning to the parallel conduct and plus factors alleged **[*27]** by Tera, the Court considers three of Defendants' threshold arguments in favor of dismissing the Complaint: first, that the complaint constitutes impermissible "claim splitting;" next, that the conspiracy alleged by Tera is facially implausible; and, finally, that the Complaint engages in improper group pleading.

1. Claim Splitting

As an initial matter, Defendants contend that Tera's claims should be dismissed in their entirety for violating a prohibition against "claim splitting." (Mem. at 38-43.) Defendants argue that because "plaintiffs have no right to maintain two actions on the same subject in the court, against the same defendant at the same time" (Mem. at 38 (quoting Curtis v. Citibank, NA., 226 F.3d 133, 140 (2d Cir. 2000))), the Complaint must be dismissed in light of its "striking overlap" with Tera's earlier complaint in *In re IRS (id*. at 43). The Court is unpersuaded.

"Claim splitting" is a variant of the res judicata doctrine that bars a plaintiff from "'splitting' his claim into various suits, based on different legal theories." Waldman v. Dill. of Kiryas Joel, 207 F.3d 105, 110 (2d Cir. 2000); *see also* Am. Stock Exchange v. Mopex, Inc., 215 F.R.D. 87, 91 (S.D.N.Y. 2002) ("It is well established, under the doctrine of 'claim splitting,' that a party cannot avoid the effects of res judicata by splitting her cause of action into separate grounds of recovery and then raising **[*28]** the separate grounds in successive lawsuits.") (citations omitted). This rule against claim splitting "is based on the belief that it is fairer to require a plaintiff to present in one action all of his theories of recovery relating to a transaction, and all of the evidence relating to those theories, than to permit him to prosecute overlapping or repetitive actions in different courts or at different times." AmBase Corp. v. City Investing Co. Liquidating Tr., 326 F.3d 63, 73 (2d Cir. 2003) (internal quotation marks and citation omitted).

As recently articulated by the Tenth and Eleventh Circuits, claim splitting occurs when "the first suit, assuming it were final, would preclude the second suit." Vanover v. NCO Fin. Servs., Inc., 857 F.3d 833, 841 (11th Cir. 2017) (quoting Katz v. Gerardi, 655 F.3d 1212, 1218 (10th Cir. 2011)); *see also* Kanciper v. Suffolk Cty. SPCA, Inc., 722 F.3d 88, 92 (2d Cir. 2013) (citing Katz, 655 F.3d at 1218-19). In assessing whether the two actions arise from "the same nucleus of operative facts" for purposes of the preclusion inquiry, courts consider "(1) whether the case involves the same parties and their privies, and (2) whether separate cases arise from the same transaction or series of transactions." Vanover, 857 F.3d at 841-42.

But the focus of the claim splitting doctrine is as much about preserving judicial resources as it is about fairness to defendants. *See* Kanciper, 722 F.3d at 92 ("[T]he claim splitting rule exists to allow district courts to manage their dockets and dispense with duplicative **[*29]** litigation.") (quoting Katz, 655 F.3d at 1218-19); Ritchie v. Landau, 475

F.2d 151, 156 n.5 (2d Cir. 1973) ("Courts should not permit splitting of causes of action when the result of doing so could result in vexatious litigation for the defendant and an undue clogging of the dockets of the court"); *see also* Elgin v. Dep't of Treasury, 567 U.S. 1, 14, 132 S. Ct. 2126, 183 L. Ed. 2d 1 (2012) ("[A] tribunal generally has discretion to decide whether to dismiss a suit when a similar suit is pending elsewhere.") (citing 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4406 (2d ed. 2002)). In the Southern District of New York, Local Rule 13 of the Court's Rules for the Division of Business Among District Judges typically resolves issues related to relatedness and judicial economy. Under Rule 13, in determining relatedness, a judge considers:

> [W]hether (A) the actions concern the same or substantially similar parties, property, transactions or events; (B) there is substantial factual overlap; (C) the parties could be subjected to conflicting orders; and (D) whether absent a determination of relatedness there would be a substantial duplication of effort and expense, delay, or undue burden on the Court, parties or witnesses.

Applying the above standards, the Court finds that no impermissible claim splitting has taken place here. While this case and *In re IRS* arise **[*30]** from substantially the same events, encompass many of the same defendants, and involve sometimes identical allegations in the pleadings (*see* Mem. at 39-40), there are also key differences between the two cases. For example, the product characteristics and markets for IRS as opposed to CDS are quite distinct, and Plaintiffs will be required to introduce different proof in order to establish a conspiracy in this case as opposed to the *IRS* case. (*See* Opp'n at 41-43.) In light of these differences, the Court finds that the cases are not so intertwined as to render the second action impermissible.

The prior history of this case further bolsters the Court's conclusion that dismissal is not warranted on the basis of claim splitting, The parties briefed these issues in the context of the Local Rule 13 determination (*see* Doc. Nos. 3, 16, 18), which concluded with neither Judge Cote nor Judge Engelmayer accepting the case as related to prior actions. In a sense, Defendants' claim splitting argument asks the Court to overrule the determination of unrelatedness made by Judge Cote and Judge Engelmayer. But Defendants point to no authority in which a court has done so. Accordingly, the Court declines to dismiss **[*31]** the Complaint on claim splitting grounds.

2. Facial Plausibility

Defendants also argue that the conspiracy alleged by Tera is facially implausible, meaning it fails to "make . . . economic sense," United Magazine Co. v. Murdoch Magazines Distrib., Inc. 146 F. Supp. 2d 385, 401 (S.D.N.Y. 2001), or accord with "common economic experience," Twombly, 550 U.S. at 565. (*See* Mem. at 17.) But "[s]uch an argument presents a high hurdle in the context of a motion to dismiss, and a hurdle that is not crossed here." Iowa Pub. Emples. Ret. Sys. ("IPERS") v. Merrill Lynch, Pierce, Fenner & Smith Inc., 340 F. Supp. 3d 285, 312 (S.D.N.Y. 2018).

First, Defendants point out that Tera failed to allege that the Defendants boycotted four other CDS platforms, rendering the alleged conspiracy economically nonsensical. (Mem. at 21-22.) Yet Tera readily accounts for Defendants' decision to target its platform specifically by alleging that it was the first SEF to offer an anonymous all-to-all CLOB for CDS and that it was the only independent CLOB, in contrast to platforms like "Tradeweb — a SEF created and owned by the . . . Defendants — or Bloomberg, which did not object to their RFQ requirement." (Compl. ¶¶ 8, 15, 88.) The Complaint further alleges that Tera was unique because it was the only anonymous all-to-all CLOB SEF licensed to list CDX and iTraxx index products **[*32]** alongside single-name CDS, providing valuable arbitrage opportunities to market participants, among other features — such as advanced analytics and a proprietary credit check hub — that rendered it particularly valuable to the market. (*Id.* ¶ 10.) Defendants push back on Tera's allegation that it was the *first* all-to-all CDS platform, citing CFTC records purportedly demonstrating that "Bloomberg began offering an anonymous all-to-all CLOB for CDS long before Tera did." (Mem. at 22.) But as Tera's opposition brief demonstrates, the question of whether Bloomberg's offering was comparable to Tera's is a complex fact issue not amenable to resolution at the motion-to-dismiss stage. (*See* Opp'n at 10 (arguing that "there was little to no CDS volume on the Bloomberg or MarketAxxess CLOB because these two SEFs, at Defendants' request, directed all CDS transactions to their electronic RFQ trading platforms").) And even assuming that Bloomberg was the first SEF to meaningfully offer all-to-all CDS trading, taking Tera's well-pleaded factual allegations as true, TeraExchange still brought exclusive capabilities to the market which could plausibly warrant a boycott of that platform alone. Defendants' **[*33]** response attempts to read out of the Complaint Tera's allegations that Bloomberg deferred to Defendants in adhering to the RFQ protocol, as well as its other assertions about the uniqueness of Tera's value proposition. (*See* Reply at 5; Compl. ¶¶ 10, 15, 76.) Thus, the failure to plead that Defendants boycotted *all* CDS platforms does not doom the Complaint at this stage. *See* *In re IRS., 261 F. Supp. 3d at 472* (denying a motion to dismiss where complaint alleged Defendants boycotted three out of five platforms for all-to-all IRS trading).

Next, Defendants argue that the conspiracy is facially implausible because the alleged conduct is fully consistent with unilateral and independent decision-making. (Mem. at 22-25.) Defendants argue that Tera had too little trading volume to be attractive to Defendants, and that refraining from supporting Tera was consistent with the individual business goals of each Defendant because helping Tera become successful would have strengthened a threat to their own individual business profits. (*Id.*) But these arguments fall short of the "high hurdle" for establishing facial implausibility, *IPERS, 340 F. Supp. 3d at 312*, particularly in light of Tera's allegations regarding the market's enthusiasm for its product (Compl. **[*34]** ¶¶ 8, 79-82, 84, 87-90), not to mention Defendants' common motive to conspire (Compl. ¶¶ 4, 12, 71-76, 79-86, 91, 129-130, 140, 142). At the motion-to-dismiss stage, plaintiffs "must only put forth sufficient factual matter to plausibly suggest an inference of conspiracy, *even if* the facts are susceptible to an equally likely inteipretation." *Gelboim, 823 F.3d at 782*; *see also* *Anderson News, 650 F.3d at 184* ("Because plausibility is a standard lower than probability, a given set of actions may well be subject to diverging interpretations, each of which is plausible."). The Court is not at liberty, on a motion to dismiss, to discard Plaintiffs' version of events in favor of the narrative advanced by Defendants simply because the Defendants' version is "fully consistent" with the alleged facts.

3. Group Pleading

Defendants next argue that Tera's allegations fail because they rely excessively on "group-pleading allegations directed at 'the Dealer Defendants' as an undifferentiated whole." (Mem. at 18.) Indeed, the Complaint is rife with homogenous group allegations. Of the seventy-four paragraphs in the Complaint that set forth factual allegations about Defendants' conduct, forty consist of allegations that are directed solely at the Defendants **[*35]** as a group without providing any examples or otherwise specifying a Defendant who engaged in the alleged acts. (*See* Compl. ¶¶ 84-158.)[7]

Notably, as Judge Engelmayer recognized in *In re IRS*, not all group allegations are improper. "Given [Tera's] thesis that the [Defendants] participated in a collective boycott, it is natural that the [Complaint] express some factual allegations collectively." *In re IRS, 261 F. Supp. 3d at 478*. While "collective allegations about 'Dealer Defendants' that lack allegations about a particular" Defendant should be "discount[ed] as worthy of less weight" relative to detailed claims, they may nevertheless be taken into account, alongside more specific allegations, in determining whether Tera has pleaded a plausible *Section 1* conspiracy. *Id. at 474*. Furthermore, for purposes of establishing a *Section 1* claim, "it is proper to name a corporate sub-entity as a Defendant, such as 'Credit Suisse Securities (USA) LLC,' while pleading allegations using a more generic name, such as 'Credit Suisse,'" as long as the Complaint contains enough detail to "provide[] each Defendant with sufficient notice of the claims against that Defendant and their grounds."[8] *IPERS, 340 F. Supp. 3d at 317*.

Nevertheless, the Complaint's pervasive reliance on group allegations **[*36]** impacts the viability of Tera's claims because it results in a paucity of details linking certain of the Defendants to the alleged conspiracy. It is Tera's burden to set forth sufficient facts to establish that each Defendant, "in their individual capacities, consciously committed themselves to a common scheme designed to achieve an unlawful objective." *AD/SAT, a Div. of Skylight*

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[7] For purposes of this calculation, the Court did not include the facts set forth in the Complaint's introduction, which are appropriately phrased at a higher degree of generality than those alleged in the Complaint's facts section.

[8] While the use of a generic corporate name may pose obstacles to establishing personal jurisdiction over a defendant, as the Court found in its September 28, 2019 Order dismissing Tera's claims against UBS AG (Doc. No. 134), only UBS AG and RBS challenged the Court's personal jurisdiction. All other Defendants have waived any objections to personal jurisdiction by failing to raise them in their motion to dismiss. *See* *Fed. R. Civ. P. 12*.

Inc. v. Associated Press, 181 F.3d 216, 234 (2d Cir. 1999). At the pleading stage, Tera must provide each Defendant with 'fair notice of what the claim is and the grounds on which it rests,' including the factual connection of that defendant to the scheme and the identity of its alleged co-conspirators." In re IRS, 261 F. Supp. 3d at 478 (first quoting Anderson News, 680 F.3d at 182; then citing In re Foreign Exch. Benchmark Rates Antitrust Litig., 74 F. Supp. 3d 581, 594 (S.D.N.Y. 2015)). Absent specific allegations that link an individual Defendant to the boycott, the Complaint must be dismissed as to that Defendant — as Judge Engelmayer found in *In re IRS* when he dismissed all claims against HSBC on the basis that the complaints in that case contained a "lone claim" that was "insufficient to link HSBC to the alleged conspiracy." Id. at 483.

This insufficiency is even more pronounced here than it was in In re IRS. That case involved two operative pleadings — the 145-page Second Consolidated Amended Class Action Complaint (16-md-2704-PAE, Doc. No. 142) **[*37]** and the 134-page Javelin and TeraExchange Plaintiffs' Second Consolidated Amended Complaint (16-md-2704-PAE, Doc. No. 145), both of which contained ample factual allegations against specified Defendants. Judge Engelmayer accordingly observed that, despite the "many references to 'Dealer Defendants' . . . the lengthy complaints are also rife with specifics," containing "many allegations against individual defendants that are quite particular, both as to the actor and the act." Id. at 478. Many of those specifics are absent in the 58-page Complaint now before the Court.[9]

In its September 28, 2018 Order, the Court dismissed Tera's claims with respect to Defendant RBS on these grounds, finding that the Complaint lacked any allegation specific to RBS and therefore failed to establish a link between RBS and the alleged conspiracy. (Doc. No. 134 at 6.) Tera protests against this analysis, arguing that examining the Complaint's allegations as to each Defendant in isolation fails to "consider[] [the allegations] in context." (Opp'n at 33.) Yet the Court's duty to consider the Complaint as a whole in making the overall determination of whether Tera has plausibly **[*38]** pleaded a conspiracy does not supplant Tera's basic obligation to set forth facts connecting each individual Defendant to the conspiracy. *See, e.g.,* IPERS, 340 F. Supp. 3d at 317 n.11 (identifying specific factual allegations in the complaint linking each defendant to the alleged conspiracy). Accordingly, the Court will now consider each remaining Defendant in turn to determine whether Tera has alleged sufficient facts to establish the requisite connection to the alleged conspiracy.

a. HSBC

With respect to HSBC, Judge Engelmayer's ruling in In re IRS is directly on point. Here, too, the only specific claim made against HSBC is that its FCM "'gave TeraExchange the runaround for over a year before finally refusing to clear for the platform,' in that an HSBC official, despite receiving approximately a half-dozen 'successful demonstrations' of Tera's trading platform, 'refused to give a direct answer on whether HSBC would clear customers' trades on the platform,'" In re IRS, 261 F. Supp. 3d at 483, before ultimately "inform[ing] Tera in or around March 2014 that HSBC would not clear trades on TeraExchange without the approval of HSBC's trading desks." (Compl. ¶ 115.) The Complaint also alleges that HSBC is one of twelve CDS clearing members at LCH. Clearnet **[*39]** and one of thirteen clearing members at CME, but does not allege that HSBC did anything specific to further the conspiracy in those capacities. (*Id.* ¶ 111 nn.25-26.)

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[9] *In re IRS* is broader in scope than the instant case and therefore the longer complaints in that action included many factual allegations inapposite here. However, even as to conduct and events that are equally significant in both cases, the *In re IRS* pleadings contain more detail than does the Complaint. Some allegations included in the *In re IRS* pleadings that would strengthen Tera's CDS allegations are mysteriously absent from the Complaint. *See, e.g., In re IRS* Javelin and TeraExchange Plaintiffs' Second Consolidated Amended Complaint ¶ 231 (alleging that "in July 2015, certain of the Dealer Defendant FCMs, including those of Barclays, BNP [Paribas], Credit Suisse, and JP Morgan, began jointly penalizing certain buy-side firms that were pushing against the bifurcated market structure by hiking their clearing fees by as much as ten-fold, while obedient buy-side customers [were] protected" (internal quotations omitted)); *Id.* ¶ 199 (describing a named Barclays official who used the excuse that Barclays was "resource constrained" as a pretext for refusing to establish trade clearing for TeraExchange and alleging that Deutsche Bank, Morgan Stanley, and Credit Suisse used the same language).

Tera argues that these factual allegations are sufficient to show that HSBC consciously committed itself to the scheme because they "give rise to the plausible inference that HSBC's misconduct does not stand alone" and HSBC's "runaround" can "be fairly viewed as one of several delay tactics . . . employed by the Defendants who conspired to boycott TeraExchange." (Opp'n to HSBC at 4.) Yet Tera does not plead any facts that elevate HSBC's action in taking its time considering Tera's proposal and ultimately deciding not to clear for Tera into anything other than a unilateral business decision unrelated to any prior agreement with other Defendants. Tera therefore cannot establish that HSBC, "in [its] individual capacit[y], consciously committed" to the conspiracy, *AD/SAT, 181 F.3d at 234*, nor can they furnish the requisite "fair notice of what the . . . claim is and the grounds upon which it rests," *Anderson News, 680 F.3d at 182* (quoting *Twombly, 550 U.S. at 555*). In arguing otherwise, Tera misguidedly relies on the premise that "only '*slight evidence*' is necessary to connect a defendant to an antitrust **[*40]** conspiracy once the conspiracy is established." (Opp'n to HSBC at 1-2 (quoting *Precision Assocs., Inc. v. Panalpina World Transport (Holding) Ltd., No. 08-cv-00042 (JG) (VVP), 2012 U.S. Dist. LEXIS 113829, 2012 WL 3307486, at *2 (E.D.N.Y Aug. 13, 2012)* (emphasis added by Tera)).) Yet the "slight evidence" standard in the antitrust context was imported from the criminal conspiracy context, *see* *Apex Oil Co. v. DiMauro, 822 F.2d 246, 257 (2d Cir. 1987)* (quoting *United States v. Wilkinson, 754 F.2d 1427, 1436 (2d Cir. 1985))*, where — as Judge Engelmayer pointed out in refusing to apply the standard — the Second Circuit has expressly "repudiated that formulation as inaccurately describing the burden of proof in conspiracy cases." *In re IRS, 261 F. Supp. 3d at 482 n.30* (citing *United States v. Huezo, 546 F.3d 174, 180 n.2 (2d Cir. 2008))*. In light of the eroded doctrinal underpinnings of the "slight evidence" standard in the antitrust context and the obvious tension between such a standard and the Second Circuit's exhortations in *AD/SAT* and *Anderson News* that plaintiffs must plead a substantial connection between each individual defendant and the alleged conspiracy, the Court rejects that standard here.

The Court thus finds that, as in *In re IRS*, a "close review of the [Complaint] reveals no allegations that HSBC took any action against any trading platform that proposed all-to-all trading or against any customer that sought to so trade," and that the "lone claim" regarding HSBC's delay in **[*41]** declining to provide clearing services for Tera "is insufficient to link HSBC to the alleged conspiracy among" Defendants. *Id. at 483*.

Accordingly, the Court dismisses the *Section 1* claim against HSBC.

b. Deutsche Bank

As to Deutsche Bank, the Complaint's allegations are similarly sparse. The only factual allegations about Deutsche Bank are that it has an ownership stake in ICE Clear and is a clearing member of LCH. Clearnet and CME; that a former Deutsche Bank official previously worked for another Defendant and communicated with his counterparts working for other Defendants; and that a former Deutsche Bank official once worked at MarkitSERV. (Compl. ¶¶ 110 n.24, 111 & nn.25-26, 113, 135.) These claims pale in comparison to the substantial factual allegations against Deutsche Bank in *In re IRS* and are arguably even more lacking than the Complaint's allegations with regard to HSBC. They describe ordinary business activities and unremarkable communications that do nothing to tie Deutsche Bank to an illicit anticompetitive scheme.

Accordingly, for the reasons stated above in dismissing the *Section 1* claim against HSBC, the Court dismisses the *Section 1* claim against Deutsche Bank.

c. Goldman Sachs

The Complaint's allegations **[*42]** regarding Goldman Sachs are substantially identical to those against Deutsche Bank. The Complaint alleges that Goldman Sachs has an ownership stake in ICE Clear and is a clearing member of LCH.Clearnet and CME; that a Goldman Sachs official regularly communicated — about who knows what — with a former Deutsche Bank official who also previously worked for another Defendant; and that a former Goldman Sachs official is the CEO of MarkitSERV. (*Id.* ¶¶ 110 n.24, 111 & nn.25-26, 113, 135.) As above, these generic assertions do not sufficiently link Goldman Sachs to the alleged conspiracy.

Accordingly, the Court dismisses the *Section 1* claim against Goldman Sachs.

d. Morgan Stanley

The Complaint contains essentially no specific factual allegations as to Morgan Stanley whatsoever. The only references to Morgan Stanley state that it has an ownership stake in ICE Clear and is a clearing member of LCH.Clearnet and CME — clearly not a sufficient basis to establish Morgan Stanley's ties to the alleged scheme. (*Id.* ¶¶ 110 n.24, 111 & nn.25 26.)

Accordingly, the Court dismisses the *Section 1* claim against Morgan Stanley.

e. Bank of America

Tera's claims as to Bank of America also fall short. Tera alleges the following facts **[*43]** regarding Bank of America: together with JP Morgan and Citigroup, Bank of America controls forty percent of all CDS dealing in the United States; Bank of America has an ownership stake in ICE Clear; Bank of America is a clearing member of LCH.Clearnet and CME; an official who previously worked for other Defendants regularly communicated with his counterpart at Bank of America; the head of clearing at Bank of America regularly met with Tera to discuss the prospect of clearing trades on TeraExchange and then ultimately, in March 2014, told Tera that "his bosses would never let him;" and ANZ Bank used Bank of America's clearing services. (*Id.* ¶¶ 3, 110 n.24, 111 & nn.25-26, 113-114, 116.)

As with HSBC and Deutsche Bank, none of these facts alleges anything outside of ordinary business dealings and a unilateral decision not to clear for TeraExchange. Tera has therefore failed to plead enough facts to plausibly connect Bank of America to the alleged conspiracy.

f. Barclays

As to Barclays, Tera's allegations are slightly more substantial. The Complaint first makes the usual boilerplate assertion that Barclays was a clearing member of both LCH.Clearnet and CME. (*Id.* ¶ 111 nn.25-26.) However, **[*44]** the Complaint then goes on to state that at an October 2014 meeting with two Barclays officials from the Fixed Income Currency and Commodities Electronic Distribution division, Tera was told that Barclays "regarded TeraExchange's platform as a 'Trojan Horse.'" (*Id.* ¶ 126.) Tera further alleges that it "heard this same language in meetings with other Dealer Defendants." (*Id.*) Thus, only one factual allegation plausibly alleges any connection between Barclays and the alleged conspiracy. Yet "a single act may support an inference of involvement in a conspiracy if [it is] 'of a nature justifying an inference of knowledge of the broader conspiracy.'" *In re IRS, 261 F. Supp. 3d at 482* (quoting *Huezo, 546 F.3d at 180*). Unlike the facts pleaded about the Defendants discussed above, Tera's allegation that Barclays used the phrase "Trojan Horse" to describe Tera — part of a shared vocabulary used by multiple Defendants that Tera argues illustrates a prior agreement — directly links Barclays to the scheme. Accordingly, the Court finds that Tera has alleged sufficient facts to connect Barclays with the alleged conspiracy.

g. Credit Suisse

Likewise, Tera sufficiently pleads individual facts about Credit Suisse. Specifically, Tera alleges that Credit **[*45]** Suisse is a partial owner of ICE Clear and a clearing member of LCH.Clearnet and CME; executives at Credit Suisse made a heated phone call to an interdealer SEF run by GFI Group in response to that platform's statement that it would begin to allow anonymous trading, creating pressure that spurred GFI to "promptly reverse[] course;" and that Tera had a "similar experience" with Credit Suisse as it did with UBS, namely, that Credit Suisse repeatedly requested revisions to Tera's core documents as a precondition to routing customer orders to Tera and never ultimately executed an end-user license agreement. (Compl. ¶¶ 102-103, 110 n.24, 111 nn.25-26, 144.) By alleging that Credit Suisse took active steps to block anonymous trading, placed pressure on another platform to maintain the status quo, and participated in obstructionist conduct that was similar to that of another Defendant, these claims sufficiently link Credit Suisse to the alleged conspiracy.

h. JP Morgan

The Complaint's allegations regarding JP Morgan are relatively robust. With respect to JP Morgan, Tera sets forth its usual generic allegations that, together with Bank of America and Citigroup, JP Morgan controls forty percent **[*46]** of all CDS dealing in the United States, as well as that JP Morgan has an ownership stake in ICE

Clear and is a clearing member of LCH.Clearnet and CME. (*Id. 3*, ¶¶ 110 n.24, 111 & nn.25-26.) The Complaint also alleges that a former official of JP Morgan once worked at Deutsche Bank and regularly communicated with his counterparts working for other Defendants. (*Id.* ¶ 113.) These, alone, are insufficient to link JP Morgan to the alleged conspiracy.

But Tera also makes numerous more specific claims. The Complaint states that JP Morgan was one of four Defendants who almost simultaneously contacted Tera the day following the June 13, 2014 trade — which the Complaint alleges had not been made public — and told TeraExchange they would not clear any trades executed on the platform "until they conducted an 'audit' of TeraExchange's Rulebook." (*Id.* ¶ 95.) According to Tera, JP Morgan had already been reviewing the rulebook in the months leading up to the trade, but nevertheless demanded to conduct a new audit in the wake of the first trade. (*Id.* ¶ 98.) Tera further alleges that GMG Brokers, an IDB who wanted to use TeraExchange, told Tera that JP Morgan was "inexplicably delaying its approval for **[*47]** GMG to do so," (*Id.* ¶ 123.) In an effort to resolve the issue, Tera provided JP Morgan with a list of its "own traders that wanted to execute trades on TeraExchange" through various IDBs, but JP Morgan "would not budge," and a JP Morgan official cited the fact that they had not yet signed on to Tera's rulebook as the reason for the delay. *Id.* Tera also details a July 2014 exchange with a JP Morgan official who rebuffed Tera's request for an update regarding the status of its approval for IDBs to execute over TeraExchange, and cites an official at GMG who called JP Morgan "the biggest issue" in preventing IDBs from using TeraExchange. (*Id.* ¶¶ 124-125.) Finally, Tera alleges that, like Credit Suisse, JP Morgan made "heated phone calls" to an interdealer SEF that planned to introduce anonymous trading, pressuring the SEF to "reverse[] course." (*Id.* ¶ 144.)

These specific allegations provide an ample basis for linking JP Morgan to Tera's alleged conspiracy. *See In re IRS, 261 F. Supp. 3d at 482* (emphasizing allegations of participation in the post-June 2014 audit request in upholding claims against BNP Paribas). While Defendants contest the relevance of JP Morgan's response to the June 13, 2014 trade because that trade **[*48]** involved IRS rather than CDS (*see* Mem. at 27), Tera's successful execution of its first swap trade was an indicator of the platform's viability, regardless of the specific type of instrument traded. Accordingly, the alleged tandem actions of Defendants to implement a boycott of Tera in the wake of its first trade supports an inference of a conspiracy with respect to its CDS offering, as discussed in further detail below in considering the parallel conduct alleged by Tera. The Court thus concludes that Tera has pleaded enough facts to maintain JP Morgan as a defendant in this action.

i. BNP Paribas

Tera's allegations regarding BNP Paribas are likewise sufficient. The Complaint alleges, per usual, that BNP Paribas is a clearing member of LCH.Clearnet and CME. (Compl. ¶ 111 & n.25-26.) But BNP Paribas is further alleged to have had a key role in the post-June 13, 2014 trade response by multiple Defendants. Tera alleges that, immediately after the trade, BNP Paribas's FCM notified its trading desk that buy-side customers were using Tera, and BNP's trading desk then contacted the parties to the transaction, threatening them with loss of clearing services, general market research, and execution **[*49]** services for other asset classes. (*Id.* ¶ 92.) The Complaint further alleges that word of BNP Paribas's threat spread to other market participants and had a chilling effect, including on one of the counterparties to the June 13 trade, who stopped responding to TeraExchange. (*Id.* ¶ 93.) A BNP official then told one of the counterparties to the trade to abstain from using Tera pending the resolution of unspecified operational issues, which were never reported to Tera; subsequently, BNP Paribas never gave the bank "the green light to resume trading." (*Id.* ¶ 94.) Tera further alleges that BNP Paribas colluded with Citi, JP Morgan, and UBS by alerting them to the June 13 trade, prompting the post-trade phone calls by all four Defendants regarding their "audit" of the Tera rulebook. (*Id.* ¶ 95.) As with JP Morgan, these facts suffice to link BNP Paribas to the conspiracy alleged by Tera. *See In re IRS, 261 F. Supp. 3d at 482*.

j. UBS[10]

[10] Because the Court's September 28, 2019 Order dismissed Tera's claims against UBS AG for lack of personal jurisdiction (*see* Doc. No. 134 at 4), the term "UBS" as used here refers to UBS Securities LLC, the only UBS entity that remains a party to this lawsuit.

For substantially the same reasons, Tera sufficiently links UBS to the conspiracy. The Complaint states that UBS has an ownership stake in ICE Clear and is a clearing member of CME. (Compl. ¶¶ 110 n.24, 111 & n.25-26.) The Complaint also alleges that UBS was among the four Defendants who responded **[*50]** to Tera's first trade with a phone call the next day seeking a pretextual audit. (*Id.* ¶ 95.) The Complaint also details UBS's ultimate refusal to use TeraExchange as part of its "agency execution model" after months of negotiations and repeated requests for revisions to Tera's core documents — an experience Tera alleges was similar to the one it had with Credit Suisse. (*Id.* ¶¶ 102-103.[11] Consistent with the Court's findings above, these allegations suffice to establish a connection between UBS and the alleged conspiracy.

k. Citi

The Complaint's allegations about Citi are likewise sufficient to withstand Defendants' group pleading challenge. The Complaint alleges that, together with IP Morgan and Bank of America, Citi controls forty percent of all CDS dealing in the United States; that Cid has an ownership stake in ICE Clear; and that Citi is a clearing member of LCH.Clearnet and CME. (*Id.* ¶¶ 3, 110 n.24, 111 & nn.25-26.) As discussed above, Citi is named as one of the four Defendants who made the post-trade call regarding auditing Tera's rulebook. (*Id.* ¶ 95.) The Complaint further specifies that Citi cited its refusal to approve Tera's rulebook as one reason why the IDB OTCex could not **[*51]** use Tera. (*Id.* ¶ 98.) Tera also makes specific allegations that a Citi official quoted excessively high clearing fees to ANZ Bank for clearing trades made on Tera, while offering to clear and settle for free trades made using other platforms. (*Id.* ¶ 116.) Finally, the Complaint alleges that a Citi official refused to allow an IDB to use Tera and admitted that the refusal was "more of an internal policy rather than a regulatory one" — underscoring, according to Tera, the lack of a valid basis for Citi's withholding of permission. (*Id.* ¶ 121.) For all the reasons discussed above, the Court finds that Tera has pleaded enough facts to establish a link between Citi and the overall conspiracy alleged.

* * *

As to Barclays, Credit Suisse, JP Morgan, BNP Paribas, UBS, and Citi, the Court will now analyze the parallel conduct and plus factors set forth in the Complaint to determine the viability of Tera's *Section 1* claim. "Unanimity of action" among all the remaining Defendants "is not required;" rather, "[a]t the pleading stage, the issue is whether the inference of conspiracy, viewing the well-pled allegations holistically, is plausible." *In re IRS, 261 F. Supp. 3d at 479*. For the reasons stated below, the Court finds that Tera has **[*52]** adequately alleged parallel conduct and plus factors to survive Defendants' motion to dismiss.

4. Parallel Conduct

Tera argues that a conspiracy to boycott the TeraExchange platform can be inferred from parallel conduct by Defendants, in addition to circumstantial evidence and "plus factors" that indicate a prior agreement rather than mere parallelism. *See Id. at 472*. The Complaint alleges the following parallel conduct:

- *Parallel refusal to trade on TeraExchange*. Though Defendants, including Credit Suisse and UBS, initially claimed an interest in trading on TeraExchange, potentially as part of their "agency execution models" in which Defendants served as introducing brokers who routed trades to SEFs, they all ultimately refused to trade on the platform. Defendants refused to direct any of their CDS business to Tera and ultimately starved the platform of liquidity. (*See, e.g.*, Compl. ¶¶ 99, 101-104, 119.)

- *Parallel action towards Tera in response to its first swap trade*. After Tera conducted its first trade on June 13, 2014, which was cleared by BNP Paribas's FCM, the FCM notified BNP Paribas's trading desk of the "transgression." (*Id.* ¶ 92.) The trading desk immediately threatened the parties **[*53]** to the trade with loss of access to clearing services and alerted three other Defendants — Citi, JP Morgan, and UBS. (*Id.* ¶¶ 92-95.) The next business day, despite the fact that the trade had never been publicized, all four Defendants

[11] The Complaint also refers to UBS when it alleges that a UBS official publicly stated his opposition to the ongoing practice of name give-up (Compl. ¶ 131); however, this claim is not a factual allegation about UBS's participation in the conspiracy, but rather a component of Tera's argument that the practice of name give-up no longer had a legitimate purpose.

separately, yet "almost simultaneously," called and told Tera that they would not clear any trades, all citing the need to conduct an "audit" of Tera's rulebook — a document that was largely standardized with other SEFs and had already been reviewed by the CFTC in granting preliminary certification to the platform. (*Id.* ¶¶ 95-97.) Other Defendants later blocked trading on the platform pending a rulebook "audit," though "[n]one of these audits have ever been completed." (*Id.* ¶ 96.)

• *Parallel withholding of clearing services by Defendants' FCMs*. Defendants wielded enormous influence over the clearing business, since they own ICE Clear (the largest clearinghouse for CDS) and make up the majority of CDS clearing members at the other two major clearinghouses. (*Id.* ¶¶ 110-112.) Defendants, including BNP Paribas, leveraged this control by refusing to participate in the pre-trade credit check process and refusing to clear trades for buy-side customers who wanted **[*54]** to use TeraExchange, despite the resulting loss of income from clearing and settlement fees for Defendants' FCMs. (*Id.* ¶¶ 84, 105-119.) This uniform refusal effectively paralyzed prospective CDS transactions on TeraExchange, blocking third parties from using the platform. (*Id.* ¶¶ 107-108.)

• *Similar clearing fee differentials*. Defendants, including Citi, also sought to steer customer transactions to SEFs that engaged in RFQ trading. Multiple Defendants quoted prohibitively high rates to clear trades on TeraExchange while simultaneously offering to execute those same transactions for free or at a substantially reduced rate if traded through one of their preferred SEFs, which were either owned by Defendants or otherwise agreed to adhere to RFQ and name give-up. (*Id.* ¶¶ 15, 105, 116, 134.)

• *Common excuses and vocabulary*. Defendants relied on the same pretextual reasons for delaying or refusing to conduct business with TeraExchange, including insisting upon the need to "audit" Tera's rulebook and stringing Tera along by repeatedly reviewing and revising core documents but ultimately failing to actually execute end-user license agreements. (*Id.* ¶ 101.) Defendants also used similar language **[*55]** in describing the threat posed by TeraExchange, with multiple Defendants, including Barclays, referring to the platform as a "Trojan Horse." (*Id.* ¶ 126.)

• *Similar exertion of pressure on customers and interdealer SEFs*. Defendants, including BNP Paribas, enforced their boycott by threatening access to other banking services for buy-side customers who traded on Tera, collectively making it known that any investor caught dealing with Tera would be cut off from the ability to trade. (*Id.* ¶¶ 14, 118, 147-148.) Defendants, including Credit Suisse and JP Morgan, also pressured interdealer SEFs to not allow buy-side entities to trade on their platforms, threatening to place any SEFs who did not conform to these demands into the "penalty box" by withdrawing liquidity from them. (*Id.* ¶¶ 143-144.)

• *Similar treatment of IDBs*. Tera signed up a dozen international IDBs to use TeraExchange to execute their CDS and other swap trades in order to satisfy Dodd-Frank's cross-border requirements. (*Id.* ¶ 120.) But Defendants, including Citi and JP Morgan, singled out Tera and — in their capacities as customers of those IDBs — "unjustifiably delayed and ultimately refused to give their permission" for these **[*56]** IDBs to use Tera. (*Id.* ¶¶ 120-121.) Defendants relied on similar pretexts, such as the fact that they had not signed onto Tera's rulebook, to explain their withholding of consent. (*Id.* ¶¶ 121, 123.) Defendants threatened IDBs with a boycott should they participate in anonymous all-to-all trading. (*Id.* ¶¶ 149-150.)

• *Parallel adherence to name give-up*. Defendants insisted on the practice of "name give-up," or post-trade name disclosure, in order to police whether market participants were abiding by their demands. (*Id.* ¶¶ 127, 129.) The practice no longer served any legitimate purpose in the wake of Dodd-Frank's central clearing requirement, and was insisted upon by Defendants as a surveillance and information-control mechanism. (*Id* ¶ 129.) Defendants boycotted any trading platforms that refused to adhere to name give-up, starving them of liquidity. (*Id.* ¶ 134.) One means by which Dealer Defendants enforced name give-up was by requiring IDBs to use MarkitWIRE — a cumbersome and unnecessary service that offered counterparties a "last look" at the trade and thereby removed anonymity. (*Id.* ¶¶ 134-138.)

The Court finds that, viewed holistically, the Complaint adequately pleads parallel conduct **[*57]** that makes the inference of a conspiracy among the six remaining Defendants plausible. As in *In re IRS*, "[t]hat is so even discounting as worthy of less weight the [Complaint's] collective allegations about 'Dealer Defendants' that lack allegations about a particular" Defendant, *In re IRS, 261 F. Supp. 3d at 474*, and disregarding specific allegations about Defendants against whom the Court dismissed Tera's *Section 1* claims above. True, as Judge Engelmayer recognized and as Defendants point out, some of the parallel conduct, if considered in isolation, is consistent with unilateral action based on each Defendant's own business prerogatives — including Defendants' refusal to trade on Tera or to provide clearing services to Tera via their FCMs. (*See id; see also* Mem. at 25.) Yet this conduct does not stand alone. Tera also pleads "allegations of other common behavior that is less easily explained as unilateral action." *In re IRS, 261 F. Supp. 3d at 475*. Chief among the allegations suggesting coordination is Defendants' synchronized response to Tera's first swap trade, which entailed four different Defendants calling Tera "almost simultaneously" on the first business day following the trade and making near-identical statements that each Defendant would not clear **[*58]** trades on TeraExchange until they completed an "audit" of the rulebook. As Judge Engelmayer found in considering the same allegation in *In re IRS*, the fact "that four [Defendants] called Tera the next business day, and made the identical demand of Tera . . . as a condition for clearing trades, is improbable enough to support the inference of collaboration." *Id. at 475-76*. Here, too, "[t]hat inference is strengthened by the [Complaint's] well-[pleaded] allegation that the Dealer's interest in Tera's rulebook was pretextual," based on allegations that "(1) the Tera rulebook had already been audited by the CFTC, which had provisionally approved Tera's platform, and (2) despite their expressions of interest in the rulebook, no Dealer ever completed this supposedly important audit," *Id. at 476*. Other claims, in combination with this one, lend further support to the inference that Defendants' actions transcend mere coincidence. These include the allegations that Defendants used similar language in describing Tera as a Trojan Horse; the similar excuses and delay tactics used by Defendants; the similar kinds of pressure applied by Defendants on buy-side customers and interdealer SEFs by threatening to place them **[*59]** in the "penalty box;" the common insistence on name give-up, including through the use of MarkitSERV; and Defendants' shared practice of blocking international IDBs from using Tera.

Defendants maintain that this parallel conduct alleged by Tera is not "meaningful" enough to support the inference of a plausible conspiracy, pointing to material contained in an email cited by the Complaint to argue that JP Morgan *was* in fact providing clearing services to Tera. (Mem. at 26.) However, on a motion to dismiss, "defendants may not use plaintiffs' sources as an archive from which to build what amounts to a factual rebuttal. Defendants may argue implausibility on other grounds, but not by stacking facts extracted from secondary sources to construct an alternative narrative, at odds with the [Complaint's] well-pled allegations." *In re IRS, 261 F. Supp. 3d at 481*; *see also, e.g., Global Network Commc'ns, Inc. v. City of New York, 458 F.3d 150, 156 (2d Cir. 2006)* (district court erred by relying on materials external to complaint to "make a finding of fact that *controverted* the plaintiff's own factual assertions set out in its complaint"); *Sira v. Morton, 380 F.3d 57, 67 (2d Cir. 2004)* ("Limited quotation from or reference to documents that may constitute relevant evidence in a case is not enough to incorporate those documents, wholesale, into the complaint."). **[*60]** The Court therefore will not resolve Defendants' competing interpretations of emails and other documents at this stage. The Court also declines Defendants' invitation to "draw a negative inference from the absence" of certain allegations in the Complaint (*see* Mem. at 26), since doing so would contravene the Court's duty to draw all factual inferences in favor of Tera at the motion-to-dismiss stage.

Similarly, Defendants urge the Court to disregard Tera's allegations regarding the Defendants' June 16, 2014 response to Tera's first trade because that trade, as revealed in the *In re IRS* pleadings, was an IRS trade rather than a CDS one. (*See* Mem, at 12.) But even assuming that the Court may take judicial notice of information contained in pleadings filed in other cases, *see* *Rothman v. Gregor, 220 F.3d 81, 92 (2d Cir. 2000)*, the Court does not agree that the Complaint's allegations as to the June 13, 2014 trade are irrelevant merely because the instrument traded was an IRS rather than a CDS. As Defendants themselves acknowledge, "Tera registered just one trading platform with the CFTC, the SEF operated as 'TeraExchange.'" (Mem. at 13 n.26.) That SEF was designed as a trading platform for multiple instruments, including IRS and CDS. It is therefore **[*61]** perfectly appropriate to conclude, drawing every reasonable inference in Tera's favor, that Tera's first successful trade of any instrument was indicative of its potential viability in the CDS market and could have spurred Defendants to initiate a group boycott to protect their CDS business. The Court therefore agrees with Tera that Defendants' "focus on the nature of [the June 13] transaction is misplaced." (Opp'n at 17 n.12.)

Defendants' other arguments regarding the Complaint's allegations of parallel conduct are equally unavailing. Defendants insist that the request to audit Tera's rulebook was wholly legitimate (Mem. at 27-28), but — as Judge Engelmayer concluded in *In re IRS* — Tera pleaded sufficient facts to render plausible the inference that the requests were pretextual, including that the rulebook was largely standardized, had already been reviewed by the CFTC, and that none of the audits were ever completed. *See* Compl, ¶¶ 96, 97, 100; *see also* *In re IRS, 261 F. Supp. 3d at 456-76*. As to Defendants' attempt to contradict Tera's allegations regarding JP Morgan's audit request with reference to the meaning of an email cited in the Complaint (Mem. at 28-30), the Court — as discussed above — will not wade into a **[*62]** factual dispute at the motion-to-dismiss stage and instead accepts Tera's well-pleaded factual allegations as true.

The Court is equally unpersuaded by Defendants' argument that the IDB allegations should be disregarded because the Complaint fails to specify whether the IDBs at issue operate in the CDS market or the IRS market. (Mem. at 30.) In fact, the Complaint does specify that TeraExchange enlisted the IDBs "to execute their CDS and other swap trades" — a representation that binds the Court at this stage of the litigation. (Compl. ¶ 120.) While, as discussed above, Defendants are correct in pointing out that Defendants' refusal to direct their own business to Tera via the IDBs is consistent with unilateral action, the Complaint's allegations that Defendants did so using similar pretexts and patterns of behavior nevertheless contribute to Tera's showing of parallel conduct.

Thus, the Court concludes that Tera has adequately pleaded parallel conduct that, if combined with sufficient plus factors, would withstand a motion to dismiss. The Court accordingly now turns to the plus factors alleged by Tera.

5. Plus Factors

Of the three "plus factors" previously recognized by the Second Circuit, **[*63]** the Court finds that one — a common motive to conspire — lends strong support to the inference of a prior agreement, and another — a high degree of interfirm communications — lends moderate support. Tera also pleads circumstantial evidence that gives further credence to the conspiracy claim. Tera has therefore adequately pleaded plus factors "which, when combined with parallel behavior, might permit a jury to infer the existence of an [illegal] agreement." *Citigroup, 709 F.3d at 136 n.6*.

With respect to the first plus factor, the Complaint amply pleads that Defendants had a common motive "to preserve the 'profit center' supplied by maximal use of non-anonymous RFQ trading with the buy-side" — a motive as relevant in the CDS market as it was in the IRS market. *In re IRS, 261 F. Supp. 3d at 476*; *see also* Compl. ¶¶ 4, 12, 71-76, 79-86, 91, 129-130, 140, 142. Here, too, "conspiracy, if successful, would assure that the new platforms were starved of liquidity; there was otherwise a risk that enough [Defendants] would participate to give the new platforms enough sufficient liquidity to be viable." *In re IRS, 261 F. Supp. 3d at 476*. Judge Cote recognized a similar common motive to conspire in finding that plus factors were adequately pleaded in *In re CDS*, observing that "no single [Defendant] **[*64]** could prevent [electronic] exchanges [for CDS trading] from emerging, but all [Defendants] would profit from such prevention." *In re CDS, 2014 U.S. Dist. LEXIS 123784, 2014 WL 4379112 at *10*.[12] As Tera points out, this interdependence critically distinguishes the CDS market from the telephone market at issue in *Twombly*, where each defendant controlled a regional market in which they alone were dominant and thus could unilaterally take actions to block new competitors from encroaching on their territory. (*See* *Twombly, 550 U.S. at 566*; Opp'n at 37.)

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[12] Tera argues that this plus factor is particularly weighty here because, in light of Judge Cote's finding in *In re CDS*, "this is the second time Defendants have conspired to prevent exchange-based CDS trading to preserve the RFQ system." (Opp'n at 24.) The Court disagrees. Because *In re CDS* concluded in a settlement without any determination of liability, *see* Order Preliminarily Approving Settlements and Providing for Notice to the Settlement Class, I3-md-2476-DLC (Doc. No. 465), Judge Cote's finding that a common motive to conspire had been sufficiently pleaded to withstand a motion to dismiss does not support the conclusion that "this is the second time Defendants have conspired" in the CDS market. Likewise, the Court does not find the Complaint's allegations about past regulatory investigations related to Defendants' conduct in the CDS market to be probative because those investigations were closed without adverse findings and were related to conduct in a different time period and regulatory landscape. *See* Compl. ¶ 16; *In re IRS, 261 F. Supp. 3d at 477 n.25* (citing *In re Elevator Antitrust Litig., 502 F.3d 47, 51-52 (2d Cir. 2007)* (discounting as irrelevant alleged anticompetitive conduct by the same defendants in another region and rejecting the claim that "if it happened there, it could have happened here")).

Defendants argue that Tera failed to adequately plead common motive, citing cases for the proposition that a "common motive for increased profits always exists" and arguing that declining to trade on Tera was within each Defendant's unilateral interest. (Mem. at 33-34 (citing *In re Musical Instruments and Equipment Antitrust Litig., 798 F.3d 1186, 1194 n.8 (9th Cir. 2015))*.) But that criticism is misplaced. Tera pleads not that Defendants had a generic interest in generating increased profit, but a specific motive to protect a highly lucrative existing business that was jeopardized by the potential viability of Tera's trading platform, which could be defeated only through cooperation among multiple Defendants. As discussed above, Tera pleads far more parallel conduct in support of that common motive **[*65]** than merely refraining from trading on Tera. Bearing in mind that Tera is under no obligation to rule out the possibility of independent action at the pleading stage, *see* *Anderson News, 680 F.3d at 184*, Tera has sufficiently pleaded this plus factor.

The Complaint also makes a substantial showing with respect to the second plus factor — a high degree of interfirm communications. The Complaint alleges that BNP Paribas communicated with JP Morgan, Citi, and UBS to alert them to the June 13, 2014 trade and states that regular communications took place between Defendants' clearing divisions. (Compl. ¶¶ 95-96, 113.)[13] The Complaint also points to Defendants' overlapping roles in institutions critical to the CDS market, including their joint ownership and status as clearing members of ICE Clear (*id.* ¶ 110), as well as their roles as clearing members at CME and LCH.Clearnet (*id.* ¶ 111).[14] As Defendants point out, the interfirm communications alleged here are not as extensive as those in *In re IRS*, where the plaintiffs also alleged monthly meetings among the heads of Defendants' trading desks, common participation in trade associations, informal meals, and other gatherings. (*See* *In re IRS, 261 F. Supp. 3d at 476*; Mem. at 34-35.) Nevertheless, the Complaint **[*66]** does make allegations about significant communications that, in combination with allegations of common language and techniques used by Defendants in carrying out the boycott, contribute to the plausibility of the inference that the alleged parallel conduct flowed from a preceding agreement rather than unilateral action.

As to the fmal plus factor previously enumerated by the Second Circuit — actions against a defendant's self-interest — the Complaint provides some (admittedly less compelling) support for the existence of concerted action among the remaining Defendants. Specifically, the Complaint alleges that Defendants' FCMs acted against their own self-interest when they withheld clearing services from TeraExchange, thereby forgoing the fees they would have otherwise earned for every trade submitted to a clearinghouse. (Compl. ¶¶ 104, 109.) Although this conduct could arguably be the result of independent decisions to forgo doing any business with Tera because of a desire not to help a potential competitor become successful, multiple actors passing up a guaranteed income stream is more suggestive of a prior agreement to drive Tera out of the market. Accordingly, **[*67]** this factor lends further, albeit only "marginal[]," support to the conspiracy claim. *In re IRS, 261 F. Supp. 3d at 477*.

Tera argues that several additional facts and pieces of circumstantial evidence function as "plus factors" that support the inference of a prior agreement. (Opp'n at 22-25.) Most of these, including the timing of Defendants' audit request, the use of similar language, and the deployment of shared techniques to punish IDBs and buy-side customers who engaged in all-to-all trading, have been previously discussed in the context of Tera's pleading of parallel conduct. Nevertheless, the Court agrees that those facts contribute to a context suggestive of prior

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[13] The parties dispute whether Tera publicly reported the June 13 trade on its website, which bears upon the question of whether the other Defendants could have found out about the trade absent communication from BNP Paribas. *Compare* Mem. at 27 & n,35 (citing a post—oral argument letter by plaintiffs in *In re IRS*, which refers to data sharing regarding this trade as required by CFTC regulations) *with* Opp'n at 26 (maintaining that Tera did not post any information about the trade or counterparties on its website). In light of the Court's obligation to "accept as true all of the factual allegations contained in the complaint" at the motion-to-dismiss stage, *Twombly, 550 U.S. at 572* (internal quotation marks and citation omitted), and because the materials cited by Defendants fall far short of the level of clarity necessary to permit the Court to take judicial notice of a fact in contradiction of the well-pleaded allegations of the complaint, *see* *Global Network, 458 F.3d at 156*, the Court adopts Tera's allegation as true.

[14] The Complaint also alleges, without supporting facts, that "Defendants communicated regarding their conspiracy in secret via telephone, email, instant messaging, and Bloomberg messaging." (Compl. ¶ 154.) The Court did not consider this bald assertion in determining the degree of interfirm communications alleged by Tera.

agreement rather than merely "actions taken by market actors who are aware of and anticipate similar actions taken by competitors, but which fall short of a tacit agreement." Apex Oil, 822 F.2d at 254.

Tera also recasts two additional factual allegations as "plus factors" in its brief: first, the sudden withdrawal of IDBs and the buy-side from using TeraExchange in response to Defendants' threats, despite initial enthusiasm, and, second, the structure of the CDS market, which was dominated by Defendants and had high bathers to entry. (Opp'n at 23, 25.) However, the Court finds **[*68]** that these do not bear on the likelihood of a prior agreement and therefore do not amount to "plus factors." The reaction of IDBs and buy-side customers to Defendants' threats speaks to the efficacy of the alleged conspiracy, while Tera's allegations about the nature of the CDS market demonstrate an opportunity to conspire; neither tend to suggest that Defendants' conduct stemmed from a prior agreement rather than unilateral action. Still, as discussed above, Tera has sufficiently pleaded other "plus factors" that adequately place the alleged parallel conduct in a context that suggests prior agreement among Defendants. Tera has thus cleared *Twombly's* requirement that a complaint contain "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." Twombly, 550 U.S. at 556.

* * *

Viewed holistically, the Court finds that Tera has pleaded sufficient parallel conduct and plus factors to state a plausible Section 1 claim with respect to Barclays, Credit Suisse, JP Morgan, BNP Paribas, UBS, and Citi. The Defendants' motion to dismiss is therefore DENTED with respect to those Defendants. The Court now turns to the Defendants' motion to dismiss Tera's statelaw claims.

B. Donnelly **[*69]** Act Claim

New York's Donnelly Act prohibits "[e]very contract, agreement, arrangement or combination whereby . . . competition . . . may be restrained." N.Y. Gen. Bus. Law § 340(1). The Donnelly Act was "modelled on" the Sherman Act and therefore "should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result." X.L.O. Concrete Corp. v. Rivergate Corp., 83 N.Y.2d 513, 518, 634 N.E.2d 158, 611 N.Y.S.2d 786 (1994) (internal quotation marks and citation omitted); *see also* Williams v. Citigroup Inc., 659 F.3d 208, 211 n.2 (2d Cir. 2011) (observing that the Donnelly Act "was modeled on the Sherman Act and has generally been construed in accordance with federal precedents"); Nat'l Gear & Piston, Inc. v. Cummins Power Sys., LLC, 861 F. Supp. 2d 344, 370 (S.D.N.Y. 2012) ("The standard for a well-pleaded Donnelly Act claim is the same as a claim under Section 1 of the Sherman Act.").

Because Tera's Donnelly Act claim therefore rises and falls with the Section 1 claim, the motion to dismiss is GRANTED with respect to HSBC, Deutsche Bank, Goldman Sachs, Morgan Stanley, and Bank of America, and DENIED with respect to Barclays, Credit Suisse, JP Morgan, BNP Paribas, UBS, and Citi.[15]

C. Unjust Enrichment Claim

The Court next turns to Tera's unjust enrichment claim, While the Complaint's boilerplate unjust enrichment language fails to plead which state's unjust **[*70]** enrichment law is applicable, "[t]he elements of unjust enrichment are similar in every state" and "[D]efendants have made no showing that any differences in the various states' laws are material at this early stage of the litigation." In re CDS, 2014 U.S. Dist. LEXIS 123784, 2014 WL 4379112, at *18. Accordingly, the Court will address the sufficiency of Tera's unjust enrichment claim under New York law.

"Under New York law, a claim for unjust enrichment requires that '(1) [the] defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover." In re IRS, 261 F. Supp. 3d at 500 (quoting Diesel Props S.r.l. v. Greystone Bus. Credit LLC, 631 F.3d 42, 55 (2d Cir. 2011)).

[15] The Court previously dismissed Tera's Donnelly Act claim against RBS and UBS AG in its September 28, 2018 Order. (Doc. No. 134.)

However, where an unjust enrichment claim is made in connection with alleged antitrust violations, the law is clear that "to the extent that the [Section] 1 claims have been found deficient, the unjust enrichment claims must fall," since "without a viable underlying claim of illegality," there can be no unjust enrichment. In re IRS, 261 F. Supp. 3d at 500 (quoting Kramer v. Pollock-Krasner Found., 890 F. Supp. 250, 257 (S.D.N.Y. 1995)). Accordingly, the motion to dismiss Tera's unjust enrichment claim is granted to the extent that the Section 1 claims were dismissed.

Furthermore, as to the remaining Defendants, the Court agrees with Judge Engelmayer that Tera's unjust enrichment theory is too attenuated to state **[*71]** a claim. *See id.* Here, too, Tera "alleges an indirect theory of unjust enrichment, in that, by destroying . . . Tera, the Dealer Defendants cost [the platform] per-transaction usage revenue, while enabling themselves to benefit from the wider bid-ask spreads characteristic of other modes" of CDS trading. *Id.* But to prevail on its unjust enrichment claim, Tera must demonstrate that Defendants received a "specific and direct benefit' from the property sought to be recovered, rather than an 'indirect benefit.'" *Id.* (quoting In re Commodity Exch., Inc., 213 F. Supp. 3d 631, 676 (S.D.N.Y. 2016)). Because Tera alleges "no relationship, direct or indirect," between itself and Defendants, and since "the usage revenue of which . . . Tera [was] allegedly deprived is different from the money [Defendants] ostensibly gained (via wide trading spreads)," the Court agrees with Judge Engelmayer that Tera's theory "is too indirect to state an unjust enrichment claim." *Id. at 500-01*.

Accordingly, the motion to dismiss Tera's unjust enrichment claims is GRANTED as to all Defendants.

D. Tortious Interference with Business Relations Claim

Finally, the Court turns to Tera's claim for tortious interference with business relations. Here, too, the Complaint asserts merely three boilerplate sentences **[*72]** and fails to identify the applicable state law, though the Court agrees with Defendants' position that the applicable law of all three possible jurisdictions is substantively similar. (*See* Mem. at 44 n.52.) To state a claim for tortious interference with business relations in New York, "a plaintiff must show that '(1) there is a business relationship between the plaintiff and a third party; (2) the defendant, knowing of that relationship, intentionally interferes with it; (3) the defendant acts with the sole purpose of harming the plaintiff, or, failing that level of malice, uses dishonest, unfair, or improper means; and (4) the relationship is injured.' In re IRS, 261 F Supp. 3d at 499 (quoting Goldhirsh Grp. v. Alpert, 107 F.3d 105, 108-09 (2d Cir. 1997)). "'This tort is a difficult one to sustain, with requirements more demanding than those for interference with [the] performance of an existing contract.'" *Id.* (quoting PKG Grp., LLC v. Gamma Croma, S.p.A., 446 F. Supp. 2d 249, 251 (S.D.N.Y. 2006)).

Judge Engelmayer previously determined that the same "three boilerplate sentences" that Tera pleads here were insufficient to state a tortious interference claim, finding that they failed to "identify any customer with whose prospective business relations with . . . Tera the . . . Defendants sought to interfere or the particular **[*73]** nature of the prospective business relations." *Id; see* Commercial Data Servers, Inc. v. Int'l Bus. Mach. Corp., 166 F. Supp. 2d 891, 898 (S.D.N.Y. 2001) ("Plaintiff must specify some particular, existing relationship through which plaintiff would have done business but for the allegedly tortious behavior," (internal quotation marks and citation omitted)).

The Court agrees that the Complaint fails to state a claim for tortious interference with business relations. Even assuming that the Complaint satisfied the requirement of identifying specific customer relationships by pleading that Tera had secured agreements with hedge funds, IDBs, and other entities who committed to using the platform (*see, e.g.*, Compl. ¶¶ 80, 89), the Complaint does not plead that Defendants had "actual knowledge of any specific relationships" allegedly harmed by Defendants' actions. 4 K & D Corp. v. Concierge Auctions, LLC, 2 F. Supp. 3d 525, 546 (S.D.N.Y. Mar. 10, 2014).

Accordingly, the motion to dismiss Tera's claim for tortious interference with business relations is GRANTED as to all Defendants.

IV. CONCLUSION

For the forgoing reasons, the motion to dismiss Tera's Sherman Act claim and Donnelly Act claim is GRANTED as to HSBC, Deutsche Bank, Goldman Sachs, Morgan Stanley, and Bank of America, and DENIED with respect to

Barclays, Credit Suisse, JP Morgan, BNP Paribas, UBS, and Citi. The motion **[*74]** to dismiss Tera's unjust enrichment and tortious interference with business relations claims is GRANTED as to all Defendants.

IT IS HEREBY ORDERED THAT the parties shall submit a joint letter setting forth their views of the next steps in this litigation no later than August 16, 2019.

The Clerk of Court is respectfully directed to terminate the motion pending at Doc. No. 96.

SO ORDERED.

/s/ Richard J. Sullivan

RICHARD J. SULLIVAN

United States Circuit Judge

Sitting by Designation

Dated: July 30, 2019

New York, New York

[EuroTec Vertical Flight Sols., LLC v. Safran Helicopter Engines S.A.S.](#)

United States District Court for the Northern District of Texas, Dallas Division

August 1, 2019, Decided; August 1, 2019, Filed

CASE NO. 3:15-CV-3454-S

Reporter
2019 U.S. Dist. LEXIS 129084 *; 2019-2 Trade Cas. (CCH) P80,865; 2019 WL 3503240

EUROTEC VERTICAL FLIGHT SOLUTIONS, LLC. v. SAFRAN HELICOPTER ENGINES S.A.S., SAFRAN HELICOPTER ENGINES USA, INC., and SAFRAN HELICOPTER ENGINES CANADA, INC.

Prior History: *Eurotec Vertical Flight Sols., LLC v. Turbomeca, S.A., 2016 U.S. Dist. LEXIS 191910 (N.D. Tex., Sept. 29, 2016)*

Core Terms

alleges, engines, Defendants', helicopter, manufacturers, personal jurisdiction, Defacing, Sherman Act, customers, repair, conspiracy, antitrust claim, markets, monopolization, grant a motion, prices, rule of reason, Cartwright Act, contracts, tortious interference, geographic, premised, Fleet, anticompetitive, subsidiary, restraint of trade, unfair competition, motion to dismiss, plaintiff's claim, service provider

Counsel: **[*1]** For EuroTec Vertical Flight Solutions LLC, Plaintiff: Don Swaim, LEAD ATTORNEY, Alex Joseph Whitman, Cunningham Swaim, PLLC, Dallas, TX; Christopher B Sevedge, Courtney Joann Harrison, Daniel Bukovac, Stinson LLP, Kansas City, MO; Paul V. Herbers, PRO HAC VICE, Cooling & Herbers, PC, Kansas City, MO.

For Safran Helicopter Engines SAS, formerly known as Turbomeca SA, formerly known as Turbomeca SAS, Safran Helicopter Engines USA Inc, formerly known as Turbomeca USA Inc, Safran Helicopter Engines Canada Inc, Defendants: Bruce D Oakley, LEAD ATTORNEY, Hogan Lovells US LLP, Houston, TX; Mark J Dyer, Martin Disiere Jefferson & Wisdom, Dallas, TX; William Leitzsey Monts, III, PRO HAC VICE, Hogan Lovells US LLP, Washington, DC.

Judges: KAREN GREN SCHOLER, UNITED STATES DISTRICT JUDGE.

Opinion by: KAREN GREN SCHOLER

Opinion

MEMORANDUM OPINION AND ORDER

Plaintiff EuroTec Vertical Flight Solutions, LUC ("Plaintiff") brings this action against Safran Helicopter Engines USA, Inc. ("SafranHE USA"), and against Safran Helicopter Engines S.A.S, ("SafranHE France") and Safran Helicopter Engines Canada, Inc. ("SafranHE Canada") (together, "International Defendants," and collectively with SafranHE USA, "Defendants"). In the Third Amended **[*2]** Complaint (the "Complaint")—which is the fourth complaint in this case—Plaintiff alleges violations of the *Sherman Act, 15 U.S.C. §§ 1*, *2*, *California Cartwright Act, Cal. Bus. & Prof. Code § 16720 et seq.*, *Kansas Restraint of Trade Act, Kan. Stat. Ann. § 50-101 et seq.*, *§ 35 of the*

Lanham Act, 15 U.S.C. § 1117, *Texas Deceptive Trade Practices Consumer Protection Act ("DTPA"), Tex. Bus. & Com. Code Ann. §§ 17.46*, *17.50*, as well as common law claims for breach of contract, wrongful detention, conversion, negligence, tortious interference, civil conspiracy, unfair competition, misrepresentation, and concealment.

Pending before the Court is SafranHE USA's and the International Defendants' Motions to Dismiss [ECF Nos. 103, 104]. For the foregoing reasons, the Court grants in part and denies in part the Motions.

I. BACKGROUND

Pursuant to Special Order 3-318, this case was transferred from the docket of Judge Jane J. Boyle to the docket of this Court on March 8, 2018.

Plaintiff filed its original complaint on October 23, 2015, and amended the complaint to join new defendants on March 28, 2016. On June 1, 2016, Defendants filed a Motion to Compel Arbitration and a Motion to Dismiss, which the Court granted, staying the case pending arbitration. Following arbitration, the Court reopened the case on September 18, 2017, Plaintiff filed its **[*3]** Second Amended Complaint on October 9, 2017, and Defendants filed a new set of motions to dismiss. The Court held a hearing on the second set of motions to dismiss on November 18, 2018. The Court dismissed the Second Amended Complaint in its entirety but granted Plaintiff's motion for leave to amend. Although the Court expressed hope that affording Plaintiff an opportunity to replead would result in "some of the weaker of [the] 14 claims . . . [getting] taken out," ECF No. 92, at 65:21-23, Plaintiffs fourth attempt includes *thirty* causes of actions over the course of 130 pages, and includes many of the same weaker claims as its prior attempt. *See* Third Am. Compl. Defendants filed a third set of motions to dismiss on January 25, 2019, which is the subject of this Memorandum Opinion and Order.

A. *Parties*

Plaintiff is a Kansas limited liability company that owns helicopters and helicopter engines, is a certified repair station, and is in the business of buying, selling, and leasing helicopters, engines, and engine parts. *See* Third Am. Compl. ¶¶ 1-4. Plaintiff also provides consumers with various services, including engine maintenance, repair, and overhaul services ("MRO Services"). *Id.* **[*4]** ¶ 5. Defendants are manufacturers, marketers, sellers, and lessors of helicopter engines and of modules, components, parts, and accessories for those engines. *Id.* ¶¶ 9, 12-15, 18. Defendants also market and provide MRO Services for their engines. *Id.*

With the exception of SafranHE USA, which is a Delaware corporation with its principal place of business in Dallas County, Texas, the Defendants are foreign companies. *Id.* ¶ 11. SafranHE France, formerly Turbomeca, S.A. and Turbomeca S.A.S., is a French company and domiciliary. *Id.* ¶ 7. SafranHE Canada is a Canadian corporation and domiciliary. *Id.* ¶ 17. Plaintiff contends, however, that there is a significant unity of interest in ownership and control between the three Defendants, such that they are alter egos of one another. *Id.* ¶ 20. Plaintiff alleges that either SafranHE France is able to exert a great degree of control over the other Defendants, that Defendants are agents of one another, or that they acted in concert, pursuant to agreements, or as a joint venture, such that they should be considered a single business enterprise. *Id.* ¶¶ 21-24.

B. *Market Allegations*

Civilian and military helicopters are designed and manufactured by Airbus Helicopters ("Airbus"), Bell Helicopter, Leonardo Helicopters, Sikorsky Aircraft **[*5]** Corporation and other companies. *Id.* ¶ 70. According to Plaintiff, approximately 45% of all civil and parapublic helicopters worldwide are manufactured by Airbus. *Id.* ¶ 73. Airbus does not manufacture the engines used in its helicopters, instead relying on companies in the business of designing and manufacturing engines. *Id.* ¶ 75. Defendants are the largest manufacturers dedicated solely to the manufacturing of helicopter engines, and compete with "General Electric, Rolls-Royce, and Pratt & Whitney Canada." *Id.*

Plaintiff alleges that there is one geographic market and two relevant product markets.[1] *Id.* ¶ 244. The geographic is allegedly the United States, while the product markets are: (1) market for Defendants' engines and parts; and (2) market for MRO Services for Defendants' engines.

(1) *Geographic Market*

Plaintiff asserts that the relevant geographic market is the United States. *Id.* ¶ 244. Nonetheless, Plaintiff contends that (1) Defendants deal in the United States and Canada; (2) Defendants' customers are located in the United States and Canada, and turn to sellers in both countries for engines and parts; and (3) sellers of Safran engines and parts, as well as providers **[*6]** of MRO Services, view as competition sellers and service providers in both the United States and Canada, *Id*, ¶¶ 245-49.

(2) *Market for Engines and Parts*

The first relevant product market is allegedly the market for Defendants' engines and parts. *Id.* ¶ 252. Plaintiff states that SafranHE France is the largest supplier of helicopter engines to Airbus, manufacturing all of the engines for the ten Airbus models sold in the United States, *Id.* ¶ 79. According to the Complaint, there are approximately 1,632 helicopters in existence with Defendants engines. *Id.* ¶ 74. Airbus's other supplier, Pratt & Whitney Canada, is the exclusive supplier for only one Airbus model. *Id.* Plaintiff alleges that a consumer would not find it cost-effective either to replace an entire engine or to seek FAA recertification of a helicopter for use with another engine to avoid paying Defendants' higher prices. *Id.* ¶¶ 258-60.

Moreover, engines and parts manufactured by Defendants are allegedly neither interchangeable nor compatible with engines and parts manufactured by other manufacturers. *Id.* ¶¶ 253-55. Thus, a part manufactured by General Electric, for example, cannot be used in Defendants' engines.[2] *Id.* ¶ 257. According **[*7]** to Plaintiffs, the demand for Defendants' engines and parts is thus independent of the demand for other manufacturers' engines and parts. *Id.* ¶ 256.

Plaintiff has not alleged, however, the total number of Airbus helicopters or other facts from which the Court could deduce Defendants' market share with Airbus. Similarly, Plaintiff alleged that there are more than 2,300 helicopters with Defendants' engines, *id.* ¶ 81, but has not alleged Defendants' market share of all engines or parts in the United States or worldwide, aside from the conclusory statement that Defendants have "a market share of over 50 percent." *Id.* ¶ 668.

Plaintiff further claims that while some manufacturers use distributors to sell engine parts, some sell refurbished or used parts, and others sell new replacement parts, *id.* ¶¶ 83-86, Defendants are the sole distributors of their own parts. *Id.* ¶¶ 670-71. Plaintiff thus contends that Defendants have monopoly power in the market for their own parts. *Id.* ¶¶ 668-73.

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[1] These allegations are relevant to Plaintiff's antitrust claims. As explained in more detail below, most of Plaintiff's claims require it to plead a relevant market, which is composed of a geographic market—the geographic area where Defendants compete—and a product market—a market of reasonably interchangeable goods. *See infra* § III.C. 1.a.iii.a.

[2] Plaintiff's allegations on this point are inconsistent. Plaintiff later alleges that Defendants sought to "prevent competition from manufacturers of new PMA Parts (*substitute parts otherwise manufactured by companies not affiliated with defendants*, under an FAA program known as Part Manufacturing Authorization)." *Id.* ¶ 689 (emphasis added). Thus, there appears to be some substitutability of parts.

(3) ***Market for MRO Services***

Plaintiff alleges that there is a market for MRO Services. *Id.* ¶ 93. Plaintiff asserts that "[s]ervices **[*8]** provided to helicopter manufacturers are not within [this] relevant [product] market." *Id.* ¶ 262. Some manufacturers provide MRO Services themselves, while others authorize independent service providers to perform MRO Services, *Id.* ¶¶ 93-94. Purportedly, there is no cross-elasticity[3] between the MRO Services for Defendants' engines and MRO Services for other manufacturers engines. *Id.* ¶ 263.

Defendants provide MRO Services and have also authorized other companies to perform MRO Services subject to limitations—for example, one company is authorized to perform only "Level 4" engine repair and overhaul on a limited number of models. *Id.* ¶¶ 93-100. Defendants allegedly choose whom to authorize to perform repair services, restrain access to technical information, and withhold the supply of parts necessary to perform certain repairs. *Id.* ¶ 264, Plaintiff also states, with no factual support, that Defendants have a market share of at least 50% in the MRO Services for their engines and parts, mirroring its conclusory allegations regarding Defendants' share of the engines and parts market. *Compare id.* ¶ 674, *with id.* ¶ 668. Plaintiff thus contends that Defendants have monopoly power in the **[*9]** MRO Services for their engines and parts. *Id.* ¶¶ 674-83.

C. ***The Dispute over Parts***

For more than a decade, Plaintiff would request MRO Services or engine parts from SafranHE USA or SafranHE Canada, and these Defendants would honor Plaintiff's requests. *Id.* ¶¶ 101-03. Moreover, Plaintiff allegedly had a business arrangement in which SafranHE USA provided it with access to technical information, allowing Plaintiff to perform MRO Services on Defendants' engines and parts. *Id.* ¶ 104.

According to the Complaint, Plaintiff would routinely send parts to SafranHE USA or SafranHE Canada, requesting a quote of an estimated cost for the inspection and service. *Id.* ¶ 109. SafranHE USA and SafranHE Canada would review the documentation, disassemble the parts, and develop a quote for Plaintiff's review, *Id.* ¶¶ 110-11. The parties would then negotiate the nature of the service and any remaining or unused parts would be promptly returned to Plaintiff certified as airworthy or marked "as is."[4] *Id.* ¶¶ 112-18, Between 2001 and 2010, SafranHE USA and SafranHE Canada allowed their customers to request "scrap parts" to be returned in their "as is" condition without SafranHE USA or SafranHE Canada certifying **[*10]** the parts as airworthy, repairable, or unserviceable. *Id.* ¶¶ 119-20. SafranHE USA and SafranHE Canada would also offer to compensate Plaintiff if its part was lost in their course of dealing. *Id.* ¶¶ 122-23.

SafranHE USA and SafranHE Canada did not, however, return to Plaintiff all of the parts it sent them for MRO Services. *Id.* ¶¶ 125-28 & Exs. A-C. They allegedly lost some of the parts after assigning them work order numbers. *Id.* ¶¶ 127-31. SafranHE USA and SafranHE Canada marked some other parts as "scrap" but sent them to SafranHE France to be made serviceable again. *Id* ¶¶ 136-38. According to Plaintiff, SafranHE USA and SafranHE Canada agreed to compensate Plaintiff for some of these parts, and the parties continued discussing compensation for the remaining lost parts. *Id.* ¶¶ 132-35, 139-47.

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[3] "Cross-elasticity" refers to the responsiveness of the demand for one product to a change in price of another product. This concept is used to define a product market in antitrust claims. *See United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377, 404, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. For example, if "a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane, it would be an indication that a high cross-elasticity of demand exists between [flexible wrappings and cellophane]; that the products compete in the same market." *Id. at 400*. If the products have low cross-elasticity of demand—i.e., a change in the price of one product does not affect demand for another product, then the products are likely competing in different markets.

[4] The Complaint does not explain what "as is" certification entails.

Plaintiff further alleges that SafranHE USA and SafranHE Canada instituted a policy of "defacing" parts by scratching through the part or serial number, engraving a triangle into the part, or otherwise physically damaging the part (the "Defacing Policy"). *Id.* ¶ 148. A part that has been defaced allegedly cannot be repaired or serviced pursuant to Federal Aviation Administration ("FAA") regulations. **[*11]** *Id.* ¶ 149. Even if a part was "scrap," it was still valuable to Plaintiff, Defendants, and their customers, because it could become approved for use in engines if, among other things, the manufacturer increased the usage or service life, or the manufacturer or the FAA approved a new repair method, *Id.* ¶¶ 150-51, Moreover, Plaintiff alleges that the defacing of its parts was contrary to the parties' course of dealing, FAA regulations, and SafranHE USA's and SafranHE Canada's terms and conditions. *Id.* ¶¶ 152-58, On prior occasions, SafranHE USA and SafranHE Canada allegedly offered to compensate Plaintiff for the defaced parts. *Id.* ¶¶ 156-57.

In late 2008 or early 2009, however, SafranHE USA began holding Plaintiff's unserviceable parts pending policy review and gave Plaintiff an option of either allowing SafranHE USA to hold Plaintiff's parts, or allowing it to return the parts defaced. *Id.* ¶¶ 159-60. Plaintiff claims that SafranHE USA did not inform it of any decision to change the original course of dealing, but also alleges that SafranHE USA began including language in their quotes authorizing SafranHE USA to deface the parts. *Id.* ¶¶ 162-63. SafranHE USA emailed Plaintiff about the **[*12]** new Defacing Policy on April 25, 2011, and sought to impose the policy on any part already stored. *Id.* ¶¶ 164, 290-92. Subsequent attempts to resolve the dispute were unfruitful, with SafranHE France requiring SafranHE USA to implement the policy, and Plaintiff objecting to it and refusing to allow its parts to be defaced. *Id.* ¶¶ 165-69, 171-76. Plaintiff claims that by this time, SafranHE Canada had already defaced some of Plaintiff's parts. *Id.* ¶ 170.

After Plaintiff filed the present action, Defendants announced that they would not deface parts before returning "unsalvageable parts" to customers, so long as the customers would sign an indemnification agreement holding Defendants harmless and commit not to equip Defendants' engines with unserviceable parts. *Id.* ¶¶ 176-77. Defendants' authorized service providers adopted similar requirements for returning unserviceable parts. *Id.* ¶¶ 178-82.

In addition to its allegations regarding the Defacing Policy, Plaintiff complains about Defendants' policy regarding engines and parts involved in an accident (the "Accident Policy") and SafranHE USA and SafranHE Canada's refusal to certify or return parts serviced by Plaintiff. *Id.* ¶ 185. Pursuant **[*13]** to the Accident Policy, Defendants allegedly restricted the scope of available repair services unless certain conditions are met, *id.* ¶ 184, and SafranHE USA refused to return Plaintiff's parts certified "as is." *Id.* ¶¶ 190, 193, 290-92. Plaintiff, however, alleges that it never agreed to be bound by this policy, that the policy is contrary to the parties' course of dealing, and that the policy is not required by FAA regulations. *Id.* ¶¶ 186-88, 191-92. Additionally, Defendants allegedly refused to repair or certify parts that Plaintiff serviced because Plaintiff was not "approved" to perform Level 3 and 4 services. *Id.* ¶¶ 194-95. As a result, Plaintiff contends that its parts are not as marketable or profitable. *Id.* ¶ 198.

D. *The Dispute over Plaintiff's Role as a Service Provider*

In 2007 and 2008, Plaintiff and SafranHE USA discussed allowing Plaintiff to be an authorized provider of "Level 3" MRO Services. *Id.* ¶ 383, To meet SafranHE USA's requirements, Plaintiff trained personnel and made other investments. *Id.* ¶ 385. Nonetheless, SafranHE France, through SafranHE USA, denied Plaintiff's request to become an authorized service provider in 2008 and again in 2009. *Id.* ¶¶ 386-88.

In 2010, **[*14]** however, SafranHE USA offered Plaintiff a Maintenance Authorization Agreement ("MAA"), which allowed Plaintiff to perform Level 3 maintenance. *Id.* ¶ 389. Plaintiff maintains that it could not negotiate any change to this agreement because of its significant investment, and so agreed. *Id.* The MAA obligated Defendants to provide Plaintiff with various documentation including technical information. *Id.* ¶¶ 389-92. Either party could terminate the MAA for any reason, provided it gave ninety days written notice. *Id.* ¶ 393. A breaching party had thirty days to cure a breach of the MAA. *Id.* ¶ 394.

In May 2012, SafranHE USA and SafranHE France terminated Plaintiff's access to certain technical information. *Id.* ¶¶ 395-402. Moreover, SafranHE USA allegedly breached the MAA by refusing to train Plaintiff's technicians. *Id.* ¶

411. Mike Gaines[5] admitted to SafranHE USA's president that the MAA was still in effect, but suggested that it be terminated. *Id.* ¶ 403. According to Plaintiff, SafranHE USA attempted to formally terminate the MAA in August 2014, when it sent Plaintiff a notice of termination due to Plaintiff's breach of the MAA. *Id.* ¶ 404. Plaintiff alleges, however, that the termination letter **[*15]** was not effective to terminate the agreement because Plaintiff did not receive notice that it was in breach of the MAA.[6] *Id.* ¶ 405. Plaintiff further alleges that it had a right to continued access to Defendants technical information because of its substantial investment. *Id.* ¶ 406.

E. *Alleged Anticompetitive Conduct*

According to Plaintiff, Defendants engaged in various anticompetitive conduct. Plaintiff's allegations can be grouped into the following categories: (1) MAAs; (2) the Defacing Policy and the Accident Policy; (3) the Fleet Service Agreements; (4) alleged price fixing; (5) alleged group boycott; (6) alleged exclusive supply agreements; (7) other restraints on MRO Services; and (8) monopolization allegations.

(1) *Maintenance Authorization Agreements*

Plaintiff alleges that the MAAs SafranHE USA signed with Plaintiff and Helicopter Services of Nevada LLC ("HSN") restrain competition in the engines and parts market and the MRO Services market. *Id.* ¶¶ 421-58. The MAAs purportedly insulate Defendants from rivals offering less expensive engine parts and services. *Id.* ¶¶ 433-34, 451-52. Plaintiff alleges to have been harmed by its own MAA and by SafranHE USA's MAA with HSN. *Id.* ***[*16]*** ¶¶ 438, 457. **(2) *Defacing and Accident Policies***

Plaintiff also complains that Defendants conspired together and with other MRO Service Providers to implement the "Defacing Policy" and the Accident Policy. *Id.* ¶¶ 270-76. SafranHE France specifically required authorized service providers to abide by the Defacing Policy, and Defendants required service providers to observe the Accident Policy through a series of service letters. *Id.* ¶¶ 275-77. For example, SafranHE USA and SafranHE France purportedly entered into contracts with service providers Heli-One Colorado, Inc., Heli-One Canada, Inc., and Heli-One American Support LLC (collectively "Heli-One"), Advanced Helicopter Services of Woodland, CA ("Advanced"), and Vector Aerospace Helicopter Services, Inc. ("Vector"), requiring the service providers to observe Defendants' policies. *Id.* ¶ 278. Thus, Heli-One, Advanced, and Vector have Defacing Policies, *Id.* ¶¶ 279-83. Additionally, Defendants and other service providers return unserviceable parts only after a customer agrees to indemnify and hold them harmless, and agrees not to use unserviceable parts in Defendants engines or other helicopters. *Id.* ¶¶ 285-87. Similarly, Plaintiff claims **[*17]** that SafranHE USA and SafranHE Canada contracted with Heli-One, Vector, and Advanced to enforce the Accident Policy, meaning that Plaintiff has no available provider to make parts involved in an accident serviceable again. *Id.* ¶ 288.

According to Plaintiff, the alleged contracts adopting, and the purported conspiracy to adopt, the Defacing Policy and Accident Policy suppresses intrabrand competition in both the engine and parts market and the MRO Services market. *Id.* ¶ 294. The contracts and conspiracy allegedly allow Defendants to entrench their position in the markets for their own parts and services. *Id.* ¶ 299. In other words, the alleged conduct is meant to prevent the emergence of a market for second-hand parts and for unauthorized repair centers. *Id.* ¶¶ 300-02.

(3) *Fleet Parts and Service Agreements*

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[5] The Complaint does not state who Gaines is.

[6] At an unspecified time, Defendants did notify Plaintiff that Plaintiff was breaching the MAA by failing to maintain trained technicians, failing to comply with audit requirements, and failing to maintain insurance. *Id.* ¶ 408. Plaintiff disputes that it breached any provision. *Id.* ¶ 408-10, 412.

SafranHE USA and SafranHE Canada allegedly entered into Fleet Service Agreements or Fleet Parts Agreements with owners of helicopter fleets. Under a Fleet Service Agreement, a fleet owner is granted access to technical information solely for the purpose of performing services on Defendants' parts that the owners owned, leased, or operated. *Id.* ¶ 461. SafranHE USA purportedly has such **[*18]** agreements with HSN and Papillon Airways, Inc. ("Papillon"). *Id.* ¶¶ 452-65. A Fleet Parts Agreement, in turn, provides that SafranHE USA's or SafranHE Canada's certification of any part they service for a fleet owner is nontransferable. *Id.* ¶ 479. According to Plaintiff, these agreements suppress intrabrand competition for Defendants' parts and have harmed Plaintiff. *Id.* ¶¶ 466, 471-75, 484, 489-94.

(4) ***Price Fixing***

Plaintiff claims that Defendants conspired to fix the price of MRO Services. *Id.* ¶ 497-502. Specifically, SafranHE USA allegedly entered into agreements with Heli-One, Advanced, Arrow Aviation Company LLC ("Arrow"), and Precision Aviation Services ("Precision"), whereby these service providers agreed not to "undercut" SafranHE USA's MRO Services pricing. *Id.* ¶¶ 497-500. Advanced, in turn, entered into similar agreements with Rorotech Services, Inc. ("Rorotech") and Helicopter Specialties, Inc. ("Helicopter Specialties"). *Id.* ¶ 501. Plaintiff contends that this scheme harms intrabrand competition and has caused Plaintiff to pay higher prices for MRO Services. *Id.* ¶¶ 508-12.

(5) ***Group Boycott***

According to the Complaint, Defendants were also concerned with whether Plaintiff was **[*19]** a true end user of its parts, or whether it was secretly reselling them. *Id.* ¶¶ 555-56. Defendants asked Plaintiff about the real end user and were allegedly not convinced by the information Plaintiff provided. *Id.* ¶¶ 557-59. Beginning in February 2015, SafranHE USA allegedly instructed its network of authorized service providers not to do business with Plaintiff. *Id.* ¶¶ 561-65. This alleged group boycott was aimed at eliminating the market for second-hand parts, and harmed competition and Plaintiff. *Id.* ¶¶ 560-77.

(6) ***Exclusive Supply Agreements***

Plaintiff claims that Defendants entered into exclusive supply agreements with Zodiac Aerospace ("Zodiac") and other vendors, such that the vendors agreed to supply engine parts and accessories only to Defendants. *Id.* ¶¶ 615-18. Defendants allegedly entered into such agreements to ensure control over pricing, quality, and reliability. *Id.* ¶¶ 617, 624, Plaintiff asserts that customers complain that these supply agreements increase time and cost. *Id.* ¶¶ 618-22. Plaintiff argues that this vertical restraint harmed Plaintiff, increased costs for consumers, and was unreasonable, unjustified, and anticompetitive. *Id.* ¶¶626-40.

(7) ***Other Restraints [*20] on MRO Services***

Plaintiff alleges that Defendants imposed other unreasonable restraints on MRO Services. Defendants allegedly: (1) required the use of Defendants' parts and prohibited the installation of a customer's own parts or parts from other repair stations not authorized by Defendants; (2) conditioned the sale of some services on the purchase of modifications a customer has not requested; and (3) conditioned the return of parts used in a level of service a customer is not allowed to perform on the return of the part to an authorized service center. *Id.* ¶¶ 644-53. These restraints harmed Plaintiff and are allegedly unreasonable, unjustified, and anticompetitive. *Id.* ¶¶ 653-65.

(8) ***Monopolization Allegations***

Finally, Plaintiff alleges that Defendants monopolized or attempted to monopolize the markets for Defendants engines and parts and MRO Services by: (1) preventing competition from manufacturers of substitute parts by directing repair centers to throw away any substitute part found in Defendants' engines and by informing its customers of this fact; and (2) preventing unauthorized repair centers from accessing Defendants' technical information. *Id.* ¶¶ 689-92, 701. By taking these **[*21]** actions, Defendants were purportedly able to obtain or maintain monopoly power in the relevant markets. *Id.* ¶¶ 693-96, 700.

F. *Summary of the Claims*

Plaintiff alleges thirty separate state and federal law claims against Defendants. For the sake of clarity, the Court will group these claims into four categories: (1) breach of contract claims; (2) antitrust claims; (3) tort claims; and (4) deceptive practices claims.

(1) *Breach of Contract Claims*

In Count I, Plaintiff alleges that SafranHE USA and SafranHE Canada breached an express or implied contract by losing, misappropriating, defacing, withholding, or refusing to certify Plaintiff's parts. In Count VIII, Plaintiff alleges that SafranHE USA and SafranHE France breached the MAA.

(2) *Antitrust Claims*

In Counts V and VI, brought under Sherman Act *§ 1* and California's Cartwright Act, respectively, Plaintiff alleges that Defendants are liable for conspiring and entering into the Defacing Policy and Accident Policy together and with other service providers. In Count VII, Plaintiff alleges that Defendants imposed the Defacing Policy on its unwilling customers in violation of Sherman Act *§ 1*. In Counts IX and X, Plaintiff alleges that the MAAs Defendants **[*22]** signed with Plaintiff and HSN unreasonably restrain trade in violation of Sherman Act *§ 1*. In Counts XI and XII, Plaintiff claims that the Fleet Service Agreements and the Fleet Parts Agreements violate Sherman Act *§ 1*. In Counts XIII and XIV, Plaintiff seeks to recover under Sherman Act *§ 1* and the Cartwright Act, respectively, for the alleged price fixing. Counts XVII and XVIII purport to state claims under Sherman Act *§ 1* and the Cartwright Act, respectively, for the alleged group boycott. In Count XX, Plaintiff claims that the alleged exclusive supply agreements violate *Sherman Act § 1*, Count XXI states a Sherman Act *§ 1* claim premised on the various other restraints Defendants impose on the MRO Services. In Counts XXII and XXIII Plaintiff seeks damages and an injunction for Defendants' alleged monopolization or attempted monopolization of the relevant markets under Sherman Act *§ 2*. Finally, Plaintiff appears to recast all of the alleged claims under the *Kansas Restraint of Trade Act* in Counts XXIV and XXV.

(3) *Tort Claims*

In Count II, Plaintiff alleges that Defendants are all liable as bailees for wrongful detention, conversion, or negligence of Plaintiff's parts. Plaintiff alleges in Counts III and IV that SafranHE **[*23]** France directed or induced SafranHE USA and SafranHE Canada to breach their contracts with Plaintiff, and so is liable for tortious interference with contracts or existing business relationships. In Counts XV and XVI, Plaintiff alleges that SafranHE USA is liable for tortious interference because it instructed Advanced to breach its contracts with Plaintiff, to not do business with Plaintiff, or to refuse to extend Plaintiff credit, and otherwise restricted that business relationship. In Count XIX, Plaintiff claims that SafranHE USA tortiously interfered with its business relationship with Zodiac by instructing it not to deal with Plaintiff. Count XXVI recasts the aforementioned conduct as a claim for civil conspiracy.

(4) ***Deceptive Practices Claims***

Plaintiff alleges two sets of claims arising out of SafranHE USA's allegedly deceptive conduct. First, according to Plaintiff, SafranHE USA falsely stated in service bulletins and marketing that all manuals and technical documentation were proprietary and not available to service providers not approved by SafranHE USA. *Id.* ¶¶ 733-36. This statement was allegedly false because the FAA recently suggested that a manufacturer may not deny access **[*24]** to such technical information. *Id.* ¶¶ 737, 745, 758. Plaintiff alleges in Counts XXVII and XXVIII that these statements are actionable under Lanham Act *§ 35* or as common law unfair competition through deceptive marketing. *Id.* ¶¶ 732-63.

Second, Plaintiff complains of a certain helicopter engine module ("Module 3"). *Id.* ¶ 765, SafranHE USA allegedly serviced and overhauled this module in October 2009. *Id.* ¶ 766. At the time of the service, SafranHE USA allegedly knew that its current service procedure caused problems with the module's blades, and had already developed a new procedure to address this problem. *Id.* ¶¶ 773-76. Nonetheless, SafranHE USA allegedly serviced the module pursuant to the old procedure, concealed the issue from the owner of the module, and intentionally or negligently misrepresented to the owner that the module would operate for 800 hours. *Id.* ¶¶ 769, 778-79. After Plaintiff purchased the module and resold it to "Heli Afrique," it failed after only 96.5 hours of service. *Id.* ¶¶ 770, 784. SafranHE USA refused to repair it, informing Plaintiff that there was no justifiable reason for extending the warranty period. *Id.* ¶¶ 784-86, 789. Based on the foregoing allegations, **[*25]** Plaintiff alleges that SafranHE USA's statements regarding the availability of the new service procedure and the lack of justifiable reason for extending the warranty were false or misleading. *Id.* ¶¶ 789, 797, 800-12. Plaintiff seeks to hold SafranHE USA liable for these alleged false statements in Count XXIX, under the DTPA, and in Count XXX, under theories of misrepresentation or concealment.

G. ***Pending Motions***

In their Motions, Defendants raise multiple reasons for the Court to dismiss twenty-seven Counts in whole or in part. SafranHE USA argues that Plaintiff did not sufficiently plead claims under the Sherman Act, Cartwright Act, Kansas Restraint of Trade Act, Lanham Act, or for unfair competition, tortious interference, and civil conspiracy. *See* Br. of SafranHE USA (hereinafter, "Br.") 3-17, 19-25. SafranHE USA also argues that some of Plaintiff's antitrust claims are barred by the applicable statutes of limitations. *See id.* 17-19. The International Defendants join SafranHE USA's arguments, but also ask the Court to dismiss the alter ego allegations, to hold that the Court lacks subject matter jurisdiction over the antitrust claims, and to hold that SafranHE France is not subject to personal **[*26]** jurisdiction over any claims asserted against it. *See* Int'l Defs.' Br. 4-25.

II. LEGAL STANDARDS

A. ***Subject Matter Jurisdiction***

Under the Constitution, a federal court may decide only actual cases or controversies. *U.S. CONST. art. III, § 2*. A court properly dismisses a case where it lacks the constitutional power to decide it. *See* *Home Builders Ass'n of Miss., Inc. v. City of Madison, 143 F.3d 1006, 1010 (5th Cir. 1998)*. Dismissal for lack of subject matter jurisdiction is warranted when "it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Gilbert v. Donahoe, 751 F.3d 303, 307 (5th Cir. 2014)* (quoting *Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001))*. "Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Ramming, 281 F.3d at 161* (citing *Barrera-Montenegro v. United States, 74 F.3d 657, 659 (5th Cir. 1996))*.

B. *Personal Jurisdiction*

Federal Rule of Civil Procedure 12(b)(2) allows defendants to move to dismiss claims for lack of personal jurisdiction. The plaintiff bears the burden of making a prima facie showing that a court has personal jurisdiction over a defendant. *Monkton Ins. Servs., Ltd. v. Ritter, 768 F.3d 429, 431 (5th Cir. 2014)*. In considering a motion to dismiss pursuant to *Rule 12(b)(2)*, the court must accept the plaintiff's "uncontroverted allegations, and resolve in its favor all conflicts." *Alpine View Co. v. Atlas Copco AB, 205 F.3d 208, 215 (5th Cir. 2000)* **[*27]** . The court may consider "affidavits, interrogatories, depositions, oral testimony, or any combination of the recognized methods of discovery." *Stuart v. Spademan, 772 F.2d 1185, 1192 (5th Cir. 1985)*.

Because Texas's long-arm statute extends to the limits of federal due process, this Court has personal jurisdiction over a nonresident defendant so long as the assertion of jurisdiction comports with the *Due Process Clause of the United States Constitution*. *See Sangha v. Navig8 Shipmanagement Private Ltd., 882 F.3d 96, 101 (5th Cir. 2018)*. "Due process requires that the defendant have 'minimum contacts' with the forum state . . . and that exercising jurisdiction is consistent with 'traditional notions of fair play and substantial justice,'" *Id.* (quoting *Johnston v. Multidata Sys. Int'l Corp., 523 F.3d 602, 609 (5th Cir. 2008))*.

Personal jurisdiction can be general or specific. *See Lewis v. Fresne, 252 F.3d 352, 358 (5th Cir. 2001)*. General jurisdiction allows a court to hear any claim against a nonresident defendant, and it exists when that defendant's "affiliations with [Texas] are so 'continuous and systematic' as to render them essentially at home in [Texas]." *Daimler AG v. Bauman, 571 U.S. 117, 127, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014)* (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011))*. "Establishing general jurisdiction is 'difficult' and requires 'extensive contacts between a defendant and a forum,'" *Sangha, 882 F.3d at 101-02* (quoting *Johnston, 523 F.3d at 609*).

In evaluating specific jurisdiction, courts consider:

> (1) whether the defendant has minimum contacts with the forum state, i.e., whether it purposely directed its activities toward **[*28]** the forum state or purposefully availed itself of the privileges of conducting activities there; (2) whether the plaintiffs cause of action arises out of or results from the defendant's forum-related contacts; and (3) whether the exercise of personal jurisdiction is fair and reasonable.

Carmona v. Leo Ship Mgmt., Inc., 924 F.3d 190, 193 (5th Cir. 2019) (quoting *Seiferth v. Helicopteros Atuneros, Inc., 472 F.3d. 266, 271 (5th Cir. 2006))*. "In order for a . . . court to exercise specific jurisdiction, 'the suit' must aris[e] out of or relat[e] to the defendant's contacts with the *forum*.'" *Bristol-Myers Squibb Co. v. Super. Ct., 137 S. Ct. 1773, 1780, 198 L. Ed. 2d 395 (2017)* (first alteration added) (quoting *Daimler AG, 571 U.S. at 127*). "In other words, there must be 'an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.'" *Id.* (alteration in original) (quoting *Goodyear, 564 U.S. at 919*).

The minimum contacts analysis is fact intensive, and the touchstone is "whether the defendant's conduct shows that it 'reasonably anticipates being hauled into court'" in the forum state. *McFadin v. Gerber, 587 F.3d 753, 759 (5th Cir. 2009)* (quoting *Luv n' Care, Ltd. v. Insta-Mix, Inc., 438 F.3d 465, 470 (5th Cir. 2006))*. Once the plaintiff establishes minimum contacts, the burden shifts to the defendant to show that the exercise of jurisdiction is "unfair and unreasonable." *Sangha, 882 F.3d at 102*. In determining whether the defendant has carried this burden, courts **[*29]** balance five factors: (1) the burden on the nonresident defendant of having to defend itself in the forum; (2) the interests of the forum state in the case; (3) the plaintiffs interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in the most efficient resolution of controversies; and (5) the shared interests of the states in furthering fundamental social policies. *Id.*

C. *Failure to State a Claim*

To defeat a motion to dismiss filed pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 742 (5th Cir. 2008)*. To meet this "facial plausibility" standard, a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Plausibility does not require probability, but a plaintiff must establish "more than a sheer possibility that a defendant has acted unlawfully." *Id.* The court must accept well-pleaded facts as true and view them in the light most favorable to the plaintiff. *Sonnier v. State Farm Mut. Auto. Ins., 509 F.3d 673, 675 (5th Cir. 2007)*. However, the court does not accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions." *Ferrer v. Chevron Corp., 484 F.3d 776, 780 (5th Cir. 2007)*. A plaintiff must provide **[*30]** "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555* (internal citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (internal citations omitted).

The ultimate question is whether the complaint states a valid claim when viewed in the light most favorable to the plaintiff. *Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 312 (5th Cir. 2002)*. At the motion to dismiss stage, the court does not evaluate the plaintiff's likelihood of success. It only determines whether the plaintiff has stated a claim upon which relief can be granted. *Mann v. Adams Realty Co., 556 F.2d 288, 293 (5th Cir. 1977)*.

III. ANALYSIS

A. *Alter Ego*

The Complaint states that "[D]efendants are the alter-egos of one another." Third Am. Compl. ¶¶ 20-24. A sufficiently pleaded alter ego theory could affect the Court's analysis of the challenges to its subject matter jurisdiction or its personal jurisdiction over the International Defendants, and so the Court will address this issue first. *See, e.g.*, *Patin v. Thoroughbred Power Boats Inc., 294 F.3d 640, 653 (5th Cir. 2002)* ("[A] court [may] exercise personal jurisdiction over . . . a corporation that would not ordinarily be subject to personal jurisdiction **[*31]** in that court when the . . . corporation is an alter ego . . . of a corporation that would be subject to personal jurisdiction in that court." (collecting cases)).

The Court resolves alter ego issues by considering "the totality of the circumstances," in light of the following list of non-exhaustive factors:

> (1) the parent and the subsidiary have common stock ownership; (2) the parent and the subsidiary have common directors or officers; (3) the parent and the subsidiary have common business departments; (4) the parent and the subsidiary file consolidated financial statements and tax returns; (5) the parent finances the subsidiary; (6) the parent caused the incorporation of the subsidiary; (7) the subsidiary operates with grossly inadequate capital; (8) the parent pays the salaries and other expenses of the subsidiary; (9) the subsidiary receives no business except that given to it by the parent; (10) the parent uses the [subsidiary's] property as its own; (11) the daily operations of the two corporations are not kept separate; and (12) the subsidiary does not observe the basic corporate formalities, such as keeping separate books and records and holding shareholder and board meetings. **[*32]**

Gundle Lining Constr. Corp. v. Adams Cty. Asphalt, Inc., 85 F.3d 201, 208-09 (5th Cir. 1996) (quoting *United States v. Jon-T Chems., Inc., 768 F.2d 686, 691-92, 694 (5th Cir. 1985))*. Texas state courts consider similar factors. *See, e.g.*, *Mancorp, Inc. v. Culpepper, 802 S.W.2d 226, 229 (Tex. 1990)*. Generally, the Court will only find corporations to be alter egos of one another "when there is such unity between [the corporations] that the separateness of the corporation[s] has ceased and holding only [one] corporation liable would result in injustice," *SEC v. Res. Dev. Int'l*

LLC, 487 F.3d 295, 302 (5th Cir. 2007) (quoting Castleberry v. Branscum, 721 S.W2d 270, 272 (Tex. 1986)). The Court can dismiss an alter ego claim where the complaint lacks sufficient factual allegations to state the claim. *See, e.g.,* In re Parkcentral Global Litig., Civ. A. No, 3:09-CV-0765-M, 2010 U.S. Dist. LEXIS 79385, 2010 WL 3119403, at *10-11 (N.D. Tex. Aug. 5, 2010) (dismissing a claim to pierce the corporate veil); Rolls-Royce Corp. v. Heros, Inc., 576 F. Supp. 2d 765, 789 (N.D. Tex. 2008) (dismissing alter ego claim where complaint was devoid of factual assertions in support of it).

The Court finds that the Complaint lacks sufficient factual allegations to suggest that the Defendants are alter egos of one another. First, the Court does not credit Plaintiff's conclusory allegation that "there has existed . . . a unity of interest in ownership and control between [Defendants]." Third Am. Compl. ¶ 20. This leaves only one allegation to support the alter ego theory: that SafranHE France exercised substantial decision-making power over the other Defendants. *See id.* ¶¶ 21-24. After foraging the Complaint **[*33]** for examples of such control, the Court found the following allegations: (1) SafranHE France decided who would be an authorized service provider, *see id.* ¶¶ 52-53; (2) SafranHE France imposed various policies upon the other Defendants, *see id.* ¶¶ 55, 149, 186; and (3) the other Defendants shipped parts to SafranHE France for repairs, *see id.* ¶ 138. Even accepting these allegations as true, the relationship between Defendants is a far cry from "such unity between [the corporations] that the separateness of the corporation[s] has ceased." Res. Dev. Int'l, 487 F.3d at 302. Thus, the Court finds that Plaintiff did not plead sufficient facts to show that Defendants are alter egos of one another, Accordingly, the Court grants the Motions as to the alter ego allegations and will treat Defendants separately for jurisdictional purposes.

B. *Jurisdiction*

Having determined that the Complaint does not state a viable alter ego claim, the Court now turns to whether the Complaint alleges sufficient facts to establish the Court's subject matter jurisdiction and personal jurisdiction. Here, Defendants raise four arguments: (1) that the Foreign Trade Antitrust Improvements Act ("FTAIA") bars the federal antitrust claims against them; **[*34]** (2) that the FTAIA also bars the state antitrust claims; (3) that Plaintiff lacks standing to bring a Cartwright Act claim; and (4) that the Court lacks personal jurisdiction over SafranHE France. For the reasons stated below, the Court finds that it lacks subject matter jurisdiction over Counts IX and X as to the International Defendants, lacks subject matter jurisdiction over Count XI as to SafranHE Canada, and lacks personal jurisdiction over SafranHE France as to Count II. The Court otherwise denies the Motions to dismiss on these bases.

(1) *FTAIA and Sherman Act Claims*

The FTAIA limits the application of the federal antitrust laws when non-import foreign commerce is involved. *See* 15 U.S.C. § 6a; Den Norske Stats Oljeselskap As v. HeereMac v.o.f., 241 F.3d 420, 421 (5th Cir. 2001). The FTAIA specifically excludes claims under the Sherman Act for non-import activity unless (1) the conduct has a direct, substantial, and reasonably foreseeable effect on United States imports, domestic commerce, or United States exports, and (2) such effect gives rise to a claim under the Sherman Act. *See* 15 U.S.C. § 6a(1); Hartford Fire Ins. v. California, 509 U.S. 764, 796 n.23, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993). The FTAIA also "precludes subject matter over claims by foreign plaintiffs against defendants where the situs of the injury is overseas and that injury arises from effects in a non-domestic market." **[*35]** Den Norske, 241 F.3d at 428.

In this case, the Court finds that the FTAIA does not bar the antitrust claims pleaded in Counts V, VII, XI (against SafranHE France only), XII, XIII, XVII, XXI, and XXII. For these Counts, Plaintiff alleged that the International Defendants' conduct harmed domestic commerce and Plaintiff, a domestic corporation. *See, e.g.*, Third Am. Compl. ¶¶ 298, 374, 702. Moreover, Plaintiff alleged that the International Defendants either directly participated in the U.S. markets, *see, e.g., id.* ¶¶ 245, 285, 358, 672, 701, entered into alleged anticompetitive agreements with U.S. companies, *see, e.g., id.* ¶¶ 273, 278, 280, 463, 479, 503, or allegedly conspired to restrain U.S. commerce, *see, e.g.*, ¶¶ 270, 483, 561, 643, 645. At this stage of the litigation, these allegations are sufficient for the Court to exercise subject matter jurisdiction over these claims.

Conversely, the Court finds that it lacks subject matter jurisdiction over the antitrust claims asserted against the International Defendants in Counts IX and X, and against SafranHE Canada in Count XI. In Counts IX and X, Plaintiff alleged only that SafranHE France had a practice of denying access to technical information to unauthorized **[*36]** service centers, *see id.* ¶¶ 425, 444, and that SafranHE France "approved the restraint in the . . . MAA[s]." *See id.* ¶¶ 426, 444. Plaintiff cannot, however, state a Sherman Act *§ 1* claim against SafranHE France premised on its approval of the contract alone, absent allegations that it was a party to the contract or a co-conspirator, *See* *Rio Grande Royalty Co. v. Energy Transfer Partners, L.P., 786 F. Supp. 2d 1190, 1199-1200 (S.D. Tex. 2009)*. As for SafranHE Canada, the Complaint is silent about its involvement in these allegations; therefore, Plaintiff has not pleaded conduct that gives rise to a Sherman Act claim against SafranHE Canada in these Counts. *See* *15 U.S.C. § 6a(1)*; *Hartford Fire Ins., 509 U.S. at 796 n.23*..

Accordingly, the Court finds that it lacks subject matter jurisdiction over Counts IX and X insofar as they are pleaded against the International Defendants, and Count XI against SafranHE Canada.

(2) ***FTAIA and State Law Antitrust Claims***

The International Defendants assert that the FTAIA also bars the Kansas and California antitrust claims against them (Counts VI, XIV, XVIII, XXIV, and XXV), *see* Int'l Defs.' Br. 17-18, and Plaintiff does not respond to this argument. The Court, however, liberally construes Plaintiff's Response to encompass the International Defendants' challenge of this Court's subject matter jurisdiction over the state **[*37]** antitrust claims. First, the Court notes that it is without binding authority as to whether the FTAIA extends to state law claims. Some federal courts have concluded that it does. *See* *Proview Tech. Inc. v. AU Optronics Corp. (In re TFT-LCD Flat Panel Antitrust Litig.), No. C 12-3802 SI, 2014 U.S. Dist. LEXIS 57828, 2014 WL 1568870, at *4 (N.D. Cal. Apr. 18, 2014)* (collecting cases, but refusing to reach the issue). The Court does not need to decide this question, however, because all of the state law claims allege that the International Defendants engaged in domestic conduct that caused domestic harm. *See* Third Am. Compl. ¶¶ 311, 326, 338, 341, 517-21, 523, 530, 532, 588, 592, 597, 710-12, 719-21. Accordingly, even if the Court found that the FTAIA extends to the Cartwright Act and the Kansas Restraint of Trade Act, a conclusion the Court specifically does not reach, the Court would find that it has subject matter jurisdiction over these claims.

(3) ***Personal Jurisdiction***

SafranHE France also moves to dismiss all claims brought against it, arguing that the Court lacks personal jurisdiction over it. The Court finds that it lacks personal jurisdiction over SafranHE France as to Count II, but finds that it has specific or pendent personal jurisdiction over **[*38]** SafranHE France as to the other Counts.

a. ***General Jurisdiction***

As explained above, general jurisdiction allows a court to hear any claim against a nonresident defendant, and it exists when that defendant's "affiliations with [Texas] are so 'continuous and systematic' as to render them essentially at home in [Texas]." *Daimler AG, 571 U.S. at 127* (quoting *Goodyear, 564 U.S. at 919*). "It is . . . incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business." *Monkton, 768 F.3d at 432* (citations omitted). Plaintiff does not contend in its response that the Court has general jurisdiction over SafranHE France. Nor could it, as the Complaint makes clear that SafranHE France is a French company. *See* Third Am. Compl. ¶ 7. Moreover, SafranHE France's main customer is headquartered in France, and nothing in the Complaint suggests that SafranHE France's principal place of business is anywhere in the United States. *See id.* ¶ 71. Accordingly, the Court finds that it lacks general jurisdiction over SafranHE France.

b. ***Specific Jurisdiction***

The specific jurisdiction analysis differs for federal antitrust claims and state law claims. For the federal antitrust claims, "jurisdiction over [SafranHE France] **[*39]** may be obtainable based on nationwide contacts rather than just Texas contacts," because Congress authorized nationwide service of process for these claims. *Access Telecom, Inc. v. MCI Telecomms. Corp., 197 F.3d 694, 718 (5th Cir. 1999)* (citing *15 U.S.C. § 22*). For state law claims, however, the focus is on SafranHE France's contacts with Texas, because "'the suit' must 'aris[e] out of or relat[e] to the defendant's contacts with the *forum*.'" *Bristol-Myers Squibb, 137 S. Ct. at 1780* (quoting *Daimler AG, 571 U.S. at 127*). Regardless,

> Pendent personal jurisdiction "exists when a court possesses personal jurisdiction over a defendant for one claim, lacks an independent basis for personal jurisdiction over the defendant for another claim that arises out of the same nucleus of operative fact, and then, because it possesses personal jurisdiction over the first claim, asserts personal jurisdiction over the second claim."

*Nat'l Oil Well Varco, L.P. v. Sadagopan, Civ. A. No. H-16-2261, 2017 U.S. Dist. LEXIS 107115, 2017 WL 2957908, at *6 (S.D. Tex. July 11, 2017)* (quoting *Rolls-Royce, 576 F. Supp. 2d at 783*). "The decision to exercise pendent personal jurisdiction is discretionary with the court." *GE Capital Corp. v. Mackzilla, LLC, Civ. A. No. H-15-2425, 2016 U.S. Dist. LEXIS 34752, 2016 WL 1059529, at *5 (S.D. Tex. Mar. 17, 2016)* (citing *Rolls-Royce, 576 F. Supp. 2d at 784*). "Although the Fifth Circuit has not yet addressed pendent personal jurisdiction, this district and every circuit to decide the issue have approved the doctrine." *Id.* In this case, SafranHE **[*40]** France argues that Plaintiff did not plead sufficient minimum contacts for the Court to exercise jurisdiction over it, but does not argue that the exercise of personal jurisdiction would be otherwise unfair or unreasonable. *See* Int'l Defs.' Br. 18-21.

The Court finds that it has specific or pendent personal jurisdiction over SafranHE France as to Counts III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XXI, XXII, XXIII, XXIV, XXV, and XXVI. For each of these Counts, Plaintiff alleged that SafranHE France either contracted with, conspired with, or directed a Texas or domestic entity to engage in certain conduct—e.g., to adopt the Defacing and Accident Policies, to authorize the defacing of unserviceable parts, or to set prices, refuse services to a customer. *See, e.g.*, Third Am. Compl. ¶¶ 278, 350, 498-503, 558-62. The Court finds that these allegations suffice to show minimum contacts with the forum and a claim arising out of those contacts. *See* *Access Telecom, 197 F.3d at 719* ("While [the defendant] did not conduct much business in Texas, it conducted a high volume of business with Texas and Texas corporations. It was this business with which [the defendant] was concerned when [it] allegedly canceled [the plaintiff's] **[*41]** numbers. Such actions, if done without a legal right, may amount to a violation of U.S. law."). Even if specific jurisdiction did not exist as to one or more of these claims, the Court finds that these claims arise out of a common nucleus of operative facts and exercises pendent jurisdiction as to these claims.

On the other hand, the Court finds that Plaintiff did not plead sufficient facts for the Court to exercise specific or pendent personal jurisdiction over SafranHE France as to Count II, in which Plaintiff claims that SafranHE France converted Plaintiff's property. The Fifth Circuit addressed this precise issue in *Pervasive Software Inc. v. Lexware GmbH & Co. KG, 688 F.3d 214 (2012)*. In *Pervasive*, the Fifth Circuit considered whether specific jurisdiction existed over a German corporation regarding a claim of conversion of property. *See* *id. at 229*. The Fifth Circuit noted that specific jurisdiction would exist if the German corporation committed the tort "in whole or in part" in Texas. *Id.* (quoting *Tex. Civ. Prac. & Rem. Code Ann § 17.042*). Finding that the complaint alleged that the German corporation had offices only in Germany and did not allege that any act occurred in Texas, the Fifth Circuit concluded that the alleged conversion occurred in Germany and so did not fall under Texas's long-arm **[*42]** statute. *Id.* (citations omitted).

The Court finds the present case analogous. Plaintiff alleged that SafranHE France, a French company, converted and refused to return Plaintiff's property. *See* Third Am. Compl. ¶¶ 211, 218. There are no allegations showing that SafranHE France took any tortious action in Texas. Accordingly, the Court lacks specific jurisdiction over SafranHE France as to Count IL The Court further finds that the conversion allegations do not arise out of the same nucleus of operative fact as the other claims and so declines to exercise pendent personal jurisdiction over SafranHE France as to this Count. For these reasons, the Court grants the International Defendants' Motion as to Count II.

(4) ***Standing under the Cartwright Act***

SafranHE USA challenges Plaintiff's Cartwright Act claims, arguing that Plaintiff has not alleged that it was injured in California. *See* Br. 19-20. The Court construes this as a challenge to Plaintiff's standing to bring these claims. The Cartwright Act "is California's version of the federal Sherman Act and sets forth California's antitrust laws." *Cellular Plus, Inc. v. Super. Ct., 14 Cal. App. 4th 1224, 1232 n.2, 18 Cal. Rptr. 2d 308 (1993)*. In order for a private plaintiff to have standing to sue under the Cartwright Act, the plaintiff **[*43]** must prove antitrust injury, "which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id. at 1234* (citations omitted). Standing is broader under the Cartwright Act than under the Sherman Act, because the Cartwright Act allows even indirect purchasers to recover. *Lorenzo v. Qualcomm Inc., 603 F. Supp. 2d 1291, 1302 (S.D. Cal. 2009)*. Here, Plaintiff alleges that its injury implicates California because the various conspiracies involve Advanced, which appears to be a corporation located in California. *See* Third Am. Compl. ¶¶ 98, 338, 530, 597. The Complaint also suggests that Plaintiff was Advanced's customer. *See, e.g., id.* ¶¶ 283, 536. For the purposes of the pending motions, the Court finds that these allegations, viewed in the light most favorable to Plaintiff, are sufficient to confer standing upon Plaintiff as a customer of a California company, *See* *Lorenzo, 603 F. Supp. 2d at 1302* (quoting *Cellular Plus, 14 Cal. App. 4th at 1233*)).

C. *Failure to State a Claim*

Defendants further contend that the Complaint does not include sufficient facts to state twenty-six of the thirty causes of action alleged therein. Defendants do not challenge the sufficiency of the pleadings as to the alleged breach of contract involving Plaintiff's parts, wrongful detention, **[*44]** conversion, or negligence as to the parts, violation of the DTPA, and misrepresentation or concealment. For the following reasons, the Court grants the Motion as to every challenged claim except Count XV.[7]

(1) *Antitrust Claims*

a. *Sherman Act § 1*

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . , or conspiracy in [unreasonable] restraint of trade or commerce." *MM Steel, L.P. v. JSW Steel (USA) Inc., 806 F.3d 835, 848 (5th Cir. 2015)* (alteration in original) (quoting *15 U.S.C. § 1*). "[A] key distinction in ***antitrust law***" is that certain restraints on trade are deemed per se illegal while others are analyzed under the rule of reason. *Id.* Thus, the Court will first determine whether the claims should be analyzed under the rule of reason or per se mode of analysis, and will then address the sufficiency of Plaintiff's allegations for these claims.

i. *Mode of Analysis*

Most arrangements challenged under *§ 1* are analyzed under the "rule of reason," which "requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition." *Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 343, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*. Experience has shown, however, that certain arrangements are generally found to be unlawful under the rule of reason, and so are presumed to unreasonably restrain **[*45]** competition. *Id. at 344*. These practices are referred to as per se violations and include certain types of "price fixing, division of markets, group boycotts and tying arrangements." *N. Tex. Speciality Physicians v. FTC, 528 F.3d 346, 360 (5th Cir. 2008)* (quoting *Maricopa Cty., 457 U.S. at 344 n.15*); *but see* *Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 887, 899, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* (holding that vertical price fixing is analyzed under rule of reason); *Meyer, Inc. v. Barr Pharm., Inc., 572 F. Supp. 2d 38, 48-49 (D.D.C. 2008)* (collecting cases where exclusive supply agreements were analyzed

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[7] To the extent the Court already dismissed a claim in whole or in part, the following analysis constitutes additional grounds for dismissing that claim.

under rule of reason). Courts generally do not expand the per se category absent demonstrable economic effect and a substantial history of declaring particular conduct unlawful. *See* *Abadir & Co. v. First Miss. Corp., 651 F.2d 422, 428 (5th Cir. Unit A July 1981)* (first quoting *Cont'l T. V.., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*; and then quoting *United States v. Topco Assocs., Inc., 405 U.S. 596, 607, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972))*.

Counts V, VII, IX, X, XI, XII, XX, and XXI[8] appear to be premised on contracts or conspiracies between entities at different levels of the distribution chain. Such vertical restraints are analyzed under the rule of reason. *See, e.g.,* *Sylvania, 433 U.S. at 58* (holding that vertical restraints are generally analyzed under rule of reason); *Abadir & Co., 651 F.2d at 428* (refusing to extend per se category to "include all suppliers who also compete with their distributors"). Even if these Counts alleged contracts or conspiracies between competitors alone, these Counts do not allege price fixing, division of markets, group boycotts, or tying arrangements, and the Court will not unduly expand the per **[*46]** se category. Thus, the Court will analyze Counts V, VII, IX, X, XI, XII, XX, and XXI under the rule of reason.

This leaves Counts XIII and XVIII, which are labeled "price fixing" and "group boycott," respectively. *See* Third Am. Compl, 77, 90. Viewing the Complaint in the light most favorable to Plaintiff, the Court finds that Count XIII alleges a conspiracy to set prices among competitors. *See, e.g., id.* ¶ 497 ("SafranHE USA and Heli-One [agreed] not [to] undercut SafranHe [sic] USA's MRO services pricing . . . ."). Horizontal price fixing agreements are per se unlawful. *See* *N. Tex. Speciality, 528 F.3d at 360*. For the purpose of resolving the pending Motions, therefore, the Court will apply the per se mode of analysis to Count XIII.

With regard to the group boycott claim, "[t]he Supreme Court has regularly applied per se liability to agreements described as 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.'" *MM Steel, 806 F.3d at 848* (quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 294, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985))*. Viewed in the light most favorable to Plaintiff, the Complaint appears to suggest that Defendants and other authorized repair centers conspired not to sell parts to **[*47]** Plaintiff, a competitor. *See* Third Am. Compl. ¶¶ 554, 564. Accordingly, the Court will analyze Count XVII under the per se mode of analysis for the purpose of resolving the pending Motions.

ii. *Per Se Claims*

Although price fixing and group boycotts generally are found to be per se unlawful, it is not enough for a plaintiff to summarily assert that a price fixing or group boycott conspiracy is afoot. The Supreme Court analyzed the sufficiency of conspiracy allegations in *Bell Atlantic Corp. v. Twombly*, and held that a complaint must state more than "an allegation of parallel conduct and a bare assertion of conspiracy." *550 U.S. at 556*; *see also* *Schafer v. State Farm Fire & Cas. Co., 507 F. Supp. 2d 587, 596-97 (E.D. La. 2007)* (finding that the plaintiff did not adequately plead the existence of a conspiracy).

The Court finds that Plaintiff did not plead sufficient facts to state a conspiracy either to fix prices or to boycott Plaintiff. Count XIII, for example, alleges that Defendants conspired to fix prices through a series of agreements with competitors. *See* Third Am. Compl. ¶¶ 495-514. The Complaint does not mention, however, any agreement to which SafranHE Canada or SafranHE France was a party. Even when the Complaint discusses a specific agreement, the Complaint states no more **[*48]** than that SafranHE USA entered into agreements with its

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[8] On its own review of the Complaint, the Court is of the opinion that Count XXI includes allegations that could be construed as giving rise to a tying claim under the Sherman Act. Although Plaintiff never raises this legal theory, "[t]o survive a 12(b)(6) motion to dismiss, a complaint need not correctly categorize the legal theories giving rise to the claims." *Rathborne v. Rathborne, 683 F.2d 914, 917 n.8 (5th Cir. 1982)*; *see also* *Shippitsa Ltd. v. Slack, Civ. A. No. 3:18-CV-1036-D, 2019 U.S. Dist. LEXIS 121994, 2019 WL 3304890, at *12 (N.D. Tex. July 23, 2019)* ("Even if [the] complaint fails to identify a specific legal theory, the court cannot dismiss it on that ground."). Accordingly, the Court addresses a potential tying claim and dismisses it for the reasons stated below. *See infra* § III.C.1.c.

competitors "not to undercut SafranHe [sic] USA's service pricing." *See id.* ¶¶ 497-502. This allegation simply rephrases the claim—i.e., that SafranHE USA contracted with competitors to fix prices. Plaintiff did not allege facts showing the purported conspiracy, such as allegations showing a decrease in price competition, changes in pricing, or other facts establishing "more than a sheer possibility that [Defendants] ha[ve] acted unlawfully." *Iqbal, 556 U.S. at 678*. Similarly, Count XVII describes in significant detail how Defendants and other companies keep track of the end user of their products, *see* Third Am, Compl. ¶¶ 555-60, and then summarily states that "SafranHE USA instructed Advanced . . . as well as the entire network of repair centers ... not to do business with [Plaintiff]." *Id.* ¶ 561. These allegations, without more, are conclusory and do not raise Plaintiff's claim above the speculative level.[9] Accordingly, the Court grants the Motions as to Counts XIII and XVII.

iii. *Rule of Reason Claims*

(a) *Market Definition*

For the Court to declare a contract or conspiracy unlawful under the rule of reason, a plaintiff must allege that the contract or **[*49]** conspiracy restrains a particular market. *See* *MM Steel, 806 F.3d at 843* (quoting *Spectators' Commc'n Network Inc. v. Colonial Country Club, 253 F.3d 215, 220 (5th Cir. 2001))*; *Muenster Butane, Inc. v. Stewart Co., 651 F.2d 292, 295 (5th Cir. Unit A July 1981)*. To allege a relevant market, a plaintiff must allege a product market and a geographic market. *See* *PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 615 F.3d 412, 417 (5th Cir. 2010)*. A product market is defined by considering cross-elasticity of demand—i.e., two products are in the same market if an increase in the price of one product increases demand for another product. *See* *E.I. du Pont, 351 U.S. at 404*. Although the definition of the product market usually presents a question of fact, the Court may determine it as a matter of law:

> [w]here the plaintiff fails to define its proposed [product] market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor. . . .

Apani Sw., Inc. v. Coca-Cola Enters., Inc., 300 F.3d 620, 628 (5th Cir. 2002).

The geographic market is based on the area of "effective competition ... [which] must be charted by careful selection of the market area in which the seller operates and to which the buyers can practicably turn for supplies." *Id. at 626* (citation omitted). Specifically, the geographic market includes all areas "not just where consumers currently purchase the product, but where **[*50]** consumers could turn for alternative products or sources of the product if a competitor raises prices." *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1, 309 F.3d 836, 840 (5th Cir. 2002)*. Here, the market definition is deficient in several ways.

Plaintiff alleges two product markets: a market for Defendants' engines and parts, and a market for MRO Services for Defendants' engines and parts. *See* Third Am. Compl. ¶¶ 252, 261. Even if the Court accepted that the product markets are limited to Defendants' products, Plaintiff provides no justification for defining the markets in reference to all of Defendants' customers *except* helicopter manufacturers. *See id.* ¶¶ 253, 262. Plaintiff argues that helicopter manufacturers are properly excluded because they "are not long-term owners of the engines and thus are not participants in the MRO [S]ervices or engine/parts markets." Resp. to SafranHE USA's Mot. to Dismiss (hereinafter, "Resp.") 13. The Court will not credit this implausible assertion and unwarranted factual inference. *See* *Ferrer, 484 F.3d at 780*, Nothing in the Complaint suggests that helicopter manufacturers cannot sell leftover engines or parts, or request or perform MRO Services on old parts in lieu of purchasing new parts. Even if helicopter **[*51]** manufacturers are properly excluded, Plaintiff's product market allegations do not include "manufacturers of new

[9] Even if Plaintiff had adequately pleaded that SafranHE USA entered into a conspiracy to fix prices or boycott Plaintiff, the Complaint is devoid of any facts showing SafranHE France's or SafranHE Canada's participation in the alleged conspiracies. This deficiency is fatal to Plaintiff's claims against SafranHE France and SafranHE Canada,

PMA Parts (substitute parts otherwise manufactured by companies not affiliated with [Defendants], under an FAA program known as Part Manufacturing Authorization)." Third Am. Compl. ¶ 689. A substitute part is by definition interchangeable for the part it substitutes, meaning that the demand for substitute and original parts is typically cross-elastic. By the same token, the market definition presumably needed to include companies that service PMA parts. Finally, the Court finds that Plaintiff's allegations that the parts and services of other manufacturers are not interchangeable for Defendants' parts and services, *id.* ¶¶ 254-55, 263, are conclusory. *See* Twombly, 550 U.S. at 555.

Even if Plaintiff's product markets were properly defined, Plaintiff incomprehensibly limits the geographic market to the United States.[10] *See* Third Am. Compl. ¶ 245. Plaintiff's own allegations suggest that the geographic market is broader than this: the Complaint states that Defendants' customers and competitors are located in the United States and Canada. *Id.*, ¶¶ 245-49. Additionally, there are numerous allegations that **[*52]** would suggest the relevant geographic market might be worldwide. For example, Plaintiff alleges that: (1) SafranHE France transacts business in the United States, *id.* ¶¶ 42, 45; (2) Defendants' principal customer Airbus allegedly has its headquarters in Marginane, France, *id.* ¶ 71; (3) SafranHE France "is the largest solely dedicated manufacturer of Helicopter Engines in the world," *id.* ¶¶ 76, 79; and (4) Defendants would ship parts for service across the Atlantic, *see id.* ¶¶ 64, 138. These allegations show that companies in this industry operate globally—i.e., a French company can profitably conduct business in the United States while maintaining a physical location abroad. The Complaint provides no reason for the Court to ignore Defendants' international competitors. *See* Surgical Care, 309 F.3d at 840 (considering whether consumer would turn to areas outside the United States for "alternative products or sources of the product if a competitor raises prices"). In short, Plaintiff's "geographic market definition does not comport with the commercial realities of the industry" as described by Plaintiff. *See* Honeywell Int'l Inc. v. MEK Chem. Corp., Civ. A. No. 3:17-cv-1390-M, 2018 WL 6737514, at *3 (N.D. Tex. July 5, 2018).

For the foregoing reasons, the Court **[*53]** finds that Plaintiff did not properly allege a relevant market and grants the Motions as to Counts V, VII, IX, X, XI, XII, XX, and XXI.

(b) *Injury to Competition*

Even if Plaintiff adequately alleged a market for these Counts, the Court finds that Plaintiff's assertions regarding market injury are speculative. To state a claim under Sherman Act § 1, a plaintiff must allege *facts* showing an anticompetitive effect stemming from the unlawful conduct alleged. *See* Marucci Sports, L.L.C. v. NCAA, 751 F.3d 368, 375 (5th Cir. 2014) ("[Plaintiff's] Second Amended Complaint must allege facts showing that the [conduct] unreasonably restrained trade in the . . . market." (citations omitted)). "Speculation about anticompetitive effects is not enough." Roy B. Taylor Sales, Inc. v. Hollymatic Corp, 28 F.3d 1379, 1385 (5th Cir. 1994) (holding that plaintiff needed to show "that the tie 'as it actually operate[d] in the market' harmed competition," rather than the mere existence of a tie (quoting Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 29, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984))). Here, Plaintiff pleaded no facts showing an injury to competition for any of its Sherman Act § 1 claims. Plaintiff alleges, for example, that certain practices "suppress intrabrand competition," Third Am. Compl. ¶¶ 294, 466, 627, "harm[] competition, foreseeably, directly, and substantially," *id.* ¶¶ 298, 364, 432, 450, 488, 658, or raise prices. *See id.* ¶ **[*54]** 635. Plaintiff does not, however, provide any details about competition in the relevant markets. Accordingly, the Court finds Plaintiff's allegations of anticompetitive effect to be speculative and conclusory, and grants the Motions as to Counts V, VII, IX, X, XI, XII, XX, and XXI.

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[10] Plaintiff contends that this is a typo and that the sentence should have read "United States and Canada." *See* Resp. 12 & n.17. It is axiomatic that Plaintiff cannot amend the complaint by a brief in opposition to a motion to dismiss. Energy Coal v. Citgo Petroleum Corp., 836 F.3d 457, 462 n.4 (5th Cir. 2016) (citing Roebuck v. Dothan Sec., Inc., 515 F. App'x 275, 280 (5th Cir, 2013)). In any event, this correction would not save Plaintiff's defective market definition. Therefore, the Court will not grant Plaintiff leave to amend. *See* Resp. 12 n.17 (requesting leave to amend); Legate v. Livingston, 822 F.3d 207, 211 (5th Cir. 2016) ("[A] district court need not grant a futile motion to amend.").

b. *Sherman Act § 2*

To state a claim for monopolization, a plaintiff must plausibly allege "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Eastman Kodak Co. v. Image Tech, Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. To state a claim for attempted monopolization, a plaintiff must plausibly allege "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power [in the relevant market]." *Retractable Techs., Inc. v. Becton Dickinson & Co., 842 F.3d 883, 891 (5th Cir. 2016)* (citation omitted). For both claims, Plaintiff must properly define a geographic and product market. *See* *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)* (noting that an attempted monopolization claim generally requires "a definition of the relevant market and examination of market power"); *Eastman Kodak, 504 U.S. at 481* (noting that a plaintiff must allege "monopoly power **[*55]** in the relevant market" for a monopolization claim).

Plaintiff purports to have defined the market for its monopolization and attempted monopolization claims in its Sherman Act *§ 1* claims. *See* Third Am. Compl. ¶¶ 667, 698. As explained above, Plaintiff's market definition is deficient. Without a validly defined market, the Court cannot determine whether Defendants have market or monopoly power in those markets, *See* *Honeywell Int'l Inc., 2018 WL 6737514, at *3*. Accordingly, the Court finds that Plaintiff did not sufficiently plead claims for monopolization and attempted monopolization, and grants the Motions as to Counts XXII and XXIII.

c. *Tying Claim*

A tying arrangement is "an agreement by a party to sell one product [(also called a tying product)] but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Schlotzsky's, Ltd. v. Sterling Purchasing & Nat'l Distrib. Co., 520 F.3d 393, 405 (5th Cir. 2008)* (quoting *Eastman Kodak, 504 U.S. at 461-62*). The essential characteristic of an illegal tying arrangement "lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 34-35, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)* (citation **[*56]** omitted).

While tying arrangements are often included in the list of per se violations of the Sherman Act, *see* *N. Tex. Speciality, 528 F.3d at 360* (quoting *Maricopa Cty., 457 U.S. at 344 n.15*), not all tying arrangements are per se unlawful. To state a claim for per se tying, a plaintiff must plausibly allege facts showing:

> (1) Two separate products (as opposed to components of a single product); (2) The two products are tied together or customers are coerced; (3) The supplier possesses substantial economic power over the tying product; (4) The tie has an anticompetitive effect on the tied market; and (5) The tie affects a not insubstantial volume of commerce.

United Farmers Agents Ass'n v. Farmers Ins. Exch., 89 F.3d 233, 235 n.2 (5th Cir. 1996) (citation omitted), Specifically, a plaintiff must plead "two, distinct markets," *Paramount Pictures Corp. v. Johnson Broad. Inc., 432 F. Supp. 2d 707, 709 (S.D. Tex. 2006)* (citing *Jefferson Par., 466 U.S. at 21*), properly "define the parameters of *each* of these markets," *id.* (emphasis added), and allege that the defendant has market power in the market for the tying product. *See* *Honeywell Int'l Inc., 2018 WL 6737514, at *6* (citations omitted). A tying arrangement that does not meet these requirements is analyzed under the rule of reason, which requires a plaintiff to show, among other things, an actual adverse effect on competition. *Id.* (citations omitted).

Here, Plaintiff does not affirmatively raise a tying claim but alleges in Count XXI that "SafranHE USA **[*57]** and SafranHE Canada . . . conditioned the sale of MRO Services on the purchase of unnecessary 'modifications,'" Third Am. Compl. ¶ 645. As the Court should not dismiss a claim solely because Plaintiff did not identify a legal theory, *Rathborne, 683 F.2d at 917 n.8*, the Court must determine whether Plaintiff stated a plausible tying claim under either the per se or the rule of reason mode of analysis. First, the Court finds that Plaintiff did not state a per se tying claim, because the Complaint does not include a proper market definition, *see supra* § III.C.1.a.iii.a., let alone valid definitions of *two* distinct markets. *See* *Paramount Pictures, 432 F. Supp. 2d at 709*. And, in the absence of a validly defined market, the Court cannot determine that SafranHE USA or SafranHE Canada had market power in the sale of MRO Services. *See* *Honeywell Int'l Inc., 2018 WL 6737514, at *3, *6*, Second, Plaintiff cannot recover for tying under the rule of reason, because the Complaint does not plead facts showing actual injury to competition. *Id. at *6*. As explained above, Plaintiff's allegations of injury to competition are speculative and conclusory. *See supra* § III.C.1.a.iii.b. Accordingly, the Court grants the Motions as to Count XXI insofar as it states a tying claim.

d. ***Cartwright Act and Kansas Restraint of Trade Act***

The same **[*58]** analysis conducted in conjunction with Plaintiff's Sherman Act claims governs Plaintiff's Cartwright Act and Kansas Restraint of Trade Act claims. *See* *Cty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir, 2001)* (holding that the Cartwright Act was "modeled after the Sherman Act" and so the analysis "mirrors the analysis under federal law" (citations omitted)); *Kan. Stat. Ann. § 50-163(b)* ("[T]he Kansas restraint of trade act shall be construed in harmony with ruling judicial interpretations of federal ***antitrust law*** by the United States [S]upreme [C]ourt."). Accordingly, the Court grants the Motions as to Counts VI, XIV, XVIII, XXIV, and XXV for the reasons stated above.

e. ***Statute of Limitations***

Even if the Court did not dismiss every antitrust claim for one or more of the deficiencies described above, the Court finds that Plaintiff did not assert Count IX and portions of Counts XI, XXII, XXIII, XXIV, and XXV, within the relevant limitations period.

"[A] complaint that shows relief to be barred by . . . the statute of limitations[] may be dismissed for failure to state a cause of action." *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982)* (collecting cases). Federal antitrust claims that are not brought within four years of their accrual are "forever barred." *15 U.S.C. § 15b*. "Generally, a cause of action accrues and the statute begins **[*59]** to run when a defendant commits an act that injures a plaintiff's business." *Rx.com v. MedcoHealth Sols., Inc., 322 F. App'x 394, 396 (5th Cir. 2009)* (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971))*. If a plaintiff alleges a continuing antitrust violation, suit may be brought within four years after the defendant "commits an overt act in furtherance of an antitrust conspiracy . . . or commits an act that by its very nature is a continuing antitrust violation." *Kaiser, 677 F.2d at 1051*. The key question is whether some injurious act actually occurred during the limitations period. *See* *Hibernia Nat'l Bank v. Indus. Alloys Co., No. 93-3035, 1993 U.S. App. LEXIS 40801, 1993 WL 209995, at *2 (5th Cir. June 4, 1993)*; *Kaiser, 677 F.2d at 1053* (citing *Poster Exch., Inc. v. Nat'l Screen Serv. Corp., 517 F.2d 117, 128 (5th Cir. 1975))*. Thus, a plaintiff could allege a continuing antitrust violation by pleading that the defendant violated an antitrust duty to deal at a subsequent time during the limitations period, *see* *Rx.com, 322 F. App'x at 396*, but not by pleading that a contract was in existence at that time. *See* *Kaiser, 677 F.2d at 1053*. Importantly, even if a plaintiff alleges a continuing antitrust violation, the plaintiff can only recover for harm that occurred within the limitations period. *See* *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)* ("But the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period." (collecting cases)).

The analysis is similar for the state law antitrust claims. A claim brought under either *California's Cartwright Act* **[*60]** or the Kansas Restraint of Trade Act is not barred if the plaintiff alleges a continuous violation—a new, independent overt act that inflicts a new injury on the plaintiff. *See* *Garrison v. Oracle Corp., 159 F. Supp. 3d 1044, 1071-72 (N.D. Cal. 2016)*; *Manildra Milling Corp. v. Ogilvie Mills, Inc., 723 F. Supp. 567, 570 (D. Kan. 1989)*. Like federal claims, a Cartwright Act claim is subject to a four-year statute of limitations. *See* *Home Depot U.S.A., Inc. v.*

*AU Optronics Corp. (In re TFT-LCD (Flat Panel) Antitrust Litig.), No. M 07-1827 SI, 2014 U.S. Dist. LEXIS 77417, 2014 WL 2527221, at *3 (N.D. Cal. June 4, 2014)* (citing *Cal. Bus. & Prof. Code §§ 16750.1*, *17200*). On the other hand, a *Kansas Restraint of Trade Act* is subject to a three-year statute of limitations. *See* *Four B Corp. v. Daicel Chem. Indus,, Ltd., 253 F. Supp. 2d 1147, 1155-56 (D. Kan. 2003)* (citing *Kan. Stat. Ann. 60-512(2)*). The two statutes also differ as to when the limitation period begins to run. While the limitations period under Kansas law begins to run when "the plaintiff knew or should have known of the harm," *In re Vitamins Antitrust Litig., No. MISC 99-197, 2000 U.S. Dist. LEXIS 11351, 2000 WL 1524912, at *2 (D.D.C. July 14, 2000)* (discussing *McCue v. Franklin, 156 Kan. 1, 131 P.2d 704 (Kan. 1942))*, a Cartwright Act claim accrues "when [it] is complete with all of its elements." *Garrison, 159 F. Supp. 3d at 1065* (quoting *Pooshs v. Philip Morris USA, Inc., 51 Cal. 4th 788, 797, 123 Cal. Rptr. 3d 578, 250 P.3d 181 (2011)*).

In this case, Plaintiff first alleged antitrust claims in its First Amended Complaint, filed March 28, 2016. *See* ECF No. 10. Consequently, any federal claim premised on injury that occurred solely before March 28, 2012, is barred, *see* *Kaiser, 677 F.2d at 1051*, any Cartwright Act claim that Plaintiff could have brought before **[*61]** March 28, 2012, is barred, *see* *Garrison, 159 F. Supp. 3d at 1071-72*, and any Kansas Restraint of Trade Act premised on injury that Plaintiff should have discovered before March 28, 2013, is barred, *see* *Manildra Milling, 723 F. Supp. at 570*.

Viewing the Complaint in the light most favorable to Plaintiff, the Court finds that Plaintiff timely brought the following claims: (1) Counts V, VI, and VII premised on the alleged Defacing or Accident Policies that were enforced from 2013 to 2015 and harmed Plaintiff until 2014, *see* Third Am. Compl. ¶¶ 174, 190, 279, 281-82, 289-90, 353-55; (2) Count X that is premised on SafranHE USA's MAA with HSN signed in October 2012, *see id.* ¶ 442; (3) Counts XI and XII based on the Fleet Parts or Service Agreements, except the agreement with Heli-One signed in May 2009, *see id.* ¶ 462; (4) Counts XIII, XIV, XVII, and XVIII, purporting to state price-fixing and group-boycott claims based on conduct occurring in 2014 or 2015, *see id.* ¶¶ 498-502; (5) Counts XX and XXI that are based on exclusive supply agreements and other alleged MRO Services restraints adopted between 2013 and 2016, *see id.* ¶¶ 616, 623, 646-48; (6) Count XXII insofar as it alleges monopolization based on Defendants agreements with Advanced or the Fleet Parts or **[*62]** Service Agreements, *see id.* ¶¶ 679, 681; and (7) Counts XXIII, XXIV, and XXV, to the extent they state claims not otherwise found untimely. These allegations suffice to show that the claims arose, Plaintiff was injured, or Defendants committed a continuous violation during the limitations period.

Conversely, the Court finds that the following claims are time-barred: (1) Count IX based on Plaintiff's MAA that was entered into on April 30, 2010, *see id.* ¶¶ 390, 421-39; (2) Count XI insofar as it purports to state a claim for Heli-One's agreement entered into in February 2010, *see id.* ¶ 497; (3) Count XXII to the extent it is premised on Defendants adopting policies of throwing away substitute parts and informing customers of this policy on February 9, 2003, *see id.* ¶¶ 689-90; and (4) Counts XXIII, XXIV, and XXV, to the extent they are based on Plaintiff's MAA, SafranHE USA's February 2010 agreement with Heli-One, or Defendants' policy regarding substitute parts. Additionally, the Court finds that Counts XXIV and XXV are barred by the three-year statute of limitations applicable to Kansas Restraint of Trade claims, *see* *Four B. Corp., 253 F. Supp. 2d at 1155-56*, to the extent they are based on SafranHE USA's MAA with HSN. *See* **[*63]** Third Am. Compl. ¶ 442. The Court further finds that Plaintiff did not allege any facts for these Counts showing that Defendants entered into, acted pursuant to, or harmed Plaintiff as a result of these contracts or policies during the limitations period. *See* *Kaiser, 677 F.2d at 1051*; *Garrison, 159 F. Supp. 3d at 1071-72*; *Manildra Milling, 723 F. Supp. at 570*. As such, the Court cannot conclude that these Counts describe a continuing antitrust violation. Accepting all of Plaintiff's well-pleaded allegations as true, the Court find that any antitrust injury arising out Plaintiff's MAA, Heli-One's agreement, Defendants' policy with regards to substitute parts, and SafranHE USA's MAA with HSN under the Kansas Restraint of Trade Act, occurred outside of the relevant limitations periods.

For the reasons stated above, the Court grants the Motions on limitations grounds as to Count IX, denies the Motions on this basis as to Counts V, VI, VII, XIII, XIV, XVII, XVIII, XX, and XXI, and grants in part and denies in part the Motions on this basis as to Counts XI, XXII, XXIII, XXIV, and XXV to the extent described in the preceding paragraph.

(2) ***Deceptive Practices Claims***

a. Lanham Act

> A prima facie case of false advertising under [Lanham Act *§ 43(a)*] requires the plaintiff to establish: (1) A false or **[*64]** misleading statement of fact about a product; (2) Such statement either deceived, or had the capacity to deceive a substantial segment of potential consumers; (3) The deception is material, in that it is likely to influence the consumer's purchasing decision; (4) The product is in interstate commerce; and (5) The plaintiff has been or is likely to be injured as a result of the statement at issue.

Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489, 495 (5th Cir. 2000) (citations omitted). "The failure to prove the existence of any element of the prima facie case is fatal to the plaintiff's claim." *Id.* (citation omitted). The first element of a *§ 43(a)* claim requires a plaintiff to "demonstrate that the commercial advertisement or promotion is either literally false, or that [if the advertisement is not literally false,] it is likely to mislead and confuse consumers." *Id.* (alteration in original) (quoting *Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379, 1390 (5th Cir. 1996))*.

Here, Plaintiff alleges that the following statements of SafranHE USA are false or misleading: (1) unauthorized service centers do not have access to Defendants' technical documentations, *see* Third Am. Compl. ¶¶ 733-35, 742, 744; (2) unauthorized repair centers are "issuing falsified release documents" when they repair Defendants' engines, *id.* ¶ 734; (3) Defendants **[*65]** may withhold instructions or other documentation as proprietary, *see id.* ¶ 736; and (4) repair centers that Defendants neither authorized nor did not authorize to provide repair service do so in violation of FAA regulations,[11] *see id.* ¶ 742. Plaintiff posits that these statements are "false and misleading because FAA regulations require [Defendants] to make available Technical Instructions . . . to all owners and maintenance providers." *Id.* ¶¶ 737, 745. The Lanham Act is not, however, an appropriate vehicle to enforce Plaintiff's interpretation of FAA regulations. *See Greater Houston Transp. Co. v. Uber Techs., Inc., Civ. A. No. 4:14-0941, 2015 U.S. Dist. LEXIS 28867, 2015 WL 1034254, at *10-11 (S.D. Tex. Mar. 10, 2015)* (citing, among other things, *IQ Prods. Co. v. Pennzoil Prods. Co., 305 F.3d 368, 373-74 (5th Cir. 2002))* (holding that the plaintiffs "failed to plead a cognizable cause of action that [the defendant's] representations that they 'meet all local regulations' are false or misleading" because local regulations were subject to multiple interpretations). Thus, the fact that Plaintiff's Lanham Act claim seeks to enforce Plaintiff's preferred interpretation of FAA regulations is alone sufficient to warrant dismissal of Count XXVII.

The Court further finds that Plaintiff did not allege sufficient facts to show that any of SafranHE **[*66]** USA's statements were false or misleading. Plaintiff's only non-conclusory allegation showing that the statements were false or misleading is the FAA's November 10, 2016, letter to First Aviation Services, Inc., stating that "a design approval holder . . . may not deny access to [technical information] based on claims of proprietary data." Third Am. Compl. ¶ 737. Nothing in the Complaint explains how a 2016 FAA letter renders SafranHE USA's statements from 2009 to 2013 false or Misleading. *See S. Snow Mfg. Co. v. Snow Wizard Holdings, Inc., 829 F. Supp. 2d 437, 453 (ED. La. 2011)* (finding that subsequent agency action did not render prior statements false). Accordingly, the Court grants Safran HE USA's Motion as to Count XXVII.

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[11] The pertinent statement reads: "Turbomeca USA, Inc. specializes in the design, production, sale and support of low to medium power gas turbine engines for helicopters. . . . There are no other FAA authorized . . . Repair Centers within the United States qualified to provide all levels of repair and overhaul of the engine and fuel control unit other than Turbomeca USA, Inc.. [sic] Also, all manuals and technical documentation required to perform any repairs and/or overhauls on the Turbomeca engines are proprietary to Turbomeca USA, Inc. and are not available to non-authorized Repair Centers. Any other company providing repair service on this engine would be in violation of FAA regulations." Third Am. Compl. ¶ 742.

b. Common Law Unfair Competition

"Unfair competition under Texas law 'is the umbrella for all statutory and nonstatutory causes of action arising out of business conduct which is contrary to honest practice in industrial or commercial matters." *Taylor Publ'g Co. v. Jostens, Inc., 216 F.3d 465, 486 (5th Cir. 2000)* (quoting *Am. Heritage Life Ins. v. Heritage Life Ins., 494 F.2d 3, 14 (5th Cir. 1974))*. Liability for unfair competition must be premised on some "independent substantive tort or other illegal conduct." *Schoellkopf v. Pledger, 778 S.W.2d 897, 904-05 (Tex. App.—Dallas 1989, writ denied)*. Plaintiff's common law unfair competition claim is premised on the same allegedly false or misleading statements as its Lanham Act claim. *See* Third Am, Compl. ¶¶ 755-63; Resp. 24 **[*67]** (arguing that Plaintiff adequately pleaded a common law unfair competition claim because Plaintiff alleged a Lanham Act claim). As the Court grants SafranHE USA's Motion as to the Lanham Act claim, the Court finds that Plaintiff's unfair competition claim is not premised on any independent substantive tort or other illegal conduct. *See* *Schoellkopf; 778 S.W.2d at 904-05*. Even if the unfair competition claim was premised on some tort, the Court finds that Plaintiff did not plead sufficient facts to show that SafranHE USA made any false or misleading statement for the reasons stated above. *See also S & H Indus. v. Selander, 932 F. Supp. 2d 754, 763 (N.D. Tex. 2013)* (explaining that a common law unfair competition claim is analyzed under the same standard as a claim under the Lanham Act (quoting *Amazing Spaces, Inc. v. Metro Mini Storage, 608 F.3d 225, 236 n.7 (5th Cir. 2010)))*. Consequently, the Court grants SafranHE USA's Motion as to Count XXVIII.

(3) ***Breach of Contract***

SafranHE France moves to dismiss the portion of Count VIII that asserts that SafranHE France breached Plaintiff's MAA. "In Texas, '[t]he essential elements of a breach of contract action are: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach.'" **[*68]** *Smith Int'l, Inc. v. Egle Grp., LLC, 490 F.3d 380, 387 (5th Cir. 2007)* (alteration in original) (quoting *Valero Mktg. & Supply Co. v. Kalama Int'l, L.L.C., 51 S.W.3d 345, 351 (Tex, App.—Houston [1st Dist.] 2001, no pet.))*.

In this case, the Complaint makes clear that SafranHE France was not a party to the contract between SafranHE USA and Plaintiff. *See* Third Am. Compl. ¶ 390 ("[Plaintiff] and SafranHE USA entered into the [MAA] . . . ."). Plaintiff does not dispute that SafranHE France was not a party to this agreement, but argues that due to SafranHE France's control over the technical instructions, an implied contract existed between the two. *See* Resp. to Int'l Defs.' Mot. to Dismiss 19-20. Even if the Court permitted this eleventh hour amendment of the Complaint, which it does not, *see* *Energy Coal, 836 F.3d at 462 n.4*, the Court would still grant the International Defendants' Motion as to this claim. A claim for breach of an implied contract requires a plaintiff to "plead the existence of a valid implied contract," which, in turn, requires allegations showing "(1) an offer, (2) an acceptance, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding." *Electrostim Med. Servs., Inc. v. Health Care Serv. Corp., 614 F. App'x 731, 744 (5th Cir. 2015)* (quoting *Plotkin v. Joekel, 304 S.W.3d 455, 476 (Tex. App.—Houston [1st Dist.] 2009, pet. denied))*. The Complaint includes no facts showing that SafranHE France offered, accepted, or consented to any terms of Plaintiffs MAA with SafranHE **[*69]** USA. Accordingly, the Court grants the International Defendants' Motion as to the portion of Count VIII asserted against SafranHE France.

(4) ***Tort Claims***

a. ***Tortious Interference with Contract***

"The elements of a tortious interference with contract claim are (1) the existence of a contract subject to interference; (2) a willful and intentional act of interference; (3) such act was a proximate cause of damage; and (4) actual damage or loss occurred." *Fluorine On Call, Ltd. v. Fluorogcts Ltd., 380 F.3d 849, 864 (5th Cir. 2004)* (citation omitted). To prevail on a claim for tortious interference with an existing contract, a plaintiff must present evidence that the defendant induced a third party to breach the contract, *El Paso Healthcare Sys., Ltd. v. Murphy, 518 S.W.3d 412, 421-22 (Tex. 2017)*. For the act of interference to be intentional or willful, "[t]he interfering party must know of the existence of a contract between the plaintiff and a third party." *Hill v. Heritage Res., Inc., 964 S.W.2d 89, 123 (Tex. App.—El Paso 1997, pet. denied)*.

The Court finds that Count III should be dismissed because Plaintiff did not allege sufficient facts to show that SafranHE France had knowledge of any contract subject to interference. Plaintiff merely stated, in conelusory fashion, that "SafranHE France had knowledge of th[e] contracts," Third Am. Compl. ¶ 225, which is insufficient to state a claim for tortious interference. *See* *Hoffman v. L&M Arts, 774 F. Supp. 2d 826, 846 (N.D. Tex. 2011)*. **[*70]** The only other allegation even remotely on point—that "a SafranHE France employee[] specifically mentioned [Plaintiff] in a presentation addressing both the Defacing Policy and the Accident Policy," Third Am. Compl. ¶ 225—does nothing to suggest that SafranHE France was aware of any specific contract. Accordingly, the Court grants the International Defendants Motion as to Count III.

The Court denies, however, SafranHE USA's Motion as to Count XV. SafranHE USA argues that Count XV should be dismissed because Plaintiff did not plead that Defendants engaged in an independently tortious act. *See* Br. at 24-25. Plaintiff was not required, however, to plead an independently tortious act for this claim. *See* *El Paso, 518 S.W.3d at 421* ("[I]nterference with an existing contract does not" require "a finding that the defendant engaged in independently tortious or unlawful conduct."). Accordingly, the Court denies SafranHE USA's Motion as to Count XV.

b. *Tortious Interference with Business Relationships*

The Complaint does not clearly state whether Plaintiff is alleging tortious interference with an existing or prospective business relationship. *See* Third Am. Compl. ¶¶ 541-51. To the extent Plaintiff is alleging tortious interference **[*71]** with an existing business relationship, "its elements are: `(1) unlawful actions undertaken by [the defendants] without a legal right or justifiable excuse; (2) with the intent to harm [the plaintiff]; and (3) resulting actual harm or damage.'" *D'Onofrio v. Vacation Publ'ns, Inc., 888 F.3d 197, 214-15 (5th Cir. 2018)* (alteration in original) (quoting *Am. Med. Int'l, Inc. v. Giurintano, 821 S.W.2d 331, 335 (Tex. App.—Houston [14th Dist.] 1991, no writ))*. To the extent Plaintiff alleges tortious interference with a prospective business relationship, its elements are:

> 1) a reasonable probability that the parties would have entered into a contractual relationship; 2) an independently tortious or unlawful act by the defendant that prevented the relationship from occurring; 3) the defendant acted with a conscious desire to prevent the relationship from occurring, or it knew that the interference was certain or substantially certain to occur as a result of his conduct; and 4) the plaintiff suffered actual harm or damage as a result of the defendant's interference.

Ewbank v. ChoicePoint Inc., 551 F. Supp. 2d 563, 566-67 (N.D. Tex. 2008) (citing *RAJ Partners, Ltd. v. Darco Constr. Corp., 217 S.W.3d 638, 649 n.10 (Tex. App.—Amarillo 2006, no pet.)*; *Richardson-Eagle, Inc, v. William. M. Mercer, Inc., 213 S.W.3d 469, 475 (Tex. App.—Houston [1st Dist.] 2006, rev. denied))*.

Either way, Plaintiff must establish that Defendants committed an independently tortious or unlawful act. *See* *Ewbank, 551 F. Supp. 2d at 566-67*; *Adrain v. Genetec, Inc., No, 2:08-CV-423, 2009 U.S. Dist. LEXIS 90946, 2009 WL 3161386, at *3 (ED. Tex. Sept. 30, 2009)* (holding that unlawful act requirement of tortious interference with an existing business relationship claim is satisfied by showing that **[*72]** a defendant engaged in conduct that is "independently tortious or unlawful"). To be independently tortious or unlawful, the conduct must be more than "merely 'sharp' or unfair"—it must be "actionable under a recognized tort [theory]." *Centuria, Inc. v. Regiment Sec., LLC, Civ. A. No. 3:11-CV-2500-N, 2013 U.S. Dist. LEXIS 203187, 2013 WL 12250941, at *2 (N.D. Tex. Jan. 11, 2013)* (alteration in original) (quoting *Ash v. Hack Branch Distrib. Co., 54 S.W.3d 401, 414-15 (Tex. App.—Waco 2001, pet. denied))*.

In this case, Plaintiff alleges that Defendants' anticompetitive conduct satisfies the independently tortious act requirements of Counts IV, XVI, and XIX. *See* Third Am. Compl. ¶¶ 234, 236, 545; Resp. 25 (suggesting that the antitrust violations satisfy the independently wrongful action element). Alleged antitrust violations satisfy the independently tortious act requirement, regardless of whether the violations rise to the level of valid antitrust claims. *See* *In re Mem'l Hermann Hosp. Sys., 464 S.W.3d 686, 704-06 (Tex. 2015)*. Nevertheless, for the reasons discussed above, the Court cannot conclude that Plaintiff has pleaded a plausible antitrust violation. The various antitrust violations are deficient because Plaintiff did not plead sufficient facts to allege a conspiracy, to define a relevant market, or to show injury to competition, or because the claim itself is untimely. *See supra* § Consequently, the Court finds that **[*73]** Plaintiff did not plead an independently tortious act and grants the Motions as to Counts IV, XVI, and XIX.

Furthermore, the Court notes that Count IV suffers from an incurable defect. Plaintiff alleges in this Count that the independently tortious act is SafranHE France's decision to have SafranHE USA and SafranHE Canada adopt the Defacing Policy. *See* Third Am. Compl. ¶¶ 234, 236. Plaintiff clarifies that this decision is independently tortious because it is an unlawful anticompetitive scheme. Se*See*e Resp. to Int'l Defs.' Mot. to Dismiss 19. The Court finds that Plaintiff did not sufficiently plead that the Defacing Policy violates the antitrust laws. SafranHE France would not violate *§ 1* of the Sherman Act by "conspiring" with SafranHE USA or SafranHE France to adopt certain policies, because Defendants are in a parent-subsidiary relationship. *See* *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771-72, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (holding a parent and a wholly-owned subsidiary do not "conspire" for the purposes of Sherman Act *§ 1*); *Century Oil Tool, Inc. v. Prod. Specialties, Inc., 737 F.2d 1316, 1317 (5th Cir. 1984)* (holding two corporations owned by a single entity do not "conspire" for the purposes of Sherman Act *§ 1*). Nor has Plaintiff adequately pleaded that SafranHE France's decision to adopt the Defacing Policy violates Sherman Act *§ 2*. In the absence **[*74]** of a validly defined market, the Court cannot determine if SafranHE France possessed monopoly power in the relevant market—a necessary element of a *§ 2* claim. *See* *Eastman Kodak, 504 U.S. at 481*. As the analysis of the state antitrust claims would be the same, *see supra* § III.C.1.d., the Court finds that Plaintiff did not sufficiently plead that the decision to adopt the Defacing Policy is independently tortious and grants the International Defendants' Motion as to Count IV for this additional reason.

c. *Civil Conspiracy*

A civil conspiracy claim has the following elements: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result." *Wackman v. Rubsamen, 602 F.3d 391, 408 (5th Cir. 2010)* (quoting *Tri v. J.T.T., 162 S.W.3d 552, 556 (Tex. 2005))*. Defendants allege that Plaintiff's allegations regarding "a meeting of the minds" are conclusory. The Court agrees that Plaintiff's civil conspiracy claim should be dismissed.

The only remaining claims at this point are: Count I alleging that SafranHE USA and SafranHE Canada breached contracts; Count II alleging that SafranHE USA and SafranHE Canada are liable for wrongful detention, conversion, and negligence; Count VIII alleging that SafranHE **[*75]** USA breached Plaintiff's MAA; Count XV stating that SafranHE USA tortiously interfered with Plaintiff's contracts with Advanced; and Counts XXIX and XXX alleging that SafranHE USA is liable for misrepresentations or concealment under the DTPA or common law. The civil conspiracy claim does not, however, relate to any of these Counts. Rather, the conspiracy claim appears to be premised on the dismissed antitrust allegations. *See* Third Am. Compl. ¶ 727 ("The object to be accomplished by the conspiracy or conspiracies was to prevent competition . . . ."). As the Court grants the Motions as to the predicate claims, the Court also grants the Motions as to the civil conspiracy claim. *See* *Walker v. Beaumont Indep. Sch. Dist., Civ. A. No. 1:15-CV-379, 2016 U.S. Dist. LEXIS 41408, 2016 WL 6666828, at *10 (ED. Tex. Mar. 11, 2016)* (dismissing conspiracy claim after dismissing predicate claim). Accordingly, the Court grants the Motions as to Count XXVI.

D. *Dismissal with Prejudice*

The Court has discretion whether to dismiss a claim with or without prejudice. *See* *Club Retro L.L.C. v. Hilton, 568 F.3d 181, 215 n.34 (5th Cir. 2009)*. "[A]t some point, a court must decide that a plaintiff has had fair opportunity to make his case; if, after that time, a cause of action has not been established, the court should finally dismiss the suit." *Schiller v. Physicians Res. Grp., Inc., 342 F.3d 563, 567 (5th Cir. 2003)* (quoting **[*76]** *Jacquez v. Procunier, 801 F.2d 789, 792 (5th Cir. 1986))*. "[P]leadings review is not a game where the plaintiff is permitted to file serial amendments until he finally gets it right." *United States ex rel. Adrian v. Regents of the Univ. of Cal., 363 F.3d 398, 404 (5th Cir. 2004)*; *see also* *United States ex rel. Willard v. Humana Health Plan of Tex. Inc., 336 F.3d 375, 387 (5th Cir. 2003)* (holding that leave to amend was properly denied where the plaintiff had two prior opportunities to amend the complaint and the district court had once before granted leave to cure the complaint's lack of specificity). This is especially true where a plaintiff "did not suggest in [his or her] responsive pleading any additional facts not initially pled that could, if necessary, cure the pleading defects raised by the defendants." *Goldstein v. MCI WorldCom, 340 F.3d 238, 255 (5th Cir. 2003)*. Additionally, a district court may deny the plaintiff an opportunity to replead if an amendment of a claim is futile. *See* *Legate, 822 F.3d at 211* (citing *Stripling v. Jordan Prod. Co., 234 F.3d 863, 872 (5th Cir. 2000))*.

Plaintiff did not move for leave to amend the Complaint. In fact, Plaintiff only requested to amend the definition of the geographic market, and the Court found this proposed amendment to be futile. *See supra* note 10. Moreover, Plaintiff had the benefit of an entire arbitration proceeding, *see* ECF No. 44, four prior motions to dismiss, ECF Nos. 25, 31, 54, 55, and oral argument before this Court, *see* ECF No. 91. In fact, the Court previously dismissed the Second Amended Complaint due to numerous **[*77]** pleading deficiencies, *see* ECF No. 92 at 61:20-24, and many of these deficiencies stayed the same after Plaintiff's *third amendment*. *See* ECF Nos. 54, 55. Despite being afforded significant opportunities to state its case, Plaintiff used these opportunities to expand the number of its claims while failing to substantiate with facts existing claims. The Court will not condone Plaintiff's scattershot pleading tactics. The Fifth Circuit has held that a court may, in its sound discretion, deny leave to amend on substantially similar facts. *See* *Humana Health Plan, 336 F.3d at 387*. Accordingly, in its discretion, the Court finds that Plaintiff "has had fair opportunity to make [its] case," *Schiller, 342 F.3d at 567*, and grants the Motions as to Counts II and VIII against SafranHE France with prejudice and Counts III, IV, V, VI, VII, IX, X, XI, XII, XIII, XIV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVI, XVII, and XXVIII against all Defendants in their entirety with prejudice. The Court additionally finds that amendment of Counts III, IV, V, VI, VII, VIII, IX, X, XI, XII, XX, XXI, XXII, XXIII, XXIV, XXV, XVI, XXVII, and XXVIII would be futile.

IV. CONCLUSION

For the reasons discussed above, the Court grants in part and denies in part the Motions. The **[*78]** Court grants the Motions as to Counts II and VIII against SafranHE France with prejudice and Counts III, IV, V, VI, VII, IX, X, XI, XII, XIII, XIV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVI, XVII, and XXVIII against all Defendants in their entirety with prejudice. The Court denies SafranHE USA's Motion as to Count XV.

SO ORDERED.

SIGNED August 1, 2019.

/s/ Karen Gren Scholer

KAREN GREN SCHOLER

UNITED STATES DISTRICT JUDGE

Labor One, Inc. v. Staff Mgmt. Sols., LLC

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

August 5, 2019, Decided; August 5, 2019, Filed

Case No. 17 C 7580

Reporter

2019 U.S. Dist. LEXIS 130030 *; 2019-2 Trade Cas. (CCH) P80,875; 2019 WL 3554412

LABOR ONE, INC., an Illinois Corporation, Plaintiff, v. STAFF MANAGEMENT SOLUTIONS, LLC, an Illinois Limited Liability Company, ARAMARK SERVICES, INC., a Delaware Corporation, and ARAMARK FOOD AND SUPPORT SERVICES, INC., a Delaware Corporation, Defendants.

Prior History: *Labor One, Inc. v. Staff Mgmt. Solutions, LLC, 2018 U.S. Dist. LEXIS 146657 (N.D. Ill., Aug. 28, 2018)*

Core Terms

allegations, antitrust, temporary worker, temporary employee, amended complaint, terminated, competitor, consumers, anticompetitive conduct, monopolize, temporary, billing, terminate a contract, contracts, vendor, tests, Sherman Act, monopoly, asserts, argues, rights, hire

LexisNexis® Headnotes

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

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

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

To survive a motion to dismiss, the complaint must include enough factual detail to give defendants fair notice of the claims and the grounds upon which they rest, and the allegations must amount to a claim for relief that is plausible on its face. To state a plausible claim, plaintiffs must allege enough factual matter, taken as true, to raise a right to relief above the speculative level and nudge its claims across the line from conceivable to plausible. In determining whether the compliant meets this test, the court accepts all well-pleaded facts as true and draws all reasonable inferences in favor of plaintiff. The court does not, however, accept as true legal conclusions couched as factual allegations. Formulaic recitation of the elements of a cause of action supported by conclusory statements are insufficient.

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

HN2[] **Attempts to Monopolize, Elements**

To state a claim for attempted monopolization, a plaintiff must plead that (1) the defendant had specific intent to achieve monopoly power in a relevant market; (2) the defendant engaged in predatory or anticompetitive conduct directed to accomplishing this purpose; and (3) there is a dangerous probability that the attempt at monopolization will succeed.

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

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

HN3[] Actual Monopolization, Claims

Possessing or attempting to possess monopoly power does not by itself violate *15 U.S.C.S. § 2*. Rather, the law is well-settled that defendant must have engaged in predatory or anticompetitive conduct to be subject to *Section 2* liability. The offense of monopolization is the acquisition of monopoly by improper methods or, more commonly the abuse of monopoly. *Section 2* forbids not the intentional pursuit of monopoly power but the employment of unjustifiable means to gain that power.

Antitrust & Trade Law > Consumer Protection

Antitrust & Trade Law > Procedural Matters

HN4[] Antitrust & Trade Law, Consumer Protection

A private antitrust plaintiff cannot recover damages unless it proves the existence of antitrust injury. Antitrust lawsuits are to be brought to enforce rights of those persons for whose benefit the laws were enacted—that is, consumers. Antitrust is designed to protect consumers from producers, not to protect producers from each other or to ensure that one firm gets more of the business. When conduct excludes a competitor from the marketplace, it raises antitrust concerns only if it impairs the health of the competitive process itself. To challenge its exclusion from the market as an antitrust violation, therefore, a plaintiff must prove that the likely effect of the exclusion will be to raise prices above the competitive level, or otherwise injure competition. ***Antitrust law*** is meant to protect consumers from producers, not to protect producers from each other.

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

HN5[] Motions to Dismiss, Failure to State Claim

Dismissal of an action is warranted if the plaintiff can prove no set of facts in support of his claims that would entitle him to relief.

Civil Rights Law > ... > Contractual Relations & Housing > Equal Rights Under the Law (sec. 1981) > Proof of Discrimination

Civil Rights Law > ... > Contractual Relations & Housing > Equal Rights Under the Law (sec. 1981) > Protected Rights

HN6[] Equal Rights Under the Law (sec. 1981), Proof of Discrimination

41 U.S.C.S. § 1981 protects the equal right of all persons within the jurisdiction of the United States to make and enforce contracts without respect to race. The statute defines the making and enforcing of contracts as the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. *42 U.S.C.S. § 1981(b)*. It applies to public and private contracts, as well as to existing and "would-be" contracts. To state a claim under *§ 1981*, a plaintiff must allege that (1) it is a member of a racial minority; (2) the defendant had an intent to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute, such as the making and enforcing of a contract. Moreover, a plaintiff cannot state a claim under *§ 1981* unless he has (or would have) rights under the existing (or proposed) contract that he wishes to make and enforce.

Civil Rights Law > ... > Contractual Relations & Housing > Equal Rights Under the Law (sec. 1981) > Protected Classes

HN7[] **Equal Rights Under the Law (sec. 1981), Protected Classes**

In some circumstances, a corporation has standing to assert a *42 U.S.C.S. § 1981* claim, such as when the corporation has assumed an imputed racial identity from its shareholders and can therefore be a direct target of discrimination.

Civil Rights Law > ... > Contractual Relations & Housing > Equal Rights Under the Law (sec. 1981) > Proof of Discrimination

HN8[] **Equal Rights Under the Law (sec. 1981), Proof of Discrimination**

Plaintiffs must plead a prima facie case of discrimination under *42 U.S.C.S. § 1981* before the burden shifts to defendants to articulate a legitimate, non-discriminatory reason for its allegedly discriminatory actions. To sufficiently plead its prima facie case, plaintiffs must allege, among other things, that the defendant treated plaintiff less favorably than a similarly situated business outside the protected class. Establishing a prima facie case for racial discrimination in making and enforcing contracts requires showing that the plaintiff (1) is a member of a protected class, (2) satisfactorily performed the contract, (3) suffered an adverse action, and (4) was treated differently than another similarly situated contractor outside the protected class.

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

HN9[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

When all federal claims in a suit in federal court are dismissed before trial, the presumption is that the court will relinquish federal jurisdiction over any supplemental state-law claims.

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For Staff Management Solutions, LLC, An Illinois Limited Liability Company, Aramark Services, Inc., A Delaware Corporation, Aramark Food and Support Services, Inc., A Delaware Corporation, Defendants: Christopher Ray Hughes, LEAD ATTORNEY, Leech Tishman Fuscaldo & Lampl, LLC, Oak Brook, IL.

For Staff Management Solutions, LLC, An Illinois Limited Liability Company, Counter Claimant: Christopher Ray Hughes, LEAD ATTORNEY, Leech Tishman Fuscaldo & Lampl, LLC, Oak Brook, IL.

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

Opinion by: REBECCA R. PALLMEYER

Opinion

MEMORANDUM OPINION AND ORDER

The parties to this case are both in the business of providing temporary workers to other businesses. Between July 2015 and May 2017, Plaintiff Labor One, Inc. was a subcontractor for Defendant Staff Management Solutions, Inc. Under the parties' contract, Labor One provided temporary employees to Staff Management's clients, including Defendants Aramark Services, Inc. and Aramark Food and Support Services Group, Inc. (collectively, Aramark). A billing dispute **[*2]** arose, however, and Staff Management terminated the contract in May 2017. This lawsuit, between two Illinois entities, followed.

In a ruling last year, this court concluded that Plaintiff Labor One's claims do not arise under federal law, and that there is no other basis for federal jurisdiction. *Labor One, Inc. v. Staff Management Solutions LLC, No. 17 C 7580, 2018 U.S. Dist. LEXIS 146657, 2018 WL 4110676 (N. D. Ill. Aug. 8, 2018)*. Labor One has filed an amended complaint, but the court stands by its conclusion that the parties' business dispute does not give rise to claims under federal antitrust or civil rights law. Accordingly, Defendants' motion to dismiss [62] is granted.

BACKGROUND

Labor One's amended complaint [52] alleges the following: Staff Management is a procurement manager for temporary labor services. (Am. Compl. ¶¶ 13, 22.) It is also "in the business of providing its own temporary workers to other entities while performing centralized management services" in connection with those workers. (*Id.* ¶ 13.) At some point, Aramark "retained Staff Management as the procurement manager" for temporary employees at McCormick Place, a venue in Chicago, Illinois. (*Id.* ¶ 22.)

Labor One, too, is in the business of providing temporary workers. (*Id.* ¶ 13.) In what it calls a "Community First Program," **[*3]** Labor One hires temporary employees from "specifically targeted low-income neighborhoods" of Chicago "to create local jobs." (*Id.* ¶¶ 15, 20.) In July 2015, Aramark "contacted Labor One about providing temporary labor services at McCormick Place" under the Community First Program. (*Id.* ¶ 14.) At the time, Aramark "was aware that Staff Management had its own preferred vendor list for temporary workers" and that Staff Management "did not want Labor One as the provider of temporary labor services at McCormick Place." (*Id.*) Nonetheless, on July 22, 2015, Labor One and Staff Management entered into a contract under which Labor One would supply temporary employees to Aramark—via Staff Management—for work at McCormick Place. (*Id.* ¶ 22.) Because Labor One planned to provide temporary workers from its Community First Program, "most, if not all, of the temporary workers to be supplied under the" contract were African American. (*Id.* ¶ 20.) Indeed, in its original complaint, Labor One alleged that it "only hired African-American workers." (Compl. [1] ¶ 94). Perhaps in response to the court's concern about that allegation (see Memorandum Order [46] at 6-7), Labor One now alleges it "has laborers **[*4]** from various ethnic and racial backgrounds." (Am. Compl. [52] ¶ 21.)[1]

Under the contract between Labor One and Staff Management, Staff Management would receive "a fee of 3% for providing centralized management services" to Aramark in connection with temporary employees that Staff Management procured for McCormick Place. (*Id.* ¶ 22.) The contract also required Staff Management to use a "Vendor Managed System (VMS) . . . for the acquisition, tracking, reporting and billing of Services for" Aramark. (*Id.* ¶ 24.) In addition, it required Labor One to "enter its billing hours for temporary labor services into the VMS system." (*Id.* ¶ 25.) Finally, it required Staff Management to pay Labor One after Aramark approved Labor One's billing

[1] The parties do not specify whether Labor One supplies temporary employees other than through the Community First Program.

entries. (*Id.* ¶ 26.) Staff Management, in turn, would "receive a commission from all invoices created by Labor One in the VMS system." (*Id.*)[2]

Between 2015 and 2017, Labor One "encountered technical issues with the VMS system . . . in entering its billing hours." (*Id.* ¶ 29.) Labor One made repeated efforts to seek assistance from Staff Management with these issues, but its efforts were "to no avail." (*Id.* ¶ 31.) On some occasions, Aramark participated in the negotiations **[*5]** between Staff Management and Labor One. (*See, e.g., id.* ¶¶ 36-46.) Staff Management, for its part, failed to timely pay Labor One for the services it provided. (*See id.* ¶¶ 28, 34.)

After this billing dispute arose, Staff Management "began to raise concerns about the honesty and quality of Labor One's temporary workers." (*Id.* ¶ 41.) At one point, Staff Management "accused Labor One's temporary workers of 'stealing time and hours' when assigned to a job with Aramark" and stated that the workers' conduct in this regard "was the reason for the delay in payment of the invoices." (*Id.* ¶ 42.) In addition, "[a]s a result of Labor One's efforts to get paid for its services, Staff Management began to request [repeated] background checks and drug tests for all of its temporary laborers working at McCormick place." (*Id.* ¶ 44; *see also id.* ¶ 46 (alleging that Staff Management started requesting "full-scale drug testing . . . even though the [contract with Labor One] provided for random testing").) And in a meeting around November 2016, Staff Management asked Labor One to "stop providing 'those people'"—meaning workers from the Community First Program—to Aramark at McCormick Place. (*Id.* ¶ 45.) Staff **[*6]** Management tried to force Labor One to instead "hire temporary workers from Staff Management's parent company or transition [Labor One's] temporary workers to Staff Management's preferred vendor list." (*Id.* ¶ 98; *see also id.* ¶ 45.) Around the same time, "Aramark employees" disclosed to Labor One supervisors that Staff Management was withholding payment from Labor One "in an attempt to force [it] to terminate the Contract and get rid of Labor One's workers from the Community First Program." (*Id.* ¶ 46.) In a letter dated May 26, 2017, "Staff Management unilaterally terminated" the contract with Labor One and "claim[ed] that the termination was due to Labor One's failure to enter time correctly in the VMS system." (*Id.* ¶ 48.)

According to Labor One, Staff Management still owes it $48,063.75. (*Id.* ¶ 49.) Labor One asserts claims against Staff Management for breach of contract (Count I); intentional interference with prospective economic relations (Count II); negligent interference with economic relations (Count III); violation of *Section 2 of the Sherman Act*, *15 U.S.C. § 2* (Count V); violation of Illinois' unfair competition law (Count VI); commercial disparagement under Illinois common law (Count VII); and **[*7]** violation of the *Civil Rights Act, 42 U.S.C. § 1981* (Count VIII). Labor One asserts a claim against Aramark for unjust enrichment (Count IV).

DISCUSSION

As in Labor One's original complaint, only two of the counts in the amended complaint invoke federal law: Count V, which asserts a claim arising under the Sherman Act, *15 U.S.C. § 2*, and Count VIII, which asserts a claim arising under the Civil Rights Act, *42 U.S.C. § 1981*. ***HN1***[] To survive Staff Management's motion to dismiss these counts, Labor One's amended complaint must include enough factual detail to give Staff Management fair notice of the claims and the grounds upon which they rest, and the allegations must amount to a claim for relief that is plausible on its face. *Ashcroft v. Iqbal, 556 U.S. 662, 678-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. To state a plausible claim, Labor One must allege enough factual matter, taken as true, to "raise a right to relief above the speculative level" and "nudge[] [its] claims across the line from conceivable to plausible." *Bell Atl. v. Twombly, 550 U.S. 544, 555-57, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In determining whether Labor One meets this test, the court accepts all well-pleaded facts as true and draws all reasonable inferences in favor of Labor One. *Iqbal, 556 U.S. at 679*. The court does not, however, accept as true legal conclusions couched as factual allegations. *Iqbal, 556 U.S. at 679*. Formulaic recitation of the elements of **[*8]** a cause of action supported by conclusory statements

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[2] This commission appears to be the same as the three percent fee for providing centralized management services. (*See* Labor One Opp. 9 (stating that pursuant to the contract, "Labor One was to pay Staff Management 3% of its gross sales per invoice for Staff Management's role as a fee-charging procurement manager of temporary labor services at McCormick Place for Aramark").)

are insufficient. *Id. at 678*; *see also* *Tamburo v. Dworkin, 601 F.3d 693, 699 (7th Cir. 2010)* (affirming dismissal of antitrust claims that were "pleaded in a wholly conclusory fashion" and "appear[ed] to sweep in the entire gamut of federal antitrust violations"); *Swanson v. Citibank, N.A., 614 F.3d 400, 405 (7th Cir. 2010)* (in general, antitrust claims "will require more detail, both to give the opposing party notice of what the case is all about and to show how . . . the dots should be connected").

As the court will explain, Labor One's allegations that Staff Management violated the Sherman Act and the Civil Rights Act do not meet these pleading standards.

A. Sherman Act

Labor One alleges that Staff Management violated *Section 2* of the Sherman Act by attempting to monopolize the business of "suppl[ying] . . . temporary workers to Aramark at McCormick Place." (Am. Compl. ¶¶ 94-97.)[3] Under *Section 2*, "[e]very person who shall monopolize, or attempt to monopolize" is subject to antitrust liability. *15 U.S.C. § 2*; *see also* *15 U.S.C. § 15* (providing individual right of action). ***HN2***[] To state a claim for attempted monopolization, a plaintiff must plead that (1) the defendant had "specific intent to achieve monopoly power in a relevant market"; (2) the defendant engaged in "predatory or anticompetitive conduct **[*9]** directed to accomplishing this purpose"; and (3) there is "a dangerous probability that the attempt at monopolization will succeed." *Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 854 (7th Cir. 2011)*.

HN3[] Possessing or attempting to possess monopoly power does not by itself violate *Section 2*. *See* *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 447, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)* (citing *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1996))*. Rather, the law is well-settled that defendant must have "engaged in predatory or anticompetitive conduct" to be subject to *Section 2* liability. *Mercatus Grp., 641 F.3d at 854*; *see also, e.g.,* *American Academic Suppliers, Inc. v. Beckley-Cardy, Inc., 922 F.2d 1317, 1320 (7th Cir. 1991)* ("The offense of monopolization is the acquisition of monopoly by improper methods or, more commonly . . . the abuse of monopoly."); *State of Ill. ex rel. Burris v. Panhandle E. Pipe Line Co., 935 F.2d 1469, 1481 (7th Cir. 1991)* ("*Section 2* forbids not the intentional pursuit of monopoly power but the employment of unjustifiable means to gain that power."). In ruling on defendants' first motion to dismiss, the court observed that Labor One's *Section 2* claim appeared to be based only on Staff Management's termination of the contract with Labor One. *See* Memorandum Opinion at 5-6.. Because the antitrust laws generally do not prohibit a company from refusing to deal with a rival, the court reasoned, "Labor One's allegation that Staff Management has terminated the parties' agreement does not on its face constitute an attempt to monopolize." *Id.* at 5 (citing, *inter alia,* *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409-10, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004))*.

In its effort to allege anticompetitive **[*10]** conduct, the amended complaint fares no better. Specifically, Labor One asserts that Staff Management engaged in anticompetitive conduct by (1) refusing to pay Labor One (and thereby attempting to force Labor One into insolvency); (2) making false statements to Aramark about the quality of Labor One's temporary employees, including by accusing them of inaccurately reporting hours worked; (3) repeatedly requesting background checks and drug tests for Labor One's temporary employees; and (4) "attempt[ing] to

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[3] Labor One equivocates in defining the relevant market for purposes of this claim. In some places, it defines the market as "staffing temporary labor services at McCormick Place." (Am. Compl. ¶ 96; *see also, e.g., id.* ¶¶ 97-98, 101-02, 104, 106.) In other places, it defines the relevant market as "the Chicago Market for staffing services." (*Id.* ¶ 94; *see also* Labor One Opp. to Defs.' Mot. ("Labor One Opp.") [68], 4 (alleging that Staff Management excluded Labor One "from the relevant market of providing temporary labor services at McCormick Place, as well as at any location Aramark services in the Chicago market").) In still others, Labor One defines the relevant market as providing temporary labor services at McCormick Place and Navy Pier, another venue in Chicago. (*See* Labor One Opp. 6.) Because the amended complaint does not contain any factual allegations concerning the "Chicago market" or Navy Pier, the court will assume that Labor One is relying on the first definition listed here. In any event, this issue is immaterial; as the court explains below, it need not address whether Labor One has sufficiently alleged a relevant market because it dismisses the antitrust claim on other grounds.

require Labor One to either hire temporary workers from Staff Management's parent company or transition [its] temporary workers to Staff Management's preferred vendor list." (Am. Compl. ¶¶ 44, 96-98; Labor One Opp. 3, 8.)[4]

Labor One admits that it was able to provide Aramark with temporary employees for McCormick Place—in other words, to participate in what it defines as the relevant market—only through its contract with Staff Management. (*See, e.g.*, Am. Compl. ¶¶ 22, 96; Labor One Opp. 7.) Accordingly, Labor One's allegations that Staff Management engaged in anticompetitive conduct are, in essence, allegations that Staff Management terminated the contract or **[*11]** sabotaged Labor One's ability to perform under it. Indeed, Labor One alleges that Staff Management terminated the contract only after trying to manipulate Labor One into doing the same. (*See* Am. Compl. ¶ 36 (alleging that according to Aramark, "Staff Management was dragging its feet with payments in an attempt to force Labor One to terminate the Agreement").) As noted, the antitrust laws generally do not require Staff Management to deal with Labor One, a competitor. *Verizon Commc'ns, 540 U.S. at 409-10*; Memorandum Opinion at 5. Nor do they require Staff Management to honor a subcontract with Labor One for services under its contract with Aramark. *See* *Colsa Corp. v. Martin Marietta Servs., Inc., 133 F.3d 853, 856 (11th Cir. 1998)* (where defendant terminated subcontract with plaintiff for services under a separate contract between defendant and a third party, defendant's conduct could not "be characterized as anticompetitive" and plaintiff's rights against defendant, if any, "sound[ed] in contract"). Accordingly, Labor One's allegations that Staff Management terminated or otherwise sabotaged the parties' contract—whether by delaying payments, souring Aramark on Labor One's temporary employees, or imposing disruptive screening requirements—do not plead anticompetitive conduct.

Labor One cites *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*, for **[*12]** the proposition that in some circumstances, a court can impose antitrust liability for refusal to deal with a competitor. (Labor One Opp. 8-9.) Labor One argues that the court should do so here because like the defendant in *Aspen Skiing*, Staff Management displayed "a willingness to forsake short-term profits to achieve an anticompetitive end." (Labor One Opp. 9.) The court is not persuaded. In *Aspen Skiing*, defendant discontinued an agreement with its competitor to offer a ski pass that customers could use interchangeably at the parties' resorts. *See* *Aspen Skiing, 472 U.S. at 589-91*. The evidence showed, among other things, that if defendant continued to offer the interchangeable pass, it would still be compensated at retail price. *See* *id. at 593 n.14, 610*. The evidence also showed that offering the interchangeable pass "provided [defendant] with immediate benefits" and benefitted consumers. *Id. at 610*. This evidence, the court determined, supported an inference that in ceasing to offer the pass, defendant "was not motivated by efficiency concerns" and instead "was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Id. at 610-11*.

The circumstances in the present case are not comparable. **[*13]** First, in *Aspen Skiing*, defendant's rival was an independent market participant. *See, e.g.*, *472 U.S. at 590-91*. Here Labor One concedes that it was participating in the relevant market only through its contract with Staff Management. Accordingly, Staff Management could harm Labor One's position in the market only by terminating the parties' contract or rendering Labor One unable to perform its contractual obligations. Labor One's remedy, if any, for such harm arises under contract law. Second, although Staff Management was entitled to three percent of Labor One's gross sales per invoice under the parties' contract (*see* Labor One Opp. 9; Am. Compl. ¶ 22), Labor One alleges that Staff Management would "receive 100% of the revenues for any temporary workers it provided to Aramark" directly rather than through Labor One. (Am. Compl. ¶ 13.) It is not clear, therefore, that Staff Management's alleged anticompetitive actions left it worse off in the short-term than it would have been by making good on the parties' contract. Third, other than alleging in a conclusory fashion that Staff Management's actions "result[ed] in increased labor costs," Labor One does not allege

[4] Because Labor One does not allege that its business involves anything other than providing temporary employees, it is unclear what incentive Labor One would have to use Staff Management's temporary employees. Likewise, because Labor One alleges that Staff Management tried to prevent it from supplying temporary employees from the Community First Program (*see, e.g., id.* ¶¶ 36, 45-46), the court does not understand why Staff Management would permit or even desire that Labor One "transition" those employees to its "preferred vendor list." (*Id.* ¶ 98.) Accordingly, the court assumes that this last allegation is coextensive with the allegation that Staff Management tried to exclude Labor One from the relevant market by replacing Labor One's temporary employees with its own or those from preferred vendors. (*See id.* ¶ 36.)

that Staff Management was "willing to **[*14]** sacrifice . . . consumer goodwill." (Am. Compl. ¶ 106; *Aspen Skiing, 472 U.S. at 611*.) For these reasons, Labor One has not convinced the court that this is one of the rare cases in which refusal to deal with a competitor can give rise to antitrust liability.

Labor One's *Section 2* claim fails for an additional reason as well: Labor One has not "plausibly [pleaded] the existence of an antitrust injury," which it must do in order to state a *Section 2* claim. *Tamburo, 601 F.3d at 699*; *see also, e.g., Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (stating that ***HN4***[] a private antitrust plaintiff cannot recover damages unless it "prove[s] the existence of *antitrust* injury" (internal quotation marks omitted)). Antitrust lawsuits are to be brought to enforce rights of "those persons for whose benefit the laws were enacted"—that is, consumers. *Robert F. Booth Trust v. Crowley, 687 F.3d 314, 317 (7th Cir. 2012)*; *Ehredt Underground, Inc. v. Commonwealth Edison Co., 90 F.3d 238, 240 (7th Cir. 1996)* ("[W]e stress that antitrust is designed to protect consumers from producers, not to protect producers from each other or to ensure that one firm gets more of the business.") When conduct excludes a competitor from the marketplace, it raises antitrust concerns "only if it impairs the health of the competitive process itself." *Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 394 (7th Cir. 1984)*. To challenge its exclusion from the market as an antitrust violation, therefore, a plaintiff must prove that the likely "effect of the exclusion **[*15]** will be to raise prices above . . . the competitive level, or otherwise injure competition." *Id.*

The court dismissed Labor One's original complaint in part because "Labor One ma[de] no such allegation." Memorandum Opinion [42] at 6. In its amended complaint, Labor One alleges that Staff Management's anticompetitive conduct "result[ed] in increased labor costs." (Am. Compl. ¶ 106.) As noted above, this conclusory statement is unsupported; there are no factual allegations concerning the actual cost of temporary laborers at McCormick Place at any given time. Moreover, both the amended complaint and Labor One's briefing suggest that companies other than Labor One and Staff Management supply temporary employees in the relevant market. (*See id.* ¶ 98 (alleging that Staff Management has a "preferred vendor list"); Labor One Opp. 9 (suggesting that there are "similarly situated companies" in the market "that are not part of [Staff Management's] preferred vendor list").)[5] Accepting this allegation as true, it undermines Labor One's allegation that labor costs increased merely because Staff Management excluded it from the market. Labor One's allegation that Staff Management's conduct "increased **[*16]** labor costs" is a "formulaic recitation" of an antitrust injury and therefore does not sufficiently plead that element of Labor One's *Section 2* claim. *Iqbal, 556 U.S. at 678* (internal quotation marks omitted).

Labor One's allegations that Staff Management's actions "impair[ed] the competitive process," "injured competition," and "caused an antitrust injury" are also legal conclusions couched as facts, and the court declines to credit them. (Am. Compl. ¶¶ 97, 102-03; *see Twombly, 550 U.S. at 555*.) And Labor One's remaining allegations fail to plead an antitrust injury because they concern injuries only to Labor One itself as a competitor. (*See* Am. Compl. ¶¶ 100, 105 (alleging that Staff Management's conduct "undermined [its] ability to provide temporary labor services to Aramark as contemplated" and interfered with "current and future contractual relationships" that would have enabled Labor One to "provid[e] temporary workers in the service industry"); *Ehredt, 90 F.3d at 240* (***antitrust law*** is meant "to protect consumers from producers, not to protect producers from each other").)

Labor One argues that it has sufficiently pleaded antitrust injury because its exclusion from the market is "inseparable" from harm to the competitive process. (Labor One Opp. 3-4.) **[*17]** In making this argument, Labor One relies on *Gulf States Reorganization Group, Inc. v. Nucor Corp., 466 F.3d 961, 967 (11th Cir. 2006)*. Labor One's reliance on *Nucor* is misplaced. In that case the court credited at the summary judgment stage plaintiff's evidence that it was capable of entering the market and that if it had been allowed to do so, it would have become "a viable competitor" of the dominant market participant. *Id. at 967*. In addition, the court credited evidence that "[plaintiff's] becoming a viable competitor" would likely have generated pressure to reduce prices. *Id. at 968*. The court concluded that "the injury to [plaintiff]—its exclusion from the relevant market—is inseparable from the alleged harm to competition" because the exclusion "denies consumers the benefit of the pressure to lower prices . . . ." *Id.*

[5] Labor One argues that Staff Management excluded these "similarly situated" companies (*see* Labor One Opp. 9), but no such allegation appears in the amended complaint.

at 967-69. Here, as already noted, Labor One has not provided factual allegations to support the conclusion that its presence in the market exerted any pressure on Staff Management to lower the cost of temporary employees. Labor One's exclusion from the market, therefore, is not "inseparable" from harm to the competitive process. Nucor, 466 F.3d at 967.

Finally, Labor One maintains that its allegations concerning antitrust injury are similar to those in OverEnd Technologies, LLC v. Invista S.A.R.L., 431 F. Supp. 2d 925 (E.D. Wis. 2006). Labor One, however, ignores major differences between **[*18]** the allegations in *OverEnd* and those in this case. In *OverEnd*, plaintiff alleged that "defendants control[led] roughly three quarters of the market . . . and [were] using a fraudulently-obtained patent to force competitors out of business and to inhibit others from entering the field." Id. at 930. The court noted that "[s]uch behavior could lead to reduced competition, decreased innovation, and higher prices to consumers," and determined that plaintiff had plausibly alleged an antitrust injury. *Id.* By contrast, Labor One alleges that Staff Management drove only it—not multiple competitors—out of the market. (Again, Labor One's suggestion in its opposition that other staffing companies are also victims finds no support in the amended complaint.) Moreover, Labor One does not allege that Staff Management tried to block other competitors from *entering* the market. Because the record lacks allegations that were crucial to the court's decision in *OverEnd*, that case does not assist Labor One. The court also notes that *OverEnd* was decided before *Twombly* and *Iqbal. Cf.* OverEnd, 431 F. Supp. 2d at 928 (stating that **HN5**[] "[d]ismissal of an action . . . is warranted if the plaintiff can prove no set of facts in support of his claims that would **[*19]** entitle him to relief" (citing, *inter alia,* Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)).)

For the foregoing reasons, the court dismisses Labor One's Sherman Act claim.[6]

B. *Section 1981*

Labor One's alternative claim to federal jurisdiction over this contract dispute rests on the Civil Rights Act. Thus, Labor One claims that Staff Management violated 42 U.S.C. § 1981 by willfully "impeding [Labor One's] right to make and to enforce contracts based on racial discrimination . . . ." (Am Compl. ¶ 122.) In support of this claim, Labor One alleges that after it "informed Staff Management[] . . . that its temporary workers were almost entirely African-American, Staff Management asked that Labor One not continue to use those workers, referring to them as 'those people' . . . ." (*Id.* ¶ 121.) Relatedly, Labor One alleges that Staff Management asked it to replace the workers with workers "from Staff Management's hiring system." (*Id.*) Labor One further alleges that "Staff Management's acts or omissions were motivated, at least in part, by the fact that Labor One has a workforce of minority-based temporary workers of African-American descent under the Community First Program." (*Id.* ¶ 123.)

HN6[] Section 1981 "protects the equal right of '[a]ll persons within the jurisdiction of the United **[*20]** States' to 'make and enforce contracts' without respect to race." Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 474-75, 126 S. Ct. 1246, 163 L. Ed. 2d 1069 (2006) (quoting 42 U.S.C. § 1981(a)). The statute defines the making and enforcing of contracts as "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). It applies to public and private contracts, *see, e.g.,* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 609, 107 S. Ct. 2022, 95 L. Ed. 2d 582 (1987), as well as to existing and "would-be" contracts. Domino's Pizza, 546 U.S. at 476. To state a claim under § 1981, a plaintiff must allege that (1) it is a member of a racial minority; (2) the defendant had an intent to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute, such as the making and enforcing of a contract. Black Agents & Brokers Agency, Inc. v. Near N. Ins. Brokerage, Inc., 409 F.3d 833, 837 (7th Cir. 2005). Moreover, "a plaintiff cannot state a claim under § 1981 unless

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[6] Because the court is dismissing this claim for failure to sufficiently plead anticompetitive conduct and an antitrust injury, the court need not address Staff Management's arguments that Labor One has failed to allege (1) a relevant market; (2) that Staff Management's actions had a substantial effect on interstate commerce; and (3) that Staff Management had monopoly power. (*See* Defs.' Mot. to Dismiss [62], 5-8.)

he has (or would have) rights under the existing (or proposed) contract that he wishes 'to make and enforce.'" *Domino's Pizza, 546 U.S. at 479-80*.

HN7[] In some circumstances, a corporation has standing to assert a *§ 1981* claim, such as when the corporation has "assume[d] an 'imputed racial identity' from its shareholders" and can therefore be a direct target of discrimination. *Amber Pyramid, Inc. v. Buffington Harbor Riverboats, LLC, 129 F. App'x 292, 294-95 (7th Cir. 2005)* (unpublished) (quoting *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1059 (9th Cir. 2004))*; *see also, e.g., Jones v. Culver Franchising Sys., Inc., 12 F. Supp. 3d 1079, 1084-85 (N.D. Ill. 2013)* (determining that corporations had **[*21]** standing to pursue a claim under *§ 1981*); *A.H. Empl. Co. v. Fifth Third Bank, No. 11 C 4586, 2012 U.S. Dist. LEXIS 27666, 2012 WL 686704, at *5 (N.D. Ill. Mar. 1, 2012)* (similar). Neither party has addressed whether Labor One has standing to assert its *§ 1981* claim, and Labor One has not pleaded facts that would allow the court to make this determination. The court will assume for the sake of argument that Labor One has standing because, even if the claim is properly before the court, it must be dismissed. As in the original complaint, the allegations in the amended complaint do not "raise [Labor One's] right to relief above the speculative level." *Twombly, 550 U.S. at 555*. First, Labor One still fails to explain how any of Staff Management's actions impeded Labor One's own right to enter into employment agreements with its workers. Second, as the court addresses in more detail below, Labor One's allegations offer no plausible basis for a conclusion that Staff Management acted with an intent to discriminate based on race.

Labor One argues that Staff Management acted with discriminatory intent because "it stated in its termination letter that it was going to transition Labor One workers into Staff Management's workforce, which never occurred because it did not want African American workers under the Community First Program." (Labor One Opp. 12 **[*22]** (citing Am. Compl. ¶¶ 36, 38, 99).) But Labor One's argument that Staff Management "did not want African American workers" is unsupported by factual allegations. Indeed, in paragraphs 36 and 38 of the amended complaint, Labor One merely alleges that Staff Management wanted to replace Labor One's temporary employees with its own. In paragraph 99, Labor One alleges that Staff Management's only stated reason for terminating the contract was Labor One's "failure to enter time correctly in the VMS system." (Am. Compl. ¶ 99.) On its face, that reason is unrelated to race. Even viewed in the light most favorable to Labor One, the allegations in paragraphs 36, 38, and 99 of the amended complaint permit only a conclusion that Staff Management terminated the contract or otherwise sought to replace Labor One's temporary employees as a result of the parties' billing dispute.

Other arguments in Labor One's opposition suffer from the same flaws. Labor One, for example, argues that Staff Management acted with discriminatory intent when it questioned "the honesty and integrity of Labor One's temporary workers," including by accusing them of "stealing time and hours." (Labor One Opp. 13.) But Labor **[*23]** One admits that Staff Management began questioning the workers' honesty and integrity only "after Labor One complained to Aramark of not being paid for six months." (*Id.; see also* Am. Compl. ¶¶ 32, 39-42 (similar).) In addition, Labor One now suggests that Staff Management required its temporary employees to undergo extra background checks and drug tests because it knew that most of the workers were African-American. (Labor One Opp. 13.) In the amended complaint, however, Labor One alleges that Staff Management began requesting the extra background checks and drug tests "[a]s a result of Labor One's efforts to get paid for its services." (Am. Compl. ¶¶ 44.) Finally, Labor One maintains that because Staff Management knew that most of its temporary employees were African-American, its request for Labor One to stop using "those people" exhibited discriminatory motive. (Labor One Opp. 13.) Without more, however, the allegation that Staff Management used that phrase does not "nudge[] [Labor One's] claims across the line from conceivable to plausible." *Twombly, 550 U.S. at 570*. In short, Labor One has not offered any basis for the conclusion that Staff Management's conduct, including its decision to terminate the **[*24]** contract, was racially motivated; to the contrary, Labor One's allegations instead support the inference that Staff Management's goal was to avoid paying Labor One amounts to which Labor One is entitled.

Labor One separately argues that it has satisfied the pleading standard for its *§ 1981* claim under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*. ***HN8***[] Under the *McDonnell Douglas* framework, Labor One must plead a *prima facie* case of discrimination before the burden shifts to Staff Management to articulate a legitimate, non-discriminatory reason for its allegedly discriminatory actions. *See id. at 802*. To sufficiently plead its *prima facie* case, Labor One must allege, among other things, that Staff Management treated Labor One less favorably than a similarly situated business outside the protected class. *See Amber Pyramid, 129 F. App'x at 295* (establishing a *prima facie* case for racial discrimination in making and enforcing contracts requires showing that the plaintiff "(1) is a member of a protected class, (2) satisfactorily performed the contract, (3) suffered an adverse action, and (4) was treated differently than another similarly situated contractor outside the protected class") According to Labor One, it has alleged that "it was treated **[*25]** differently." (Labor One Opp. 13 (citing Am. Compl. ¶¶ 14, 30-33, 43, 45, 47).) But the amended complaint (including the paragraphs that Labor One cites) contains no such allegations. Because Labor One has not pleaded this element, it has not satisfied its burden under the *McDonnell Douglas* framework.

For the foregoing reasons, the court dismisses Labor One's *§ 1981* claim. Having also dismissed Labor One's claim under the Sherman Act, there is no other basis for federal jurisdiction. Moreover, Labor One has not attempted to establish that the court has diversity jurisdiction. The court, therefore, dismisses the amended complaint in its entirety without prejudice. *See RWJ Mgmt. Co. v. BP Prods. N. Am., Inc., 672 F.3d 476, 479 (7th Cir. 2012)* ***HN9***[] ("[W]hen all federal claims in a suit in federal court are dismissed before trial, the presumption is that the court will relinquish federal jurisdiction over any supplemental state-law claims." (quoting *Al's Serv. Ctr. v. BP Prods. N. Am., Inc., 599 F.3d 720, 727 (7th Cir. 2010))*).

CONCLUSION

For the foregoing reasons, the court grants Defendants' motion to dismiss Labor One's amended complaint [62]. The Clerk is directed to terminate the case in this court, without prejudice to litigation of Labor One's breach of contract claim in any court having jurisdiction over that claim.

ENTER:

Dated: August 5, 2019 **[*26]**

/s/ Rebecca R. Pallmeyer

REBECCA R. PALLMEYER

United States District Judge

Lawrence v. Wells Fargo Bank, N.A.

United States District Court for the Eastern District of California

August 7, 2019, Decided; August 7, 2019, Filed

1:19-cv-00302-LJO-EPG

Reporter

2019 U.S. Dist. LEXIS 132795 *; 2019 WL 3714774

ROBERT LAWRENCE, an Individual, Plaintiff, v. WELLS FARGO BANK, N.A., a National Association; FIRST AMERICAN TITLE INSURANCE COMPANY, a Nebraska Corporation; and DOES 1 through 100 inclusive., Defendants.

Subsequent History: Dismissed by, Without prejudice *Lawrence v. Wells Fargo Bank, N.A., 2019 U.S. Dist. LEXIS 148684 (E.D. Cal., Aug. 29, 2019)*

Core Terms

reinstate, fraudulent, promise, foreclosure, fails, allegations, default, unfair, wrongful foreclosure, cause of action, negligent misrepresentation, fraudulent conduct, leave to amend, prong, motion to dismiss, borrower, grounds, notice, promissory estoppel, unfair competition, notice of default, misrepresentation, particularity, heightened, oppressive, willfully, parties, district judge, trust deed, conclusory

Counsel: **[*1]** For Robert Lawrence, an Individual, Plaintiff: Jarrod Y. Nakano, Timothy G. McFarlin, LEAD ATTORNEYS, McFarlin LLP, Irvine, CA.

For Wells Fargo Bank, N.A., a National Association, Defendant: Raagini Rashmi Shah, LEAD ATTORNEY, Reed Smith LLP, Los Angeles, CA; Bryan David Trader, Reed Smith LLP, Los Angeles, CA.

Judges: Lawrence J. O'Neill, UNITED STATES CHIEF DISTRICT JUDGE.

Opinion by: Lawrence J. O'Neill

Opinion

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITH LEAVE TO AMEND.

I. PRELIMINARY STATEMENT TO PARTIES AND COUNSEL

Judges in the Eastern District of California carry the heaviest caseloads in the nation, and this Court is unable to devote inordinate time and resources to individual cases and matters. Given the shortage of district judges and staff, this Court addresses only the arguments, evidence, and matters necessary to reach the decision in this order. The parties and counsel are encouraged to contact the offices of United States Senators Feinstein and Harris to address this Court's inability to accommodate the parties and this action. The parties are required to reconsider consent to conduct all further proceedings before a Magistrate Judge, whose schedules are far more realistic **[*2]** and accommodating to parties than that of U.S. Chief District Judge Lawrence J. O'Neill, who must prioritize criminal and older civil cases.

Civil trials set before Chief Judge O'Neill trail until he becomes available and are subject to suspension mid-trial to accommodate criminal matters. Civil trials are no longer reset to a later date if Chief Judge O'Neill is unavailable on the original date set for trial. Moreover, this Court's Fresno Division randomly and without advance notice reassigns civil actions to U.S. District Judges throughout the Nation to serve as visiting judges. In the absence of Magistrate Judge consent, this action is subject to reassignment to a U.S. District Judge from inside or outside the Eastern District of California.

II. INTRODUCTION

Plaintiff Robert Lawrence ("Plaintiff" or "Lawrence") brings the present action against Wells Fargo Bank, N.A. ("Wells Fargo" or "Defendant") and First American Title Insurance Company ("First American")[1] for the alleged wrongful foreclosure of Plaintiff's home. Plaintiff brings claims of wrongful foreclosure, fraudulent misrepresentation, negligent misrepresentation, promissory estoppel, and for violation of California's Unfair **[*3]** Competition Law (UCL), *California Business & Professions Code § 17200 et seq.*

Under review is Wells Fargo's motion to dismiss for failure to state a claim under *Federal Rule of Civil Procedure 12(b)(6)*. ECF No. 4. For the reasons set forth below, the Court grants Defendant's motion to dismiss with leave to amend.

III. BACKGROUND [2]

Plaintiff Robert Lawrence was the owner of the residential real property located at 935 East Laurel Avenue, Porterville, California 93257 (the "Property"). ECF No. 1-1 ¶ 1. Defendant Wells Fargo Bank, N.A. is a national association conducting business in Tulare County California. ECF No. 1-1 ¶ 2. First American is a Nebraska corporation conducting business in Tulare County California.

On or around August 15, 2003, Lawrence entered into a loan agreement ("Loan") with Wells Fargo for $190,000 to finance the purchase of the Property. ECF No. 1-1 ¶ 12. To secure the note and Property, Lawrence executed a deed of trust. *Id.* Wells Fargo is the beneficiary under the deed of trust, and Fidelity National Title Insurance Company was named as the trustee under the deed of trust. *Id.*

In 2013, Lawrence began to experience a financial hardship from an illness that caused medical expenses and time away from work. *Id.* ¶ 13. Lawrence fell behind on his payments on the Loan. **[*4]** *Id.* ¶ 13. Lawrence claims he sought to reinstate the Loan and requested a payoff quote from Wells Fargo. *Id.* ¶ 14. In or around May 2016, Lawrence made a payment of $15,244.75 according to a reinstatement quote from Wells Fargo to reinstate the Loan. *Id.* Lawrence contends he "immediately followed up with Wells Fargo to ensure that his payment was applied to the Loan but never received confirmation." *Id.* ¶ 14.

Lawrence continued to make monthly payments on the Loan. ECF No. 1-1 ¶ 15. Shortly thereafter, Lawrence discovered that the reinstatement funds had been applied to a separate account rather than to the Loan. *Id.* ¶ 16.

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[1] First American has yet to make an appearance in this matter.

[2] Unless otherwise noted, the facts are taken from the Complaint, ECF No. 1-1. For purposes of the motion to dismiss all alleged material facts are taken as true and viewed in the light most favorable to Plaintiff. *Coalition For ICANN Transparency, Inc. v. VeriSign, Inc., 611 F.3d 495, 501 (2010)*.

On September 26, 2017, First American, on behalf of Wells Fargo issued a notice of default on the Property that was recorded on October 2, 2017.[3] ECF No. 1-1, Ex. B at 29, 32. The notice of default declared that Lawrence was in default for the installment due May 1, 2017 and all subsequent installments. *Id.*, Ex. B at 31. The total amount in default as of September 26, 2017 was $6,953.65. *Id.*, Ex. B at 29.

In January 2018, Lawrence applied for a loan modification with Wells Fargo and Wells Fargo denied the request. *Id.* ¶ 18.

On May 15, 2018, the Property sold at foreclosure **[*5]** sale to Wells Fargo as the highest bidder for $144,000. ECF No. 1-1, Ex. C at 45-46.

On January 22, 2019, Lawrence filed the present lawsuit against Wells Fargo, First American, and 1 to 100 unknown defendants, the "DOES" defendants. ECF 1-1, at 1.

IV. LEGAL STANDARD

A. Motion to Dismiss under *Rule 12(b)(6)*

A motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* challenges the legal sufficiency of the opposing party's pleadings. Dismissal of an action under *Rule 12(b)(6)* is proper where there is either a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. When considering a motion to dismiss for failure to state a claim under *Rule 12(b)(6)*, all allegations of material fact must be accepted as true and construed in the light most favorable to the pleading party. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*. The inquiry is generally limited to the allegations made in the complaint. *Lazy Y Ranch LTD v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008)*.

Under *Federal Rule of Civil Procedure 8(a)*, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A plaintiff is required to allege "enough facts to state a claim to relief that is plausible on its face." *Id.* "A claim has facial **[*6]** plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly, 550 U.S. at 556*).

While *Rule 8(a)* does not require detailed factual allegations, "it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Iqbal, 556 U.S. at 678*. A pleading is insufficient if it offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly, 550 U.S. at 555*; *see also Iqbal, 556 U.S. at 678* ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Moreover, it is inappropriate to assume that the plaintiff "can prove facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged[.]" *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. In practice, "a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Twombly, 550 U.S. at 562*. In other words, the complaint must describe the alleged misconduct in **[*7]** enough detail to lay the foundation for an identified legal claim.

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[3] Lawrence contends that he never received notice of the change in trustee and avers that the notice of default is therefore void.

V. ANALYSIS

1. Fraudulent Misrepresentation and Negligent Misrepresentation

In Lawrence's second cause of action, he contends that "Defendants . . . knowingly and willfully made false representations to Plaintiff, as described above." ECF No. 1-1 ¶ 32. Lawrence purports that Wells Fargo made a false statement when it told him he could reinstate the loan. *Id.* ¶ 26. Under Lawrence's negligent misrepresentation claim (third cause of action), he contends that Defendants made a false representation that they knew or should have known was false. *Id.* ¶ 39. For the elements of fraud, the Court looks to state law. *Kearns v. Ford Motor Co., 567 F.3d 1120, 1126 (9th Cir. 2009)*. In California, the elements of fraud are (1) a misrepresentation; (2) made with knowledge of its falsity (scienter); (3) with the intent to defraud and induce reliance; (4) which did induce reasonable reliance; and (5) resulting damages. *Id.* The elements for the cause of action for negligent misrepresentation are the same as those of a claim of fraud, except that the defendant need not actually know the representation was false. *Neilson v. Union Bank of California, N.A., 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003)*. For negligent misrepresentation, it is sufficient to allege that the defendant lacked **[*8]** reasonable grounds to believe that the representation was true. *Id.*

Because these claims sound in fraud, Lawrence must meet the heightened pleading standard of *Federal Rule of Civil Procedure 9(b)*. *Vess v. Ciba-Geigy Corp., 317 F.3d 1097, 1103-04 (9th Cir. 2003)*. *Rule 9(b)* requires a party alleging fraud to "state with particularity the circumstances constituting [the] fraud[.]" In the Ninth Circuit, claims for fraud and negligent misrepresentation must meet *Rule 9(b)*'s particularity requirements. *Khan v. CitiMortgage, Inc., 975 F. Supp. 2d 1127, 1139 (E.D. Cal. 2013)*; *Neilson, 290 F. Supp. 2d at 1141*. This heightened pleading standard requires the party to do more than simply identify a transaction and allege in a conclusory manner that the transaction was fraudulent. *See In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994)* (en banc), *superseded by statute on other grounds*. Rather, the party must set forth in detail "the who, what, when, where, and how" of the misconduct charged. *Vess, 317 F.3d at 1106* (citation omitted). In a fraud action against a corporation, a plaintiff must allege the names of the persons who made the fraudulent representation, their authority to speak, to whom they spoke, what they said, and when the representation was made. *Khan, 975 F. Supp. 2d at 1140*.

The purpose of *Rule 9(b)* is to protect defendants from factually baseless claims of fraud as much as it is meant to give defendants notice of the claims asserted against them. *See Kearns, 567 F.3d at 1125*. When a party averring fraud fails to meet the heightened **[*9]** pleading standard of *Rule 9(b)*, dismissal of the claim is proper. *See Vess, 317 F.3d at 1107* ("A motion to dismiss a complaint or claim 'grounded in fraud' under *Rule 9(b)* for failure to plead with particularity is the functional equivalent of a motion to dismiss under *Rule 12(b)(6)* for failure to state a claim.").

The Court dismisses the claims of fraudulent and negligent misrepresentation because Lawrence fails to plead the circumstances of the fraud with particularity. Lawrence's complaint does not set forth the who, what, when, where, and how the fraudulent conduct occurred. Instead, the complaint vaguely alleges that Wells Fargo falsely informed Lawrence that he could reinstate the loan when Wells Fargo knew this was false or should have known this to be false. ECF 1-1, ¶¶ 32-33, 39. Lawrence then alleges that "[i]n bad faith, Defendants wrongfully refused to honor its promise to reinstate the Loan." *Id.* ¶ 35.

According to the allegations in the complaint, Lawrence experienced financial hardship in or around 2013, and he "shortly thereafter" requested a payoff quote. ECF No. 1-1, ¶ 13. Then in May 2016, Lawrence made the required $15,244.75 payment to reinstate the loan. *Id.* ¶ 14. Lawrence fails to allege when Wells Fargo provided **[*10]** the reinstatement quote, only offering a timeframe spanning from on or around 2013 to May 2016—a period of more than three years. Next, the complaint does not allege who provided the quote. The complaint alludes to an oral promise to reinstate the loan, ECF No. 1-1 ¶ 44, but fails to identify who made such a promise.

The vague allegations that Wells Fargo promised to reinstate the loan for a specific amount and subsequently failed to honor the promise does not apprise Wells Fargo of its allegedly fraudulent conduct.

"Dismissal without leave to amend is proper if it is clear that the complaint could not be saved by amendment." *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1051 (9th Cir. 2008)*. If the court concludes that dismissal under *Rule 12(b)(6)* is warranted, the court should not dismiss the complaint "unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 247 (9th Cir. 1990)* (citations omitted).

Given the opportunity, Plaintiff may be able to state the ostensibly fraudulent conduct with particularity which would place Defendants on notice of the who, what, when, where, and how the conduct was committed. Accordingly, the claims of fraudulent misrepresentation and negligent misrepresentation are dismissed with leave to amend.

2. Wrongful [*11] Foreclosure

Lawrence's first cause of action alleges that Wells Fargo engaged in wrongful foreclosure of the Property in violation of California's Homeowner *Bill of Rights* ("HBR"), *California Civil Code Section 2923, et seq.* Lawrence contends that Wells Fargo acted in bad faith by misapplying Lawrence's reinstatement payment to another account. ECF No. 1-1 ¶ 26. According to the complaint, Wells Fargo falsely stated that Lawrence could reinstate the Loan and Wells Fargo knew the statements were false. *Id.* In addition, Lawrence argues that Wells Fargo violated the HBR by failing to comply with the requirements of *California Civil Code Section 2923.5* ("*Section 2923.5*") and the notice of default provisions of *California Civil Code Section 2924, et seq.* ECF No. 1-1 ¶ 28.

The Court holds that the complaint fails to allege facts that give rise to a plausible claim of wrongful foreclosure. The elements of an equitable cause of action to set aside a foreclosure sale are:

> (1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered **[*12]** the amount of the secured indebtedness or was excused from tendering.

Lona v. Citibank, N.A., 202 Cal. App. 4th 89, 104, 134 Cal. Rptr. 3d 622 (2011).

Alleged facts do not show illegal, fraudulent, or willfully oppressive sale

First, Lawrence fails to adequately plead how Wells Fargo caused an illegal, fraudulent, or willfully oppressive sale of real property. Plaintiff argues that the complaint states a claim under the "illegal" and "willfully oppressive" prongs of this element, claiming that Wells Fargo violated *Section 2923.5*, which requires a lender or its agent to attempt to contact a defaulted borrower prior to foreclosure. *See* ECF No. 10 at 6. *Section 2923.5(a)(2)* requires a "mortgagee beneficiary or authorized agent" to "contact the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure." *Section 2923.5(b)* requires a default notice to include a declaration of compliance with *Section 2923.5*, including an attempt "with due diligence to contact the borrower as required by this section." Lawrence also points to *California Civil Code Section 2924.11* ("*Section 2924.11*"), which prohibits a trustee's sale while a complete foreclosure prevention alternative application is pending. *See* ECF No. 10 at 6.

It is not clear from the complaint how Lawrence claims that the requirements of *Section 2923.5* or *Section 2924.11* were **[*13]** not followed. The complaint states, "Defendants cannot prove that the non-judicial foreclosure proceedings have complied with the statutory requirements of *California Civil Code Sections 2923.5* and *2924, et seq.*" ECF No. 1-1 ¶ 28. Plaintiff continues, "[a]s set forth above, Defendants have failed to comply with the requirements of *California Civil Code [S]ections 2923.5* and *2924*." ECF No. 1-1 ¶ 28. Plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Twombly, 550 U.S. at 570*. These conclusory allegations fail to plausibly allege that Wells Fargo caused an illegal or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust.[4]

To the extent Plaintiff attempts to base this claim upon "fraudulent" conduct, that claim fails for the reasons set forth above in the discussion on the claims of fraudulent and negligent misrepresentation.

Failure to tender full amount of secured indebtedness

Lastly, in a wrongful foreclosure claim, the plaintiff must show that the mortgagor tendered the amount of the secured indebtedness (or at least the amount the plaintiff was in default), or was excused from tendering. *Compare, e.g.,* *Arnolds Mgmt. Corp. v. Eischen, 158 Cal. App. 3d 575, 578, 205 Cal. Rptr. 15 (Ct. App. 1984)* ("It is settled that an action to set aside a trustee's sale for **[*14]** irregularities in sale notice or procedure should be accompanied by an offer to pay the full amount of the debt for which the property was security."), *Alicea v. GE Money Bank, 2009 U.S. Dist. LEXIS 60813, 2009 WL 2136969, at *3 (N.D. Cal. 2009)* (same), *Lona, 202 Cal. App. 4th at 104* (allowing for exceptions to full tender requirement), *with, e.g.,* *Miller v. Washington Mut. Bank FA, 776 F. Supp. 2d 1064, 1069 (N.D. Cal. 2011)* (requiring tender of amount in default); *Lopez v. Chase Home Fin., LLC, 2009 U.S. Dist. LEXIS 34647, 2009 WL 1120318, at *6 (E.D. Cal. 2009)* (same). The basic rule is that an offer of performance is of no effect if the person making it is not able to perform. *Karlsen v. American Sav. & Loan Assn., 15 Cal. App. 3d 112, 118, 92 Cal. Rptr. 851 (Cal. Ct. App. 1971)*.

In the complaint, Lawrence makes the blanket statement that "Plaintiff stands ready, willing, and able to tender and pay the amounts due under the Loans . . . and is ready, willing, and able to make such payment at the times required of them by law." ECF No. 1-1 ¶ 24. This is insufficient to establish a credible tender offer by Plaintiff. Attempting to obscure the absence of tender by alleging that the plaintiff is ready, willing, and able to tender will not satisfy the tender requirement. *Flores v. EMC Mortg. Co., 997 F. Supp. 2d 1088, 1107 (E.D. Cal. 2014)*. Rather than supporting a credible tender offer, the complaint tends to show the absence of such an offer. Lawrence complains of a failed promise to reinstate the Loan in May 2016, yet Wells Fargo initiated foreclosure in September 2017 for defaulted payments starting in May 2017. Following the notice of default, **[*15]** Lawrence sought to modify the Loan which was denied in January 2018. These facts suggest that Lawrence was not able to tender the amount he was in default, let alone the full amount of secured indebtedness prior to the May 15, 2018 foreclosure sale. Accordingly, the complaint fails to allege a credible tender as required.

Prejudice or harm to Lawrence

To prevail on a claim of wrongful foreclosure, the plaintiff must show that she was prejudiced or harmed. *Lona, 202 Cal. App. 4th at 104*. Because the Court finds the claim defective on other grounds, it will not address prejudice or harm.

For these reasons, the complaint fails to make a plausible claim for relief under the theory of wrongful foreclosure. That claim is dismissed with leave to amend.

3. Promissory Estoppel

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[4] To the extent Plaintiff is attempting to base his wrongful foreclosure claim on the assertion that he did not receive notice that "First American had replaced, substituted, and removed the prior named trustee under the Deed of Trust," ECF No. 1-1 ¶ 17, any amended complaint must make it clear that he is doing so. Counsel is warned, however, that any assertion that the procedure underlying the trustee substitution voided the notice of default must comport with Counsel's obligations under *Rule 11*, and frivolous allegations will not be tolerated in this overburdened Court.

Lawrence alleges promissory estoppel as his fourth cause of action. ECF No. 1-1 ¶¶ 43-49. A promissory estoppel claim requires a showing that (1) the defendant made a promise that is definite and clear; (2) the plaintiff reasonably relied on the promise; and (3) the plaintiff suffered substantial detrimental effect because of the reliance. *U.S. Ecology, Inc. v. State, 129 Cal. App. 4th 887, 901, 28 Cal. Rptr. 3d 894 (2005)*.

Promissory estoppel is "a doctrine which employs equitable principles to satisfy the requirement that consideration **[*16]** must be given in exchange for the promise sought to be enforced." *Raedeke v. Gibraltar Sav. & Loan Asso., 10 Cal. 3d 665, 672, 111 Cal. Rptr. 693, 517 P.2d 1157 (1974)*. "[P]romissory estoppel claims are aimed solely at allowing recovery in equity where a contractual claim fails for a lack of consideration, and in all other respects the claim is akin to one for breach of contract . . . ." *US Ecology, Inc., 129 Cal. App. 4th at 904*. "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted." *Garcia v. World Sav., FSB, 183 Cal. App. 4th 1031, 1041, 107 Cal. Rptr. 3d 683 (2010)*.

Wells Fargo argues that any alleged oral promise to reinstate the loan was not a definite and clear promise. ECF No. 4, at 13. Similarly, Wells Fargo argues that Lawrence fails to show reliance on any alleged promise by Wells Fargo because the default occurred in October 2017, one year and five months after Lawrence made the reinstatement payment. *Id.*, at 13-14. In addition, the notice of default declares that Lawrence was in default on the installment due May 1, 2017 and for all subsequent installments. ECF No. 1-1, Ex. B, at 31. Therefore, by evaluating the notice of default, even if we assume that Wells Fargo promised to reinstate the Loan in May 2016, the foreclosure arose out of defaults **[*17]** on payments that occurred between May 2017 and October 2017. Accordingly, Lawrence cannot show that he relied on the promise or that he suffered a substantial detrimental impact as a result of such reliance. For these reasons, the promissory estoppel claim is dismissed with leave to amend.

4. Unfair Competition Law (UCL) Claims

Lastly, Lawrence brings a claim under the Unfair Competition Law ("UCL"), *California Business and Professions Code Section 17200, et seq.* Under the UCL, any person or entity that has engaged, is engaging or threatens to engage in unfair competition may be enjoined in any court of competent jurisdiction. *Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1140 (9th Cir. 2012)* (citing *Cal. Bus. & Prof. Code §§ 17201*, *17203*). Unfair competition includes any "unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Cal. Bus. & Prof. Code § 17200*. A business act or practice needs to meet one of three criteria—unlawful, unfair, or fraudulent—to be considered unfair competition under the UCL. *Abramson v. Marriott Ownership Resorts, Inc., 155 F. Supp. 3d 1056, 1066 (C.D. Cal. 2016)* (citing *Daro v. Superior Court, 151 Cal. App. 4th 1079, 1093, 61 Cal. Rptr. 3d 716 (2007))*.

Lawrence claims to have statutory standing to bring the UCL claim by the mere fact that Wells Fargo initiated foreclosure proceedings against him. Because the Court holds that the complaint fails to state a plausible claim for relief under the UCL, the Court does not need to address whether Lawrence has statutory **[*18]** standing to pursue the UCL claim.

"Unlawful" prong

The complaint fails to identify unlawful conduct that would support a UCL claim.

The UCL's "unlawful" prong "borrows violations of other laws and treats them as independently actionable." *Wilson, 668 F.3d at 1140*. A violation of another law is a predicate for stating a cause of action under the UCL's unlawful prong. *DocMagic, Inc. v. Ellie Mae, Inc., 745 F. Supp. 2d 1119, 1146 (N.D. Cal. 2010)*. Where a plaintiff cannot state a claim under the borrowed law, she cannot state a UCL claim under the "unlawful" prong either. *See Smith v. State Farm Mutual Automobile Ins. Co., 93 Cal. App. 4th 700, 718, 113 Cal. Rptr. 2d 399 (2001)*.

Lawrence alleges that the Defendants committed unlawful business practices and "said acts and practices violate the contract between the parties, and Defendants' fiduciary duties." ECF No. 1-1 ¶ 59. The singular piece of specific misconduct alleged by Lawrence is that Wells Fargo promised to reinstate his loan and instead of applying the lump sum payment to reinstate the loan, applied it to another account. The complaint fails to set forth how Wells Fargo's conduct violated another law. Even if the Court assumes that Wells Fargo broke its promise to reinstate the loan, Lawrence does not demonstrate how this conduct broke the law.

"Unfair" prong

The UCL does not define the term "unfair" and the California courts are unresolved **[*19]** as to the exact definition under the statute. *Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1169 (9th Cir. 2012)*. The Ninth Circuit Court of Appeals has acknowledged a split in the California courts as to whether a claim under the "unfair" prong may be properly brought by consumers or if the cause of action is limited to competitors. *Id. at 1170*. Prior to the decision in *Cel-Tech Commc'ns Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*, the California courts held that "unfair" conduct occurs when the practice offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. *Davis, 691 F.3d at 1169* (citing *S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 886, 85 Cal. Rptr. 2d 301 (1999))*. Under this approach, a court must balance the utility of the defendant's conduct against the gravity of the harm to the alleged victim. *Id. Cel-Tech* held that this balancing test provided too little guidance to the courts. *20 Cal. 4th at 185*.

Accordingly, *Cel-Tech* adopted a separate analysis, holding that "unfair" means "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id. at 544*. California courts have been split on whether to apply the *Cel-Tech* approach or the pre-*Cel-Tech* balancing **[*20]** test to consumer actions alleging unfair conduct under the UCL. *Davis, 691 F.3d at 1170*. The *Davis* Court declined to decide which approach applied, holding that the plaintiff's claims failed under either alternative. *Id.* Similarly, Lawrence's claim that Wells Fargo's conduct was unfair fails under either approach.

As with Lawrence's other claims for relief, the UCL claims are overly broad and framed in a conclusory manner. The UCL allegations lack facts of Wells Fargo's specific wrongdoing to provide fair notice in order to defend the lawsuit.

In his opposition to Defendant's motion to dismiss, Lawrence contends that Wells Fargo's conduct was unfair because it lacked authority to conduct the foreclosure and it failed to follow its own "pre-Notice of Default outreach requirements." ECF No. 10, at 13. The complaint makes the unsupported, conclusory allegation that Wells Fargo was without authority to foreclose on Lawrence's property. Lack of authorization to initiate foreclosure does not support a wrongful foreclosure claim. *See Gomes v. Countrywide Home Loans, Inc., 192 Cal. App. 4th 1149, 1154, 121 Cal. Rptr. 3d 819 (2011)* (allowing a judicial proceeding to determine the authority of the party initiating foreclosure would be contrary to the comprehensive statutory scheme of nonjudicial foreclosures).

[*21] *"Fraudulent" prong*

Because Lawrence's UCL claim is grounded in alleged fraudulent conduct, he must meet the heightened pleading standard of *Rule 9(b)*. He fails to meet that heightened pleading standard.

Where a UCL claim is grounded in alleged fraudulent conduct, it is subject to the heightened pleading standard of *Rule 9(b)*. *See Vess, 317 F.3d at 1103-04*. When a plaintiff relies entirely on a unified course of fraudulent conduct as a basis for a UCL claim, the claim must satisfy the particularity requirements of *Rule 9(b)*. *Kearns, 567 F.3d at 1126-27*.

Lawrence's UCL claim fails to plead the circumstances of the alleged fraudulent conduct with particularity. As analyzed above in the fraudulent and negligent misrepresentation claims, Lawrence fails to plead the who, what, when, where and how the misconduct was committed.

In sum, Lawrence does not substantiate his claim that Wells Fargo committed an unlawful, unfair, or fraudulent business act or practice that would allow his UCL claim to proceed. To the extent that his UCL claim relies on fraudulent conduct, he fails to plead with particularity as required by *Rule 9(b)*. Therefore, the UCL claim is dismissed with leave to amend.

VI. CONCLUSION AND ORDER

For the foregoing reasons, Wells Fargo's motion to dismiss is GRANTED with **[*22]** leave to amend. Plaintiff must file an amended complaint within 21 days of the date of this order. If Plaintiff cannot plead to satisfy the legal requirements outlined in this Order, the Court has no time to reeducate in any subsequent order.

IT IS SO ORDERED.

Dated: **August 7, 2019**

/s/ Lawrence J. O'Neill

UNITED STATES CHIEF DISTRICT JUDGE

Sinclair Oil Corp. v. Oneok Energy Servs. Co., L.P.

United States District Court for the District of Wyoming

August 7, 2019, Decided; August 7, 2019, Filed

Case No. 05-CV-254-F

Reporter
2019 U.S. Dist. LEXIS 246114 *; 2019 WL 13222753

SINCLAIR OIL CORPORATION, Plaintiff, vs. ONEOK ENERGY SERVICES COMPANY, L.P., Defendant,

Core Terms

natural gas, trades, conspiracy, enterprise, manipulate, false reporting, summary judgment, traders, prices, argues, reporting, antitrust claim, competitors, indices, antitrust, genuine, material fact, summary judgment motion, common purpose

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For OneOK Energy Services Company LP, a Texas corporation, Defendant: David L Bryant, LEAD ATTORNEY, PRO HAC VICE, GABLEGOTWALS, Boerne TX.

Judges: NANCY D. FREUDENTHAL, UNITED STATES DISTRICT JUDGE.

Opinion by: NANCY D. FREUDENTHAL

Opinion

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S ANTITRUST CLAIMS AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S RICO CLAIM

This matter is before the Court on two motions for summary judgment by Defendant OneOK Energy Services Company, L.P. ("OESC"). The first motion seeks judgment against Sinclair Oil Corporation ("Sinclair") as to its federal and state antitrust claims. CM/ECF Document (Doc.) 60. The second motion seeks judgment against Sinclair as to its claim for violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO claim"). Doc. 61. Both pending motions have been fully briefed by the parties and are ready for disposition. Finding that Sinclair presented sufficient evidence to create a genuine issue of material fact as to whether OESC participated in the industry's effort to manipulate natural gas prices, the Court denies OESC's first motion seeking judgment against Sinclair's antitrust **[*3]** claims. However, finding that no genuine issue of material fact exists and concluding that OESC is entitled to judgment as a matter of law against Sinclair's RICO claim, the Court grants OESC's second summary judgment motion.

Background

This matter returns to the Court following pretrial management in a multi-district litigation consolidated in the District of Nevada. The procedural history along with a summary of the facts and regulatory framework can be found in the case, *In re Western States Wholesale Natural Gas Antitrust Litigation, 715 F.3d 716 (9th Cir. 2003)*. For purposes of OESC's motion, between June 1999 to December 2002 ("the Relevant Period"), Sinclair purchased natural gas from OESC. During the Relevant Period, buyers and sellers relied on industry trade publications that published daily and monthly price indices as reference points to determine the market price for natural gas transactions. The crux of the claims before the Court is that the natural gas industry, including OESC, collectively manipulated price indices compiled by these trade publication, which resulted in market distortion and price fixing. *Id. at 725*. More specifically, Sinclair alleges that OESC conspired with others in violation of antitrust laws to manipulate the natural gas market in order to sell natural **[*4]** gas at artificially inflated prices. Doc. 1, pp. 15-19. Sinclair further alleges that, in its antitrust efforts to manipulate price indices in order to fix and inflate natural gas prices, OESC conducted an "enterprise's affairs through a pattern of racketeering activity" in violation of *Section 1962(c) of RICO*, *18 U.S.C. §§ 1961-1968*. *Id.* at pp. 19-20.

Discussion

A. Summary Judgment Standard

Under *Fed. R. Civ. P. 56(c)*, summary judgment is only appropriate if the movant shows "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *W. Diversified Servs., Inc. v. Hyundai Motor Am., Inc., 427 F.3d 1269, 1272 (10th Cir. 2005)*. An issue is "genuine" if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. An issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Id.* The non-moving party is entitled to all reasonable inferences from the factual record, which is viewed in the light most favorable to the party opposing summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. However, to defeat summary judgment, a plaintiff must support the claim with more than conjecture and speculation. *Self v. Crum, 439 F.3d 1227, 1236 (10th Cir. 2006)*. The burden of persuasion rests squarely on the moving party. *Trainor v. Apollo Metal Specialties, Inc., 318 F.3d 976, 980 (10th Cir. 2002)*.

The Tenth Circuit has noted "that in a broad sense, summary **[*5]** judgment in antitrust cases should be used sparingly. [Citations omitted.] Nonetheless, the usual rules governing summary judgment still apply." *Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc., 131 F.3d 874, 882 (10th Cir. 1997)*.

For purposes of OESC's pending motion against the antitrust claims, Sinclair has pled a *§ 1* conspiracy in violation of the *Sherman Act (15 U.S.C. § 1 et seq.)*, in addition to conduct by OESC in violation of Oklahoma's antitrust statute (79 O.S. § 203A). The same legal standards apply to Sinclair's federal and Oklahoma antitrust claims.[1] *Cohlmia v. Ardent Health Servs., LLC, 448 F. Supp. 2d 1253, 1262-63 (N.D. Okla. 2006)*. Therefore, the Court will only discuss the legal standards for the *Sherman Act* claim. "Because *§ 1* of the Sherman Act 'does not prohibit [all unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy,' . . . '[t]he crucial question' is whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement, tacit or express,'" *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007)*. "It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement." *U.S. v. Paramount Pictures, 334 U.S. 131, 142 (1948), 68 S. Ct. 915, 92 L. Ed. 1260* (citation omitted). Indeed, "acquiescence in an illegal scheme" violates the Sherman act as much as the creation and promotion of one. *Id. at 161*. Nonetheless, "at the summary judgment stage a *§1* plaintiff's **[*6]** offer of conspiracy evidence must tend to rule out the possibility that the [alleged conspirators] were acting independently." *Bell Atlantic, 550 U.S. at 554*.

For purposes of OESC's pending motion against the RICO claim, Sinclair has pled a civil RICO claim which requires proof: "(1) that the defendant violated *§ 1962*; (2) that the plaintiff's business or property was injured; and (3) that the defendant's violation [was] the cause of that injury." *Safe Streets Alliance v. Hickenlooper, 859 F.3d 865, 881 (10th Cir. 2017)* (citations omitted). To establish a violation of *§ 1962(c)* by OESC, Sinclair would be required to prove that OESC "(1) conducted the affairs (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Id. at 882* (citations and internal quotation marks omitted).

A RICO enterprise may include "any union or group of individuals associated in fact although not a legal entity." *18 U.S.C. § 1961(4)*. However, to constitute a so-called "association-in-fact" enterprise, the group of persons must be "associated together for a common purpose of engaging in a course of conduct." *United States v. Turkette, 452 U.S. 576, 583, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981)*. "The concept of association requires both interpersonal relationships and a common interest." *Boyle v. U.S., 556 U.S. 938, 946 (2009), 129 S. Ct. 2237, 173 L. Ed. 2d 1265*. *Section 1962(c)* also requires proof that the defendant "conduct[ed] or participate[d], directly or indirectly, in the conduct of [the] enterprise's **[*7]** affairs." *18 U.S.C. § 1962(c)*. Proving this requires a plaintiff show the defendant "participate[d] in the operation or management of the enterprise itself." *Reves v. Ernst & Young, 507 U.S. 170, 185, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993)*. In order to participate, directly or indirectly, in the conduct of such enterprise's affairs, "a plaintiff must demonstrate that the defendant conducted the affairs of the enterprise rather than simply conducting the defendant's own affairs." *George v. Urban Settlement Servs., 833 F.3d 1242, 1249 (10th Cir. 2016)*. "Racketeering activity" refers to various state or federal offenses known as "predicate offenses," such as mail fraud and wire fraud. *18 U.S.C. § 1961(1)(B)*. Finally, a RICO claim requires proof that a defendant's alleged RICO violation was both a but-for cause and a proximate cause of a plaintiff's injury. *Safe Streets, 859 F.3d at 889*.

B. Sinclair's Antitrust Claims

Sinclair alleges a price fixing conspiracy involving OESC and other natural gas suppliers which it claims is supported by direct evidence of false reporting to trade publications of trades that did not occur as actual OESC trades. NV CM/ECF 03-cv-1431, Doc. 2756-4, p. 5 (Skoog depo.).[2] Sinclair also points to evidence involving an

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[1] It should be noted that Oklahoma's ***antitrust law*** differs from federal law in one respect. If properly pled, a unilateral act can give rise to liability under Oklahoma law. *See* *Harolds Stores, Inc. v. Dillard Dept. Stores, Inc., 82 F.3d 1533, 1550 (10th Cir. 1996)*.

OESC trader who acknowledged false reporting as well as inexplicable differences between his actual experience with trades and index price reports. NV CM/ECF 03-cv-1431, **[*8]** Doc. 2756-5, pp. 7-8 (Robertson depo.). Other evidence involved a different OESC trader who engaged in a recorded phone call with an alleged co-conspirator in which the two discussed reporting "funky numbers" and how they both knew "how the game works," with the OESC trader admitting to reporting some of his index deals as fixed price deals. NV CM/ECF 03-cv-1431, Doc. 2756-2, p. 71-72, 73. Further, Sinclair points to what it claims were collusive "wash trades" involving OESC. *Id.* at p. 74. Finally, Sinclair's expert opined on circumstantial evidence supporting collusion, including the structure of the natural gas market which "provide[d] the opportunity for high level interaction among industry participants." *Id.* at p. 97.

In response, OESC argues Sinclair's evidence shows, at most, only bare "conscious parallelism," which is insufficient to support an antitrust conspiracy claim. Further, OESC argues it had no reason to engage in the alleged conspiracy because its business model was indifferent to the price of gas because it hedged away the opportunity to benefit from increased prices. Rather, OESC's model was designed to generate trading profits based on a positive trading margin on **[*9]** its balanced book of natural gas sales offset by natural gas purchases. Thus, it had no financial incentive to manipulate prices. As to the alleged false reporting, OESC argues there is a plausible alternative interpretation for its reporting conduct that rebuts the alleged conspiracy, namely that its reporters were attempting to provide index publishers an accurate representation of what they observed in the marketplace even if certain reports were not of actual OESC trades. As to the alleged "wash trades," OESC provides evidence that these six pairs of transactions did not meet the definition of a "wash trade" as a prearranged pair of trades between the same counterparties that involves no economic risk, no net change in beneficial ownership, and serves no legitimate business purpose. In short, OESC argues Sinclair's evidence shows, at most, only that: (i) OESC submitted some transaction reports which, viewed individually, were inaccurate; and (ii) certain OESC natural gas traders were aware that other gas marketing companies had submitted inaccurate reports of their gas transactions. OESC argues this evidence does not give rise to an inference of conspiracy because it had no motive **[*10]** to conspire in that, with balanced positions, OESC could not possibly skew the indices to its benefit, and its conduct is plausibly explained by traders unilaterally attempting to provide publishers with an accurate picture of the market.

In the form of proposed findings of fact and conclusions of law, Sinclair responds that self-serving and conclusory statements by OESC about its wash trades don't refute the existence of these prearranged trades, which has already been concluded by the MDL Court to imply an antitrust conspiracy contrary to the goal of market competition. Sinclair also reargues its direct evidence of agreement with competitors to report "funky numbers" in the "game" played by the industry. In addition, Sinclair argues that the explanation by OESC that its traders were unilaterally attempting to provide publishers with an accurate picture of the market makes no sense as OESC fails to explain how false reporting can provide an accurate picture of the market. Further, Sinclair points to the prevalence of false reporting in the industry — and the discussion among competitors that it was occurring, including by OESC — which excludes the possibility OESC acted alone. Sinclair **[*11]** argues absent collusion, OESC's false reporting would not further its own interests or achieve the goal of providing an accurate picture of the market, thus the likely (or only) explanation for false reporting is that it was part of a conspiracy to move market prices to its benefit. As to OESC's motive to conspire, OESC points to a FERC report identifying a number of motives including to "influence reported gas prices, to enhance the value of financial positions or purchase obligations, and to increase reported volumes to attract participants by creating the impression of more liquid markets." CM/ECF Doc. 62-1, p. 19. Finally, Sinclair argues OESC acquiesced to the industry-wide conduct of reporting false prices to the indices. "[A]cquiescence in an illegal scheme is as much a violation of the *Sherman Act* as the creation and promotion of one." *Paramount Pictures, 334 U.S. at 161*. According to Sinclair, OESC "both engaged in trade talk and exchanged information with its competitors and then conformed its actions to that of its competitors, which all support an inference that it was part of a price manipulation conspiracy." Doc. 62-1, p. 24.

In considering the arguments of the parties, the Court agrees with Sinclair that it has gone **[*12]** beyond speculation and conjecture to create a genuine issue of material fact as to whether OESC participated in the larger

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[2] The parties incorporated by reference certain documents from the Multi-District Litigation Case 2:03-cv-01431, which is referred to herein as NV CM/ECF 03-cv-1431.

price manipulation conspiracy shown in the record for the Relevant Time Period, when false and misleading reporting of gas transactions for use in calculating index prices was prevalent among some in the natural gas industry. In summary, OESC admits to some inaccurate transaction reports, the record shows evidence of what may be considered "wash" trades that can be viewed as characteristic of an antitrust conspiracy, the record shows OESC engaged in "trade talk" with its competitors which indicates knowledge of others submitting false and misleading reports and tends to show OESC acquiesced (if not conformed) to that conduct, and the record includes economic evidence tending to show that price-fixing was feasible, including evidence about the structure of the natural gas industry and the standardized nature of the natural gas commodity. While OESC argues its price-neutral business model supports "conscious parallelism" as an explanation for its conduct rather than involvement in a price-fixing conspiracy, these arguments go to evidentiary matters best considered **[*13]** and weighed by the jury, and are not for the Court at the summary judgment phase.

C. Sinclair's RICO Claim

In arguing against the RICO claim, OESC claims Sinclair has no admissible evidence to establish the essential elements of the claim, which caused Sinclair to admit it "is not at this time in possession of sufficient information to describe with certainty the precise details of the RICO enterprise that Sinclair alleges in its complaint." Doc. 61-5, p. 3. Following this admission, Sinclair only identifies the FERC Final Report on Market Manipulation in Western Markets (CM/ECF 03-cv-1431, Doc. 2758) and the CFTC Order Instituting Proceedings Pursuant to *Sections 6(c)* and *6 d)* of the Commodity Exchange Act (Doc. 61-6) as demonstrating "a high probability that [OESC] engaged in market manipulation and defrauded Sinclair." Doc. 61-5, p. 3. According to OESC these documents fail to show either the existence of a RICO "enterprise," or that OESC "conducted the affairs" of such enterprise as opposed to conducting its own affairs. OESC points out that the FERC report never mentioned OESC, and the CFTC Consent Order (which OESC does not admit) found that OESC inappropriately conducted its own reporting affairs, not that OESC had any part in **[*14]** directing the affairs of an enterprise whose common purpose was to inflate indices through conspiratorial false reporting.[3]

In response, Sinclair relies on the FERC report, the CFTC Consent Order, and the same evidence it argued to support its antitrust claim to advance the argument that the natural gas traders, including OESC, banded together to engage in a pattern of false reporting over a number of years with the common purpose of manipulating natural gas prices. As to whether OESC conducted the affairs of the RICO enterprise, Sinclair argues the "operation or management" test is a broad standard and OESC's traders knew false reporting occurred and stated its intent to participate in the false reporting enterprise with its competitors. Sinclair also points out that OESC conducted wash trades with competitors which undercuts the contention it was conducting only its own affairs. Finally, Sinclair argues it made no explicit and unambiguous statement that it had abandoned its RICO claim.

In reply, OESC points out none of Sinclair's evidence tends to show OESC was engaged in or participated in any form of "enterprise" whose purpose was to manipulate the indices. OESC continues to argue **[*15]** that the FERC report makes no reference to it and the CFTC's Order made no finding or allegation that OESC made any attempt to manipulate the price of natural gas. In short, the fact of "false reporting" alone is not enough to satisfy the elements of a RICO claim. OESC also continues to advance its arguments that the FERC Report and the CFTC Order are inadmissible.

Following OESC's reply, Sinclair filed a motion for leave to file a sur-reply to address a new argument made by OESC on the public records exception under Rule 803(8). Doc. 83. Because the reason for the Court's decision on OESC's motion does not depend on a ruling as to whether the FERC Report is admissible, a sur-reply will not be permitted.

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[3] OESC argues both reports are inadmissible. According to OESC, the FERC report is inadmissible hearsay and the CFTC Consent Order is an inadmissible settlement agreement between the CFTC and OESC.

As to the arguments made by the parties on Sinclair's RICO claim, the Court agrees with OESC. There is no evidence that OESC conducted the affairs of a RICO enterprise comprising natural gas traders by reporting to certain reporting firms trades that did not occur or reporting to those firms certain trades at false or misleading prices or volumes. Further, the evidence that certain OESC traders knew others were submitting false or misleading reports to the trading firms is not evidence that OESC **[*16]** conducted the affairs of a RICO enterprise. Contrary to Sinclair's argument, there is nothing beyond guess and conjecture that OESC banded together with its competitors to engage in a pattern of false reporting with the common purpose of manipulating natural gas prices. While some false reporting conduct might be similar, that evidence is simply not sufficient to defeat summary judgment. The FERC Report, the CFTC Order and the testimony by OESC traders simply don't support the conclusion that OESC associated itself with other traders or natural gas companies for the common purpose or common interest of manipulating the natural gas market sufficient to support a *§ 1962(c)* civil RICO violation.

Conclusion

For the foregoing reasons, the Court finds there exist genuine questions of material fact precluding summary judgment against Sinclair on its antitrust claims. The Court further finds there are no genuine questions of material fact as to Sinclair's RICO claim, and OESC is entitled to summary judgment against Sinclair as to this claim.

IT IS THEREFORE HEREBY ORDERED that Defendant OESC's motion for summary judgment on Plaintiff's Antitrust Claims (Doc. 60) is DENIED; and

IT IS FURTHER HEREBY ORDERED **[*17]** that Defendant OESC's motion for summary judgment on Plaintiff's RICO Claim (Doc. 61) is GRANTED; and

IT IS FINALLY ORDERED that Sinclair's motion for leave to file a sur-reply in opposition to OESC's motion for summary judgment on Plaintiff's RICO Claim (Doc. 83) is DENIED.

Dated this 7 day of August, 2019.

/s/ Nancy D. Freudenthal

NANCY D. FREUDENTHAL

UNITED STATES DISTRICT JUDGE

Fireworks Lady & Co., LLC v. Firstrans Int'l Co.

United States District Court for the Central District of California

August 8, 2019, Decided; August 8, 2019, Filed

Case No.: CV 18-10776-CJC (MRWx)

Reporter

2019 U.S. Dist. LEXIS 209935 *; 2019 WL 6448943

FIREWORKS LADY & CO., LLC, Plaintiff, v. FIRSTRANS INTERNATIONAL CO., HUA YANG TRANSPORTATION CO., and DING YAN ZHONG, Defendants.

Prior History: *Fireworks Lady & Co., LLC v. Firstrans Int'l Co., 2019 U.S. Dist. LEXIS 130887 (C.D. Cal., Apr. 23, 2019)*

Core Terms

fireworks, alleges, shipping, motion to dismiss, leave to amend, cured, monopolization, inland, tying arrangement, cause of action, deceptive, unfair, civil conspiracy, corporate veil, transportation, damages, unjust enrichment, tied product, purchasers, breached

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Judges: CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE.

Opinion by: CORMAC J. CARNEY

Opinion

ORDER GRANTING MOTION TO DISMISS [Dkt. 44]

I. INTRODUCTION

Plaintiff Fireworks Lady & Co., LLC ("Fireworks Lady") brings this putative class action against Defendants Firstrans International Co. ("Firstrans"), Hua Yang Transportation Co. ("Hua Yang"), and Ding Yan Zhong asserting claims arising under both federal ***antitrust law*** and state law. (Dkt. 41 [First Amended Complaint, hereinafter "FAC"].)

Before the Court is Firstrans's motion to dismiss Plaintiff's **[*2]** First Amended Complaint pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. (Dkt. 44 [hereinafter "Mot."].) For the following reasons, the motion is **GRANTED**.[1]

II. BACKGROUND

This lawsuit arises out of Defendants' alleged monopolization of the fireworks shipping business. Defendant Firstrans is allegedly an Indiana corporation that specializes in the shipping of fireworks from the People's Republic of China ("PRC") to the United States. (FAC ¶¶ 48, 71.) Defendant Hua Yang was allegedly an Indiana corporation that, after several name changes, became Firstrans in 2012. (*Id.* ¶¶ 51-53). Defendant Ding Yan Zhong is a citizen of the PRC and is allegedly the current president of Firstrans. (*Id.* ¶¶ 50, 55.)

Plaintiff, a Florida fireworks merchant, purchases fireworks from nonparty manufacturers located in the inland Hunan and Jiangxi provinces of the PRC. (Dkt. 52 [Opp'n] at 1.) According to the First Amended Complaint, the fireworks' journey from these manufacturers to Plaintiff's place of business occurs in two distinct stages. First, the fireworks are shipped from Hunan and Jiangxi provinces to Shanghai. (FAC ¶¶ 4-15.) Next, they are shipped from Shanghai to the United States. (*Id.* ¶ 16.) The PRC heavily regulates the transportation **[*3]** of fireworks and requires fireworks carriers to obtain special permits. (*Id.* ¶ 4.) According to Plaintiff, the Defendants hold one of only four permits that the PRC has issued to companies engaged in shipping fireworks from the inland provinces to Shanghai. (*Id.* ¶ 11.)

Plaintiff utilizes Defendants' shipping services to carry the fireworks it purchases from the nonparty manufacturers to its locations in the United States. (*Id.* ¶ 20.) Plaintiff's allegations arise out of this business relationship. Plaintiff asserts that Firstrans has violated federal antitrust laws in two ways. First, it alleges that Firstrans has established an unlawful tying arrangement by conditioning the shipment from the inland provinces to Shanghai on customers continuing to use their shipping services from Shanghai to the United States. (*Id.* ¶ 107.) This arrangement allegedly prevents Plaintiff from utilizing the services of other merchants who would otherwise be willing to ship Plaintiff's fireworks at lower costs. (*Id.* ¶ 20.) Next, Plaintiff alleges that Defendants have engaged in unlawful monopolization of inland transportation services. (*Id.* ¶ 121.) This monopolization allegedly allows Firstrans to charge **[*4]** inflated prices for their shipping services, causing injury to Plaintiff and similarly situated buyers. (*Id.* ¶ 43.)

Plaintiff also brings several state law claims against Firstrans, including breach of contract, (*id.* ¶¶ 128-131), negligence, (*id.* ¶¶ 132-36), "piercing the corporate veil," (*id.* ¶¶ 137-152), civil conspiracy, (*id.* ¶¶ 153-156), *Florida's Deceptive Trade Practices Act* claims, (*id.* ¶¶ 157-160), and unjust enrichment, (*id.* ¶¶ 161-64).

III. LEGAL STANDARD

A motion to dismiss under *Rule 12(b)(6)* tests the legal sufficiency of the claims asserted in the complaint. The issue on a motion to dismiss for failure to state a claim is not whether the claimant will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997)*. *Rule 12(b)(6)* is read in conjunction with *Rule 8(a)*, which requires only a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. When evaluating a *Rule 12(b)(6)* motion, the district court must accept all material allegations in the complaint as true and construe them in the light most favorable to the nonmoving party. *Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994)*. The district court may also consider additional facts in materials that the district court may take judicial notice, **[*5]** *Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994)*, as well as "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading," *Branch*

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[1] Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* *Fed. R. Civ. P. 78*; *Local Rule 7-15*. Accordingly, the hearing set for August 12, 2019, at 1:30 p.m. is hereby vacated and off calendar.

v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994), *overruled in part on other grounds by* *Galbraith v. Cty. of Santa Clara, 307 F.3d 1119 (9th Cir. 2002)*.

However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*; *see also* *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (stating that while a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, courts "are not bound to accept as true a legal conclusion couched as a factual allegation" (citations and quotes omitted)). Dismissal of a complaint for failure to state a claim is not proper where a plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." *Twombly, 550 U.S. at 570*. In keeping with this liberal pleading standard, the district court should grant the plaintiff leave to amend if the complaint can possibly be cured by additional factual allegations. *Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995)*.

III. ANALYSIS

A. Tying Claim (Count I)

Plaintiff's first claim alleges that Defendants violated *Section 1* of the Sherman Act by unlawfully tying the purchase of their "inland delivery services" to the purchase of their Shanghai-to-United States delivery services. **[*6]** (FAC ¶ 107.) According to Plaintiff, Defendants agree to ship fireworks from the inland provinces to Shanghai only after Plaintiff promises to use Defendant's services on the Shanghai-to-United States leg. (*Id.* ¶ 108.) Because Defendants allegedly provide the only viable shipping service from inland to Shanghai, Plaintiff has no choice but to do business with them for this leg of the journey and agree to the tying arrangement. (*Id.* ¶ 19.) Plaintiff alleges that by being forced to agree with Defendants, it cannot seek out the services of other carriers who would be willing to ship from Shanghai to the United States at a lower cost. (*Id.* ¶ 21.)

In a tying arrangement, a "seller conditions the sale of one product (the tying product) on the buyer's purchase of a second product (the tied product)." *Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 912 (9th Cir. 2008)*. "Tying arrangements are forbidden on the theory that, if the seller has market power over the tying product, the seller can leverage this market power through tying arrangements to exclude other sellers of the tied product." *Id.* To establish *Section 1* liability based on a tying arrangement, a plaintiff must allege "(1) that the defendant tied together the sale of two distinct products or services, (2) **[*7]** that the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product, and (3) that the tying arrangement affects a 'not insubstantial volume of commerce' in the tied product market." *Id. at 913* (quoting *Paladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1159 (9th Cir. 2003))*.

Firstrans argues that Plaintiff has failed to plead the first element of a tying arrangement: a tie between two distinct products or services. The Court agrees. To establish a tie between "distinct products or services," a plaintiff must allege facts that show "a sufficient demand for the purchase of the tied product separate from the tying product." *Rick-Mik Enters. Inc. v. Equilon Enters., LLC, 532 F.3d 963, 974 (9th Cir. 2008)*. Plaintiff's First Amended Complaint, however, does not allege sufficient facts to establish two distinct services. It only alleges facts showing two separate segments of a single journey. Fireworks purchasers in the United States have no use for a service that delivers fireworks from the inland provinces to Shanghai without one that, in turn, ships those fireworks from Shanghai to the United States. *See* *Unigestion Holding, S.A. v. UPM Tech., Inc., 305 F. Supp. 3d 1134, 1150 (D. Or. 2018)* (rejecting claim that international phone termination services and transportation services were distinct products because Plaintiff did not "sufficiently allege[] that there is **[*8]** independent consumer demand for international call transportation services as a standalone product."). Contrary to Plaintiff's assertion, shipping fireworks from producers in the PRC to purchasers in the United States is a single service, not a tie between each of the different segments of that service. *See* *Debjo Sales, LLC v. Houghton Mifflin Harcourt Publ'g Co., 2015 U.S. Dist. LEXIS 56504, 2015 WL 1969380, at *4 (D.N.J. Apr. 29, 2015)* (holding that defendant's production of textbooks and delivery of those same textbooks were not distinct services and could not form the basis of a tying claim).

The Court previously dismissed Plaintiff's tying claim with leave to amend. (Dkt. 39.) Because Plaintiff has failed to cure the deficiencies in this claim despite being given an opportunity to do so, and because the Court does not believe that Plaintiff can cure the deficiencies, the Court finds that granting further leave to amend would be futile. Accordingly, Plaintiff's tying claim is **DISMISSED WITH PREJUDICE**.

B. Monopolization Claim (Count II)

Plaintiff's second claim alleges that Defendants violated the *Section 2* of the Sherman Act "by monopolizing the market for inland transportation services from Hunan and Jiangxi provinces to Shanghai." (FAC ¶ 121.) To state a valid monopolization claim, Plaintiff must allege both (1) the **[*9]** possession of monopoly power and (2) "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Verizon Commc'n Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 571-72, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*. "The Supreme Court has consistently held that there must be 'predatory' conduct to attain or perpetuate a monopoly" for this second element to be met. *See Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 549 (9th Cir. 1991)* (refusing to impose *Section 2* liability on airline companies absent evidence of predatory conduct).

Plaintiff has failed to allege that Firstrans engaged in any such predatory conduct. Plaintiff's monopolization claim centers around Sinotrans Hunan Co. ("Sinotrans"), an alleged state-owned enterprise that began offering the same shipping services as Firstrans sometime in 2018. According to Plaintiff, Sinotrans secured government permits which allowed it to participate in the shipment of fireworks and compete with Firstrans. (Dkt. 52 [Opp'n] at 6.) After a short period of time, however, "Sinotrans terminated service due to the fact that it was losing money." (FAC ¶ 126.) Though Plaintiff alleges that Sinotrans's exit was caused by "an exercise of monopoly powers by Defendants," (*id.*), it fails to allege any facts that **[*10]** show Firstrans engaged in any specific predatory conduct designed to eliminate Sinotrans. Given that such conduct is required to state a valid monopolization claim, Firstrans's motion to dismiss with respect to this claim is **GRANTED**. Because it is unclear whether the deficiencies in the First Amended Complaint could be cured by amendment, Plaintiff's monopolization claim is **DISMISSED WITH FOURTEEN DAYS' LEAVE TO AMEND**.

C. State Law Claims (Counts III—VIII)

Plaintiff's first state law claim alleges breach of contract by Defendants. Plaintiff asserts that "Defendants have breached their agreed upon responsibilities and obligations causing Plaintiff to suffer damages." (*Id.* ¶ 130.) Under California law, "the elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." *Oasis W. Realty, LLC v. Goldman, 51 Cal. 4th 811, 821, 124 Cal. Rptr. 3d 256, 250 P.3d 1115 (2011)*. "While it is unnecessary for a plaintiff to allege the terms of a contract with precision, the Court must be able to discern at least what material obligation of the contract the defendant allegedly breached." *Langan v. United Servs. Auto. Ass'n, 69 F. Supp. 3d 965, 979 (N.D. Cal. 2014)* (internal citations omitted).

Plaintiff's First Amended **[*11]** Complaint fails to meet this requirement because it does not offer evidence of any specific obligation that Firstrans allegedly breached. Instead, it alleges only that "Defendants have breached their agreed upon responsibilities and obligations causing Plaintiff to suffer damages." (FAC ¶ 130.) Plaintiff cannot validly state a breach of contract claim without pointing to a specific obligation or duty breached by Firstrans. Firstrans's motion to dismiss with respect to this claim is **GRANTED**. Because it is unclear whether the deficiencies in the First Amended Complaint could be cured by amendment, Plaintiff's breach of contract claim is **DISMISSED WITH FOURTEEN DAYS' LEAVE TO AMEND**.

Plaintiff's next state law claim is under a negligence theory and stems from the alleged mishandling of two fireworks containers purchased by Plaintiff. The elements of negligence are duty, breach, causation, and damages. *See* [Burgess v. Superior Court, 2 Cal. 4th 1064, 1072, 9 Cal. Rptr. 2d 615, 831 P.2d 1197 (1992)](). According to Plaintiff, after it filed this action against Firstrans, Firstrans substituted another vendor to deliver one of Plaintiff's pending orders. (Dkt. 52 [Opp'n] at 13.) Plaintiff alleges that Firstrans acted negligently when it substituted this vendor without notifying Plaintiff **[*12]** because those fireworks were subsequently damaged. (*Id.*)

Plaintiff alleges no facts to indicate that defendant acted negligently in selecting the substitute vendor. Nor does Plaintiff allege any causal connection between Firstrans's selection of the new vendor and Plaintiff's alleged damages. Plaintiffs' boilerplate recitations of the elements of a negligence action are insufficient to state a claim. *See* Twombly, 550 U.S. at 556-57. Firstrans's motion to dismiss with respect to this claim is **GRANTED**. Because it is unclear whether the deficiencies in the First Amended Complaint could be cured by amendment, Plaintiff's negligence claim is **DISMISSED WITH FOURTEEN DAYS' LEAVE TO AMEND**.

Plaintiff's next cause of action asks the Court to "pierce the corporate veil to obtain a court order as [sic] against individual defendant Mr. Ding." (FAC ¶ 126.) However, piercing the corporate veil is not an independent cause of action, but rather a procedural device that allows courts to disregard a corporate entity and hold individuals liable for the corporation's obligations. *See* Hennessey's Tavern, Inc. v. Am. Air Filter Co., 204 Cal. App. 3d 1351, 1359, 251 Cal. Rptr. 859 (1988). Under California law, two conditions must be met before courts are permitted to invoke this doctrine. First, there must be "such a unity of interest **[*13]** and ownership between the corporation and its equitable owner" that separate personalities do not exist. Sonora Diamond Corp. v. Superior Court, 83 Cal. App. 4th 523, 538, 99 Cal. Rptr. 2d 824 (2000). Next, "there must be an inequitable result if the acts in question are treated as those of the corporation alone." *Id.* Piercing the corporate veil is "an extreme remedy, sparingly used" by courts. *Id.*

Plaintiff has not alleged any facts to suggest that it is appropriate for the Court to pierce the corporate veil in this case. Plaintiff's sole allegation regarding this claim is that "Mr. Ding dominates and controls the corporate defendants Firstrans and Hua Yang." (FAC ¶ 138.) This allegation alone does not provide sufficient grounds for the application of the doctrine. Firstrans's motion to dismiss with respect to this claim is **GRANTED**. Because it is unclear whether the deficiencies in the First Amended Complaint could be cured by amendment, Plaintiff's "piercing the corporate veil" claim is **DISMISSED WITH FOURTEEN DAYS' LEAVE TO AMEND**.

Plaintiff also brings a claim under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), *Fla. Stat. Ann. § 501.201, et seq.* To state a claim under the FDUTPA, a plaintiff must allege (1) a deceptive act or unfair practice, (2) causation, and (3) actual damages. Rollins, Inc. v. Butland, 951 So. 2d 860, 869 (Fla. Ct. App. 2006). A deceptive **[*14]** practice is "one that is likely to mislead consumers," whereas an unfair practice is "one that offends established public policy and one that is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." Tuckish v. Pompano Motor Co., 337 F. Supp. 2d 1313, 1320 (S.D. Fla. 2004) (internal quotation marks and citations omitted). The FDUTPA can be violated in two ways: "(1) a per se violation premised on the violation of another law proscribing unfair or deceptive practice and (2) adopting an unfair or deceptive practice." Hap v. Toll Jupiter Ltd. P'ship, 2009 U.S. Dist. LEXIS 5866, 2009 WL 187938, at *9 (S.D. Fla. Jan. 27, 2009).

Given that Plaintiff has failed to plead that Firstrans violated any law proscribing unfair or deceptive practices, the first approach is inapplicable here. Nor can Plaintiff rely on the second approach. Plaintiff's First Amended Complaint merely asserts, without support, that "[t]he acts described above . . . are both deceptive and unfair." (FAC ¶ 158.) Plaintiff fails to allege any specific actions taken by Firstrans that were deceptive or unfair. Again, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," cannot alone defeat a motion to dismiss. *See* Iqbal, 556 U.S. at 678. Firstrans's motion to dismiss with respect to this claim is **GRANTED**. Because it is unclear whether the deficiencies **[*15]** in the First Amended Complaint could be cured by amendment, Plaintiff's FDUTPA claim is **DISMISSED WITH FOURTEEN DAYS' LEAVE TO AMEND**.

Plaintiff's next cause of action alleges that Firstrans engaged in a civil conspiracy. (FAC ¶¶ 153-56.) However, "[c]onspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." _Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 510-11, 28 Cal. Rptr. 2d 475, 869 P.2d 454 (1994)_. To state a claim for civil conspiracy, a plaintiff must allege (1) the formation and operation of a conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts. _Younan v. Equifax, Inc., 111 Cal. App. 3d 498, 511 n.9, 169 Cal. Rptr. 478 (1980)_. A civil conspiracy "must be activated by the commission of an actual tort," _Applied Equip. Corp., 7 Cal. 4th at 511_, or other wrong, _Younan, 111 Cal. App. 3d at 511 n.9_.

Plaintiff's First Amended Complaint fails to allege that such a tort has been committed. Rather, Plaintiff's claims for civil conspiracy are entirely premised on Defendants' alleged antitrust violations. (FAC ¶ 154.) Because Plaintiffs failed to allege sufficient facts to establish such violations, there is no independent wrongful act on which to base their civil conspiracy claims. Firstrans's motion **[*16]** to dismiss with respect to this claim is **GRANTED**. Because it is unclear whether the deficiencies in the First Amended Complaint could be cured by amendment, Plaintiff's civil conspiracy claim is **DISMISSED WITH FOURTEEN DAYS' LEAVE TO AMEND**.

Plaintiff's final cause of action alleges that Firstrans has been unjustly enriched by the inflated prices it allegedly charges for the shipment of fireworks. (FAC ¶¶ 161-64.) Under California law, unjust enrichment is not an independent cause of action, but rather the theory "underlying a claim that a defendant has been unjustly conferred a benefit 'through mistake, fraud, coercion, or request.'" _Astiana v. Hain Celestial Grp., Inc., 783 F.3d 753, 762 (9th Cir. 2015)_ (quoting 55 Cal. Jur. 3d Restitution § 2). A plaintiff seeks the return of that benefit typically in a quasi-contract cause of action. *Id.* Here, Plaintiff alleges that the prices it paid for shipping services unjustly conferred a benefit on Firstrans. (FAC ¶ 162.) However, Plaintiff alleges no facts to indicate that defendant received this benefit unjustly. Plaintiff does not allege how any benefit was obtained through "mistake, fraud, coercion, or request." _Astiana, 783 F.3d at 762_ (internal quotations omitted). The bare allegation that Firstrans was unjustly enriched "as a result **[*17]** of [its] wrongful and illegal conduct" is insufficient to survive a motion to dismiss. *See* _Iqbal, 556 U.S. at 678_. Firstrans's motion to dismiss with respect to this claim is **GRANTED**. Because it is unclear whether the deficiencies in the First Amended Complaint could be cured by amendment, Plaintiff's unjust enrichment claim is **DISMISSED WITH FOURTEEN DAYS' LEAVE TO AMEND**.

IV. CONCLUSION

For the foregoing reasons, Firstrans's motion is **GRANTED**. Plaintiff's tying claim is **DISMISSED WITH PREJUDICE**. The remainder of Plaintiff's claims are **DISMISSED WITH FOURTEEN DAYS' LEAVE TO AMEND**.

DATED: August 8, 2019

/s/ Cormac J. Carney

CORMAC J. CARNEY

UNITED STATES DISTRICT JUDGE

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[In re Zetia (Ezetimibe) Antitrust Litig.]

United States District Court for the Eastern District of Virginia, Norfolk Division

August 9, 2019, Decided; August 9, 2019, Filed

MDL NO. 2:18md2836

Reporter

400 F. Supp. 3d 418 *; 2019 U.S. Dist. LEXIS 134791 **; 2019 WL 3761680

In re: ZETIA (EZETIMIBE) ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: ALL CASES

Prior History: *In re Zetia Ezetimibe Antitrust Litig., 2019 U.S. Dist. LEXIS 59469 (E.D. Va., Feb. 6, 2019)*

Core Terms

Settlement, consumer protection, Plaintiffs', agrees, unjust enrichment, motion to dismiss, generic, no-AG, trade name, allegations, antitrust, Ezetimibe, purchaser, recommendation, per se rule, patent, branded, anticompetitive, effects, pharmaceutical, trademark, indirect, consumer, notice, grounds, permits, resident, unfair, monopolization, intrastate

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

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

Patent Law > Infringement Actions > Exclusive Rights > Limitations

Civil Procedure > Settlements > Settlement Agreements

HN1[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Courts have universally applied the rule of reason to reverse payment settlements, including those involving a no-AG agreement. The per rule is appropriate only after courts have had considerable experience with the type of restraint at issue.

Civil Procedure > Judicial Officers > Magistrates > Objections

Civil Procedure > Judicial Officers > Magistrates > Standards of Review

HN2[] **Magistrates, Objections**

Objections that do not attempt to undermine the magistrate judge's findings or recommendations by presenting additional arguments do not require the court to make de novo determinations of the R&R findings.

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

HN3[] **Per Se Rule & Rule of Reason, Per Se Violations**

The per se rules treat certain business practices as necessarily illegal. By treating a particular business practice as necessarily illegal, the per se rules, by their very nature, preclude a court from considering the surrounding circumstances of that practice before deeming it illegal.

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

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

Antitrust & Trade Law > Regulated Practices > Intellectual Property

HN4[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Patent and antitrust policies are both relevant in determining the scope of the patent monopoly-and consequently ***antitrust law*** immunity-that is conferred by a patent.

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

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

Civil Procedure > Settlements > Settlement Agreements

Antitrust & Trade Law > Regulated Practices > Intellectual Property

HN5[] **Actual Monopolization, Anticompetitive & Predatory Practices**

It would be incongruous to determine antitrust legality by measuring a reverse payment settlement's anticompetitive effects solely against patent law policy, rather than by measuring them against procompetitive antitrust policies as well.

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

Civil Procedure > Settlements > Settlement Agreements

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

Antitrust & Trade Law > Regulated Practices > Intellectual Property

HN6[] Actual Monopolization, Anticompetitive & Predatory Practices

Courts are bound to evaluate a reverse payment settlement under the rule of reason, regardless of the settlement's form. Reverse payment settlements can sometimes violate the antitrust laws. Accordingly, reverse payment settlements should not be evaluated under presumptive rules (or a quick look approach). Applying presumptive rules is appropriate only where an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets. Reverse payment settlements do not meet this criterion.

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

Civil Procedure > Settlements > Settlement Agreements

Antitrust & Trade Law > Regulated Practices > Intellectual Property

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

HN7[] Actual Monopolization, Anticompetitive & Predatory Practices

Applying presumptive rules to reverse payment settlements would be inappropriate because the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification. To account for these complexities of a reverse payment settlement, a court reviewing a reverse payment settlement should apply the rule of reason to determine whether that settlement violates the antitrust laws. Under the rule of reason, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. An analysis of the reasonableness of particular restraints includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption. Applying a per se rule to a reverse payment settlement would be inappropriate because a presumptive rule would not account for the circumstances and complexities surrounding a reverse payment settlement.

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

HN8[] Motions to Dismiss, Failure to State Claim

A district court's dismissal under *Fed. R. Civ. P. 12(b)(6)* is, of course, with prejudice unless it specifically orders dismissal without prejudice. That determination is within the district court's discretion.

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

HN9[] Motions to Dismiss, Failure to State Claim

A complaint must be dismissed if plaintiff's allegations fail to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b) (6)*. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Facial plausibility means that a plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. It is, therefore, not enough for a plaintiff to allege facts demonstrating a sheer possibility or mere consistency with unlawful conduct. The court accepts facts alleged in the complaints as true and views those facts in the light most favorable to the plaintiff. A motion to dismiss under *Rule 12(b)(6)* tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.

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

HN10[] **Motions to Dismiss, Failure to State Claim**

When a court considers relevant facts from the public record at the pleading stage, the court must construe such facts in the light most favorable to the plaintiffs.

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

HN11[] **Motions to Dismiss, Failure to State Claim**

The court need not accept as true, for purposes of *Fed. R. Civ. P. 12(b)(6)*, allegations contradicting documents that are referenced in the complaint.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem

Contracts Law > Contract Interpretation

HN12[] **Contract Interpretation, Ambiguities & Contra Proferentem**

An ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations. Consistent with familiar canons of construction, the words of an agreement are given their ordinary meaning. Technical terms or words of art will be given their technical meaning, unless the context or local usage shows a contrary intention.

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

HN13[] **Motions to Dismiss, Failure to State Claim**

The plausibility pleading standard requires plaintiffs to plead sufficient facts that when accepted as true allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. At the pleading stage, the court considers plausibility, not probability.

Antitrust & Trade Law > Procedural Matters

Civil Procedure > ... > Class Actions > Class Members > Absent Members

Civil Procedure > ... > Class Actions > Class Members > Named Members

HN14[] **Antitrust & Trade Law, Procedural Matters**

Thus, a class representative that is not a Utah citizen or resident may bring claims under the Utah Antitrust Act on behalf of absent class members who are citizens or residents of Utah.

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

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

Arizona's consumer protection statute covers an unfair act, *Ariz. Rev. Stat. Ann. § 44-1522(A)*, includes a Federal Trade Commission Act harmonization provision, *§ 44-1522(C)*, and therefore, broadly covers unfair trade practices.

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

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

Idaho's consumer protection statute is limited to unconscionable sales conduct that is directed at the consumer.

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

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

Maine's consumer protection statute encompasses claims of unfair methods of competition and includes a Federal Trade Commission Act harmonization provision, Me. Stat. tit. 5, § 207.

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

HN18[] **Deceptive & Unfair Trade Practices, State Regulation**

Vermont's consumer protection statute should be broadly read, and the Federal Trade Commission Act harmonization provision in Vermont's consumer protection statute applies to *Vt. Stat. Ann. tit. 9, § 2453(a)*, which sets out the practices prohibited under the Act.

Antitrust & Trade Law > Procedural Matters

Civil Procedure > Special Proceedings > Class Actions

HN19[] **Antitrust & Trade Law, Procedural Matters**

The Illinois Antitrust Act class-action bar does not apply in federal court.

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

HN20[] **Deceptive & Unfair Trade Practices, State Regulation**

Virginia's consumer protection statute provides a remedy for any person who suffers loss as the result of a violation of the chapter. *Va. Code Ann. § 59.1-204*. "Person" means any natural person, corporation, trust, partnership, association and any other legal entity. *Va. Code Ann. § 59.1-198*. And, the loss must be the result of fraudulent acts or practices committed by a supplier in connection with a consumer transaction. *Va. Code Ann. §§ 59.1-204*, *59.1-200*.

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

HN21[] **Deceptive & Unfair Trade Practices, State Regulation**

The plain text of *W. Va. Code § 46A-6-106(c)* clearly permits a post-filing demand letter.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN22[] **Equitable Relief, Quantum Meruit**

For an unjust enrichment claim to proceed in New York, the relationship between the purchasers and the producers cannot be too attenuated. This means that a product's indirect purchaser cannot assert an unjust enrichment claim against an entity that manufactured one of that product's ingredients, but that an indirect purchaser can assert such an unjust enrichment claim against the manufacturer of the product itself.

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

HN23[] **Complaints, Requirements for Complaint**

Fed. R. Civ. P. 8 allows plaintiffs to plead claims in the alternative and assert inconsistent claims. *Fed. R. Civ. P. 8(d)(2)-8(d)(3)*.

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Judges: Rebecca Beach Smith, United States District Judge.

Opinion by: Rebecca Beach Smith

Opinion

[*422] These matters come before the court on the Glenmark Defendants'[1] Motion to Dismiss Direct Purchaser Plaintiffs' Consolidated Class Action Complaint, ECF No. 157;[2] the Defendants' Joint Motion to Dismiss the Retailer Plaintiffs' Complaints, ECF No. 160; and the Defendants' Joint Motion to Dismiss All Claims **[**12]** Asserted by End Payer Plaintiffs, ECF No. 162.

On November 27, 2018, these matters were referred to United States Magistrate Judge Douglas E. Miller pursuant to the provisions of *28 U.S.C. § 636(b) (1)(B)* and *Federal Rule of Civil Procedure 72(b)*, to conduct necessary hearings, including the hearing that was held on January 14, 2019, and to submit to the undersigned district judge proposed findings of fact, if applicable, and recommendations for the disposition of the Motions. Referral Order, ECF No. 208.

By copy of the Magistrate Judge's Report and Recommendation ("R&R"), filed on February 6, 2019, the parties were advised of their right to file written objections to the findings and recommendations made by the Magistrate Judge within fourteen (14) days from the date of service of the R&R on the objecting party. R&R at 105, ECF No. 234. Three sets of objections were filed on February 20, 2019: Retailer Plaintiffs' Objections to Report and Recommendation Regarding Motions to Dismiss ("Retailer Plaintiffs' Objections"), ECF No. 235; Glenmark Defendants' Objections to the February 6, 2019 Report and Recommendation Denying Motions to Dismiss Claims by Direct Purchaser Plaintiffs, End-Payor Plaintiffs, and Retailer Plaintiffs ("Glenmark Defendants' Objections"), **[**13]** ECF No. 236; and Merck Defendants' Written Objections to the Magistrate Judge's Report and Recommendation Dated February 6, 2019 ("Merck Defendants' Objections"), ECF No. 237.[3] Responses to each set of objections were filed on March 6, 2019: Defendants' Joint Response to Retailer Plaintiffs' Objections

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[1] The Glenmark Defendants consist of Glenmark Pharmaceuticals, Ltd. and Glenmark Pharmaceuticals Inc., USA, the latter incorrectly identified as Glenmark Generics Inc., USA.

[2] The Merck Defendants filed a Notice of Joinder in the Glenmark Defendants' Motion to Dismiss Direct Purchaser Plaintiffs' Consolidated Class Action Complaint on October 11, 2018. ECF No. 164. The Merck Defendants consist of Merck & Co., Inc.; Merck Sharp & Dohme Corp.; Schering-Plough Corp.; Schering Corp.; and MSP Singapore Co. LLC.

[3] The Merck Defendants join in the Glenmark Defendants' Objections, Merck Defs.' Objs. at 2, and the Glenmark Defendants join in the Merck Defendants' Objections, Glenmark Defs.' Objs. at 1 n.1.

("Defendants' Response"), ECF No. 240; Plaintiffs' Response to Glenmark Defendants' Objections ("Plaintiffs' Response"), ECF No. 239; and End-Payor Plaintiffs' Opposition to the Merck Defendants' Objections ("EPPs' Opposition"), ECF No. 238. On March 6, 2019, the Glenmark Defendants filed a request for hearing on **[*423]** their Objections. ECF No. 241. The court finds a hearing unnecessary to resolve the Glenmark Defendants' Objections.

Pursuant to *Rule 72(b) of the Federal Rules of Civil Procedure*, the court, having reviewed the record in its entirety, hereby makes a de novo determination of those portions of the R&R to which the Defendants have specifically objected. See *Fed. R. Civ. P. 72(b)*. The court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter to him with instructions. *28 U.S.C. § 636(b) (1)*.

I. Retailer Plaintiffs' Objections

The Retailer Plaintiffs object to the portion of the R&R "that recommends dismissal **[**14]** of Retailer Plaintiffs' per se claim under *section 1 of the Sherman Act*, *15 U.S.C. § 1*." Retailer Pls.' Objs. at 1. Specifically, the Retailer Plaintiffs assert that this "recommendation rests on two legally untenable propositions." Id. The first proposition is that Merck's existing patent rights preclude application of the per se rule. Id. (citing R&R at 51). The second proposition is that applying a per se rule would preclude the court from examining the Defendants' proffered justifications for settlement. Id. As explained below, the court finds that both propositions are legally tenable and consistent with controlling Supreme Court precedent.

The Retailer Plaintiffs' objections assume that the form of the alleged reverse payment settlement in this case, an agreement by Merck not to compete with Glenmark by launching an authorized generic (a "no-AG agreement"), requires this court to depart from *FTC v. Actavis, Inc., 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*, and apply a per se rule. Retailer Pls.' Objs. at 15 ("Retailer Plaintiffs do not contend that all reverse-payment settlement[s] should be subject to per se condemnation, but rather that no-AG agreements should be subject to such condemnation."). However, the Retailer Plaintiffs have not put forth any meritorious argument **[**15]** why the form of a reverse payment settlement, such as a no-AG agreement, warrants a departure from Actavis. ***HN1***[] The Retailer Plaintiffs also have not identified any case in which a court applied a per se rule to a reverse payment settlement or a no-AG agreement, and courts have universally applied the rule of reason to reverse payment settlements, including those involving a no-AG agreement. See, e.g., *United Food & Commercial Workers Local 1776 & Participating Emps. Health & Welfare Fund v. Teikoku Pharma USA, Inc., 74 F. Supp. 3d 1052, 1075 & n.30 (N.D. Cal. 2014)* (citing cases in which "district courts have considered no-authorized generic agreements under the rule of reason approach as set forth by the Court in Actavis"); see also *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* ("[T]he per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue." (citing *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 9, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979))*).

Instead, the Retailer Plaintiffs have analogized the alleged no-AG agreement to three instances in which per se rules apply: a horizontal market-allegation agreement, a horizontal output restriction, and a price-fixing agreement. See Retailer Pls.' Objs. at 18-23. In the R&R, the Magistrate Judge aptly concluded that these analogies to various per se violations all share "the same fatal defect. Each relies solely on a characterization of the **[**16]** [no-AG] Agreement's effects while ignoring entirely the admittedly lawful basis Defendants assert for those same effects." R&R at 54. The **[*424]** Retailer Plaintiffs do not challenge this conclusion by adjusting their analogies or making any new arguments for applying a per se rule. See Retailer Pls.' Objs. In fact, the Retailer Plaintiffs' objections appear to repeat verbatim their entire argument for applying a per se rule, including the analogies, from their Memorandum in Opposition to Defendants' Motion to Dismiss. Compare id. at 15-23, with ECF No. 186 at 7-16.[4]

[4] This portion of the Retailer Plaintiffs' Objections that repeats verbatim prior arguments is not a proper objection and is not entitled to de novo review. ***HN2***[] Objections that "do not attempt to undermine the Magistrate Judge's findings or recommendations by presenting additional arguments . . . do not require this court to make de novo determinations of the R&R findings." *Bennett v. Zydron, No. 2:17CV92, 2017 U.S. Dist. LEXIS 154692, 2017 WL 4176972, at *2 (E.D. Va. Sept. 21, 2017)* (citing ***Nichols v. Colvin*, 100 F. Supp. 3d 487, 498 (E.D. Va. 2015)**); *Williams v. Astrue, No. 2:09cr60, 2010 U.S. Dist. LEXIS*

To undermine the Magistrate Judge's conclusion, the Retailer Plaintiffs attack his consideration of "the admittedly lawful basis Defendants assert for [the] effects [of the no-AG agreement]" in determining that a per se rule would be inappropriate. R&R at 54. The Retailer Plaintiffs do so by objecting to the Magistrate Judge's recognition of Merck's patent rights and the Magistrate Judge's proper application of Actavis, which permits courts to consider the proffered justifications for an alleged reverse payment settlement. Retailer Pls.' Objs. at 1. The Retailer Plaintiffs' objections overlook the very **[**17]** nature of the per se rules and disregard the clear and binding precedent of Actavis that directs courts to analyze reverse payment settlements under the rule of reason.

HN3[] The per se rules treat certain business practices as "necessarily illegal." *Leegin Creative Leather Prods., Inc., 551 U.S. at 886* ("The per se rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work . . . ." (emphasis added) (citing *Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)))*. Thus, if the court applied a per se rule to an alleged reverse payment settlement because it took the form of a no-AG agreement, the court must treat that settlement as "necessarily illegal." See id. By treating a particular business practice as "necessarily illegal," the per se rules, by their very nature, preclude a court from considering the surrounding circumstances of that practice before deeming it illegal. See id.

Thus, applying a per se rule to the alleged no-AG agreement and finding it to be necessarily illegal would preclude the court from balancing the competing patent and antitrust polices that arise in the context of a reverse payment settlement. See *Actavis, 570 U.S. at 148* ***HN4***[] ("[P]atent and antitrust policies are both relevant **[**18]** in determining the 'scope of the patent monopoly'-and consequently ***antitrust law*** immunity-that is conferred by a patent."). The line of reasoning in the R&R related to Merck's patent rights does nothing more than recognize that applying a per se rule would be inappropriate in this case because of the balance that must be struck between competing patent and antitrust policies. See R&R at 51-53. This line of reasoning in the R&R further recognizes that patent polices do not become any less relevant in determining the antitrust immunity conferred by a patent when the reverse payment settlement **[*425]** takes the form of a no-AG agreement. See id.

Similarly, applying a per se rule to the alleged no-AG agreement and finding it to be necessarily illegal would preclude the court from considering the reasonableness of and the procompetitive justifications for the alleged reverse payment settlement, as required by Actavis. See *Actavis, 570 U.S. at 148* ***HN5***[] ("[I]t would be incongruous to determine antitrust legality by measuring the settlement's anticompetitive effects solely against patent law policy, rather than by measuring them against procompetitive antitrust policies as well."); *id. at 154* ("We concede that settlement on terms permitting the patent **[**19]** challenger to enter the market before the patent expires would also bring about competition, again to the consumer's benefit.").

HN6[] Moreover, this court is bound by *Actavis* to evaluate a reverse payment settlement under the rule of reason, regardless of the settlement's form. In Actavis, the Supreme Court held that "reverse payment settlements . . . can sometimes violate the antitrust laws." *Id. at 141* (emphasis added). Accordingly, the Court specifically refused to evaluate reverse payment settlements under "presumptive rules (or a 'quick look' approach)." *Id. at 159*. The Court reasoned that applying presumptive rules "is appropriate only where 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.'" Id. (quoting *Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999))*. The Court did "not believe that reverse payment settlements . . . meet this criterion." Id.

HN7[] The Court further reasoned that applying presumptive rules to reverse payment settlements would be inappropriate "because the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation **[**20]** costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification." Id. To account for "these complexities" of a reverse payment settlement, the Court also held that a court reviewing a reverse payment settlement should apply the "rule of reason" to determine whether that settlement violates the antitrust laws. Id.; see

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*9023, 2010 WL 395631, at *1 (E.D. Va. Feb. 2, 2010))*. Nevertheless, even after undertaking de novo review, the court agrees with the Magistrate Judge's conclusion that these arguments are meritless.

also Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977) ("Under th[e] rule [of reason], the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."); United States v. Topco Assocs., Inc., 405 U.S. 596, 607, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972) ("An analysis of the reasonableness of particular restraints includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption." (citing Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918))). In reaching this conclusion, the Court implicitly held that applying a per se rule to a reverse payment settlement would be inappropriate because a presumptive rule would not account for the circumstances and complexities surrounding a reverse payment settlement. See Actavis, 570 U.S. at 159.

Accordingly, the court finds that the reasoning **[**21]** and conclusions in the R&R that the Retailer Plaintiffs have specifically objected to are consistent with controlling Supreme Court precedent. The court **[*426]** further agrees with the Magistrate Judge's conclusion that the reverse payment settlement at issue in this case is properly evaluated under the rule of reason. Therefore, the Retailer Plaintiffs' Objections are hereby **OVERRULED**, and the Retailer Plaintiffs' per se claim under § 1 of the Sherman Act, 15 U.S.C. § 1, is **DISMISSED** with prejudice.[5]

II. Glenmark Defendants' Objections

The Glenmark Defendants "object[] to Section V(A) of the R&R that concludes Direct Purchaser Plaintiffs, End-Payor Plaintiffs, and Retailer [Plaintiffs] have plausibly pled (1) the existence of a reverse payment that is large and unjustified, and (2) anticompetitive effects." Glenmark Defs.' Objs. at 1. The Glenmark Defendants also object to Sections V(C), (D) (1), and (D) (4) of the R&R to the extent those Sections incorporate the reasoning in Section V(A). Id.

HN9[] At this stage of the litigation, the Complaints must be dismissed if Plaintiffs' allegations "fail[] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b) (6). "To survive a motion to dismiss, a complaint must contain sufficient **[**22]** factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Facial plausibility means that a "plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556). It is, therefore, not enough for a plaintiff to allege facts demonstrating a "sheer possibility" or "mere[] consist[ency]" with unlawful conduct. Id. (citing Twombly, 550 U.S. at 557).

The court accepts facts alleged in the Complaints as true and views those facts in the light most favorable to the Plaintiffs. See, e.g., Venkatraman v. REI Sys., Inc., 417 F.3d 418, 420 (4th Cir. 2005). "A motion to dismiss under Rule 12(b) (6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992) (emphasis added).[6]

A. Objection Regarding the Existence of a Large and Unjustified Reverse Payment

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[5] **HN8**[] "A district court's dismissal under Rule 12(b)(6) is, of course, with prejudice unless it specifically orders dismissal without prejudice. That determination is within the district court's discretion." Carter v. Norfolk Cmty. Hosp. Ass'n, Inc., 761 F.2d 970, 974 (4th Cir. 1985).

[6] To the extent that the analysis and conclusions in the R&R improperly relied upon Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp., 910 F.2d 139, 144 (4th Cir. 1990), R&R at 27, the court clarifies that the analysis and conclusions in this Order rely on the standards outlined here, and not on Advanced Health-Care Servs., 910 F.2d 139. See Glenmark Defs.' Objs. at 11.

The Glenmark Defendants object to two different aspects of the Magistrate Judge's finding that the Plaintiffs have plausibly pled the existence of a large and unjustified reverse payment. First, the Glenmark Defendants assert that the Magistrate Judge's conclusion that the Settlement Agreement contains a no-AG **[**23]** provision applies the improper legal standard and misreads the Settlement Agreement. Glenmark Defs.' Objs. at 4-5, 14-19. Second, the Glenmark Defendants assert that the Plaintiffs' circumstantial allegations of parallel conduct, without more, are insufficient **[*427]** to plausibly allege the existence of a no-AG agreement. Id. at 5, 19-22.

1. The Settlement Agreement

As a threshold matter, the Settlement Agreement is properly considered at this stage of litigation. ***HN10***[] Consideration of the Settlement Agreement does not convert, under *Federal Rule of Civil Procedure 12(d)*, the Motions to Dismiss into Motions for Summary Judgment under *Federal Rule of Civil Procedure 56*, because the Settlement Agreement is "integral to and explicitly relied on in the [C]omplaint[s] and because [P]laintiffs do not challenge its authenticity." *Phillips v. LCI Int'l, Inc., 190 F.3d 609, 618 (4th Cir. 1999)*. The Settlement Agreement must be viewed in the light most favorable to the Plaintiffs and all reasonable inferences from it must be drawn in the Plaintiffs' favor. See, e.g., *Zak v. Chelsea Therapeutics Int'l, Ltd., 780 F.3d 597, 607 (4th Cir. 2015)* ***HN11***[] ("[W]hen a court considers relevant facts from the public record at the pleading stage, the court must construe such facts in the light most favorable to the plaintiffs.").

The Glenmark Defendants assert that the R&R is incorrect when it states that the Settlement Agreement's "language is **[**24]** only relevant if it unambiguously contradicts the factual claims in the Complaint." Glenmark Defs.' Objs. at 14 (emphasis omitted) (quoting R&R at 34). There is no question that the Settlement Agreement's language is relevant, as its contents are directly at issue in this case, the point here being relevancy. Better stated, and what the court concludes, is that the Settlement Agreement language only requires dismissal of the Plaintiffs' claims if it unambiguously contradicts the allegations in the Complaints. See R&R at 40; see also, e.g., *Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008)* ("[W]e need not accept as true allegations contradicting documents that are referenced in the complaint."); *Alt. Energy, Inc. v. St. Paul Fire & Marine Ins. Co., 267 F.3d 30, 34-36 (1st Cir. 2001)* (concluding the complaint was properly dismissed under *12(b)(6)* because the contract language at issue was unambiguous and released defendant from liability as a matter of law).

The Glenmark Defendants assert that three provisions of the Settlement Agreement, sections 1.14, 5.3, and 7.2(c), "unambiguously contradict" the Plaintiffs' allegations that Merck agreed not to compete with Glenmark by launching an AG. Glenmark Defs.' Objs. at 14 n.8. Section 5.3 of the Settlement Agreement grants Glenmark a limited exclusive license to market "Generic Ezetimibe":

> During any period of exclusivity to **[**25]** which Glenmark is entitled under *21 U.S.C. § 355(j) (5) (B)(iv)*, and through the expiration of Schering's rights under the '721 Patent and Ezetimibe Pediatric Exclusivity, Schering's grant of the rights in Paragraphs 5.1 and 5.2 is exclusive to Glenmark and its Affiliates with respect to the commercial distribution and sale of Generic Ezetimibe, subject only to Schering's right to grant rights to or otherwise authorize Third Parties to make, have made, use, sell, offer to sell, import or distribute Generic Ezetimibe pursuant to such Third Parties' ANDAs or applications pursuant to *21 U.S.C. § 355(b) (2)*.

Settlement Agreement § 5.3, ECF No. 159.[7] Section 1.14 of the Settlement Agreement **[*428]** defines the term "Generic Ezetimibe":

> The term 'Generic Ezetimibe' shall mean a drug product containing ezetimibe as its sole active ingredient (a) that refers to the Approved Zetia Product as the reference-listed drug in an ANDA or pursuant to an application under *21 U.S.C. § 355(b)(2)* or (b) that is sold pursuant to NDA No. 21-445 but is not sold under the trademark Zetia® or another trademark or trade name of Schering, MSP or their Affiliates.

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[7] The Settlement Agreement remains filed under seal. The sections quoted and cited herein have previously been quoted or cited in publicly filed documents. See, e.g., R&R at 19-20, 32.

Id. § 1.14. Section 7.2(c) reserves Merck's right to engage in "conventional commercial conduct in competition with the Glenmark Product." Id. § 7.2(c).

The Glenmark Defendants have aptly identified **[**26]** the current question before the court as "whether [this] license can plausibly be read to be an anticompetitive agreement by Merck not to compete with Glenmark by launching an AG." Glenmark Defs.' Objs. at 10. The answer to this question depends on the interpretation of the Settlement Agreement's definition of "Generic Ezetimibe," and whether that definition permits Merck to sell an AG. The Settlement Agreement's definition of "Generic Ezetimibe" permits Merck to sell a product pursuant to its NDA, provided the product is "sold under the trademark Zetia® or another trademark or trade name of Schering, MSP or their Affiliates." Settlement Agreement § 1.14.

The parties and the court agree that the Settlement Agreement's definition of "Generic Ezetimibe" clearly permits Merck to sell a branded product, that is, a product "sold under the trademark Zetia® or another trademark . . . of Schering, MSP or their Affiliates." Id.; Glenmark Defs.' Objs. at 17 ("'Zetia' and 'trademark' already refer to branded products."); Pls.' Resp. at 10 ("Glenmark's exclusivity does not extend to branded Zetia or to an ezetimibe product that Merck might sell under another trademark or trade name."). The Magistrate **[**27]** Judge and the Plaintiffs agree that the Settlement Agreement's definition of "Generic Ezetimibe," permitting Merck to sell a product that is "sold under . . . another . . . trade name of Schering, MSP or their Affiliates," can plausibly be read to allow Merck to sell only a branded product. Settlement Agreement § 1.14 (emphasis added); R&R at 35-39; Pls.' Resp. at 10 ("Glenmark's exclusivity does not extend to branded Zetia or to an ezetimibe product that Merck might sell under another trademark or trade name."). The Glenmark Defendants contend that this same language unambiguously "allowed Merck to . . . launch a nonbranded form of Zetia under a 'trade name' of Merck or an affiliate, i.e., an in-house AG." Glenmark Defs.' Objs. at 14 (citing Settlement Agreement § 1.14).

The court agrees with the Magistrate Judge and the Plaintiffs that the Settlement Agreement's definition of "Generic Ezetimibe" can plausibly be read as a no-AG agreement because it permits Merck to sell only a branded, and not a generic, product. See Settlement Agreement § 1.14. As the Magistrate Judge noted, "pharmaceuticals are not sold 'under' a manufacturer's name, but under either a trademarked specialty name for branded drugs (e.g. Zetia, **[**28]** Lipitor, or Celebrex) or under the generic name assigned by the [United States Adopted Names ("USAN")] Council (e.g. ezetimibe, atorvastatin, celecoxib)." R&R at 38. Moreover, the pharmaceutical industry uses the term "trade name" to refer to "a drug product, not the drug company." Pls.' Resp. at 13. This usage of the term "trade name" in the pharmaceutical industry is supported by statutory and regulatory provisions, industry publications, and the Glenmark Defendants' **[*429]** filings in the underlying litigation between the Defendants.

At least one provision of the *Food, Drug, and Cosmetic Act ("FDCA")* specifically uses the term "trade name" to refer to a pharmaceutical product, not a pharmaceutical company. See *21 U.S.C. § 355(t)(1)(A)(i)*. Title *21 U.S.C. § 355(t)(1)(A)(i)* directs that the "drug trade name" and "brand company manufacturer" are to be included in a "[d]atabase for authorized generic drugs." Id. The United States Food & Drug Administration's ("FDA") Listing of Authorized Generics indicates that a drug's trade name is the same as its proprietary or brand name, as the Listing of Authorized Generics includes the "[p]roprietary [n]ame," but not the generic name of a given product.[8]

At least **[**29]** three provisions in Title 21 of the Code of Federal Regulations also use the term "trade name" to refer to a pharmaceutical product, not a pharmaceutical company. See, e.g., *21 C.F.R §§ 1.101*, *60.20*, *316.28*. At least two of these provisions also distinguish the "trade name" of a product from its "generic name." See, e.g., id. *§§ 60.20*, *316.28*. *Section 1.101* requires "[t]he product's trade name" be identified in the notifications required "for drugs, biological products, and devices exported under *section 802* of the act." Id. *§ 1.101(d) (1) (i)*. Under *§ 60.20*, the FDA will include "[t]he trade name and generic name (if applicable) of the product" in the "regulatory review period determination" notice published in the Federal Register. Id. *§ 60.20(c) (2)*. Pursuant to *§ 316.28*, the FDA will include "[t]he generic name and trade name, if any, or if neither is available, the chemical name or a meaningful descriptive name of the drug" in a "publicly available cumulative posting of all drugs designated as orphan drugs." Id. *§ 316.28(b)*.

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[8] FDA Listing of Authorized Generics as of July 1, 2019, https://www.fda.gov/media/77725/download .

Publications from the FDA and Merck further support the Plaintiffs' reading of the term "trade name" to refer to a pharmaceutical product, not a pharmaceutical company. The FDA's publication Approved Drug Products with Therapeutic Equivalence Evaluations, commonly known as the "Orange Book," uses **[**30]** the term "trade name" to refer to the proprietary name of a pharmaceutical product. FDA, Approved Drug Products with Therapeutic Equivalence Evaluations ("Orange Book") at vi (39th ed. 2019) ("This publication also includes indices of prescription and OTC drug products by trade name (proprietary name) or established name (if no trade name exists)."); see also id. at xii, xxii, 2-2. A publication from Merck discussing drug naming explains that pharmaceuticals are "given a [g]eneric (official) name" and a "[b]rand (proprietary or trademark or trade) name."[9] This publication not only demonstrates the use of "trade name" to identify a drug, but further illustrates that a drug's "trade name" refers to a brand, proprietary, or trademark name, not a generic name. See Marsh, supra note 9. This use and understanding of the term "trade name" is further confirmed by the Glenmark Defendants' filing in the underlying litigation between the Glenmark and the Merck Defendants. In that litigation, Glenmark identified Zetia as "Schering's trade name of the drug product at issue in this litigation." Defendant/Counterclaim Plaintiff Glenmark Pharmaceuticals Inc. USA's, **[*430]** Corrected Answer, Affirmative Defenses, and Counterclaims **[**31]** to Complaint ¶ 82, Schering Corp. v. Glenmark Pharm., Inc. USA, No. 2:07-cv-01334 (D.N.J. Jun. 7, 2007), ECF No. 20 ("Ezetimibe is the active ingredient in Schering's drug product Zetia®, Schering's trade name of the drug product at issue in this litigation." (emphasis added)).

Thus, the court can conclude that the term "trade name," as used in the Settlement Agreement's definition of "Generic Ezetimibe," can plausibly mean the proprietary or brand name of a drug product, and the Settlement Agreement permitted Merck to sell only a branded product. Because the Settlement Agreement allowed Merck to sell ezetimibe under a "trade name," or brand name, and not under the generic name "ezetimibe," the Settlement Agreement did not allow Merck to sell a generic product, including an AG. See R&R at 38. Therefore, the Settlement Agreement's definition of "Generic Ezetimibe" can plausibly be read as a no-AG agreement.

The Glenmark Defendants advance a competing interpretation of the Settlement Agreement that does not unambiguously contradict Plaintiffs' reading and render it implausible. See Glenmark Defs.' Objs. at 14-19. ***HN12***[↑] Instead, the Glenmark Defendants' competing **[**32]** interpretation highlights an ambiguity in the Settlement Agreement. See, e.g., *Cooper River Plaza E., LLC v. Briad Grp., 359 N.J. Super. 518, 528, 820 A.2d 690 (App. Div. 2003)* ("An ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations." (quoting *Kaufman v. Provident Life & Cas. Ins. Co., 828 F. Supp. 275, 283 (D.N.J. 1992))*); see also Settlement Agreement § 10.3 (selecting New Jersey Law). The Glenmark Defendants' interpretation relies upon the ordinary, dictionary, meaning of "trade name" to refer to a company. Glenmark Defs.' Objs. at 15-18; *Flanigan v. Munson, 175 N.J. 597, 606, 818 A.2d 1275 (2003)* ("Consistent with familiar canons of construction, the words of an agreement are given their 'ordinary' meaning."). Whereas, the Plaintiffs' interpretation relies on the meaning of "trade name" as used in the pharmaceutical industry to refer to a branded product. Plfs.' Resp. at 13-14; Guide to New Jersey Contract Law § 5.4.5 (2013) ("Technical terms or words of art will be given their technical meaning, unless the context or local usage shows a contrary intention." (citing *Josefowicz v. Porter, 32 N.J. Super. 585, 591, 108 A.2d 865 (App. Div. 1954))*).

At this juncture, the court does not need to determine which interpretation is more probable or correct. *Martin, 980 F.2d at 952* ("A motion to dismiss under *Rule 12(b)(6)* . . . does not resolve contests surrounding the facts."). Rather, the court finds that the Settlement Agreement's definition of "Generic Ezetimibe," **[**33]** specifically, the meaning of "sold under . . . another . . . trade name of Schering, MSP or their Affiliates," is open to at least two reasonable alternative interpretations, and thus, the meaning of "trade name" is ambiguous. See *Cooper River Plaza E., LLC, 359 N.J. Super. 518, 820 A.2d 690*. Accordingly, the Settlement Agreement does not clearly and unambiguously allow Merck to sell an AG, and it can plausibly be read as a no-AG agreement because it only permits Merck to sell a branded, rather than a generic, product.

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[9] Daphne E. Smith Marsh, Overview of Generic Drugs and Drug Naming, Merck Manual Consumer Version (Aug. 2017), https://www.merckmanuals.com/home/drugs/brand-name-and-generic-drugs/overview-of-generic-drugs-and-drug-naming .

2. The Circumstantial Allegations

The Glenmark Defendants assert that the Plaintiffs' circumstantial allegations of parallel conduct, without more, are insufficient to plausibly allege the existence of a no-AG agreement. Glenmark Defs.' Objs. at 5-6, 19-22. The Glenmark Defendants **[*431]** further assert that "[t]he R&R erred in concluding otherwise." Id. at 19. However, the Magistrate Judge did not conclude in the R&R that the Plaintiffs' circumstantial allegations alone plausibly allege the existence of a no-AG agreement. See R&R at 31-32, 39-40.

The Magistrate Judge's conclusion that the Plaintiffs had plausibly alleged the existence of a no-AG agreement relied on the Plaintiffs' detailed allegations in the Complaints and the language in the Settlement Agreement. **[**34]** Id. at 39-40 ("The other allegations in the Complaint[s], and the language of the Settlement Agreement itself, are sufficient to plausibly allege [a no-AG agreement]." (emphasis added)). The Magistrate Judge's analysis in the R&R viewed the Plaintiffs' circumstantial allegations as "corroborating," not independently supporting, the Plaintiffs' allegation of a no-AG agreement. Id. ("This is particularly so in light of other corroborating evidence of the Agreement, including Glenmark's claims to exclusivity on release of its generic ezetimibe and Merck's failure to release any authorized generic in competition with Glenmark's generic product throughout the 180-day period of exclusivity.").

Moreover, the success of the Glenmark Defendants' argument relies on the court finding that the Settlement Agreement does not plausibly contain a no-AG clause. Glenmark Defs.' Objs. at 19 ("In the absence of a plausible allegation as to the existence of a full No-AG clause in the Settlement Agreement, Plaintiffs are left only with alleged circumstantial evidence."). As discussed above, the court agrees with the conclusion in the R&R that the Settlement Agreement, when viewed in the light most favorable to the Plaintiffs, **[**35]** plausibly contains a no-AG clause and does not render the Plaintiffs' allegation of a no-AG agreement implausible. Accordingly, the court agrees with the Magistrate Judge's analysis and views the Plaintiffs' circumstantial allegations as corroborating, rather than independently supporting, the Plaintiffs' plausible allegation of a no-AG agreement.

B. Objection Regarding Anticompetitive Effects

The Glenmark Defendants object to the Magistrate Judge's finding that the Plaintiffs have plausibly pled anticompetitive effects. Glenmark Defs.' Objs. at 1, 6, 22-25. The Glenmark Defendants assert that the Magistrate Judge erred in two different ways with respect to this finding. Id. at 22-25. First, the Glenmark Defendants assert that the Magistrate Judge applied the wrong legal standard in the R&R. Id. at 22-23. Second, the Glenmark Defendants assert that the Magistrate Judge incorrectly concluded that "important differences between the Mylan and Glenmark challenges undercut the Defendants' argument that the Plaintiffs' claims of anticompetitive effect lack plausibility." Id. at 23 (quoting R&R at 44).

First, the Magistrate Judge applied the correct legal standard. ***HN13***[] The plausibility pleading standard requires the Plaintiffs to plead **[**36]** sufficient facts that when accepted as true "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678* (citing *Twombly, 550 U.S. at 556*). "[A]t the pleading stage," the court "consider[s] plausibility, not probability." *In re Lipitor Antitrust Litig., 868 F.3d 231, 260 (3d Cir. 2017)*; see also *id. at 267-68* (considering whether prior litigation rendered plaintiffs' allegations implausible).[10] Thus, **[*432]** the Magistrate Judge applied the correct legal standard when he assessed whether the later Mylan litigation renders Plaintiffs' allegations implausible, not whether it makes Plaintiffs' allegations less probable. See R&R at 44-45, 47-48.

[10] To the extent the Glenmark Defendants' object to the Magistrate Judge's reliance on *In re Lipitor Antitrust Litig., 868 F.3d 231, 260 (3d Cir. 2017)*, Glenmark Defs.' Objs. at 24 n.15, the court agrees with the Magistrate Judge's consideration of this persuasive authority as instructive, R&R at 44-45.

Second, the Magistrate Judge correctly concluded that Merck's success in the later Mylan patent litigation does not render the Plaintiffs' allegations of anticompetitive effects implausible. R&R at 47 ("In short, the fact that Merck successfully defeated a single challenge by a later-in-time ANDA filer does not totally undermine Plaintiffs' claims of anticompetitive effect."). The Plaintiffs' allegations of anticompetitive effects are that "but for the no-AG promise, the strength of Glenmark's patent challenge would have produced one of two outcomes. The two companies would have settled with an earlier generic entry date, or Glenmark **[**37]** would have prevailed in the litigation, invalidated the '721 patent, and launched its generic thereafter." Id. at 41 (citing DPP Compl. ¶¶ 199-203). If the Plaintiffs have plausibly alleged that Glenmark's patent claims against Merck had substantial merit, then the Plaintiffs have alleged "anticompetitive effect because Glenmark's delay is not entirely out of respect for a valid patent, but rather the result of the Defendants' agreement to allocate unlawful monopoly profits obtained by paying Glenmark to delay generic entry in the form of the no-AG agreement." Id. at 41-42.

The Glenmark Defendants' arguments to the contrary fail. The Glenmark Defendants again apply an incorrect probability standard, as opposed to the correct plausibility standard, to the Plaintiffs' allegations. Glenmark Defs.' Objs. at 23-25 ("Those allegations plainly are not enough to tip the scales in Plaintiffs' favor when weighed against the actual outcome of the trial and appeal."). Additionally, the Glenmark Defendants' argument that the Plaintiffs' allegations are implausible because Merck prevailed in the Mylan litigation, id. at 24-25, ignores the Plaintiffs' allegations that not all claims raised in the Glenmark litigation were litigated to final **[**38]** judgment in the Mylan litigation.

The court agrees with the Magistrate Judge's review of the Plaintiffs' detailed allegations regarding the claims raised in the Glenmark litigation that were not litigated to final judgment in the Mylan litigation. R&R at 42, 45-47 (citing DPP Compl. ¶¶ 155-60). Accordingly, the court agrees with the Magistrate Judge's conclusion that the Mylan litigation does not render the Plaintiffs' allegations implausible and the Plaintiffs have adequately pled anticompetitive effects.[11] Because the Plaintiffs have plausibly alleged a no-AG agreement and anticompetitive effects, the Glenmark Defendants' Objections are hereby **OVERRULED**, and the Defendants' Motion to Dismiss the *§ 1* Sherman Act claims is **DENIED**.

III. Merck Defendants' Objections

The Merck Defendants raise numerous objections to Sections V.D.2 through V.D.6 of the R&R. Merck Defs.' Objs. at 2. The **[*433]** court has conducted a de novo review of the record and will briefly address the objections by Section below.

A. Objections to Section V.D.2.

The Merck Defendants object to the Magistrate Judge's finding that the EPPs have Article III standing, and his conclusion that the ability of the named class representatives **[**39]** to represent absent class members' state law claims should be addressed under *Federal Rule of Civil Procedure 23*. Merck Defs.' Objs. at 3-7. The court agrees with the Magistrate Judge's well-reasoned analysis and conclusion that the Article III standing issue is properly addressed at the time of class certification. R&R at 59-62. Thus, the Merck Defendants' objection is **OVERRULED**, and the Defendants' Motion to Dismiss the EPPs' claims for lack of standing is **DENIED**.

B. Objections to Section V.D.3.

[11] To the extent that the Glenmark Defendants object to other portions of the R&R because "they rely on or incorporate the reasoning of Section V(A), including Sections V(D)(1), and V(D)(4)," Glenmark Defs.' Objs. at 1, the court **OVERRULES** those objections for the reasons stated in Part II of this Order. Similarly, to the extent there are objections to Section V(B) of the R&R based on the arguments already addressed, the court **OVERRULES** those objections for the reasons stated in Part II of this Order.

The Merck Defendants raise several objections to the Magistrate Judge's recommendation that the EPPs' state antitrust claims in nineteen jurisdictions should proceed. Merck Defs.' Objs. at 7-16.

1. Objections Regarding Section V.D.3.a.

The Merck Defendants object to the Magistrate Judge's finding that indirect purchasers have standing under Puerto Rico law. Merck Defs.' Objs. at 8-11. The court agrees with the Magistrate Judge's conclusions and reliance on Pressure Vessels of P.R. v. Empire Gas de P.R., 137 D.P.R. 497, 518-20, 1994 Juris P.R. 144 (1994), and *Rivera-Muniz v. Horizon Lines Inc., 737 F. Supp. 2d 57, 61 (D.P.R. 2010)*. R&R at 63-65. Thus, the Merck Defendants' objections is hereby **OVERRULED**, and the Defendants' Motion to Dismiss the EPPs' claim under Puerto Rico law is **DENIED**.

2. Objections Regarding Section V.D.3.b.

The Merck Defendants object to the Magistrate Judge's finding that the EPPs plausibly allege **[**40]** an intrastate connection sufficient to meet the requirements of state law. Merck Defs.' Objs. at 11-12. The court agrees with the Magistrate Judge's well-reasoned analysis and conclusion that EPPs have "sufficiently allege[d] the necessary intrastate connections in each of the challenged jurisdictions." R&R at 65-67. Thus, the Merck Defendants' objection is hereby **OVERRULED**, and the Defendants' Motion to Dismiss the EPPs' claims for insufficient intrastate connections is **DENIED**.

3. Objections Regarding Section V.D.3.c.

The Merck Defendants object to the Magistrate Judge's conclusion that the EPPs' failure to timely comply with statutory notice requirements does not warrant dismissal. Merck Defs.' Objs. at 12-13. The court agrees with the Magistrate Judge and finds the reasoning in *In re Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 817 (N.D. Ill. 2017)*, and *In re Aftermarket Filters Antitrust Litig., No. 08C4883, 2009 U.S. Dist. LEXIS 104114, 2009 WL 3754041, at *6 (N.D. Ill. Nov. 5, 2009)*, to be persuasive that failure to timely comply with pre-suit notice requirements does not warrant dismissal. Assuming arguendo that the statutory notice requirements apply in federal court, the statutes do not require dismissal for failing to comply precisely with the notice requirement. See R&R at 69.[12] Moreover, **[*434]** the court agrees with the Magistrate Judge that dismissal is unwarranted in this case because the EPPs' delay **[**41]** in providing notice did not prejudice the Defendants. See id. Thus, the Merck Defendants' objection is hereby **OVERRULED**, and the Defendants' Motion to Dismiss the EPPs' claims for improper notice is **DENIED**.

4. Objections Regarding Section V.D.3.d.

The Merck Defendants object to the Magistrate Judge's conclusion that the Illinois Antitrust Act class-action bar does not apply in federal court. Merck Defs.' Objs. at 13-15. The court agrees with the Magistrate Judge's analysis of the plain text of the Illinois Antitrust Act, 740 Ill. Comp. Stat. 10/7(2), and the Magistrate Judge's finding that pursuant to *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010)*, "*Rule 23* governs class actions in federal court and permits the EPPs' suit under the Illinois statute."

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[12] Contrary to the Merck Defendants' objection, the Magistrate Judge did not conclude that the notice requirements are procedural and inapplicable in federal court. See R&R at 67-69. Rather, the Magistrate Judge properly assumed the requirements apply in federal court, but the late or improper notice did not warrant dismissal. Id. at 68-69. The Magistrate Judge merely noted, without concluding, that "Shady Grove may preclude" "more complex procedural requirements" from applying in federal court. Id. at 69.

R&R at 69-72. Thus, the Merck Defendants' objection is hereby **OVERRULED**, and the Defendants' Motion to Dismiss the EPPs' Illinois antitrust claims is **DENIED**.

5. Objections Regarding Section V.D.3.e.

The Merck Defendants object to the Magistrate Judge's finding that the EPPs have standing under the *Utah Antitrust Act*. Merck Defs.' Objs. at 15-16. The court agrees with the Merck Defendants that the Magistrate Judge's reasoning seems to "conflat[e] Defendants' Article III standing arguments with the arguments Defendants actually make concerning **[**42]** Utah." Id. Specifically, the Merck Defendants argue that the EPPs have not sufficiently alleged that "any [named] EPP is a Utah citizen or resident," and only a Utah citizen or resident may bring a claim under the Utah Antitrust Act. Id. at 16 (citing *Utah Code Ann. § 76-10-3109(1)(a)*). This argument is distinct from the Merck Defendants' Article III argument that the EPPs lack standing to bring claims in jurisdictions where the named EPPs "do not reside and do not claim to have made even a single purchase." Id. at 3-7 (emphasis added) (asserting the named EPPs have not alleged an injury in those jurisdictions); see also EPP Compl. ¶ 12, ECF No. 130 (alleging Self-Insured Schools of California "indirectly purchased, paid for and/or provided reimbursement for Zetia and/or its generic equivalent" in Utah).[13]

Nevertheless, the court finds, drawing all reasonable inferences in favor of the EPPs, that the EPPs have sufficiently alleged that the class includes Utah residents. EPP Compl. ¶ 311 (bringing claims "on behalf of the following Class: All persons and entities in the Indirect Purchaser States that indirectly purchased, paid and/or provided reimbursement for some or all of the purchase price of Zetia or its AB-rated generic equivalents **[*435]** in any form . . . **[**43]** ."); id. ¶ 337(x) (alleging a violation of the Utah Antitrust Act "with respect to purchases of Zetia and AB-rated generic equivalents in Utah by Class members and/or purchases by Utah residents"). Moreover, to the extent that the Merck Defendants argue that the Utah Antitrust Act requires that a named EPP or class representative is a Utah citizen or resident, the court agrees with the EPPs that there is no such requirement in the text of the statute. See *Utah Code Ann. § 76-10-3109(1)(a)* ("A person who is a citizen of this state or a resident of this state and who is injured or is threatened with injury in his business or property by a violation of the Utah Antitrust Act may bring an action for injunctive relief and damages, regardless of whether the person dealt directly or indirectly with the defendant."); see also EPPs' Opp. at 12. ***HN14***[] Thus, a class representative that is not a Utah citizen or resident may bring claims on behalf of absent class members who are citizens or residents of Utah. See, e.g., *In re Generic Pharms. Pricing Antitrust Litig., 368 F. Supp. 3d 814, 838-39 (E.D. Pa. 2019)* ; *In re Liquid Aluminum Sulfate Antitrust Litig., No. 16-md-2687, 2017 U.S. Dist. LEXIS 115294, 2017 WL 3131977, at *28 (D.N.J. July 20, 2017)*; *In re Asacol Antitrust Litig., No. 15-cv-12730, 2016 U.S. Dist. LEXIS 94605, 2016 WL 4083333, at *13 (D. Mass. July 20, 2016)*.

Based on this reasoning set forth above, with supporting case law, the court agrees with the Magistrate Judge's conclusion **[**44]** that the EPPs can bring claims under Utah's Antitrust Statute. See R&R at 72-73. Thus, the court **MODIFIES** the reasoning in the R&R, **OVERRULES** the Merck Defendants' objection, and **DENIES** the Defendants' Motion to Dismiss the EPPs' Utah antitrust claim.

C. Objection to Section V.D.4.

The Merck Defendants object to the Magistrate Judge's recommendation that the EPPs' state law monopolization claims may proceed, with the exception of the claim under California Code *§ 17200*. Merck Defs.' Objs. at 16-17.

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[13] Self-Insured Schools of California is the only named EPP that asserts it "indirectly purchased, paid for and/or provided reimbursement for Zetia and/or its generic equivalent" in Utah. EPP Compl. ¶ 12. On May 7, 2019, Self-Insured Schools of California voluntarily dismissed its claim without prejudice. ECF No. 248. To the extent this voluntary dismissal raises an Article III standing issue with respect to the ability of the named class representatives to represent absent class members' claims under Utah law, that issue should be addressed under *Federal Rule of Civil Procedure 23* during class certification. See supra Part III.A.

The Merck Defendants acknowledge that the EPPs' state law monopolization claims "rely on the same factual allegations [that] the DPPs and Retailers rely on for their federal monopolization claim." Id. at 16 (citing R&R at 73). For the reasons discussed supra Part II, the court agrees with the Magistrate Judge that all Plaintiffs have "alleged sufficient facts to state a claim of conspiracy to monopolize under" federal and state law. R&R at 74.

To the extent the Merck Defendants object to the Magistrate Judge's assertion that the Defendants did not raise any specific challenges to the state law monopolization claims, Merck Defs.' Objs. at 16-17, the court acknowledges that the Defendants' arguments and objections addressed supra Part III.B, **[**45]** would apply to both the EPPs' conspiracy and monopolization claims. See also Merck Defs.' Mem. Supp. Mot. Dismiss at 11, ECF No. 163 (addressing the EPPs' conspiracy and monopolization claims together). For the reasons stated supra Parts II and III.B, the court **OVERRULES** the Merck Defendants' objection and **DENIES** the Defendants' Motion to Dismiss the EPPs' state law monopolization claims, with the exception of the claim under California Code *§ 17200*. The court **DISMISSES** with prejudice the EPPs' claim under California Code *§ 17200*.

D. Objections to Section V.D.5.

The Merck Defendants raise several objections to the Magistrate Judge's recommendation that some of the EPPs' consumer protection claims should proceed. Merck Defs.' Objs. at 18-24.

[*436] 1. Objections Regarding Section V.D.5.a.

The Merck Defendants object to the Magistrate Judge's conclusion that the EPPs can bring indirect purchaser actions under the consumer protection laws of Illinois and Missouri. Merck Defs.' Objs. at 18-19. The Merck Defendants objection regarding the EPPs' claim under the consumer protection laws of Illinois is based on the same reasoning as the objection previously addressed supra Part III.B.4. The court agrees with the Magistrate **[**46]** Judge's reasoning and conclusion that the EPPs can bring an indirect purchaser action under the consumer protection statutes of Illinois. See R&R at 75-76. The court further agrees with the Magistrate Judge's reasoning and conclusion that *Gibbons v. J. Nuckolls, Inc., 216 S.W.3d 667 (Mo. 2007)*, permits an action by indirect purchasers under Missouri's consumer protection statutes. See R&R at 77. Thus, the Merck Defendants' objections are hereby **OVERRULED**, and the Defendants' Motion to Dismiss the EPPs' Illinois and Missouri consumer protection claims is **DENIED** on this basis. However, the court **DISMISSES** the EPPs' consumer protection claim under Missouri law without prejudice on other grounds, namely, the EPPs are not proper plaintiffs under Missouri's consumer protection statutes. See R&R at 91, 93.

2. Objections Regarding Section V.D.5.b.

The Merck Defendants object to the Magistrate Judge's recommendation that the court permit the EPPs' claims to proceed under the consumer protection statutes of Arizona, Idaho, Maine, Rhode Island, and Vermont. Merck Defs.' Objs. at 19-20.

HN15[] With respect to Arizona, the court agrees with the Magistrate Judge's conclusion that Arizona's consumer protection statute covers an "unfair act," *Ariz. Rev. Stat. Ann. § 44-1522(A)*, includes a *Federal Trade Commission Act ("FTC Act")* **[**47]** harmonization provision, id. *§ 44-1522(C)*, and therefore, broadly covers unfair trade practices. See R&R at 79. Moreover, the court finds the Merck Defendants' citation to *Watts v. Medicis Pharm. Corp., 239 Ariz. 19, 365 P.3d 944 (Ariz. 2016)*, unpersuasive. Watts merely recites the elements of a consumer fraud claim under the Arizona consumer protection statute prior to the addition of "unfair act" to the statute in 2013. *Id. at 953* ("[T]o succeed on a claim of consumer fraud, a plaintiff must show (1) a false promise or misrepresentation made in connection with the sale or advertisement of 'merchandise,' and (2) consequent and proximate injury resulting from the misrepresentation. (citing *Kuehn v. Stanley, 208 Ariz. 124, 91 P.3d 346, 351 (Ariz. Ct. App. 2004)))*. As such, the Merck Defendants' objection is hereby **OVERRULED**, and the Defendants' Motion to Dismiss the EPPs' claim under Arizona's consumer protection statute is **DENIED**.

HN16[] With respect to Idaho, the Merck Defendant's object to the Magistrate Judge's initial conclusion in § V.D.5.b of the R&R that the EPPs' claim premised on anticompetitive conduct may proceed under Idaho's consumer protection statute because the statute "prohibits unfair methods of competition and aligns its consumer protection statute with the FTC Act." R&R at 80 (citing *Idaho Code §§ 48-603*, *-604*). This part of the objection is well-taken, but it overlooks **[**48]** the Magistrate Judge's later conclusion in § V.D.5.c that the same claim should be dismissed because Idaho's consumer protection statute is limited to "unconscionable 'sales conduct' that is directed at the consumer." Id. at 85 (quoting *State ex rel. Wasden v. Daicel Chem. Indus., Ltd., 141 Idaho 102, 106 P.3d 428, 433-35 [*437] (2005)*). The court agrees with the Magistrate Judge's conclusion that the EPPs cannot pursue a claim under Idaho's consumer protection statute because the EPPs have not alleged "unconscionable 'sales conduct' that is directed at the consumer." See *Wasden, 106 P.3d at 433-35*. Thus, the Merck Defendants' objection is **OVERRULED AS MOOT**, and the EPPs' claim under Idaho's consumer protection statute is **DIMISSED** with prejudice.

With respect to Maine, the court agrees with the Magistrate Judge's reasoning and conclusion that the EPPs' claim premised on anticompetitive conduct may proceed under Maine's consumer protection statute. R&R at 80-81. The Merck Defendants assertion that "consumer-directed deception or inducement" is required, Merck Defs.' HN17[] Objs. at 19, ignores the plain language of Maine's consumer protection statute that encompasses claims of "unfair methods of competition" and includes a FTC Act harmonization provision, *Me. Stat. tit. 5, § 207*. The court finds the Merck Defendants' citation to *In re TFT-LCD (Flat Panel) Antitrust Litig., 586 F. Supp. 2d 1109, 1126-27 (N.D. Cal. 2008)*, unpersuasive **[**49]** because it misreads *Tungate v. MacLean-Stevens Studios, Inc., 1998 ME 162, 714 A.2d 792 (Me. 1988)*, a case about "unfair or deceptive acts or practices," specifically an unfair pricing claim, to apply to cases about unfair methods of competition. Thus, the Merck Defendants' objection is hereby **OVERRULED**, and the Defendants' Motion to Dismiss the EPPs' claim under Maine's consumer protection statute is **DENIED** on this basis. However, the EPPs' claim under Maine's consumer protection statute is **DISMISSED** without prejudice because the EPPs are not the proper plaintiffs under that statute. R&R at 91-92.

With respect to Rhode Island, the court agrees with the Magistrate Judge's reasoning and conclusion that the EPPs' claim premised on anticompetitive conduct may proceed under Rhode Island's consumer protection statute. R&R at 83. The court is persuaded by the Supreme Court of Rhode Island's broad reading of Rhode Island's consumer protection statute in *Ames v. Oceanside Welding & Towing Co., Inc., 767 A.2d 677, 681 (R.I. 2001)*. Thus, the Merck Defendants' objection is hereby **OVERRULED**, and the Defendants' Motion to Dismiss the EPPs' claim under Rhode Island's consumer protection statute is **DENIED** on this basis. However, the EPPs' claim under Rhode Island's consumer protection statute is **DISMISSED** without prejudice because the EPPs are not the proper plaintiffs **[**50]** under that statute. R&R at 91, 93.

With respect to Vermont, the court agrees with the Magistrate Judge's reasoning and conclusion that the EPPs' claim premised on anticompetitive conduct may proceed under Vermont's consumer protection statute. R&R at 84. HN18[] Moreover, *Elkins v. Microsoft Corp., 174 Vt. 328, 817 A.2d 9 (Vt. 2002)*, requires a broad reading of Vermont's consumer protection statute and clarifies that the FTC Act harmonization provision in Vermont's consumer protection statute applies "to *§ 2453(a)*, which sets out the practices prohibited under the Act." *Id. at 13, 17*. The court finds *In re Propranolol Antitrust Litig., 249 F. Supp. 3d 712, 729 (S.D.N.Y. 2017)*, cited by the Merck Defendants, to be unpersuasive because it fails to account for the clear precedent of Elkins. Thus, the Merck Defendants' objection is hereby **OVERRULED**, and the Defendants' Motion to Dismiss the EPPs' claim under Vermont's consumer protection statute is **DENIED** on this basis. However, the EPPs' claim under Vermont's consumer protection statute is **DISMISSED** without prejudice because the **[*438]** EPPs are not the proper plaintiffs under that statute. R&R at 91, 93.

3. Objections Regarding Section V.D.5.c.

The Merck Defendants object to the Magistrate Judge's finding that the consumer protection statutes of Illinois and West Virginia encompass antitrust violations. Merck Defs.' Objs. at 20-21. The Merck **[**51]** Defendants' objection regarding Illinois is premised on the assertion that only the Illinois Attorney General may bring an antitrust class action on behalf of indirect purchaser plaintiffs. Id. at 20. HN19[] As the court concluded supra Part III.B.4, the

Illinois Antitrust Act class-action bar does not apply in federal court. Because the court found that the EPPs' claims under Illinois's antitrust statute may proceed, the EPPs' claims under Illinois's consumer protection statute may also proceed. See Siegel v. Shell Oil Co., 480 F. Supp. 2d 1034, 1046-48 (N.D. Ill. 2007) ("[A] plaintiff may not use the Consumer Fraud Act when doing so would be inconsistent with the legislative intent manifested in the Illinois Antitrust Act."). Thus, the Merck Defendants' objection is hereby **OVERRULED**, and the Defendants' Motion to Dismiss the EPPs' claim under Illinois's consumer protection statute is **DENIED**.

With respect to West Virginia, the court agrees with the Magistrate Judge's reasoning and conclusion that the EPPs' claim under West Virginia's consumer protection laws may proceed. R&R at 85. The court finds persuasive the reasoning in In re Packaged Seafood Prods. Antitrust Litig., 242 F. Supp. 3d 1033, 1087-88 (S.D. Cal. 2017), which permitted claims to proceed under West Virginia's consumer protection statute on the basis of the statute's FTC Act harmonization provision. The **[**52]** Merck Defendants misread and misconstrue the citations in In re Packaged Seafood Prods. to require allegations of false or misleading statements for a claim to proceed under West Virginia's consumer protection statute. Merck Defs.' Objs. at 20-21. Thus, the Merck Defendants' objection is hereby **OVERRULED**, and the Defendants' Motion to Dismiss the EPPs' claim under West Virginia's consumer protection statute is **DENIED**.

4. Objections Regarding Section V.D.5.d.

The Merck Defendants object to the Magistrate Judge's finding that the EPPs have adequately alleged sufficient intrastate connections with respect to the EPPs' claims under the consumer protection laws of New Hampshire, New York, and North Carolina. Merck Defs.' Objs. at 21. In support of this objection, the Merck Defendants rely on arguments previously considered supra Part III.B.2. The court, again, agrees with the Magistrate Judge's reasoning and conclusion that the allegation of "a nationwide pattern of conduct that resulted in consumers in each of the challenged jurisdiction purchasing ezetimibe at elevated prices" adequately pleads sufficient intrastate connections. R&R at 87-88; see also Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 737 F. Supp. 2d 380, 400 (E.D. Pa 2010) (denying motion to dismiss **[**53]** for failure to allege sufficient intrastate effects in North Carolina "[w]ithout clear authority for the proposition that the sale and marketing of a product in North Carolina is insufficient intrastate conduct to expose [the defendant] to antitrust liability there"); LaChance v. U.S. Smokeless Tobacco Co., 156 N.H. 88, 931 A.2d 571, 578 (N.H. 2007) (noting that New Hampshire's consumer protection statute covers "any trade or commerce directly or indirectly affecting the people of this state" (quoting N.H. Rev. Stat. Ann. § 358-A:1)); Goshen v. **[*439]** Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 774 N.E.2d 1190, 1195, 746 N.Y.S.2d 858 (N.Y. 2002) ("We conclude that the transaction in which the consumer is deceived must occur in New York.").

Thus, the Merck Defendants' objection is hereby **OVERRULED**, and the Defendants' Motion to Dismiss the EPPs' consumer protection claims for lack of intrastate connections is **DENIED**. However, the EPPs' claim under New York's consumer protection statute is **DISMISSED** without prejudice "[b]ecause the allegations here do not reflect consumer-oriented deception by any Defendants." R&R at 82.

5. Objections Regarding Section V.D.5.e.

The Merck Defendants object to the Magistrate Judge's conclusion that the EPPs are proper plaintiffs under Virginia's consumer protection statute. Merck Defs.' Objs. at 21-22. The Merck Defendants contend that the Magistrate Judge's reasoning, that "the mere **[**54]** fact that the underlying transaction (that is, the drug purchase) is for 'personal, family, or household use,' as most of the laws at issue require, does not extend a right of action to third-party payors which reimburse those payments as part of a separate insurance obligation," should apply to the EPPs' claim under Virginia's consumer protection statute. Id. (quoting R&R at 91). The Magistrate Judge's reasoning, quoted above, is premised on the fact that the EPPs "do not actually make purchases—rather, they reimburse their members or pharmacies for the costs of Zetia or ezetimibe purchases when their members fill prescriptions." R&R at 90-91 (emphasis added).

The Merck Defendants overlook the plain language of Virginia's consumer protection statute, which does not require that the EPPs themselves purchased Zetia or ezetimibe. Cf. *Me. Stat. tit. 5, § 213* (providing a remedy only to "[a]ny person who purchases or leases goods, services or property, real or personal, primarily for personal, family or household purposes"); *Mo. Rev. Stat. § 407.025* (providing a remedy only to "[a]ny person who purchases or leases merchandise primarily for personal, family or household purposes"); 6 *R.I. Gen. Laws § 6-13.1-5.2* (providing a remedy only to "[a]ny person who purchases **[**55]** or leases goods or services primarily for personal, family, or household purposes"). Instead, ***HN20***[] Virginia's consumer protection statute provides a remedy for "[a]ny person who suffers loss as the result of a violation of this chapter." *Va. Code Ann. § 59.1-204*. "'Person' means any natural person, corporation, trust, partnership, association and any other legal entity." Id. *§ 59.1-198*. And, the loss must be the result of "fraudulent acts or practices committed by a supplier in connection with a consumer transaction." Id. *§ 59.1-204*, *-200*.

In sum, Virginia only requires that the EPPs suffered a loss in connection with a consumer transaction. Thus, the court agrees with the Magistrate Judge's interpretation of the plain language of Virginia's statute, and the court concludes that the EPPs have sufficiently alleged that they suffered a loss in connection with a consumer transaction by reimbursing consumer transactions. See R&R at 90. The Merck Defendants' objection is hereby **OVERRULED**, and the Defendants' Motion to Dismiss the EPPs' consumer protection claim under Virginia law is **DENIED**.

6. Objections Regarding Section V.D.5.f.

The Merck Defendants object to the Magistrate Judge's conclusion that the **[*440]** "EPPs' failure to send pre-suit notice to Defendants **[**56]** does not warrant dismissal of their Massachusetts and West Virginia consumer protection claims." Merck Defs.' Objs. at 22-23 (citing R&R at 93-95). ***HN21***[] With respect to West Virginia, the court agrees with the Magistrate Judge's interpretation of the plain text of the statute, which clearly permits a post-filing demand letter. See R&R at 94-95 (citing *W. Va. Code §46A-6-106(c)*).[14]

With respect to Massachusetts, the Magistrate Judge recommended dismissal of the EPPs' Massachusetts consumer protection claim on other grounds. R&R at 92. The Magistrate Judge found that the EPPs "engaged in trade or commerce" and "must proceed under *section 11 of the Massachusetts Consumer Protection Act*." Id. "However *section 11* bars indirect purchaser claims." Id. The EPPs "did not formally object" to this conclusion, but they "respectfully disagree with the court's finding." EPPs' Opp. at 22 n.16. 147. The court has reviewed the Magistrate Judge's finding and agrees that the EPPs' claims are properly brought under *section 11*. R&R at 92; see also *United Food & Commercial Workers Local 1776 & Participating Employers Health & Welfare Fund v. Teikoku Pharma USA, Inc., 74 F. Supp. 3d 1052, 1084-85 (N.D. Cal. 2014)* ("The Plan and the City appear to be engaged in the 'trade or commerce' of providing health and welfare benefits. I conclude that the City and Iron Workers were engaged in trade or commerce and are covered by *Section 11*."). The court further agrees **[**57]** with the Magistrate Judge that "[t]he Massachusetts notice provision only applies to claims under *section 9* of the state's consumer protection act." R&R at 94; see also *Mass. Gen. Laws ch. 93A, § 11*. Thus, no notice was required, and this is not a proper basis for dismissal. Nevertheless, the court agrees with the Magistrate Judge's recommendation of dismissal of the EPPs' Massachusetts consumer protection claim on other grounds. See R&R at 92.

Thus, the Merck Defendants' objections are hereby **OVERRULED**, and the Defendants' Motion to Dismiss the EPPs' consumer protection claims in West Virginia and Massachusetts for lack of pre-suit notice is **DENIED**. The EPPs' consumer protection claim in Massachusetts is **DISMISSED** without prejudice on other grounds, namely, the EPPs' claims must proceed under *section 11*, which bars indirect purchaser claims.

[14] To clarify, record of the West Virginia notice is located in MDL Member Case No. 2:18cv108, ECF No. 54-6. See R&R at 95 n.23 (misstating the MDL Member Case No. as 4:18cv108).

7. Objections Regarding Section V.D.5.g.

The Merck Defendants object to the Magistrate Judge's conclusion that *Federal Rule of Civil Procedure 9(b)*'s heightened pleading standard does not apply to the EPPs' claim under Florida's consumer protection laws. Merck Defs.' Objs. at 23-24. The court agrees with the Magistrate Judge's conclusion that *Rule 9(b)*'s heightened pleading standard is inapplicable in this case because "the EPPs are proceeding under the statute's **[**58]** 'unfair methods of competition' prong," and the EPPs are not bringing any claims alleging fraudulent conduct. R&R at 95; see also *Hill v. Hoover Co., 899 F. Supp. 2d 1259, 1263 (N.D. Fla. 2012)* (citing *Jovine v. Abbott Labs., Inc., 795 F. Supp. 2d 1331 (S.D. Fla. 2011))*. Thus, the Merck Defendants' objection is hereby **OVERRULED**, and the Defendants' Motion to Dismiss the EPPs' consumer protection claim under Florida law is **DENIED**.

[*441] 8. Objections Regarding Section V.D.5.h.

The Merck Defendants object to the Magistrate Judge's conclusion that Tennessee's class-action bar does not apply in federal court. Merck Defs.' Objs. at 24. As the Merck Defendants acknowledge, the Magistrate Judge recommends that the court dismiss the EPPs' claim under Tennessee's consumer protection statute on other grounds. Id.; R&R at 86. The EPPs have not filed any objections to the R&R, and the court agrees with the Magistrate judge that the EPPs' claim under Tennessee's consumer protection statute should be dismissed on those other grounds. R&R at 86 ("[P]laintiffs cannot bring claims based on anticompetitive conduct under the *Tennessee Consumer Protection Act*." (quoting *In re Flonase Antitrust Litig. (Flonase I), 610 F. Supp. 2d 409, 417 (E.D. Pa. 2009)))*. Nevertheless, the court agrees with the Magistrate Judge's conclusion that Shady Grove governs class actions in federal court and permits the EPPs' suit under the Tennessee statute. R&R at 95-96. Thus, the Merck **[**59]** Defendants' objection is hereby **OVERRULED**, and the Defendants' Motion to Dismiss the EPPs' consumer protection claim under Tennessee law is **DENIED** on this basis. However, the EPPs' consumer protection claim under Tennessee law is **DISMISSED** with prejudice on other grounds, namely, the EPPs' cannot bring claims based on anticompetitive conduct under Tennessee's consumer protection statute. R&R at 86-87.

E. Objections to Section V.D.6.

The Merck Defendants raise several objections to the Magistrate Judge's recommendation that some of the EPPs' unjust enrichment claims should proceed. Merck Defs.' Objs. at 25-28.

1. Objections Regarding Section V.D.6.a.

The Merck Defendants object to the Magistrate Judge's conclusion that the EPPs' Consolidated Complaint satisfies the *Rule 8* pleading requirement for unjust enrichment. Merck Defs.' Objs. at 25-26. The Merck Defendants argue that because "the requirements for stating an unjust enrichment claim vary from jurisdiction to jurisdiction, . . . blanket incorporation of antitrust-based allegations without accounting for material differences in jurisdictions' requirements for unjust enrichment claims cannot satisfy *Rule 8*'s pleading standards." Id. at 25. However, the Merck Defendants **[**60]** do not point to any specific material differences in jurisdictions' requirements for unjust enrichment claims that warrant consideration, other than those already raised before the Magistrate Judge. Id. at 25 ("The R&R itself shows the inadequacy of this broad-brush approach when it reasons that some jurisdictions require conferral of a direct benefit to state an unjust enrichment claim while others do not." (citing R&R at 100-03)). Moreover, the court agrees with the Magistrate Judge's reasoning and conclusion that when considering the EPPs' Consolidated Complaint as a whole, it satisfies the *Rule 8* pleading requirement for pleading unjust enrichment. R&R at 97-99. Thus, the Merck Defendants' objection is hereby **OVERRULED**, and the Defendants' Motion to Dismiss the EPPs' unjust enrichment claims is **DENIED** on this basis.

2. Objections Regarding Section V.D.6.c.

The Merck Defendants object to the Magistrate Judge's conclusion that indirect unjust enrichment claims are permitted in Kansas, Maine, New York, and North Dakota. Merck Defs.' Objs. at 26-27.

[*442] With respect to Kansas, the court agrees with the Magistrate Judge's conclusion and citation to *In re Automotive Parts Antitrust Litig., 29 F. Supp. 3d 982, 1019-1020 (E.D. Mich. 2014)*, which addresses and disposes of the arguments raised by the Merck Defendants regarding **[**61]** *Haz-Mat Response, Inc. v. Certified Waste Servs. Ltd, 259 Kan. 166, 910 P.2d 839 (1996)*, and *Spires v. Hosp. Corp. of Am., 289 Fed. App'x 269 (10th Cir. 2008)*. The court also finds the reasoning in *In re Keurig Green Mt. Singleserve Coffee Antitrust Litig., 383 F. Supp. 3d 187, 2019 WL 1789789, at *54 (S.D.N.Y. 2019)*, and *In re Processed Egg Prods. Antitrust Litig., 851 F. Supp. 2d 867, 929-30 (E.D. Pa. 2012)*, to be persuasive and support the conclusion that the EPPs' unjust enrichment claim in Kansas may proceed.

With respect to Maine, the court agrees with the Magistrate Judge's conclusion that the EPPs' unjust enrichment claim in Maine may proceed. R&R at 102. In addition to the case cited by the Magistrate Judge, the court also finds the analysis in *In re Keurig, 383 F. Supp. 3d 187, 2019 WL 1789789, at *54*, and *Sergeants Benevolent Ass'n Health & Welfare Fund v. Actavis, PLC, No. 15 CIV. 6549 (CM), 2018 U.S. Dist. LEXIS 220574, 2018 WL 7197233, at *62 (S.D.N.Y. Dec. 26, 2018)*, to be persuasive and support the conclusion that the EPPs' unjust enrichment claim in Maine may proceed.

With respect to New York, the court, the court agrees with the Magistrate Judge's reading of *Sperry v. Crompton Corp., 8 N.Y.3d 204, 863 N.E.2d 1012, 1018, 831 N.Y.S.2d 760 (N.Y. 2007)*, and conclusion that the EPPs' unjust enrichment claim in New York may proceed. R&R at 102. ***HN22***[] For an unjust enrichment claim to proceed in New York, the relationship between the EPPs and the Defendants cannot be "too attenuated." *Sperry, 863 N.E.2d at 1018* ("Here, the connection between the purchaser of tires and the producers of chemicals used in the rubber-making process is simply too attenuated to support such a claim."). The court also finds the reasoning in *In re Processed Egg Prods., 851 F. Supp. 2d at 930* ("One federal court has explained that this means that 'a product's indirect purchaser cannot assert **[**62]** an unjust enrichment claim against an entity that manufactured one of that product's ingredients,' but that an 'indirect purchaser can assert such an unjust enrichment claim against the manufacturer of the product itself.'" (quoting *Waldman v. New Chapter, Inc., 714 F. Supp. 2d 398, 403-04 (E.D.N.Y. 2010))*), to be persuasive and support the conclusion that the EPPs' unjust enrichment claim in New York may proceed.

With respect to North Dakota, the court agrees with the Magistrate Judge's conclusion that the EPPs' unjust enrichment claim in North Dakota may proceed. R&R at 103. The court agrees with the Magistrate Judge's citation to *In re Automotive Parts Antitrust Litig., 29 F. Supp. 3d 982, 1019-1020 (E.D. Mich. 2014)*, which distinguishes *Apache Corp. v. MDU Res. Grp., Inc., 1999 ND 247, 603 N.W.2d 891, 895-96 (N.D. 1999)*, from the case at bar. The court further finds the reasoning and cases cited in *Sergeants Benevolent Ass'n Health & Welfare Fund, 2018 U.S. Dist. LEXIS 220574, 2018 WL 7197233, at *65-66*, to be persuasive and support the conclusion that the EPPs' unjust enrichment claim in North Dakota may proceed.

Thus, the Merck Defendants' objections are hereby **OVERRULED**, and the Defendants' Motion to Dismiss the EPPs' unjust enrichment claims in Kansas, Maine, New York, and North Dakota is **DENIED**.

3. Objections Regarding Section V.D.6.d.

The Merck Defendants object to the Magistrate Judge's conclusion that the **[*443]** EPPs may plead unjust enrichment in the alternative. Merck Defs.' Objs. at 27-28. This objection applies to the EPPs unjust enrichment **[**63]** claims in Alabama, Hawaii, and Massachusetts. Id.

With respect to Alabama, the Merck Defendants objection is entirely premised on the assumption that the EPPs have an adequate remedy at law that precludes the EPPs from bringing an unjust enrichment claim. Merck Defs.' Objs. at 27 ("Merck's argument is that the EPPs cannot avail themselves of these claims at all given the existence of adequate remedies at law."). However, the Merck Defendants overlook the fact that the EPPs have not alleged claims in Alabama on a legal theory other than unjust enrichment. Cf. EPP Compl. ¶¶ 337, 347, 357 (alleging violations of state antitrust and consumer protection laws in jurisdictions, not including Alabama). Additionally, the Merck Defendants do not point to any available adequate remedy at law that would preclude the EPPs from pursuing an unjust enrichment claim in Alabama at this juncture. Thus, the court agrees with the Magistrate Judge that the EPPs' unjust enrichment claim in Alabama should proceed.

With respect to Massachusetts, the Magistrate Judge recommended dismissing the EPPs' unjust enrichment claim in Massachusetts on other grounds. R&R at 99-100. The EPPs have not filed any objections to the R&R, **[**64]** and the court agrees with the Magistrate judge that the EPPs' unjust enrichment claim in Massachusetts should be dismissed on those other grounds. Id. (finding that the EPPs cannot circumvent Illinois Brick by bringing unjust enrichment claims in jurisdictions that do not allow indirect purchaser antitrust actions). Nevertheless, as discussed below with respect to Hawaii, the court agrees with the Magistrate Judge's reasoning and conclusion that the unjust enrichment claim in Massachusetts should not be dismissed on this basis.

HN23[] With respect to Hawaii, the court agrees with the Magistrate Judge that *Federal Rule of Civil Procedure 8* allows the EPPs to plead claims in the alternative and assert inconsistent claims. *Fed. R. Civ. P. 8(d) (2)-(3)*. Moreover, the EPPs explicitly pled their claims of unjust enrichment in the alternative, and explicitly pled that they have no adequate remedy at law. EPP Compl. ¶¶ 361, 365. To the extent that the EPPs have alleged violations of Hawaii's antitrust and consumer protection laws, see EPP Compl. ¶¶ 337, 347, 357, it is not certain that the EPPs will prevail on those claims, and thus, it would be premature to dismiss the EPPs unjust enrichment claim in Hawaii. See, e.g., *In re Chocolate Confectionary Antitrust Litig., 749 F. Supp. 2d 224, 237 (M.D. Pa. 2007)* (evaluating the same argument and declining **[**65]** to dismiss an unjust enrichment claim in Hawaii).

The Merck Defendants' objections are hereby **OVERRULED**, and the Defendants' Motion to Dismiss the EPPs' unjust enrichment claims in Alabama, Massachusetts, and Hawaii is **DENIED**. The EPPs' unjust enrichment claim in Massachusetts is **DISMISSED** with prejudice on other grounds, namely, the EPPs cannot circumvent Illinois Brick by bringing an unjust enrichment claim.

IV. Conclusion

The court, having examined all of the Objections to the R&R, and having made de novo findings with respect thereto, hereby **OVERRULES** the Retailer Plaintiffs' Objections, ECF No. 235, and the Glenmark Defendants' Objections, ECF No. 236. The court **OVERRULES** the Merck Defendants' Objections. ECF No. 237. The court **MODIFIES** the reasoning in the R&R, as noted supra Part III.B.5. The court **ADOPTS AND APPROVES IN [*444] FULL** the recommended disposition of each claim as set forth in the Magistrate Judge's thorough and well-reasoned R&R, ECF No. 234, filed on February 6, 2019. Accordingly, the Defendants' Motions to Dismiss, ECF Nos. 157, 160 & 162, are **GRANTED IN PART AND DENIED IN PART** as set forth in the R&R and Exhibits A and B attached thereto. See R&R at 104, Exs. A & B.

The Clerk is **[**66] DIRECTED** to send a copy of this Opinion to counsel for all parties.

IT IS SO ORDERED.

/s/ Rebecca Beach Smith

Rebecca Beach Smith

United States District Judge

August 9, 2019

Nat'l Football League's Sunday Ticket Antitrust Litig. v. DirecTV, LLC

United States Court of Appeals for the Ninth Circuit

December 7, 2018, Argued and Submitted, Pasadena, California; August 13, 2019, Filed

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Reporter
933 F.3d 1136 *; 2019 U.S. App. LEXIS 24041 **; 2019-2 Trade Cas. (CCH) P80,870; 2019 WL 3788253

IN RE NATIONAL FOOTBALL LEAGUE'S SUNDAY TICKET ANTITRUST LITIGATION,NINTH INNING, INC., DBA The Mucky Duck; 1465 THIRD AVENUE RESTAURANT CORP., DBA Gael Pub; ROBERT GARY LIPPINCOTT, JR.; MICHAEL HOLINKO, an individual, for himself and all others similarly situated, Plaintiffs-Appellants, v. DIRECTV, LLC; DIRECTV HOLDINGS, LLC; NATIONAL FOOTBALL LEAGUE, INC.; NFL ENTERPRISES, LLC; ARIZONA CARDINALS, INC.; ATLANTA FALCONS FOOTBALL CLUB LLC; BALTIMORE RAVENS, LP; BUFFALO BILLS, INC.; PANTHERS FOOTBALL, LLC; CHICAGO BEARS FOOTBALL CLUB, INC.; CINCINNATI BENGALS, INC.; CLEVELAND BROWNS, LLC; DALLAS COWBOYS FOOTBALL CLUB, LTD.; DETROIT LIONS, INC.; GREEN BAY PACKERS, INC.; HOUSTON NFL HOLDINGS, LP; INDIANAPOLIS COLTS, INC.; JACKSONVILLE JAGUARS, LTD.; KANSAS CITY CHIEFS FOOTBALL CLUB, INC.; MIAMI DOLPHINS, LTD.; MINNESOTA VIKINGS FOOTBALL CLUB, LLC; NEW ENGLAND PATRIOTS, LP; NEW ORLEANS LOUISIANA SAINTS, LLC; NEW YORK FOOTBALL GIANTS, INC.; NEW YORK JETS FOOTBALL CLUB, INC.; OAKLAND RAIDERS, LP; PHILADELPHIA EAGLES FOOTBALL CLUB, INC.; PITTSBURGH STEELERS SPORTS, INC.; SAN DIEGO CHARGERS FOOTBALL CO.; SAN FRANCISCO FORTY NINERS, LTD.; THE RAMS FOOTBALL COMPANY, LLC; BUCCANEERS, LP; TENNESSEE FOOTBALL, INC.; WASHINGTON FOOTBALL, INC.; FOOTBALL NORTHWEST LLC; DENVER BRONCOS FOOTBALL CLUB, Defendants-Appellees.

Subsequent History: Counsel Amended August 15, 2019.

Later proceeding at *Ninth Inning, Inc. v. DirecTV, LLC (In re NFL Sunday Ticket Antitrust Litig.), 2019 U.S. App. LEXIS 26606 (9th Cir. Cal., Sept. 3, 2019)*

Rehearing denied by, En banc *Ninth Inning Inc. v. DirecTV (In re NFLs Sunday Ticket Antitrust Litig.), 2019 U.S. App. LEXIS 30400 (9th Cir. Cal., Oct. 10, 2019)*

Stay granted by *In re NFL Sunday Ticket Antitrust Litig., 2019 U.S. App. LEXIS 30822 (9th Cir. Cal., Oct. 16, 2019)*

Motion granted by *NFL v. Ninth Inning, Inc., 140 S. Ct. 1291, 206 L. Ed. 2d 373, 2020 U.S. LEXIS 1522, 2020 WL 1124419 (U.S., Mar. 9, 2020)*

US Supreme Court certiorari denied by *NFL v. Ninth Inning, Inc., 141 S. Ct. 56, 208 L. Ed. 2d 291, 2020 U.S. LEXIS 5194, 2020 WL 6385695 (U.S., Nov. 2, 2020)*

Request granted *NFL's Sunday Ticket Antitrust Litig. v. DirecTV, LLC, 2021 U.S. App. LEXIS 6074 (9th Cir. Cal., Mar. 2, 2021)*

Prior History: **[**1]** Appeal from the United States District Court for the Central District of California Beverly. D.C. No. 2:15-ml-02668-BRO-JEM. Reid O'Connell, District Judge, Presiding.

In re NFL Sunday Ticket Antitrust Litig., 2017 U.S. Dist. LEXIS 121354 (C.D. Cal., June 30, 2017)

Disposition: REVERSED.

Core Terms

telecasts, teams, games, television, conspiracy, broadcast, rights, output, league, antitrust, consumer, purchaser, football, sports, alleges, interlocking, conspired, network, defendants', monopolize, professional football, price-fixing, plaintiffs', horizontal, co-conspirator, competitors, subscribers, satellite, compete, cable

LexisNexis® Headnotes

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

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

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

The appellate court reviews a district court's grant of a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss for failure to state a claim de novo. Additionally, the court takes all allegations of material fact as true and construes them in the light most favorable to the nonmoving party. However, conclusory allegations of law and unwarranted inferences are insufficient to avoid a *Rule 12(b)(6)* dismissal.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN2[] **Sherman Act, Claims**

Section 1 of the Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. *15 U.S.C.S. § 1*. Although on its face, *§ 1* appears to outlaw virtually all contracts, it has been interpreted as outlawing only unreasonable restraints of trade.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

HN3[] **Sherman Act, Claims**

The court determines whether a particular restraint of trade is unreasonable and thus a violation of *§ 1* of the Sherman Act under the so-called rule of reason. Under this rule, the court examines the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed, to determine the effect on competition in the relevant product market.

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

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

HN4[] Per Se Rule & Rule of Reason, Per Se Violations

Under ***antitrust law***, some restraints of trade, such as horizontal agreements among competitors to fix prices, restrict output, and divide markets, are generally deemed to be per se unreasonable, and therefore it is unnecessary to apply the rule of reason in order to determine whether such agreements violate *§ 1* of the Sherman Act. The per se rule does not apply to agreements involving teams engaged in league sports, on the ground that such sports can only be carried out jointly. Therefore, when considering agreements among entities involved in league sports, a court must determine whether the restriction is unreasonable under the rule of reason.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN5[] Sherman Act, Claims

In order to state a *§ 1* of the Sherman Act claim under the rule of reason, plaintiffs must plead four separate elements. Plaintiffs must plead facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition. Additionally, the plaintiffs must plead antitrust standing, meaning they must allege that (4) they are the proper parties to bring the antitrust action because they were harmed by the defendants' contract, combination, or conspiracy, and the harm they suffered was caused by the anti-competitive aspect of the defendants' conduct.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

HN6[] Sherman Act, Claims

In order to satisfy the third requirement for stating a *§ 1* of the Sherman Act claim under the rule of reason, the plaintiffs must identify a harm that is attributable to an anti-competitive aspect of the practice under scrutiny. A harm that could have occurred under the normal circumstances of free competition fails to satisfy this requirement. An agreement between competitors (a horizontal agreement) satisfies the requirement of showing injury to competition if it reduces competitors' independent decisions about whether and how often to offer to provide services, or otherwise limits competitors' freedom to compete. In order to show that an agreement injures competition, a plaintiff must generally show that the defendants have market power within a relevant market, meaning that the defendants have the ability to raise prices above those that would be charged in a competitive market. Alternatively, plaintiffs can show that a restraint injures competition if they plausibly allege a naked restriction on price or output, such as an agreement not to compete in terms of price or output. An agreement between companies at different levels of a supply chain (a vertical agreement) may injure competition if it facilitates horizontal collusion.

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

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

HN7[] **Scope, Monopolization Offenses**

An agreement among college football teams and the NCAA violates *§ 1* of the Sherman Act where the agreement eliminates competition in the market for college football telecasts.

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

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

HN8[] **Scope, Monopolization Offenses**

Courts are required to take a holistic look at how interlocking agreements actually impact competition. Indeed, the essential inquiry is whether or not the challenged restraint enhances competition, which is assessed by considering the totality of the nature or character of the contracts. Thus, the law requires that the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. Accordingly, the court must give plaintiffs the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.

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

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

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

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

HN9[] **Scope, Monopolization Offenses**

A horizontal agreement among competitors to pool separate property rights and enter into an agreement to license their rights vertically can constitute a *§ 1* of the Sherman Act violation.

Copyright Law > Scope of Copyright Protection > Subject Matter > Specific Subject Matter

HN10[] **Subject Matter, Specific Subject Matter**

Under copyright law, it is well-established that an underlying sporting event is not copyrightable subject matter. The initial performance of a game is an athletic event outside the subject matter of copyright.

Copyright Law > Scope of Copyright Protection > Subject Matter > Specific Subject Matter

HN11[] **Subject Matter, Specific Subject Matter**

The telecasts of sporting events are plainly copyrightable motion pictures under the Copyright Act of 1976. *17 U.S.C.S. § 102(a)(6)*. Recorded broadcasts of sporting events, as opposed to the games themselves, are entitled to copyright protection.

Copyright Law > Scope of Copyright Protection > Ownership Interests > Initial Ownership

HN12[] **Ownership Interests, Initial Ownership**

Under general copyright law, copyright ownership vests initially in the author of the work, *17 U.S.C.S. § 201(a)*, who, as a general rule, is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection. Thus, in the absence of an agreement otherwise, the person or company that creates the telecast is the author of the telecast for the purposes of copyright law. Assuming that this rule applies in the league sports setting, the team or network that creates the telecasts would be the sole owner of the copyright in the telecasts, absent some agreement to the contrary.

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

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

HN13[] **Scope, Monopolization Offenses**

When there is an agreement not to compete in terms of output, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.

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

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

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

HN14[] **Scope, Monopolization Offenses**

To plead the fourth element of a *§ 1* of the Sherman Act claim under the rule of reason, antitrust standing or antitrust injury, plaintiffs must allege that they were harmed by the injury to competition. Further, plaintiffs must allege that their harm was caused directly by the antitrust violator. Indirect purchasers who are two or more steps removed from the violator in a distribution chain may not sue. Allowing every purchaser in a distribution chain to claim damages flowing from a single antitrust violation would create a serious risk of multiple liability for defendants. This avoids the evidentiary complexities and uncertainties that would be multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant in the chain of distribution. Accordingly, a bright-line rule that authorizes suits by direct purchasers but bars suits by indirect purchasers has been established. Said otherwise, purchasers who are two or more steps removed from the antitrust violator in a distribution chain may not sue. To illustrate, under this rule, if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A. However, C may sue B if B is an antitrust violator.

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

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

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

HN15[] **Scope, Monopolization Offenses**

If the direct purchaser conspires to fix the price paid by the plaintiffs, then the plaintiffs pay the fixed price directly and are not indirect purchasers (i.e., there is no pass-on theory involved). In other words, when coconspirators have jointly committed the antitrust violation, a plaintiff who is the immediate purchaser from any of the conspirators is directly injured by the violation.

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

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

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

HN16[] **Scope, Monopolization Offenses**

If the direct purchaser conspires to limit the output that will ultimately be available to the plaintiffs, then the plaintiffs are directly impacted by the output limitation and have standing to sue. In other words, when plaintiffs adequately allege that their injury was caused by a conspiracy to violate antitrust laws, even when the conspiracy involves multiple levels of producers, distributors, and sales, the plaintiffs sufficiently allege an antitrust injury that can withstand a motion to dismiss.

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

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

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

HN17[] **Scope, Monopolization Offenses**

Price-fixing conspiracies are functionally indistinguishable from output-restricting conspiracies. An agreement on output also equates to a price-fixing agreement, because if firms raise price, the market's demand for their product will fall, so the amount supplied will fall too, in other words, output will be restricted. On the other hand, if instead the firms restrict output directly, price will as mentioned rise in order to limit demand to the reduced supply. Accordingly, with exceptions, raising price, reducing output, and dividing markets have the same anticompetitive effects. A conspiracy between a cartel of widget producers and their widget retailer to set an artificially high price for widgets is functionally the same as a conspiracy to set an artificially low total output of widgets, which causes prices to rise. Therefore, the consumer of widgets would be directly injured by the antitrust violators at both levels of the distribution chain and would have standing to sue those coconspirators in both scenarios.

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

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

HN18[] **Conspiracy to Monopolize, Elements**

Section 2 of the Sherman Act makes it unlawful for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations. *15 U.S.C.S. § 2*. To establish a conspiracy to monopolize claim under *Section 2*, plaintiffs must plead: (1) the existence of a combination or conspiracy to monopolize; (2) an overt act in furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal antitrust injury. To plausibly plead a monopolization claim, plaintiffs must allege: (a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury.

Summary:

SUMMARY[**]

Antitrust

The panel reversed the district court's dismissal for failure to state a claim of an antitrust action brought by a putative class of residential and commercial subscribers to DirecTV's NFL Sunday Ticket, a bundled package of all NFL games available exclusively to subscribers of DirecTV's satellite television service.

Each NFL team entered into a "Teams-NFL Agreement" with the NFL to pool their telecasting rights and give the NFL the authority to exercise those rights. Acting on behalf of its teams, the NFL entered into two additional agreements licensing the teams' telecast rights. Under the "NFL-Network Agreement," CBS and Fox coordinate to create a single telecast for every Sunday-afternoon NFL game, and the NFL permits CBS and Fox to broadcast a limited number of what are known as local games through free, over-the-air television. Under the "NFL-DirecTV Agreement," the NFL allows DirecTV to obtain all of the live telecasts produced by CBS and Fox, package those telecasts, and deliver the bundled **[**2]** feeds to NFL Sunday Ticket subscribers.

Plaintiffs alleged that defendants' interlocking agreements work together to suppress competition for the sale of professional football game telecasts in violation of *§§ 1* and *2* of the *Sherman Act*.

The panel held that plaintiffs stated a *§ 1* claim under the rule of reason because they adequately alleged (1) a contract, combination, or conspiracy among two or more persons or business entities; (2) by which the persons or entities intended to harm or restrain trade; (3) and which actually injured competition; and (4) antitrust standing. The first and second elements were undisputed. As to the third element, the panel held that, under *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*, plaintiffs plausibly alleged that the interlocking agreements caused injury to competition. As to the fourth element, it was undisputed that plaintiffs had standing to challenge the Teams-NFL Agreement and the NFL-DirecTV Agreement. The panel held that plaintiffs also had standing to challenge the Teams-NFL Agreement because they alleged that their injury was caused by a single conspiracy. The panel concluded that *Illinois Brick*, limiting the standing of indirect purchasers, did not apply.

The panel held that the plaintiffs **[**3]** stated a claim under *§ 2* of the Sherman Act in alleging that, by entering into interlocking agreements, the defendants conspired to monopolize the market for professional football telecasts and have monopolized it.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Judge N.R. Smith dissented from Part III(C) of the majority's opinion, addressing antitrust standing. Judge Smith disagreed with the majority's conclusion that, because plaintiffs alleged a conspiracy among defendants to limit output, the direct purchaser rule of *Illinois Brick* did not apply to plaintiffs' damages claim related to the Teams-NFL Agreement.

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Greg H. Levy (argued), Derek Ludwin, John S. Playforth, and Sonia Lahr-Pastor, Covington & Burling LLP, Washington, D.C.; Beth A. Wilkinson, Wilkinson Walsh & Eskovitz LLP, Washington, D.C.; Sean Eskovitz, Wilkinson Walsh & Eskovitz LLP, Los Angeles, California; for Defendants-Appellees.

Craig C. Corbitt, Corbitt Law Office, San Francisco, California, for Amici Curiae Economists. **[**4]**

Judges: Before: Sandra S. Ikuta and N. Randy Smith, Circuit Judges, and George Caram Steeh III,* District Judge. Opinion by Judge Ikuta; Dissent by Judge N.R. Smith.

Opinion by: Sandra S. Ikuta

Opinion

[*1143] IKUTA, Circuit Judge:

Every Sunday during football season, millions of National Football League (NFL) fans tune in to watch their team play. If they live in the same area as their favorite team—such as Los Angeles Rams fans who live in Los Angeles—they can tune into their local Fox or CBS station to enjoy their team's game on free, over-the-air television. But if NFL fans happen to live far away from their favorite team—such as Seattle Seahawks fans residing in Los Angeles—they can watch every Seahawks game only if they purchase DirecTV's NFL Sunday Ticket, a bundled package of all NFL games available exclusively to subscribers of DirecTV's satellite television service.

The plaintiffs, a putative class of Sunday Ticket subscribers, claim that this arrangement harms NFL fans because it eliminates competition in the market for live telecasts of NFL games. Without this arrangement restricting the televising of NFL games, plaintiffs argue, the individual teams would create multiple telecasts of **[*1144]** each game and would compete **[**5]** against one another by distributing telecasts of their games through various cable, satellite, and internet channels. We conclude that at this preliminary stage, plaintiffs have stated a cause of action for a violation of *Sections 1* and *2 of the Sherman Act* that survives a motion to dismiss. We therefore reverse the district court's decision to the contrary.

I

To analyze the challenged arrangement between the NFL teams, the NFL, and DirecTV, it is necessary to understand the history of television broadcasting of NFL games. The NFL, an association of "separately owned professional football teams," was formed in 1920. *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 187, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)*. While the NFL had a rocky first two decades, its teams gradually became successful. *See* *U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1343 (2d Cir. 1988)*. Indeed, by 1959, a majority of NFL team owners felt that there was a "growing interest in professional football and the healthier financial condition of the NFL teams." *Am. Football League v. Nat'l Football League, 205 F. Supp. 60, 67 (D. Md. 1962)*, *aff'd*, *323 F.2d 124 (4th Cir. 1963)*. And as professional football gained popularity, so did the telecasts of its games.

* The Honorable George Caram Steeh III, United States District Judge for the Eastern District of Michigan, sitting by designation.

In the 1950s, the right to telecast NFL games was "controlled by individual teams," which independently licensed the telecasts of their games to television networks. *U.S. Football League, 842 F.2d at 1346*.[1] For example, in 1951, the "Dumont network televised five regular season **[**6]** games (twelve by 1954), as well as the championship game each year." *Id.* Additionally, in the mid-1950s, "the Columbia Broadcasting System ('CBS') began broadcasting certain NFL regular season games for $1.8 million per year, and the National Broadcasting Company ('NBC') acquired the right to televise the NFL championship game." *Id.*

Concerned that too much competition between the teams in the market for broadcast rights might drive some teams out of business, the NFL amended its 1951 bylaws to address this issue. In Article X of the bylaws, the NFL required each NFL team to agree to minimize competition by refraining from telecasting its games into another team's local market whenever that local team was either playing at home or broadcasting its away game in its local territory.[2] *United States v.* ***[*1145]*** *Nat'l Football League, 116 F. Supp. 319, 321 (E.D. Pa. 1953)* (*NFL I*).

In 1951, the Justice Department brought suit in district court to enjoin enforcement of Article X, alleging that it violated *Section 1 of the Sherman Act*. *Id. at 321*. After a bench trial, Judge Grim held that the NFL could restrict the broadcast of distant games into home territories in order to protect attendance for the local team's game without violating **[**7]** ***antitrust law***. *Id. at 325-26*. Because "primarily all of NFL revenues were derived from gate receipts," protecting live attendance at NFL games was important to the league's success. H.R. Rep. No. 93-483 at 5 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2032, 2035; *see* *NFL I, 116 F. Supp. at 325*. However, the NFL could not restrict teams from broadcasting their games into another team's local market when that team was playing away games. *NFL I, 116 F. Supp. at 326-27*. Such a restriction, Judge Grim held, would be an impermissible restraint of trade that violated the Sherman Act. *Id. at 327*. Judge Grim therefore enjoined the NFL teams from entering into a contract that restricts "the sale of rights for the telecasting of outside games in club's home territory on a day when the home club is permitting the telecast of its away game in its home territory." *Id. at 330*.

The NFL did not appeal the 1953 injunction imposed by *NFL I*, which remained in force until Congress addressed the issue. "For a number of years after the 1953 decision, the broadcasting practices of the member clubs of the National Football League stabilized." H.R. Rep. No. 93-483 at 4 (1973). The individual NFL teams competed against each other on the field and in the market for telecasting rights. Indeed, "[b]y the **[**8]** late 1950s, eleven individual teams had signed contracts with the Columbia Broadcasting System; two teams—Baltimore and Pittsburgh—had signed contracts with the National Broadcasting Company; and one team—Cleveland—had organized its own network." *Id.*

This changed when the NFL began to face competition from its newly formed rival, the American Football League (AFL). While the NFL was precluded under *NFL I* from restricting the sale of telecasts, the AFL was not. *Id.* at 2034. As a result, the AFL "entered into league-wide television contracts," *id.*, and pooled its television rights and revenues in a broadcast contract with ABC, *U.S. Football League, 842 F.2d at 1346*.

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[1] By this time, courts had agreed that sports teams had a property interest in their games. In *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, the leading case on this issue, a radio station broadcast play-by-play descriptions of the Pirates' baseball games without the consent of the team. *24 F. Supp. 490, 492 (W.D. Pa. 1938)*. The Pirates sued to enjoin the unauthorized broadcasts. *Id.* The district court enjoined the radio station, holding that the baseball team, "by reason of its creation of the game, its control of the park, and its restriction of the dissemination of news therefrom, has a property right in such news, and the right to control the use thereof for a reasonable time following the games." *Id.*; *see* *Nat'l Exhibition Co. v. Fass, 133 N.Y.S.2d 379, 380 (Sup. Ct. 1954)* (enjoining the "defendant from the unauthorized transmission, subsequently broadcast, of detailed accounts of games"); *Sw. Broad. Co. v. Oil Ctr. Broad. Co., 210 S.W.2d 230, 234 (Tex. Civ. App. 1947)* (granting an injunction to prevent a radio broadcaster from broadcasting play-by-play accounts of football games); *cf.* *Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 575, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977)* (citing *Pittsburgh Athletic Co., 24 F. Supp. 490*).

[2] Article X would have prevented, for example, the New England Patriots from broadcasting their game against the Minnesota Vikings within 75 miles of Washington, D.C. when the Washington Redskins were either (1) playing at home or (2) playing an away game but telecasting that game in Washington, D.C. *See* *NFL I, 116 F. Supp. at 325*.

In light of this disparity with the AFL, and out of concern "that the league's competitive balance on the field would eventually be destroyed if teams in major television markets continued to sell their broadcast rights individually," in 1961, the NFL teams also decided "to sell their collective television rights as a single package and to share broadcast revenues equally among all franchises." *Id.* (quoting the testimony of Commissioner Rozelle). In 1961, the NFL filed a petition with Judge Grim seeking to implement a new television contract between the NFL and CBS. *United States v. Nat'l Football League, 196 F. Supp. 445, 447 (E.D. Pa. 1961)* (*NFL* ***[**9]*** *II*). Under the terms of the NFL-CBS contract, the NFL teams would pool their television rights in the NFL and then the NFL would jointly sell those rights to CBS. *Id. at 446-47*. Judge Grim denied the petition, holding that the proposed agreement violated the 1953 injunction because if the agreement went into effect, "the member clubs of the League [would] have eliminated competition among themselves in the sale of television rights to their games." *Id. at 447*. Judge Grim therefore issued a second injunction (the 1961 injunction) enjoining the implementation of the pooled rights contract between NFL and CBS. *Id.*

[*1146] Rather than appeal the 1961 injunction, the NFL sought Congressional relief. In response to the NFL's lobbying, Congress passed the *Sports Broadcasting Act (SBA)*, which "was specifically designed to establish parity between the National Football League and the American Football League." H.R. Rep. No. 93-483 at 5 (1973). The SBA effectively overruled *NFL II*, providing:

> The antitrust laws, as defined in *section 1 of the [Sherman] Act* . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by **[**10]** which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.

15 U.S.C. § 1291. Thus, the SBA provides a tailored exemption for "professional team sports" to sell their rights to "sponsored telecasts" through a joint agreement. *Id.* In passing the SBA, Congress recognized "that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act," and that therefore an exemption from *Section 1 of the Sherman Act* was required. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 104 n.28, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)* (*NCAA)*.

For the next 25 years, the NFL teams pooled their telecasting rights to their games and sold them as a single package through free, over-the-air television. *See* In the Matter of Implementation of Section 26 of the Cable Television Consumer Protection & Competition Act of 1992, *8 F.C.C. Rcd. 4875, 4879-80 (1993)*.

Because the SBA applied only to professional sports leagues, it did not apply to college football, which continued to be subject to the *Sherman Act*. *See* *15 U.S.C. § 1291*. Like the NFL, the NCAA had a long-standing **[**11]** restriction on televising team games. *See* *NCAA, 468 U.S. at 89-90*. Beginning in 1951, the NCAA enforced procedures ensuring that "only one game a week could be telecast in each area, with a total blackout on 3 of the 10 Saturdays during the season," and "[a] team could appear on television only twice during a season." *Id. at 90*. The NCAA maintained this approach for the next two decades.

Finally, in the 1980s, the NCAA's arrangement was challenged by colleges that wanted to negotiate more lucrative television deals for their popular football teams. *Id. at 90-91*. This challenge resulted in the Supreme Court's authoritative opinion on the ***antitrust law*** of league sports, *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*.

In *NCAA*, the Supreme Court struck down the NCAA's restrictive telecast agreements as violating the Sherman Act. According to the Court, "[b]y participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another." *Id. at 99*. Such an arrangement violated *Section 1 of the Sherman Act* because "[i]ndividual competitors **[**12]** lose their freedom to compete," and "[p]rice is higher and output lower than they would otherwise be, and both are **[*1147]** unresponsive to consumer preference." *Id. at 106-07*.

After *NCAA*, commentators documented the changes caused by the increased competition in college football telecasts. "With conferences and teams now free to sign their own deals, the number of televised college football games grew exponentially." Nathaniel Grow, *Regulating Professional Sports Leagues*, *72 Wash. & Lee L. Rev. 573, 617 (2015)*. Moreover, because college football teams could compete "against one another in the marketplace, broadcasters collectively pa[y] half as much for the rights to televise a larger number of games than the NCAA had previously received for its collective package." *Id.* By contrast, under the SBA, the NFL's control over the pooled broadcasting rights increased revenues from telecasting, *see* Michael A. McCann, American Needle v. NFL: *An Opportunity to Reshape Sports Law*, *119 Yale L.J. 726, 732 (2010)*, while decreasing the number of telecasts available to consumers, *see* Ariel Y. Bublick, Note, *Are You Ready for Some Football*?, *64 Fed. Comm. L.J. 223, 231, 234-36 (2011)*.

While the NFL's collective sale of telecast rights to free, over-the-air television networks was squarely covered by the SBA, as television technology **[**13]** advanced, from over-the-air to cable to satellite television, the NFL and other professional leagues began using new methods of distributing telecasts of the games.[3] In 1987, the NFL entered into its first cable deal, selling the right to telecast eight Sunday games to ESPN. *See* *8 F.C.C. Rcd. 4875, 4879*. Beginning in 1994, the NFL entered into an agreement with DirecTV, allowing DirecTV to sell Sunday Ticket exclusively through its satellite television service. Babette Boliek, Antitrust, Regulation, and the "New" Rules of Sports Telecasts, *65 Hastings L.J. 501, 541 (2014)*.

Courts considering challenges to the telecasting arrangements between sports leagues and satellite television services have concluded that "'sponsored telecasting' refers to broadcasts which are financed by business enterprises (the 'sponsors') in return for advertising time and are therefore provided free to the general public." *Shaw v. Dallas Cowboys Football Club, Ltd., 172 F.3d 299, 301 (3d Cir. 1999)*. Therefore, the SBA does not exempt league contracts with cable or satellite television services, for which subscribers are charged a fee, from antitrust liability. *Id. at 303*; *see also* *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 961 F.2d 667, 671 (7th Cir. 1992)* (*Bulls I*) (holding that the SBA applies when a league has transferred rights to sponsored telecasting and therefore did not apply to the NBA's efforts to limit **[**14]** distribution by the Bulls of their games on a cable network); *Chicago Professional Sports Ltd. Pshp. v. NBA, 95 F.3d 593, 595 (7th Cir. 1996)* (*Bulls II*) (same); *Kingray, Inc. v. NBA, Inc., 188 F. Supp. 2d 1177, 1183* ***[*1148]*** *(S.D. Cal. 2002)* ("'Sponsored telecasting' under the SBA pertains only to network broadcast television and does not apply to non-exempt channels of distribution such as cable television, pay-per-view, and satellite television networks.").

The current arrangements for cable broadcasting of NFL games is as follows. The 32 individual NFL teams, each of which is a separate "independently owned, and independently managed business," *Am. Needle, 560 U.S. at 196*, entered into an agreement with the NFL ("Teams-NFL Agreement") to pool their telecasting rights and give the NFL the authority to exercise those rights, rather than exercising those rights individually. The consequence of this agreement is that an individual team cannot enter into individual agreements with networks, satellite TV providers, or internet streaming services. Instead, only the NFL can enter into an agreement to sell those rights.

[3] Over-the-air television is conveyed by "[b]roadcast stations [that] radiate electromagnetic signals from a central transmitting antenna." *Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 627, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994)*. It is free to "any television set within the antenna's range." *Id.* Cable television, in contrast, typically relies upon "cable or optical fibers strung aboveground or buried in ducts to reach the homes or businesses of subscribers." *Id. at 628*. Satellite television providers deliver their "signals via satellite directly into its customers' homes." *DirecTV, Inc. v. Webb, 545 F.3d 837, 841 (9th Cir. 2008)*. As with "conventional radio and television broadcasting, [satellite television] signals are broadcast through the air and can be received—or intercepted—by anyone with the proper hardware." *Id.* Because satellite signals could be received by anyone with a satellite dish, satellite providers typically "encrypt[] [their] signals to protect against signal theft." *Id.*

Acting on behalf of its teams, the NFL entered into two additional agreements licensing the teams' telecast rights: (1) "the NFL-Network Agreement," which governs "local games," and (2) "the NFL-DirecTV Agreement," which governs "out-of-market games."

Under **[**15]** the NFL-Network Agreement, CBS and Fox coordinate to create a single telecast for every Sunday-afternoon NFL game. Pursuant to that agreement, NFL owns the copyright in the telecasts. *See, e.g.*, U.S. Copyright Office, *NFL 2016 Season: Cowboys @ Packers, Week #6*, Reg. No. PA0002069024 (Jan. 4, 2017) (noting that copyright was held by the NFL pursuant to transfer "[b]y contract"). The NFL, in turn, permits CBS and Fox to broadcast a limited number of games through free, over-the-air television. These are the so-called local games.

Under the NFL-DirecTV Agreement, the NFL allows DirecTV to obtain all of the live telecasts produced by CBS and Fox, package those telecasts, and deliver the bundled feeds to NFL Sunday Ticket subscribers. Thus, Sunday Ticket subscribers have access to both local and out-of-market games.

As a result of these agreements, fans who do not subscribe to Sunday Ticket have access to, at most, two to three local games each Sunday afternoon, in any given geographic area. This means, for example, that Los Angeles fans would be able to use over-the-air cable to watch the Rams play the Chargers at 1:00PM E.T. on Fox, the Vikings play the Patriots at 1:00PM E.T. on CBS, **[**16]** and the Dolphins play the Cowboys at 4:00PM E.T. on CBS. But there is no option for NFL fans to watch any of the other 7 to 10 games played each Sunday afternoon which are not available on free, over-the-air television.

Fans who want to watch other out-of-market games cannot purchase games individually or by team, but are required to buy the entire package of NFL games. Additionally, in order to subscribe to the Sunday Ticket, consumers must also purchase a basic television package from DirecTV. In 2015, the cost of a basic Sunday Ticket package was $251.94 annually for residential subscribers. For commercial subscribers, the price varied depending on the capacity of the establishment, ranging from $2,314 to $120,000 per year.

II

Four plaintiffs (Ninth Inning, Inc., 1465 Third Avenue Restaurant Corp., Robert Gary Lippincott, Jr., and Michael Holinko) filed a consolidated complaint against the National Football League, NFL Enterprises LLC, all 32 individual NFL teams, DirecTV Holdings LLC, and DirecTV, LLC, on behalf of a putative class of residential and commercial NFL Sunday Ticket subscribers. (Our reference to "plaintiffs" **[*1149]** refers to the plaintiffs collectively. We will refer to the **[**17]** defendants collectively, or as the NFL, the NFL teams, and DirecTV, as appropriate.)

The plaintiffs' consolidated complaint alleges that the defendants' interlocking agreements work together to suppress competition for the sale of professional football game telecasts in violation of *Section 1* and *Section 2* of the Sherman Antitrust Act. Specifically, the complaint alleges that absent the anti-competitive Teams-NFL and NFL-DirecTV Agreements, the telecasts broadcast solely on Sunday Ticket would be available through other distributors. Additionally, each NFL team could make its own arrangements for telecasts of its games, and could contract with competing distribution channels or media, including other cable, satellite or internet carriers or competing networks. As a result of competition, the complaint alleges, a greater number of telecasts of NFL games would be created, and those telecasts would be more accessible to more viewers at lower prices.

The district court dismissed the consolidated complaint for failure to state a claim under either *Section 1* or *Section 2 of the Sherman Act*. ***HN1***[] "We review a district court's grant of a *Rule 12(b)(6)* motion to dismiss for failure to state a claim de novo." *Bain v. Cal. Teachers Ass'n, 891 F.3d 1206, 1211 (9th Cir. 2018)*. Additionally, we "take all allegations **[**18]** of material fact as true and construe them in the light most favorable to the nonmoving party." *Turner v. City & Cty. of S.F., 788 F.3d 1206, 1210 (9th Cir. 2015)*. However, "conclusory allegations of law and unwarranted inferences are insufficient to avoid a *Rule 12(b)(6)* dismissal." *Cousins v. Lockyer, 568 F.3d 1063, 1067 (9th Cir. 2009)* (internal quotation marks omitted). We examine the district court's dismissal of the *Section 1* and *Section 2* claims in turn.

It is significant here that the defendants do not argue on appeal that the SBA applies to the Teams-NFL or NFL-DirecTV Agreements. As the foregoing history indicates, the NFL and the NFL teams' early decision to pool their telecast rights into a single package and share broadcast revenues was invalidated by Judge Grim as a violation of the Sherman Act. *NFL I, 116 F. Supp. at 329-30*. The NFL recovered its ability to enter into such pooling arrangements only by the enactment of the SBA, which offered the NFL and the NFL teams an exemption from ***antitrust law***. *See* *15 U.S.C. § 1291*. Because the defendants do not argue that the SBA applies to satellite broadcasting, we assume (without deciding) that it is not applicable to the Teams-NFL or NFL-DirecTV Agreements. Accordingly, our analysis of the complaint's allegations regarding those agreements is largely governed by the Supreme Court's decision in *NCAA, 468 U.S. 85*, which analyzed a similar **[**19]** league sport broadcasting arrangement under the Sherman Act, without any applicable statutory exemption.[4]

III

HN2[] *Section 1 of the Sherman Act* prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. Although on its face, *Section 1* appears to outlaw virtually all contracts, it has been interpreted as "outlaw[ing] only unreasonable restraints" of trade. *State Oil Co. v. Khan, **[*1150]** 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*.

HN3[] We determine whether a particular restraint of trade is unreasonable and thus a violation of *Section 1* under the so-called "rule of reason."[5] Under this rule, we examine "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed," to determine the effect on competition in the relevant product market. *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*.

HN5[] "In order to state a *Section 1* claim under the rule of reason, plaintiffs must plead four separate elements." *Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1197 (9th Cir. 2012)*. "[P]laintiffs must plead facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition." **[**20]** *Id.* (internal quotation marks and citations omitted). Additionally, the plaintiffs must plead antitrust standing, meaning they must allege that (4) they are the proper parties to bring the antitrust action because they were harmed by the defendants' contract, combination, or conspiracy, and the harm they suffered was caused by the anti-competitive aspect of the defendants' conduct. *Id.*

A

The defendants do not dispute that the complaint adequately alleges that defendants have contracts for the purpose of restraining trade, the first and second elements. The defendants argue only that the complaint does not adequately allege the third and fourth elements of a *Section 1* claim. We begin with the third element of a *Section 1* claim, whether plaintiffs have adequately alleged that the restraint injures competition.

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[4] The defendants argue, and the plaintiffs do not dispute, that the NFL-Network Agreement is covered by the SBA. But the parties do not argue that the agreements at issue here are exempt from antitrust liability merely because the NFL-Network Agreement has such immunity.

[5] ***HN4***[] Under ***antitrust law***, some restraints of trade, such as horizontal agreements among competitors to fix prices, restrict output, and divide markets, are generally deemed to be per se unreasonable, and therefore it is unnecessary to apply the rule of reason in order to determine whether such agreements violate *Section 1*. *See* *In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1191 (9th Cir. 2015)*. Although this case concerns a horizontal agreement, the Supreme Court has concluded that the per se rule does not apply to agreements involving teams engaged in league sports, on the ground that such sports "can only be carried out jointly." *NCAA, 468 U.S. at 101* (quoting Bork, The Antitrust Paradox 278 (1978)). Therefore, when considering agreements among entities involved in league sports, such as here, a court must determine whether the restriction is unreasonable under the rule of reason. *Id. at 103*.

HN6[] In order to satisfy this third requirement, the plaintiffs must identify a harm that is "attributable to an anti-competitive aspect of the practice under scrutiny." *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. A harm that could have occurred under the normal circumstances of free competition fails to satisfy this requirement. *See Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. An agreement between competitors (a horizontal agreement) satisfies the requirement of showing injury to competition **[**21]** if it reduces competitors' independent decisions about "whether and how often to offer to provide services," *F.T.C. v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 422, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990)*, or fixes prices, *United States v. Socony—Vacuum Oil Co., 310 U.S. 150, 223, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*, or otherwise limits competitors' "freedom to compete," **[*1151]** *NCAA, 468 U.S. at 106*. In order to show that an agreement injures competition, a plaintiff must generally show that the defendants have market power within a relevant market, *Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1044 (9th Cir. 2008)*, meaning that the defendants have "the ability to raise prices above those that would be charged in a competitive market," *NCAA, 468 U.S. at 109 n.38*. Alternatively, plaintiffs can show that a restraint injures competition if they plausibly allege "a naked restriction on price or output," such as "an agreement not to compete in terms of price or output." *Id. at 109*. An agreement between companies at different levels of a supply chain (a vertical agreement) may injure competition if it facilitates "horizontal collusion." *Brantley, 675 F.3d at 1198*.

B

In this case, the plaintiffs' allegations on their face adequately allege an injury to competition. The interlocking agreements at issue are similar to those that have historically required an exemption from antitrust liability by the SBA: they are "joint agreement[s]" whereby a "league of clubs participating in professional football . . . sells **[**22]** or otherwise transfers all or any part of the rights of such league's member clubs" in the telecasting of such games. *15 U.S.C. § 1291*. This is the exact type of arrangement that Judge Grim concluded violated the Sherman Act—and, more importantly, that the Supreme Court held caused an injury to competition in the context of college football. *See NCAA, 468 U.S. at 104*.

Because we assume that the NFL's interlocking agreements are not protected by the SBA, the Supreme Court's decision in *NCAA* controls our analysis. In that case, the Supreme Court held that ***HN7***[] an agreement among college football teams and the NCAA violated *Section 1 of the Sherman Act* because the agreement eliminated competition in the market for college football telecasts. *See generally id.* Here, the interlocking agreements impose similar restrictions. First, the Supreme Court noted in *NCAA* that the agreement at issue "limits the total amount of televised intercollegiate football and the number of games that any one team may televise." *Id. at 94*. The complaint here alleges that the interlocking agreements in this case impose analogous limitations: plaintiffs assert that the Teams-NFL and NFL-DirecTV Agreements limit the "amount of televised [professional] football" that one team **[**23]** may televise because they restrict the number of telecasts made to a single telecast for each game.

Second, the Supreme Court noted that the agreements in *NCAA* provided that "[n]o member [college] is permitted to make any sale of television rights except in accordance with the basic plan." *Id.* In our case, plaintiffs allege that the NFL teams are similarly restricted. Under the terms of the Teams-NFL and NFL-DirecTV Agreements, no individual NFL team is permitted to sell its telecasting rights independently. Independent telecasts are forbidden under the terms of the Agreements because they would cause the teams to compete with each other and with DirecTV. Just as the University of Oklahoma was forbidden from increasing the number of telecasts made of its games, so too are the Seattle Seahawks forbidden from selling their telecast rights independently from the NFL.

Third, in *NCAA* the Court concluded that the agreement among the member colleges was a horizontal agreement among competitors because "the policies of the NCAA with respect to television rights are ultimately controlled by the vote of member institutions." *Id. at 99*. The same type of agreement is alleged **[*1152]** here. According to the complaint, **[**24]** the NFL members vote to approve the contract between DirecTV and the NFL. Therefore, the complaint adequately alleges that the Teams-NFL Agreement is a "horizontal restraint—an agreement among competitors" that "places an artificial limit on the quantity of televised football that is available [for sale] to broadcasters and consumers." *Id.*

Finally, *NCAA* held that the agreements constituted a naked restriction on output, and defined the relevant output to be "the quantity of television rights available for sale," meaning "the total amount of televised intercollegiate football," *Id. at 94, 99*, as opposed to whether each game was broadcast in some market at some time. In our case, the complaint likewise alleges that the interlocking agreements restrain the production and sale of telecasts in a manner that constitutes "a naked restriction" on the number of telecasts available for broadcasters and consumers.

Because the complaint alleges that the interlocking agreements in this case involve the same sorts of restrictions that *NCAA* concluded constituted an injury to competition, we likewise conclude that the complaint plausibly alleges an injury to competition. Further, because the alleged restrictions **[**25]** on the production and sale of telecasts constitute "a naked restriction" on the number of telecasts available for broadcasters and consumers, the plaintiffs were not required to establish a relevant market. *Id. at 109*.

The defendants make a number of arguments against this conclusion. We consider each in turn.

1

First, the defendants argue that under *In re Musical Instruments & Equipment Antitrust Litigation, 798 F.3d 1186 (9th Cir. 2015)*, it is necessary to analyze the horizontal NFL Teams agreement separately from the vertical NFL-DirecTV agreement, and when viewed in that light, the NFL-DirecTV agreement does not injure competition because it is an exclusive distribution agreement of the type that is presumptively legal. We disagree. First, *Musical Instruments* does not require a court to break down an alleged conspiracy into its constituent parts. *Musical Instruments* merely explained the uncontroversial principle that, in general, horizontal agreements are analyzed under per se rules, while vertical agreements are analyzed under the rule of reason. *Id. at 1191-92*. But as noted above, both types of agreements are analyzed under the rule of reason in cases involving league sports. *NCAA, 468 U.S. at 101-03*.

Contrary to the defendants' argument, ***HN8***[] we are required to take a holistic look at how the interlocking agreements actually **[**26]** impact competition. *See* *Nat'l Soc'y. of Prof'l Eng'rs, 435 U.S. at 692*. Indeed, "the essential inquiry" is "whether or not the challenged restraint enhances competition," which is assessed by considering the totality of "the nature or character of the contracts." *NCAA, 468 U.S. at 103-04* (quoting *Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 690*). Thus, the law requires that the "character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 698-99, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)* (quoting *United States v. Patten, 226 U.S. 525, 544, 33 S. Ct. 141, 57 L. Ed. 333 (1913))*. Accordingly, we must give plaintiffs "the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *City of Long Beach v. Standard Oil* ***[*1153]*** *Co., 872 F.2d 1401, 1404-05 (9th Cir. 1989)*, *opinion amended on denial of reh'g*, *886 F.2d 246 (9th Cir. 1989)* (quoting *Continental Ore Co., 370 U.S. at 699*).

Looking holistically at the alleged conduct, we conclude that the complaint adequately pleads that the vertical NFL-DirecTV Agreement works in tandem with the Teams-NFL agreement to restrain competition. The Supreme Court has held that***HN9***[] a horizontal agreement among competitors to pool separate property rights and enter into an agreement to license their rights vertically can constitute a *Section 1* violation. *See* *Am. Needle, 560 U.S. at 201* (holding that an agreement among the NFL and its member teams to create an entity that jointly licensed their separately owned intellectual **[**27]** property constituted concerted action in violation of the Sherman Act). Accordingly, we reject the defendants' argument that we cannot view the effects of both the horizontal and vertical agreements working together.

2

Defendants further argue that plaintiffs have failed to allege an injury to competition because the production of the telecasts necessarily requires joint action, and therefore the restrictions are pro-competitive. According to defendants, each NFL game broadcast is a copyrighted work jointly authored by the NFL, the two competing teams, and the broadcast network, and the agreement of all participants is necessary in order to create the telecasts at all.

Thus, defendants argue, the Supreme Court's decision in *American Needle* is inapposite because that decision concerned separately owned intellectual property, *id. at 187*, whereas here, the telecasts could only be created through cooperation between competitors.

We disagree. Defendants have failed to identify, and we are unaware of, any binding precedent requiring the teams and the NFL to cooperate in order to produce the telecasts.

HN10[] Under copyright law, it is well-established that the underlying NFL game is not copyrightable subject **[**28]** matter. *See Dryer v. NFL, 814 F.3d 938, 942 (8th Cir. 2016)* (noting that "courts have recognized that the initial performance of a game is an 'athletic event' outside the subject matter of copyright"); *Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 846 (2d Cir. 1997)* ("*NBA*") ("In our view, the underlying basketball games do not fall within the subject matter of federal copyright protection because they do not constitute 'original works of authorship' under *17 U.S.C. § 102(a)*.").

However, ***HN11***[] the telecasts of sporting events are plainly copyrightable "motion pictures" under the Copyright Act of 1976. *17 U.S.C. § 102(a)(6)*; *NBA, 105 F.3d at 847* ("[R]ecorded broadcasts of NBA games—as opposed to the games themselves—are . . . entitled to copyright protection."). Indeed, "[t]he *Copyright Act* was amended in 1976 specifically to insure that simultaneously-recorded transmissions of live performances and sporting events would meet the Act's requirement that the original work of authorship be 'fixed in any tangible medium of expression.'" *NBA, 105 F.3d at 847* (citing *17 U.S.C. § 102(a)*; H.R. Rep. No. 94-1476, at 52); *see also Nat'l Football League v. McBee & Bruno's, Inc., 792 F.2d 726, 732 (8th Cir. 1986)* ("[T]he legislative history demonstrates a clear intent on the part of Congress to 'resolve, through the definition of "fixation" . . . , the status of live broadcasts,' using—coincidentally but not insignificantly—the example of a live football game.").

[*1154] ***HN12***[] Under general copyright **[**29]** law, copyright ownership vests initially in the author of the work, *17 U.S.C. § 201(a)*, who, as a general rule, "is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection." *See Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989)*. Thus, in the absence of an agreement otherwise, the person or company that creates the telecast is the "author" of the telecast for the purposes of copyright law. *See id.*; *see also Garcia v. Google, Inc., 786 F.3d 733, 744 (9th Cir. 2015)* (en banc). Assuming that this rule applies in the league sports setting, the team or network that creates the telecasts would be the sole owner of the copyright in the telecasts, absent some agreement to the contrary. *See Reid, 490 U.S. at 737*; *see also Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 668-69 (7th Cir. 1986)* ("When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent to the public and in which order, there is little doubt that what the cameramen and the director are doing constitutes 'authorship.'" (internal quotation marks and citations omitted)).

In the absence of a legal requirement that the NFL teams, NFL, and broadcasters coordinate in filming and broadcasting live games, the Los Angeles Rams (for instance) **[**30]** could contract for their own telecast of Rams games and then register the telecasts for those games with the Rams (and perhaps the team against whom they are playing). Only the agreements that are the subject of plaintiffs' antitrust action prevent such independent actions. Thus, we reject the defendants' argument that *American Needle, 560 U.S. at 190*, is inapposite; here, like in *American Needle*, the agreements not to compete concern separately owned intellectual property, and impose an unlawful restraint on independent competition.

Indeed, the history of the NFL, as well as the practice in other professional sports leagues, supports our conclusion. As discussed above, prior to the passage of the SBA, the telecast rights in NFL games "were controlled by individual teams" and NFL teams routinely licensed telecasts of their games to television networks. *U.S. Football League, 842 F.2d at 1346*. Indeed, by the late 1950s, thirteen individual teams had signed contracts with either CBS or NBC and one team "had organized its own network." H.R. Rep. No. 93-483 at 4 (1973). Thus, the Supreme Court explained that college football teams "are clearly able to negotiate agreements with whatever broadcasters they choose." *NCAA, 468 U.S. at 114 n.53* (quoting the district court, *Board of Regents v. National Collegiate*

Athletic Asso., 546 F. Supp. 1276, 1307-08 (W.D. Okla. 1982)). Further, after **[**31]** the decision in *NCAA*, the NCAA teams arranged telecasting on their own. Grow, supra, 72 Wash. & Lee L. Rev. at 617. Additionally, in comparable sports leagues, namely the National Hockey League and Major League Baseball, "each team owns the initial right to control telecasts of its home games." Laumann v. NHL, 907 F. Supp. 2d 465, 473, 485 (S.D.N.Y. 2012); see also New Boston Television, Inc. v. ESPN, No. 81-1010-Z, 1981 U.S. Dist. LEXIS 15032, 1981 WL 1374, at *1 (D. Mass. Aug. 3, 1981) ("The copyright of the teleplays of all Red Sox games is owned by the Red Sox."). And in another form of media, radio broadcasting, plaintiffs allege that the NFL Teams already negotiate individual radio broadcasting contracts.

Therefore, we reject defendants' argument that the complaint fails to allege a Section 1 violation because the telecasts **[*1155]** can be created only through cooperation among competitors.

3

Defendants next assert that plaintiffs' complaint failed to allege injury to competition because the NFL-DirecTV agreement did not reduce the output of NFL game broadcasts. From the supply side, defendants argue, every regular season NFL game is broadcast over free television in some geographic area, and therefore, the entire potential supply of NFL game broadcasts is produced and distributed to the public. From the demand side, defendants argue, NFL broadcasts receive the most views **[**32]** of any sports league; 202.3 million unique viewers watched an NFL football game in 2014.

We disagree that the defendants' definition of output is the only permissible definition for purposes of determining whether plaintiffs have stated a claim. As noted above, *NCAA* indicated that the relevant output is "the total amount of televised intercollegiate football," available to consumers. 468 U.S. at 94. We therefore reject the defendants' argument that because all NFL Sunday-afternoon games are broadcast somewhere, there is no limitation on output as a matter of law.

The complaint alleges that defendants have limited output by restricting the quantity of telecasts available for sale, and that the NFL has set a uniform quantity of telecasts of football games—one per game—with no regard to the actual consumer demand for the telecasts. The plaintiffs plausibly allege that "if member institutions were free to sell television rights, many more games would be shown," 468 U.S. at 105, because an individual NFL team would "be free to sell the right to televise its games for whatever price it could get." Id. at 106 n.30 (quoting the district court's findings, 546 F. Supp. at 1318). "The prices would vary for the games, with games between prominent [NFL teams] **[**33]** drawing a larger price than games between less prominent [NFL teams]." *Id.* (quoting the district court's findings, 546 F. Supp. at 1318). We conclude that for purposes of determining whether plaintiffs have stated an injury to competition, the plaintiffs have plausibly alleged that the output in this case is the number of telecasts of games, and that the defendants' interlocking agreements reduce that output.

4

Finally, defendants claim that the complaint fails to allege injury to competition because it has not alleged a properly defined market in which defendants have market power. Defendants argue that the complaint failed to plausibly allege that they have market power in either the market for live video presentations of regular season NFL games or the submarket for out-of-market game broadcasts. We reject these arguments. Given that professional football games have no substitutes (as fans do not consider NFL games to be comparable to other sports or forms of entertainment), *see* L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1393 (9th Cir. 1984), the defendants in this case have effective control over the entire market for telecasts of professional football games. The complaint therefore plausibly alleges a naked restraint on output: that the defendants' interlocking **[**34]** agreements have the effect of limiting output to one telecast of each game, which is then broadcast in a limited manner, solely according to the NFL's agreements with CBS, Fox, and DirecTV. **HN13**[] When there is such an agreement not to compete in terms of output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." NCAA, 468 U.S. at 109 (quoting Nat'l Soc'y of Prof'l Eng'rs, **[*1156]** 435 U.S. at 692). Here, as in NCAA, "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."

Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999). Because the complaint adequately alleged that the defendants have imposed "a naked restriction" on output, it has not failed to allege market power. NCAA, 468 U.S. at 109.

We conclude that the complaint adequately alleges the element of injury to competition by alleging that the interlocking Teams-NFL and NFL-DirecTV Agreements injure competition.

C

Defendants next argue that the plaintiffs lack antitrust standing to challenge the Teams-NFL Agreement.[6] **HN14**[] To plead the fourth element, antitrust standing or antitrust injury, plaintiffs must allege that they were harmed by the injury to competition. Brantley, 675 F.3d at 1197. Further, plaintiffs must allege that their **[**35]** harm was caused directly by the antitrust violator. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 746, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977). In *Illinois Brick*, the Supreme Court incorporated "principles of proximate cause" into an action for violation of the Sherman Act, holding "that *indirect* purchasers who are two or more steps removed from the violator in a distribution chain may not sue." Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520-21, 203 L. Ed. 2d 802 (2019). The Supreme Court reasoned that allowing every purchaser in a distribution chain to claim damages flowing from a single antitrust violation "would create a serious risk of multiple liability for defendants." Illinois Brick, 431 U.S. at 730. The Court also wanted to avoid "the evidentiary complexities and uncertainties" that would be "multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant in the chain of distribution." Id. at 732. Accordingly, *Illinois Brick* "established a bright-line rule that authorizes suits by *direct* purchasers but bars suits by *indirect* purchasers." Pepper, 139 S. Ct. at 1521. Said otherwise, "purchasers who are two or more steps removed from the antitrust violator in a distribution chain may not sue." *Id.* To illustrate, under this rule, if "manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A." *Id.* However, "C may sue B if B is an antitrust **[**36]** violator." *Id.*

These "principles of proximate cause," id. at 1520, apply differently when the injury to plaintiffs is caused by a multi-level conspiracy to violate antitrust laws. We first considered this issue in Arizona v. Shamrock Foods Co., 729 F.2d 1208 (9th Cir. 1984). In that case, a class of consumers brought an antitrust action against dairy producers and grocery stores, alleging they had jointly conspired to fix the price of dairy products at the retail level. Id. at 1211. Because the consumers alleged a price-fixing conspiracy implicating both the dairy producers and the grocery retailers, we concluded the plaintiffs' claim was not barred. Id. at 1210. Under the principles of *Illinois Brick*, we reasoned that the **[*1157]** plaintiffs' injuries were caused by the conspiracy itself (the concerted action of the dairy producers and grocery retailers), and thus the case did not require calculating the pass-through effects of an indirect injury or raise the risk of duplicative damage claims. Id. at 1213-14; *see also* In re ATM Fee Antitrust Litig., 686 F.3d 741, 750 (9th Cir. 2012). As we subsequently explained, **HN15**[] "[i]f the direct purchaser conspires to fix the price paid by the plaintiffs, then the plaintiffs pay the fixed price directly and are not indirect purchasers (i.e., there is no pass-on theory involved)." In re ATM Fee Antitrust Litig., 686 F.3d at 750. In other words, when co-conspirators have jointly **[**37]** committed the antitrust violation, a plaintiff who is the immediate purchaser from any of the conspirators is directly injured by the violation. *See* Pepper, 139 S. Ct. at 1522.

Here, the plaintiffs allege that DirecTV has conspired with the NFL and the NFL teams. According to the complaint, the conspiracy involves both the Teams-NFL agreement and the NFL-DirecTV agreement, which work together as a single conspiracy to limit the output of NFL telecasts. This output limitation in turn results in prices for out-of-market games being higher than they would be in the absence of the conspiracy. Because, as in *Shamrock Foods*, the complaint alleges that plaintiffs' injuries were proximately caused by a single conspiracy, their complaint does not require calculating the pass-through effects of an indirect injury or raise a risk of claims for duplicative harms.

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[6] There is no dispute that the plaintiffs have standing to challenge the NFL-DirecTV Agreement because they are direct purchasers of DirecTV. Nor is there a dispute that the plaintiffs have standing to seek injunctive relief based on the Teams-NFL Agreement because "indirect purchasers are not barred from bringing an antitrust claim for injunctive relief against manufacturers." Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1235 (9th Cir. 1998). The dissent agrees on these points, as well. Dissent at 41 n.2.

See 729 F.2d at 1213-14.[7] Even though DirecTV is the immediate seller to the plaintiffs, the plaintiffs' allegation that they were directly injured by the conspiracy among the NFL teams, the NFL, and DirecTV is sufficient to allege antitrust standing for purposes of surviving a motion to dismiss. *See* Pepper, 139 S. Ct. at 1521.

The defendants argue (and the dissent **[**38]** agrees) that the plaintiffs do not have standing to challenge the Teams-NFL Agreement because *In re ATM Antitrust Fee Litigation* limited the co-conspirator exception to *Illinois Brick* to cases where an indirect purchaser "establishes a price-fixing conspiracy between the manufacturer and the middleman." Id. at 749. Because the conspiracy in this case involved an output restriction, defendants argue, *Illinois Brick* applies and precludes the plaintiffs from challenging an agreement that did not affect them directly. This argument misunderstands *ATM Antitrust Fee Litigation*. As we explained, the "co-conspirator exception is not really an exception at all," but rather describes a situation in which *Illinois Brick* is simply not applicable. Id. at 750. Because the **[*1158]** conspiracy alleged in *ATM Antitrust Fee Litigation* was a price-fixing conspiracy, we analyzed that sort of conspiracy, and held *Illinois Brick* did not apply because "[i]f the direct purchaser conspires to fix the price paid by the plaintiffs, then the plaintiffs pay the fixed price directly and are not indirect purchasers." *Id.*[8]

Although *ATM Antitrust Fee Litigation* focused on an alleged price fixing conspiracy, its **[**39]** reasoning is equally applicable to an output-restriction conspiracy, such as the situation here: ***HN16***[] if the direct purchaser conspires to limit the output that will ultimately be available to the plaintiffs, then the plaintiffs are directly impacted by the output limitation and have standing to sue. *See* Pepper, 139 S. Ct. at 1521. In other words, under our caselaw, when plaintiffs adequately allege that their injury was caused by a conspiracy to violate antitrust laws, even when the conspiracy involves multiple levels of producers, distributors, and sales, the plaintiffs sufficiently allege an antitrust injury that can withstand a motion to dismiss.

Defendants argue that we should distinguish between price-fixing and output-restricting conspiracies, but provide no reasoned basis for doing so.[9] Nor can they, because the Supreme Court has concluded that ***HN17***[] price-fixing conspiracies are functionally indistinguishable from output-restricting conspiracies. *See* Cal. Dental Ass'n, 526 U.S. at 777. As the Supreme Court explained, "[a]n agreement on output also equates to a price-fixing agreement," because "[i]f firms raise price, the market's demand for their product will fall, so the amount supplied will fall too—in other words, output will be restricted." **[**40]** *Id.* (internal quotations omitted). On the other hand, "[i]f instead the firms restrict output directly, price will as mentioned rise in order to limit demand to the reduced supply." *Id.* (internal quotations omitted). Accordingly, the Supreme Court noted, "with exceptions not relevant here, raising price, reducing output, and dividing markets have the same anticompetitive effects." *Id.* (internal quotations omitted). A conspiracy between a cartel of widget producers and their widget retailer to set an artificially high price for widgets is functionally the same as a conspiracy to set an artificially low total output of widgets, which causes prices to rise. *See id.* Therefore, the consumer of widgets would be directly injured by the antitrust violators at both levels of the

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[7] The dissent argues that our holding would require the complex damages calculations that the rule in *Illinois Brick* was intended to avoid. Dissent at 41. In *Illinois Brick*, the Court expressed concern that the judicial system would be too burdened if it had to determine how much of the antitrust violator's overcharge to the first purchaser was passed on to the second, third, or fourth purchasers in the distribution chain. 431 U.S. at 733 n.13 ("[T]he final purchaser still will have to trace the overcharge through each step in the distribution chain."). But those sorts of calculations are not required in this context. Unlike the situation in *Illinois Brick*, the plaintiffs here do not allege that an innocent middleman has passed through damages caused by a higher-level antitrust violator. Because plaintiffs allege that DirecTV is part of the conspiracy, DirecTV directly caused the injury to the consumers. Thus, to calculate the plaintiffs' damages, a court would not need to determine to what extent the NFL overcharged DirecTV; it would need to consider only the prices consumers paid compared to the prices that would have existed in a competitive market. *See* Los Angeles Mem'l Coliseum Comm'n, 791 F.2d at 1367.

[8] Our analysis of *ATM Antitrust Fee Litigation* accords with the Supreme Court's instruction that in a distribution chain where "manufacturer A sells to retailer B, and retailer B sells to consumer C, . . . C may sue B if B is an antitrust violator." Pepper, 139 S. Ct. at 1521. Because this rule applies so long as B is an antitrust violator, it is irrelevant whether B is engaged in a price-fixing or an output-restricting conspiracy. *See id.*

[9] The dissent echoes this argument, *see* Dissent at 41 n. 3, but likewise fails to explain a reasoned basis for such a distinction.

distribution chain and would have standing to sue those co-conspirators in both scenarios. *See* *Pepper, 139 S. Ct. at 1521*.

Accordingly, we conclude that *Illinois Brick* is not applicable here because the complaint adequately alleges that DirecTV conspired with the NFL and the NFL Teams to limit the production of telecasts to one per game, and that plaintiffs suffered antitrust injury due to this conspiracy to limit output.

IV

We now turn to the **[**41]** question whether the complaint adequately alleges a violation of *Section 2* of the Sherman Act. ***HN18***[] *Section 2* makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any **[*1159]** part of the trade or commerce among the several States, or with foreign nations . . . ." *15 U.S.C. § 2*. Plaintiffs allege two forms of *Section 2* violations, a conspiracy to monopolize claim and a monopolization claim. To establish a conspiracy to monopolize claim under *Section 2*, plaintiffs must plead: "(1) the existence of a combination or conspiracy to monopolize; (2) an overt act in furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal antitrust injury." *Paladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1158 (9th Cir. 2003)*. To plausibly plead a monopolization claim, plaintiffs must allege: "(a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury. " *Somers v. Apple, Inc., 729 F.3d 953, 963 (9th Cir. 2013)* (quoting *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 998 (9th Cir. 2010))*.[10]

Plaintiffs allege that by entering into interlocking agreements, the defendants conspired to monopolize the market for professional football telecasts and have monopolized it. Defendants argue that the complaint fails to state a claim for the same reason that the *Section 1* claim **[**42]** fails: plaintiffs have failed to allege injury to competition or a properly defined relevant market. Defendants also claim that plaintiffs have failed to allege that the defendants had the specific intent to monopolize a relevant market.

We reject this argument. For the reasons explained above, plaintiffs have adequately alleged injury to competition, and have adequately alleged that defendants have market power in the market for professional football telecasts. Moreover, the complaint adequately alleges that the interlocking NFL-Team and NFL-DirecTV agreements were designed to maintain market power, which is sufficient to allege defendants' specific intent. Accordingly, we conclude that the complaint adequately alleges a *Section 2* violation.

REVERSED.

Dissent by: N. Randy Smith

Dissent

SMITH, N.R., Circuit Judge, dissenting from Part III(C) of the Majority's opinion[*]

The Majority concludes that the direct purchaser rule articulated in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)* does not apply to Plaintiffs' damages claim related to the Teams-NFL Agreement, because Plaintiffs have alleged a conspiracy among Defendants to limit output. Maj. Op. at 33-37. Because this conclusion is controverted by Supreme Court and Ninth Circuit caselaw, I cannot agree.

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[10] By its terms, the SBA applies only to *Section 1 of the Sherman Act* and has no relevance to the plaintiffs' *Section 2* claims. *15 U.S.C. § 1291*.

[*] I concur in the rest of the Majority's opinion.

In *Illinois* ***[**43]*** *Brick*, the Supreme Court articulated the direct purchaser rule, which instructs that "indirect purchasers may not use a pass-on theory to recover damages [on an anti-trust claim] and thus have no standing to sue." *Brennan v. Concord EFS, Inc. (In re ATM Fee Antitrust Litig.), 686 F.3d 741, 748 (9th Cir. 2012)* (citing *Illinois Brick, 431 U.S. at 745-46*). The Court created this rule to alleviate the concern that pass-on theories of recovery would require courts to "trac[e] a wholesale overcharge through an intermediary and allocat[e] the retail price between an unlawful wholesale overcharge and market forces."*Arizona v. Shamrock Foods Co., 729 F.2d 1208, 1214 (9th Cir. 1984)*; *Illinois Brick, 431 U.S. at 737* ("[T]he use of pass-on theories . . . essentially would transform [damages] actions into massive efforts to **[*1160]** apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to [damages] suits and seriously undermine their effectiveness.").

The rule has an exception: where a plaintiff alleges a price-fixing conspiracy between a manufacturer and the direct purchaser. We refer to this exception as the "co-conspirator exception." *In re ATM Fee Antitrust Litig., 686 F.3d at 750*. With a price-fixing conspiracy, "[t]he injury suffered by **[**44]** the [consumer] through the effectuation of a voluntary co-conspiracy [to fix the consumer price] can be determined by computing the retail price of [the product] but-for the alleged price fix, and subtracting that total from the actual purchase price." *Shamrock Foods Co., 729 F.2d at 1214* (quoting *In re Mid-Atlantic Toyota Antitrust Litig., 516 F. Supp. 1287, 1295 (D. Md. 1981))*. In other words, where there is a price-fixing conspiracy, the court need not engage in a complex damages calculation, because the overcharge "was not passed on to the consumers through any other level in the distribution chain." *Id.*

In our case, Plaintiffs' challenge to the horizontal agreement among the NFL Teams is unquestionably based on a pass-on theory of injury, and the co-conspirator exception does not apply. After all, Plaintiffs have not alleged that the NFL Teams set, or conspired to set, the actual price paid by any consumers. Instead, they allege only *that DirecTV* has set an artificially high consumer price—an allegation that would require the court to determine whether the payment DirecTV made to the NFL for the telecast rights was an overpayment,[1] how much of an overpayment it was (relative to what DirecTV would have had to pay had the NFL Teams not agreed to pool all of their broadcast rights), and how much of **[**45]** that overpayment was actually then passed on to the consumers. Thus, Plaintiffs' claim for damages stemming from the alleged horizontal agreement among the NFL Teams would require the very analysis prohibited by the *Illinois Brick* rule. That claim fails.[2]

The Majority disagrees, claiming that, because Plaintiffs have alleged a conspiracy between the manufacturer and the distributor to restrict output, the *Illinois Brick* rule is inapplicable. Maj. Op. at 38. The Majority's theory creates problems for three reasons.

First, this court has already rejected the Majority's notion that the *Illinois Brick* rule does not apply when an alleged conspiracy has the same anti-competitive effect as fixing the consumer price.[3] *See* *In* ***[*1161]*** *re ATM Fee*

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[1] If DirecTV did not overpay the NFL, then consumers have not been damaged by the NFL's horizontal agreement. Under those circumstances, any arbitrary inflation in the price set by DirecTV could not have stemmed from that agreement, but must stem from some other source.

[2] On the other hand, Plaintiffs are correct in asserting that, notwithstanding the direct purchaser rule, they "have standing to challenge the agreements between the teams and the league" for injunctive relief. *Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1145 (9th Cir. 2003)* ("*Illinois Brick* doesn't apply to equitable relief."). Thus, because Plaintiffs seek injunctive relief in addition to their damages requests, their claim challenging the NFL Teams' horizontal Agreement is not entirely precluded by the direct purchaser rule.

[3] The Majority claims that a distinction between price-fixing and output-fixing restrictions is foreclosed by *California Dental Association*. Maj. Op. at 36 (citing *Cal. Dental Ass'n v. FTC, 526 U.S. 756, 777, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999))*. However, *California Dental Association* does not discuss the *Illinois Brick* rule or the distinction between indirect and direct purchasers. *See generally* *526 U.S. 756, 119 S. Ct. 1604, 143 L. Ed. 2d 935*. Instead, that case stands only for the uncontested proposition that a conspiracy to price fix and a conspiracy to restrict output both injure consumers by arbitrarily raising the price they pay for a product—i.e., both types of conspiracy have the same anti-competitive effects. *Id. at 777*. That says nothing about

Antitrust Litig., 686 F.3d at 753 (rejecting an argument that *Illinois Brick* did not apply because "conspiring to set a [pre-market] price for the purpose and effect of raising the [market] price . . . *equates to fixing* [*the market*] *price* and makes the payers of the raised [market] price direct purchasers." (emphasis added)). It simply does not matter that the alleged pre-market conspiracy has the same effect as setting a specific market price. Id. at 752. Similarly, it does not matter that the ultimate **[**46]** consumers "are purchasing from a violator" of the Sherman Act. Id. at 755. As long as a party challenging anti-competitive behavior relies on a pass-on theory of injury, it may recover damages only if it alleges and demonstrates a conspiracy that actually sets the consumer price—not just a conspiracy that may have the same practical effect. Id. at 754 ("[U]nder the co-conspirator exception recognized in this circuit, the price paid by a plaintiff must be set by the conspiracy and not merely affected by the setting of another price.").

Second, the conspiracy alleged by Plaintiffs—that Defendants conspired to reduce the output of television broadcast rights—does not alleviate the concerns expressed in *Illinois Brick*. Unlike a price-fixing conspiracy, the injury to the consumer from an output-reduction conspiracy still depends on a pass-on theory of damages. The initial overcharge occurs between the manufacturer and the distributer—i.e., a distributor pays a manufacturer an anti-competitive price for distribution rights—and that overcharge is passed on by the distributor to the consumer. **[**47]** In such cases, courts must determine how much of the consumer price stems from ordinary market forces, and how much of it stems from the distributor's efforts to recoup its overpayment to the manufacturer.[4] *See* Illinois Brick, 431 U.S. at 744-46. **[*1162]** Thus, unlike with a price-fixing conspiracy, the reviewing court must still make the exact determination "sought to be avoided in *Illinois Brick*." Shamrock Foods Co., 729 F.2d at 1214.

Finally, in *In re ATM Fee Antitrust Litigation*, we ruled that the co-conspirator exception "only applies when the co-conspirators *fix the price paid by the plaintiff*." 686 F.3d at 752 (emphasis added). Thus, because Plaintiffs have not alleged that Defendants conspired to fix the price paid by the consumer, the co-conspirator exception—at least in its present form—does not apply. *See* Dickson v. Microsoft Corp., 309 F.3d 193, 215 (4th Cir. 2002) ("[W]e interpret these cases as standing for the more narrow proposition that *Illinois Brick* is inapplicable *to a particular type of conspiracy—price-fixing conspiracies*." (emphasis added)); In re ATM Fee Antitrust Litig., 686 F.3d at 752 (approving of the Fourth Circuit's analysis in *Dickson*). In other words, to conclude that Plaintiffs have anti-trust standing, we must create a new exception to the *Illinois Brick* rule. The Supreme Court has instructed us not to do so. Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 216, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990) ("[A]mple justifications exist for **[**48]** the Court's stated decision not to carve out exceptions to the indirect purchaser rule for particular types of markets." (quoting Illinois Brick, 431 U.S. at 744)); Illinois Brick, 431 U.S. at 745 ("As we have noted . . . *Hanover Shoe* itself implicitly discouraged the creation of exceptions to its rule barring pass-on [theories], and we adhere to the narrow scope of exemption indicated by our decision there.").

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whether a particular consumer's injury is direct or indirect, or which consumers are authorized to seek judicial redress (i.e., which consumers do not rely on a pass-on theory of injury). Indeed, in *Illinois Brick* itself, the Court acknowledged that the indirect purchasers were injured by the manufacturer overcharging the distributor, but held that those purchasers were not the proper parties to sue to recover damages. 431 U.S. at 744-46.

The Majority's reliance on *Apple Inc. v. Pepper*, is likewise misplaced, as the plaintiffs in that case purchased the relevant good directly from the monopolizing entity—not from a middleman who conspired with the monopolizing entity down the line. 139 S. Ct. 1514, 1521, 203 L. Ed. 2d 802 (2019). Here, Plaintiffs purchased a service from DirecTV, which is not a party to the NFL's horizontal agreement. While the Majority is correct that "we are required to take a holistic look at how the interlocking agreements actually impact competition," Maj. Op. at 24, determining whether a party has alleged anti-competitive effects is distinct from determining whether the party is a direct or indirect purchaser with respect to a specific agreement—and none of the cases cited by the majority say otherwise, or even address that issue.

[4] Relying exclusively on the fact that Plaintiffs "allege that DirecTV is part of the conspiracy," the Majority conclusively states that "a court would not need to determine to what extent the NFL overcharged DirecTV," because "it would need to consider only the prices consumers paid compared to the prices that would have existed in a competitive market." Maj. Op. at 34 n. 7. However, it is unclear how in practice a court *could* consider what the theoretical consumer price would have been in a competitive market (absent the NFL's horizontal agreement) without considering whether and how much of an overpayment DirecTV made.

NSS Labs, Inc. v. Symantec Corp.

United States District Court for the Northern District of California, San Jose Division

August 13, 2019, Decided; August 13, 2019, Filed

Case No. 18-cv-05711-BLF

Reporter

2019 U.S. Dist. LEXIS 136742 *; 2019-2 Trade Cas. (CCH) P80,891; 2019 WL 3804679

NSS LABS, INC., Plaintiff, v. SYMANTEC CORPORATION; ESET, LLC; and ANTI-MALWARE TESTING STANDARDS ORGANIZATION, INC., Defendants.

Subsequent History: Costs and fees proceeding at, Motion denied by *Nss Labs v. Symantec Corp., 2020 U.S. Dist. LEXIS 70176 (N.D. Cal., Apr. 21, 2020)*

Core Terms

testing, Vendor, products, Conspirators, rule of reason, Sherman Act, conspiracy, antitrust, boycott, motion to dismiss, relevant market, per se rule, alleged conspiracy, customers, alleges, argues, cybersecurity, anti-malware, Membership, competitor, markets, adhere, leave to amend, anti trust law, alleged facts, group boycott, quotation, appears, asserts, marks

LexisNexis® Headnotes

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

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

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

A motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim upon which relief can be granted tests the legal sufficiency of a claim. While a complaint need not contain detailed factual allegations, it must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim is facially plausible when it allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

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

Governments > Legislation > Interpretation

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN2[] **State Regulation, Claims**

The analysis under California's ***antitrust law*** mirrors the analysis under federal law because the Cartwright Act, *Cal. Bus. & Prof. Code § 16700 et seq.*, was modeled after the Sherman Act.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

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

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

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

HN3[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Section 1 of the Sherman Act states that every contract, combination, or conspiracy, in restraint of trade or commerce is illegal. *15 U.S.C.S. § 1*. Because every commercial agreement restrains trade, whether particular conduct violates *§ 1* of the Sherman Act depends on whether it is adjudged an unreasonable restraint. Restraints can be unreasonable in one of two ways. A small group of restraints are unreasonable per se because they always or almost always tend to restrict competition and decrease output. Restraints that are not unreasonable per se are judged under the rule of reason. The rule of reason requires courts to conduct a fact-specific assessment of market power and market structure to assess the restraint's actual effect on competition.

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

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

HN4[] **Private Actions, Sherman Act**

In order to defeat a *Fed. R. Civ. P. 12(b)(6)* motion, a plaintiff asserting Sherman Act *§ 1* claims, *15 U.S.C.S. § 1*, must allege enough factual matter (taken as true) to suggest that an agreement was made. It is insufficient to allege the existence of a conspiracy in conclusory terms, or to allege facts that suggesting the mere possibility of a conspiracy. The plaintiff must plead facts that are suggestive enough to render a *§ 1* conspiracy plausible.

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

HN5[] **Adjudicative Facts, Verifiable Facts**

A request for judicial notice may be granted where no party disputes a matter that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

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

HN6[] Private Actions, Sherman Act

For an agreement to constitute a violation of *section 1* of the Sherman Act, *15 U.S.C.S. § 1*, a conscious commitment to a common scheme designed to achieve an unlawful objective must be established.

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

HN7[] Per Se Rule & Rule of Reason, Per Se Violations

At least one court in the United States District Court for the Northern District of California, San Jose Division, has held that standard setting organizations (SSO) are not illegal per se under *15 U.S.C.S. § 1* and often create a net pro-competitive effect. Accordingly, any alleged agreement among the members of an SSO is analyzed under a rule of reason.

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

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

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

HN8[] Horizontal Refusals to Deal, Boycotts

Recognizing that there is more confusion about the scope and operation of the per se rule against group boycotts than in reference to any other aspect of the *15 U.S.C.S. § 1* per se doctrine, three characteristics that are indicative of a per se illegal boycott are: (1) the boycott cuts off access to a supply, facility, or market necessary to enable the victim firm to compete; (2) the boycotting firm possesses a dominant market position; and (3) the practices are not justified by plausible arguments that they enhanced overall efficiency or competition. A concerted refusal to deal need not necessarily possess all of these traits to merit per se treatment.

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

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

HN9[] Per Se Rule & Rule of Reason, Per Se Violations

When a defendant advances plausible arguments that a practice enhances overall efficiency and makes markets more competitive, per se treatment under *15 U.S.C.S. § 1* is inappropriate, and the rule of reason applies. This is so because plausible arguments that a practice is procompetitive make the court unable to conclude the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote.

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

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

HN10[] Per Se Rule & Rule of Reason, Per Se Violations

A per se approach under *15 U.S.C.S. § 1* is inappropriate when a defendant advances a plausible efficiency justification. At least one United States District Court for the Northern District of California court has applied that reasoning to preclude per se claims at the motion to dismiss stage.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

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

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

Under the *15 U.S.C.S. § 1* rule of reason, a plaintiff must plead four separate elements: (1) the existence of a conspiracy, (2) the intention on the part of the co-conspirators to harm or restrain competition, (3) actual injury to competition, and (4) that the plaintiffs suffered antitrust injury as a result of the conspiracy.

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

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

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

HN12[] Per Se Rule Tests, Manifestly Anticompetitive Effects

Proving injury to competition in a *15 U.S.C.S. § 1* rule of reason case almost uniformly requires a claimant to prove the relevant market and to show the effects upon competition within that market. That is, the plaintiff must allege both that a relevant market exists and that the defendant has power within that market. The term "relevant market" encompasses notions of geography as well as product use, quality, and description. The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand.

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

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

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

HN13[] Per Se Rule Tests, Manifestly Anticompetitive Effects

Three factors must be considered in assessing a plaintiff's definition of the relevant market in a *15 U.S.C.S. § 1* rule of reason case. First, the relevant market must be a product market. Second, the market must encompass the product at issue as well as all economic substitutes for the product. The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. Third, although the general market must include all economic substitutes, it is legally permissible to premise antitrust allegations on a submarket. Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim. A complaint may be dismissed under *Fed. R. Civ. P. 12(b)(6)* if the complaint's relevant market definition is facially unsustainable.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Remedies > Damages

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

HN14[] **Sherman Act, Claims**

To establish the effects on competition within a relevant product market, the plaintiff in a *15 U.S.C.S. § 1* case must allege market power.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN15[] **Sherman Act, Claims**

Only those who possess antitrust standing by virtue of having suffered antitrust injury may bring a private action for damages for violation of the antitrust laws. Plaintiff must allege harm to competition in the market and cannot succeed by merely showing harm to itself as a competitor. There are four requirements for antitrust injury: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent.

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For ESET, LLC, Defendant: Dylan Ian Ballard, Sheppard, Mullin, Richter & Hampton LLC, San Francisco, CA; Michael W. Scarborough, Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.

For Anti-Malware Testing Standards Organization, Inc., Defendant: Arnold Edward Brown, II Schwabe, LEAD ATTORNEY, Mountain View, CA; Brenna K. Legaard, LEAD ATTORNEY, PRO HAC VICE, Schwabe, Williamson & Wyatt, P.C., Portland, OR; Stephen Grant Sullivan, LEAD ATTORNEY, Schwabe Williamson Wyatt PC, Mountain View, CA.

For U.S. Department of Justice U.S. Department of Justice, Antitrust Division, Miscellaneous: Thomas Greene, LEAD ATTORNEY, **[*2]** U.S. Department of Justice, San Francisco, CA; Jeffrey D. Negrette, Department of Justice, Washington, DC.

Judges: BETH LABSON FREEMAN, United States District Judge.

Opinion by: BETH LABSON FREEMAN

Opinion

ORDER GRANTING MOTIONS TO DISMISS WITH LEAVE TO AMEND

[Re: ECF 42, 43, 51]

Plaintiff NSS Labs, Inc. ("NSS Labs") provides cybersecurity testing services for vendors and end users of cybersecurity products. NSS Labs alleges that several vendors, including Defendants Symantec Corporation ("Symantec") and ESET, LLC ("ESET"), conspired with Defendant Anti-Malware Testing Standards Organization ("AMTSO") to exclude NSS Labs from cybersecurity testing markets. NSS Labs sues Symantec, ESET, and AMTSO for violations of federal and state antitrust laws, specifically, *Section 1 of the Sherman Act*, *15 U.S.C. § 1*, and *California's Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq.*

Each of the Defendants has filed a motion to dismiss the complaint under *Federal Rule of Civil Procedure 12(b)(6)*. The Court has considered the briefing of the parties and the oral arguments presented at the hearing on May 30, 2019. For the reasons discussed below, the motions are GRANTED WITH LEAVE TO AMEND.

I. BACKGROUND[1]

The Parties

Plaintiff NSS Labs is the world's leading provider of cybersecurity testing services. Compl. ¶ 15, ECF 1. NSS **[*3]** Labs tests cybersecurity products known as Endpoint Protection ("EPP") products, which category includes Advanced Endpoint Protection ("AEP") products. *Id.* ¶¶ 6, 17. EPP products are primarily designed to protect endpoint devices such as personal computers, laptops, and smartphones. *Id.* ¶ 27. AEP products "attempt to continuously monitor threats to file systems" so as to allow users to act against these threats in real-time. *Id.* ¶ 28.

NSS Labs began its business by performing "public tests," in which it tested a number of competing cybersecurity products, assessed the products' abilities to protect from cyberattacks, and then distributed a report to paying customers. Compl. ¶ 37. NSS Labs' customers for public reports include users, potential users, and vendors of the tested products. *Id.* NSS Labs also performs "private tests" for vendors, in which NSS Labs tests a single product under a non-disclosure agreement with the vendor. *Id.* ¶ 40.

Defendants Symantec and ESET are vendors of EPP and AEP products. Compl. ¶¶ 48, 50. Defendant AMTSO holds itself out as a standards setting organization. *Id.* ¶ 52. According to AMTSO's website, it "was founded in 2008 to improve the business conditions **[*4]** related to the development, use, testing and rating of anti-malware products and solutions." *Id.* Most EPP product vendors are members of AMTSO. *Id.* ¶ 53. Symantec, ESET and other EPP product vendors have had representatives serve on AMTSO's Board of Directors. *Id.* ¶¶ 56-59. AMTSO's membership also includes companies that provide EPP testing services, including NSS Labs, but those companies are in the minority and are outvoted by the EPP vendors. *Id.* ¶¶ 54, 60.

The Alleged Conspiracy

Symantec, ESET, and other EPP vendors (collectively, "Vendor Conspirators") conspired "to license their products under terms of use or end user license restrictions that purport to prevent competitive or comparative testing of their products, and purport to prohibit their customers from allowing their copies or 'instances' of EPP products to be used for competitive or comparative testing." Compl. ¶ 64. In February 2017, the Vendor Conspirators met at a

[1] The background section is drawn from the allegations of the complaint, documents incorporated into the complaint by reference, and matters subject to judicial notice. *See* *Louisiana Mun. Police Employees' Ret. Sys. v. Wynn, 829 F.3d 1048, 1063 (9th Cir. 2016)*.

conference held in San Francisco, California. *Id.* ¶ 65. The Vendor Conspirators agreed that AMTSO would adopt standards for testing and rating anti-malware products, and that the Vendor Conspirators would refuse to deal with any cybersecurity testing service **[*5]** that did not adhere to those standards. *Id.* ¶ 66.

In May 2018, AMTSO adopted the AMTSO Testing Standard ("the Standard"), which is attached to the complaint as Exhibit A. Compl. ¶ 75 and Exh. A. The Standard does not mandate any particular testing methodology. Compl. Exh. A. Instead, it requires advance disclosure of a test plan to EPP Vendors. Compl. ¶¶ 77-78 and Exh. A. According to NSS Labs, the purpose of the Standard is to let the Vendor Conspirators know in advance exactly how their products will be tested. *Id.* ¶ 76. This gives "Vendor Conspirators the ability to tailor their products in advance to the threats against which their products will be tested." *Id.* ¶ 79. NSS Labs asserts that the Standard is intended to, and does, "defeat the purpose of independent third-party testing by giving the EPP Vendor Conspirators the ability to cheat the tests they will be subject to and to give consumers the false impression that EPP products are free from EPP Security Defects when in fact they are not." *Id.*

On May 19, 2018, Mark Kennedy of Symantec sent an email to AMTSO membership stating that Symantec is committed to using the AMTSO Standard for all privately commissioned tests, and that **[*6]** Symantec will not deal with a testing company that does not follow the Standard. Compl. ¶ 73. On May 21, 2018, at an AMTSO meeting in Portland, Oregon, other Vendor Conspirators announced that they too would refuse to deal with cybersecurity testing companies that do not adhere to the AMTSO Standard. *Id.* ¶ 74. At a June 2018 AMTSO meeting, one of the agenda items was "Driving Adoption: Companies Requiring AMTSO Standards." *Id.* ¶ 83. In September 2018, the president of AMTSO posted to the AMTSO website a blog "strongly" encouraging all testing organizations and other parties engaged in anti-malware testing to follow the AMTSO Standard. *Id.* ¶ 84.

NSS Labs refuses to adhere to the AMTSO Standard, and it continues its practice of testing without giving EPP product vendors advance information about how the tests will be performed. Compl. ¶¶ 99-100. NSS Labs claims that as a result, it is the principal target of a group boycott by the Vendor Conspirators. *Id.* ¶¶ 98-100. The Vendor Conspirators purport to prohibit even private testing of their products unless the testing company adheres to the AMTSO Standard. *Id.* ¶ 103. The Vendor Conspirators have conspired to license their products under **[*7]** terms of use that prevent competitive or comparative testing of their products and prohibit customers from allowing their copies of EPP products to be used for competitive or comparative testing. *Id.* ¶ 64.

Antitrust Claims

NSS Labs filed the complaint in this action on September 18, 2018, alleging federal and state law antitrust claims against Symantec, ESET, and AMTSO. Compl., ECF 1. NSS Labs also named EPP Vendor CrowdStrike, Inc. as a defendant, but NSS Labs has voluntarily dismissed CrowdStrike, Inc. pursuant to *Federal Rule of Civil Procedure 41(a)*. Notice of Voluntary Dismissal, ECF 75.

NSS Labs asserts claims for: (1) *Per Se* Violation of *Section 1* of the Sherman Act (Group Boycott); (2) Violation of *Section 1* of the Sherman Act under the Rule of Reason (Group Boycott); (3) *Per Se* Violation of *Section 1* of the Sherman Act (Being Disadvantaged by a Membership Organization); (4) Violation of *Section 1* of the Sherman Act under the Rule of Reason (Being Disadvantaged by a Membership Organization); (5) *Per Se* Violation of *Section 1* of the Sherman Act (Use of Membership Organization to Commit Antitrust Violations); (6) Violation of *Section 1* of the Sherman Act under the Rule of Reason (Use of Membership Organization to Commit Antitrust Violations); (7) *Per Se* Violation of *Section 1* **[*8]** of the Sherman Act (Membership Organization is Inherently Anticompetitive); (8) Violation of *Section 1* of the Sherman Act under the Rule of Reason (Membership Organization is Inherently Anticompetitive); (9) *Per Se* Violation of the Cartwright Act; and (10) Violation of the Cartwright Act under the Rule of Reason.

Symantec, ESET, and AMTSO seek dismissal of all claims under *Rule 12(b)(6)*.

II. LEGAL STANDARD

HN1[] "A motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim upon which relief can be granted tests the legal sufficiency of a claim." *Conservation Force v. Salazar, 646 F.3d 1240, 1241-42 (9th Cir. 2011)* (internal quotation marks and citation omitted). While a complaint need not contain detailed factual allegations, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

III. DISCUSSION

The complaint asserts ten antitrust claims, eight under the Sherman Act *§ 1* and two under California's Cartwright Act. The claims fall into two categories: *per se* claims based on the alleged conspiracy and group boycott (Claims 1, 3, 5, 7, and 9), and rule of reason claims based on the same conduct (Claims 2, 4, 6, 8, and 10). Defendants contend that both sets of claims are subject **[*9]** to dismissal under *Rule 12(b)(6)*, while NSS Labs asserts that its *per se* and rule of reason claims are pled adequately. When evaluating the adequacy of the pleading, the Court applies federal ***antitrust law*** to all claims, including those asserted under the Cartwright Act.***HN2***[] "The analysis under California's ***antitrust law*** mirrors the analysis under federal law because the Cartwright Act, *Cal. Bus. & Prof. Code § 16700 et seq.*, was modeled after the *Sherman Act*." *Cty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)*. The parties agree that, for pleading purposes, the Cartwright Act claims rise and fall with the Sherman Act *§ 1* claims.

A. Sherman Act *§ 1*

HN3[] *Section 1* of the Sherman Act states that "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce" is illegal. *15 U.S.C. § 1*. Because "every commercial agreement restrains trade," whether particular conduct "violates *§ 1* of the Sherman Act depends on whether it is adjudged an *unreasonable* restraint." *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)*. "Restraints can be unreasonable in one of two ways." *Ohio v. Am. Express Co., 138 S. Ct. 2274, 2283-84, 201 L. Ed. 2d 678 (2018)*. "A small group of restraints are unreasonable *per se* because they always or almost always tend to restrict competition and decrease output." *Id.* (internal quotation marks and citation omitted). "Restraints that are not unreasonable *per se* are judged under the rule of reason." *Id.* (internal **[*10]** quotation marks and citation omitted). "The rule of reason requires courts to conduct a fact-specific assessment of market power and market structure to assess the restraint's actual effect on competition." *Id.* (internal quotation marks, citation omitted, and alterations omitted).

Before addressing the pleading requirements particular to each of these theories of antitrust liability, the Court takes up the more basic question of whether NSS Labs has alleged enough facts to suggest the existence of a conspiracy. Defendant ESET contends that NSS Labs has not done so, and that all claims against ESET are subject to dismissal on that basis. While framed slightly differently, AMTSO also argues that the complaint alleges no unlawful conduct on its part, and therefore that it cannot be liable under NSS Labs' conspiracy theory. Defendant Symantec has stated expressly that it does not challenge the conspiracy allegations for purpose of its motion to dismiss. Accordingly, the Court first addresses the challenges to NSS Labs' conspiracy allegations raised by ESET and AMTSO, then it turns to all Defendants' motions to dismiss the *per se* claims, and finally it addresses all Defendants' motions to **[*11]** dismiss the rule of reason claims.

B. Conspiracy Allegations Against ESET and AMTSO

HN4[] In order to defeat a *Rule 12(b)(6)* motion, a plaintiff asserting Sherman Act *§ 1* claims must allege "enough factual matter (taken as true) to suggest that an agreement was made." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. It is insufficient to allege the existence of a conspiracy in conclusory terms, or to allege facts that suggesting the mere possibility of a conspiracy. *See id.* The plaintiff must plead "facts that are suggestive enough to render a *§ 1* conspiracy plausible." *Id.*

1. ESET

ESET argues that the complaint is devoid of allegations that ESET representatives agreed to, or took action in furtherance of, the conspiracy. The Court agrees. NSS Labs alleges that the conspiracy began in February 2017 when CrowdStrike's CTO "organized a meeting of the EPP Vendor Conspirators with the express intent, purpose and effect of obtaining agreement among the competitors to refuse to do business with companies, including specifically NSS Labs, who attempt to perform public tests of their products using testing methodologies other than those agreed to by the EPP Vendor Conspirators and embodied in the AMTSO Testing Standard." Compl. ¶ 65. According to NSS Labs, "[t]he **[*12]** EPP Vendor Conspirators agreed that defendant AMTSO would adopt 'standards' for 'testing and rating of anti-malware products and solutions,' that adherence to such standards would be mandatory at least among the EPP Vendor Conspirators, and that at least the EPP Vendor Conspirators would refuse to deal with any cybersecurity testing service that did not adhere to the testing 'standards' to be adopted by AMTSO." *Id.* ¶ 66. However, the complaint does not allege that ESET representatives were at the February 2017 meeting or voted to adopt the proposed testing standards.

ESET points out that it appears from documents attached to the complaint that ESET was not a member of the AMTSO Standards Working Group that developed the Standard. *See* Compl. Exh. A at 4 (listing of AMTSO Standards Working Group). ESET requests that the Court take judicial notice of information on AMTSO's website showing that, in fact, ESET voted against adoption of the Standard. *See* ESET's RJN Exh. 1, ECF 44-1. ***HN5***[] The request for judicial notice is granted, as no party disputes ESET's vote and the vote "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 999 (9th Cir. 2018)*.

At the hearing, **[*13]** NSS Labs' counsel argued that ESET voted against the AMTSO Standard because ESET wanted a *more* restrictive standard, and therefore that ESET's vote does not undermine the allegation of conspiracy. ESET's desire for a more restrictive standard is not alleged in the complaint. Further, NSS Labs does not explain how ESET's vote against the Standard that was the apparent focus of the conspiracy could give rise to a plausible inference that ESET was part of the conspiracy. ***HN6***[] "For an agreement to constitute a violation of *section 1* of the Sherman Act, a conscious commitment to a common scheme designed to achieve an unlawful objective must be established." *Toscano v. Prof'l Golfers Ass'n, 258 F.3d 978, 983 (9th Cir. 2001)* (internal quotation marks and citation omitted).

NSS Labs alleges that the Vendor Conspirators have conspired to license their products under terms of use that prevent competitive or comparative testing of their products and prohibit customers from allowing their copies of EPP products to be used for competitive or comparative testing. *Id.* ¶ 64. ESET points out that the complaint does not allege that *ESET's* EULAs contain such restrictions.

In summary, the complaint contains no facts plausibly suggesting that ESET agreed to or participated in the alleged **[*14]** conspiracy to boycott NSS Labs. All of the claims against ESET are subject to dismissal on that basis as well as on the grounds discussed below.

2. AMTSO

AMTSO argues that it is not alleged to have done anything unlawful, as its only relevant conduct was adopting the AMTSO Standard through a vote of its members. The Standard is not mandatory, nor does it address the type of licensing restrictions described by NSS Labs. *See* Compl. Exh. A, Standard. It is entirely unclear from the complaint how AMTSO joined or participated in the alleged conspiracy. AMTSO is not a vendor and it does not hire companies such as NSS Labs to provide testing services. In short, the complaint contains no facts plausibly suggesting that AMTSO agreed to or participated in the alleged conspiracy to boycott NSS Labs. All of the claims against AMTSO are subject to dismissal on that basis as well as on the grounds discussed below.

C. *Per Se* Claims

Defendants argue that this case does not present the type of circumstances that traditionally have warranted application of the *per se* rule, and they request that the Court dismiss the *per se* claims without leave to amend. AMTSO makes the additional argument that *per se* claims **[*15]** cannot be asserted against it in light of the *Standards Development Organization Advancement Act of 2004 ("SDOAA")*, *15 U.S.C. § 4302*. In opposition, NSS Labs claims that it has alleged a "classic group boycott" falling squarely within the scope of the *per se* rule, and that the SDOAA does not prohibit application of the *per se* rule with respect to AMTSO.

1. Circumstances Traditionally Warranting Application of *Per Se* Rule

Exactly what kinds of activity fall within the *per se* rule is "far from certain." *Nw. Wholesale Stationers, 472 U.S. at 293*. Defendants argue that cases in which the Supreme Court has applied a *per se* approach generally have involved joint efforts to disadvantage competitors by denying them suppliers or customers needed to compete. For example, in *Fashion Originators' Guild of America, Inc. v. FTC*, the Supreme Court applied the *per se* rule when dress and textile manufacturers who sold original designs agreed to boycott retailers that dealt with manufacturers who sold copies of those original designs. *312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949, 32 F.T.C. 1856 (1941)*. While the manufacturers boycotted retailers, with whom they had a vertical relationship, the purpose of the boycott was to injure competitors — manufacturers who sold copies. *Id. at 467*. In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, **[*16]** the Supreme Court applied the *per se* rule to a boycott created when a retail store, Broadway-Hale, obtained agreement from manufacturers and distributors of household appliances that they would not sell (or would sell only at discriminatory prices) to Broadway-Hale's competitor, Klor's. *359 U.S. 207, 208-09, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*. As Defendants point out, NSS Labs is not a competitor of any Defendant.

NSS Labs contends that a *per se* illegal boycott need not be aimed at a competitor, citing *F.T.C. v. Superior Court Trial Lawyers Ass'n*. In *Trial Lawyers Ass'n*, "a group of lawyers agreed not to represent indigent criminal defendants in the District of Columbia Superior Court until the District of Columbia government increased the lawyers' compensation." *493 U.S. 411, 414, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990)*. The lawyers, who were in private practice, were appointed and compensated pursuant to the *District of Columbia Criminal Justice Act ("CJA")*. *Id. at 415*. The Supreme Court held that the lawyers' "boycott constituted a classic restraint of trade within the meaning of *Section 1* of the Sherman Act," observing that "[t]he agreement among the CJA lawyers was designed to obtain higher prices for their services and was implemented by a concerted refusal to serve an important customer in the market for legal services **[*17]** and, indeed, the only customer in the market for the particular services that CJA regulars offered." *Id. at 422-23* (internal quotation marks and citation omitted). Characterizing the CJA lawyers' conduct as "the essence of price-fixing," the Supreme Court concluded that "[t]he horizontal arrangement among these competitors was unquestionably a 'naked restraint' on price and output." *Id. at 423*.

While *Trial Lawyers Ass'n* demonstrates that the *per se* rule may be applied where the conspiracy does not target a direct competitor, it involved a price-fixing cartel and thus presented factual circumstances very different from those at issue in this action. NSS Labs has not cited, and the Court has not discovered, any case in which the *per se* rule has been applied to conduct centered on standard setting activities such as those alleged here. At least one court in this district has held that "SSO's are not illegal per se and often create a net pro-competitive effect. . . . ***HN7***[] Accordingly, any alleged agreement among the members of a SSO is analyzed under a rule of reason." *Analogix Semiconductor, Inc. v. Silicon Image, Inc., No. C 08-2917 JF PVT, 2008 U.S. Dist. LEXIS 118508, 2008 WL 8096149, at *4 (N.D. Cal. Oct. 28, 2008)*.

HN8[] Recognizing that "there **[*18]** is more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine," the Supreme Court in *Nw. Wholesale*

Stationers offered guidance by identifying three characteristics that are indicative of a *per se* illegal boycott. *Nw. Wholesale Stationers, 472 U.S. at 294* (internal quotation marks, citation, and alterations omitted). The Ninth Circuit has summarized those three characteristics as follows: "(1) the boycott cuts off access to a supply, facility, or market necessary to enable the victim firm to compete; (2) the boycotting firm possesses a dominant market position; and (3) the practices are not justified by plausible arguments that they enhanced overall efficiency or competition." *Adaptive Power Sols., LLC v. Hughes Missile Sys. Co., 141 F.3d 947, 950 (9th Cir. 1998)* (summarizing *Nw. Wholesale Stationers*). "[A] concerted refusal to deal need not necessarily possess all of these traits to merit *per se* treatment." *Nw. Wholesale Stationers, 472 U.S. at 295*. Defendants argue NSS Labs' *per se* claims possess *none* of the three characteristics articulated above. Defendants focus primarily on the third characteristic, arguing that the AMTSO Standard reveals a plausible efficiency justification on its face that makes application of the *per* **[*19]** *se* rule inappropriate. However, Defendants also argue that the complaint lacks facts showing that Defendants cut off NSS Labs' access to a necessary facility or market, or that Defendants have a dominant position in any relevant market.

a. Plausible Efficiency Justification

Defendants argue that a plausible efficiency justification for the AMTSO Standard appears from the document itself. The Forward to the Standard states that "AMTSO is a non-profit organization established to help improve the business conditions related to the development, use, testing, and rating of anti-malware solutions." Standard at 3, Exh. A to Compl., ECF 1-1. The Forward goes on to discuss the critical nature of anti-malware testing, and articulates the view that "the lack of proper testing protocols can create unnecessary expense for vendors, which ultimately can impact the amount of resources devoted to research and development, and shift focus from critical threat detection toward compliance with opaque or unfair testing procedures." *Id.* The Forward states that it is "based on a premise that although testers and vendors must retain their independence, anti-malware testing is more likely to be transparent and Fair if there **[*20]** is communication between the parties regarding the solution being tested, and the testing methodology." *Id.*

HN9[] The justification for adoption offered in the Forward to the Standard is plausible on its face. Under the applicable authorities, that alone appears to doom the *per se* claims. "When a defendant advances plausible arguments that a practice enhances overall efficiency and makes markets more competitive, *per se* treatment is inappropriate, and the rule of reason applies." *Paladin Assocs., Inc. v. Montana Power Co., 328 F.3d 1145, 1155 (9th Cir. 2003)*. "This is so because plausible arguments that a practice is procompetitive make [the court] unable to conclude 'the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote.'" *Id.* (quoting *Nw. Wholesale Stationers, 472 U.S. at 294*).

NSS Labs argues that the justification set forth in the Standard's Forward cannot be accepted at face value but must be evaluated on a more developed record. NSS Labs points out that in *Paladin* the determination whether a *per se* approach was appropriate was made at summary judgment and not on a first round motion to dismiss. *See Paladin, 328 F.3d at 1155*. While NSS Labs is correct as to the procedural posture of *Paladin*, it is not apparent from the decision that the Ninth Circuit's discussion **[*21]** of the plausible efficiency justification turned on any particular evidence in the record. ***HN10***[] The Ninth Circuit found that a *per se* approach is inappropriate when a defendant "advances" a plausible efficiency justification. *See id.* At least one district court in the Northern District of California has applied that reasoning to preclude *per se* claims at the motion to dismiss stage, finding that a policy enacted by eBay, Inc. regarding the auctioning of coins on its website arguably was pro-competitive and thus that a *per se* approach was inappropriate. *See Universal Grading Serv. v. eBay, Inc., No. C-09-2755 RMW, 2011 U.S. Dist. LEXIS 25193, 2011 WL 846060, at *5 (N.D. Cal. Mar. 8, 2011)*. Other district courts, however, have declined to determine the applicability of the *per se* rule on a motion to dismiss, finding "that decision is more appropriate on a motion for summary judgment." *In re High-Tech Employee Antitrust Litig., 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012)*.

This Court concludes that because the *per se* claims in this case turn on enactment of a Standard which articulates plausible pro-competitive justifications on its face, dismissal is appropriate at the motion to dismiss stage. NSS Labs argues that its *per se* claims are not grounded wholly in the enactment of the Standard, but also in the **[*22]** EPP Vendors' agreement to boycott testing companies that refuse to comply with the Standard. NSS Labs also argues that the proffered pro-competitive justification actually is *not* plausible because there is no legitimate reason for EPP Vendors to control how their products are tested.

The separation between the enactment of the Standard and the alleged agreement to boycott is not apparent to the Court upon a reading of the complaint. The Court reads the complaint to allege that the Vendor Conspirators conceived of a scheme to enact a standard for the purpose of restricting testing of their products, and thereafter used the resulting AMTSO Standard as a justification to boycott NSS Labs. It may be that NSS Labs can clarify its theory to show anticompetitive conduct not grounded in the Standard, and to allege facts demonstrating that the justification articulated in the Forward to the Standard is not plausible. As presently framed, however, the Court reads the *per se* claims to be firmly grounded in a non-mandatory standard, which was passed by AMTSO's members in what appears to have been a legitimate vote, and which articulates a plausible efficiency justification on its face.

b. Access [*23] / Market Power

Defendants argue that NSS Labs also has failed to allege facts showing the existence of the first two characteristics listed above, specifically, that NSS Labs was denied access to a supply, facility, or market necessary to enable the victim firm to compete, or that Defendants hold a dominant position in any relevant market. Defendants' argument on these points is well-taken, and is not refuted by NSS Labs. As noted above, it appears from the face of the complaint and attached documents that the Standard is voluntary. NSS Labs is not required to adhere to the Standard, nor are its customers. NSS Labs appears to argue that it needs access to test all anti-malware products on the market in order to provide accurate results to its customers. However, it is unclear from the complaint that Defendants deprived NSS Labs of such access. While NSS Labs suggests that Defendants' EULAs restrict access to their products such that NSS Labs does not have access to Symantec and ESET products even for public testing, NSS Labs does not allege any specific facts to support that suggestion. Moreover, it is entirely unclear whether Symantec and ESET together make up 1% or 100% of NSS Labs' **[*24]** potential customer base among EPP Vendors. It therefore is unclear what effect, if any, a boycott by Symantec and ESET would have on NSS Labs. AMTSO is not alleged to participate in or hold a dominant position in any market.

c. Conclusion

Because it has failed to allege facts showing the existence of any of the three characteristics that are indicative of a *per se* illegal boycott, the Court concludes that NSS Labs has failed to allege a *per se* claim. While Defendants urge the Court to dismiss the *per se* claims without leave to amend, the Court is reluctant to do so without granting NSS Labs the opportunity to clarify its *per se* theories and attempt to cure the deficiencies noted herein. Accordingly, Defendants' motions to dismiss the *per se* claims are GRANTED WITH LEAVE TO AMEND.

2. SDOAA

Defendant AMTSO argues that the *per se* claims against it are barred by the Standards Development Organization Advancement Act of 2004 ("SDOAA"), *15 U.S.C. § 4302*. That statute provides in relevant part that, in any antitrust action under federal or state law, the conduct of "a standards development organization while engaged in a standards development activity, shall not be deemed illegal *per se*; such conduct shall be **[*25]** judged on the basis of its reasonableness, taking into account all relevant factors affecting competition, including, but not limited to, effects on competition in properly defined, relevant research, development, product, process, and service markets." *15 U.S.C. § 4302(2)*. Defendants Symantec and ESET argue that even if the SDOAA does not bar the *per se* claims against them on its face, the statute should be extended to cover them as AMTSO's members.

In opposition, NSS Labs argues that AMTSO is not a true standards setting organization covered by the SDOAA. After the hearing, the United States filed a Statement of Interest urging the Court not to dismiss NSS Labs' *per se* claims pursuant to the SDOAA. *See* Gov't's Statement of Interest, ECF 91. The Government argues that there are factual questions whether AMTSO is a standards development organization falling within the SDOAA. The Court granted Defendants leave to respond to the Government's Statement of Interest. *See* Order Granting Leave, ECF 94. Symantec and AMTSO filed responses; ESET did not.

After reviewing the Government's Statement of Interest and the responses thereto, the Court concludes that there may be factual issues as to whether the SDOAA applies **[*26]** in this case. The AMTSO Standard does not proscribe any particular testing methodology but rather focuses on what information must be exchanged between the testing company and the vendor. The Court need not make any determination regarding the application of the SDOAA at this time, however, because NSS Labs' *per se* claims are subject to dismissal on other grounds, as discussed above.

D. Rule of Reason Claims

HN11[] Under the rule of reason, a plaintiff must plead four separate elements: (1) the existence of a conspiracy, (2) the intention on the part of the co-conspirators to harm or restrain competition, (3) actual injury to competition, and (4) that the plaintiffs suffered "antitrust injury" as a result of the conspiracy. *See Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1197 (9th Cir. 2012)*. Defendants attack NSS Labs' pleading with respect to the first, third, and fourth elements.

1. Existence of Conspiracy

As discussed above, both ESET and AMTSO successfully challenge the sufficiency of NSS Labs' conspiracy allegations. The complaint does not allege facts showing that ESET's representatives were at the February 2017 where the conspiracy allegedly began, were involved in creating the AMTSO Standard, or even voted for the Standard. The complaint likewise **[*27]** contains no facts plausibly suggesting that AMTSO agreed to or participated in the alleged conspiracy to boycott NSS Labs.

2. Injury to Competition

HN12[] "Proving injury to competition in a rule of reason case almost uniformly requires a claimant to prove the relevant market and to show the effects upon competition within that market." *Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1446 (9th Cir. 1988)*. "That is, the plaintiff must allege both that a 'relevant market' exists and that the defendant has power within that market." *Newcal Indus., Inc. v. IKON Office Sol., 513 F.3d 1038, 1044 (9th Cir. 2008)*. "The term 'relevant market' encompasses notions of geography as well as product use, quality, and description." *Oltz, 861 F.2d at 1446*. "The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." *Id.*

Symantec and ESET argue that NSS Labs has not stated enough facts to plausibly establish a relevant product market or power within the market. AMTSO does not focus on the relevant product market in its motion.

Relevant Market

HN13[] In *Newcal*, the Ninth Circuit discussed three factors, drawn from *Brown Shoe Co. v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*, that must be considered in assessing a plaintiff's definition of the relevant market. *See Newcal Indus., Inc. v. IKON Office Sol., 513 F.3d 1038, 1044 (9th Cir. 2008)*. First, "the relevant market must be a product market." *Id. at 1045*. Second, "the market must encompass the product **[*28]** at issue as well as all economic substitutes for the product." *Id.* As noted by the Supreme Court in *Brown Shoe*, "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe, 370 U.S. at 325*. Third, "although the general market must include all economic substitutes, it is legally permissible to premise antitrust allegations on a submarket." *Newcal, 513 F.3d at 1045*. "Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim." *Tanaka, 252 F.3d at 1063*; *see also* *Newcal, 513 F.3d at 1045* ("[A] complaint may be dismissed under *Rule 12(b)(6)* if the complaint's 'relevant market' definition is facially unsustainable.").

The complaint alleges four product markets in the United States, referred to collectively herein as the "Relevant Product Markets": (1) national market for EPP products, (2) national market for AEP products, (3) national market for EPP product testing, and (4) national market for AEP product testing. Compl. ¶¶ 90-95. Thus, the first of the *Brown Shoe* factors is satisfied. However, the second factor is not satisfied, because NSS Labs fails to identify the economic substitutes for the product markets. Nor does NSS Labs **[*29]** plead any facts regarding the cross-elasticity of demand between the Relevant Product Markets and their substitutes. NSS Labs also does not distinguish between any general or submarkets in its complaint. Accordingly, even applying a liberal pleading standard, NSS Labs has failed to allege the relevant markets.

Market Power

HN14[] To establish the effects on competition within a relevant product market, the moving party must allege market power. *Newcal, 513 F.3d at 1044*. NSS Labs has not alleged any facts with respect to Defendants' market power in the Relevant Product Markets.

3. Antitrust Injury

HN15[] Only those who possess antitrust standing by virtue of having suffered antitrust injury may bring a private action for damages for violation of the antitrust laws. *See* *Glen Holly Entm't, Inc. v. Tektronix, Inc., 352 F.3d 367, 371 (9th Cir. 2003)*. Plaintiff must allege harm to competition in the market and cannot succeed by merely showing harm to itself as a competitor. *See* *Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1200 (9th Cir. 2012)*. There are "four requirements for antitrust injury: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California, 190 F.3d 1051, 1055 (9th Cir. 1999)*.

Symantec and AMTSO argue that NSS Labs has not alleged facts showing antitrust injury. **[*30]** They argue that even if NSS Labs has suffered an injury, there has been no harm to competition. AMTSO also asserts that any injury suffered by NSS Labs does not flow from unlawful conduct on the part of AMTSO.

NSS Labs alleges that it has suffered an antitrust injury due to Defendants' actions because it has suffered a group boycott and lost revenue based on its refusal to adhere to the AMTSO Standard. Compl. ¶¶ 98-103. NSS Labs does not link its alleged loss of revenue to conduct that also harms competition. NSS Labs argues that competition is harmed by EPP Vendors' EULAs restricting access to their products for testing, suggesting that NSS Labs does not have access to Symantec and ESET products even for public testing. Those facts are not alleged in the complaint.

With respect to AMTSO, standards setting organizations can run afoul of antitrust laws under certain circumstances, for example, where the standard is a result of coercion. *See* *Coalition for ICANN Transparency, Inc. v. VeriSign, Inc., 611 F.3d 495, 505-07 (9th Cir. 2010)* (finding that allegations of financial pressure and litigation threats demonstrated improper coercion of a standard-setting body at the motion to dismiss stage); *see also* *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 496, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)* (stating that packing a standard-setting organization with paid support to **[*31]** ban a competing product violated antitrust laws). Here, no coercion or similar activity is alleged in the complaint. It appears that the only relevant action AMTSO took was to adopt the Standard at issue pursuant to a vote of its membership. NSS Labs asserts that the Standard is anti-competitive, and causes harm to competition, because under the Standard companies such as

NSS Labs are to give EPP Vendors advance notice of the test plan. However, the Standard is voluntary, not mandatory. NSS Labs has made clear on the face of the complaint that it does not adhere to the Standard, that is, that it continues to provide testing without giving EPP Vendors advance notice. NSS Labs therefore has failed to allege how AMTSO's adoption of the Standard itself, as opposed to the EPP Vendors' alleged boycott, has caused it to suffer antitrust injury.

4. Conclusion

NSS Labs has failed to state a claim under the rule of reason, because it has failed to allege facts showing: the existence of a conspiracy and participation in such conspiracy by ESET and AMTSO; the relevant markets and Defendants' power within those markets; or antitrust injury. NSS Labs' opposition briefs suggest that NSS Labs can allege **[*32]** additional facts addressing all of these elements. Accordingly, the motions to dismiss are GRANTED WITH LEAVE TO AMEND as to NSS Labs' rule of reason claims.

IV. ORDER

(1) The motions to dismiss are GRANTED WITH LEAVE TO AMEND.

(2) Any amended complaint shall be filed on or before September 12, 2019.

(3) Leave to amend is limited to the deficiencies addressed in this order. NSS Labs may not add new parties or claims without first obtaining leave of the Court.

(4) With respect to any future motions to dismiss, the Court sets the following page limits:

- (a) Defendants collectively are limited to a single main brief of no more than 20 pages. Defendants ESET and AMTSO may, but are not required to, file supplemental briefs of no more than 5 pages each. In no event may the total pages of the moving briefs exceed 30 pages.
- (b) The opposition brief is limited to single brief that shall not exceed the total pages of the moving briefs.
- (c) Defendants collectively are limited to a single reply brief of no more than 15 pages.

Dated: August 13, 2019

/s/ Beth Labson Freeman

BETH LABSON FREEMAN

United States District Judge

End of Document

Dish Network, LLC v. Jadoo Tv, Inc.

United States District Court for the Central District of California

August 14, 2019, Decided; August 14, 2019, Filed

CV 18-9768-FMO (KSx)

Reporter

2019 U.S. Dist. LEXIS 165946 *; 2019 WL 4544423

Dish Network, LLC. v. Jadoo TV, Inc. et al.

Prior History: *Dish Network LLC v. Jadoo TV, Inc., 2019 U.S. Dist. LEXIS 22016 (C.D. Cal., Feb. 11, 2019)*

Core Terms

documents, JadooTV, proportional, defenses, grounds, privileges, waiving, incorporate by reference, permissible discovery, protections, attorney work product doctrine, accountant-client, attorney-client, disclosure, common-interest, discovery, burdensome, Box, present litigation, purports, eMedia, custody or control, confer, undue burden, clarified, Channel, confidential, unduly, protective order, non-privileged

Counsel: **[*1]** For Dish Network L.L.C., Plaintiff: Timothy M Frank, LEAD ATTORNEY, Hagan Noll and Boyle LLC, Houston, TX; David A Van Riper, Van Riper Law, Tustin, CA; Joseph H Boyle, Stephen Matthew Ferguson, PRO HAC VICE, Hagan Noll and Boyle LLC, Houston, TX.

For Jadoo TV, Inc., Sajid Sohail, Defendant: Darin W Snyder, LEAD ATTORNEY, Ashish Sudhakaran, Bill Trac, O'Melveny and Myers LLP, San Francisco, CA.

For East West Audio Video, Inc., Punit Bhatt, Defendants: John Dimuzio, Jr, LEAD ATTORNEY, David A Berstein, Berstein Law PC, Newport Beach, CA.

Judges: Karen L. Stevenson, United States Magistrate Judge.

Opinion by: Karen L. Stevenson

Opinion

CIVIL MINUTES - GENERAL

Proceedings: (IN CHAMBERS) ORDER RE: PLAINTIFF DISH NETWORK, LLC'S MOTION TO COMPEL SAJID SOHAIL'S PRODUCTION OF DOCUMENTS [DKT. NO. 75]

INTRODUCTION

Before the Court is Plaintiff Dish Network, LLC's ("Plaintiff's") Motion to Compel Defendants Jadoo TV, Inc. and Sajid Sohail's Production of Documents filed on May 24, 2019 in the joint stipulation format pursuant to *Local Rule 37-2* (the "Motion"). (Dkt. No. 75.) The caption page of the Notice of Motion refers to "Defendants Jadoo TV, Inc.

and Sajid Sohail's Production of Documents." (Dkt. No. 75.) In the body of the Motion, Plaintiff **[*2]** identifies Jadoo TV, Inc. and Sohail collectively as "JadooTV." (Joint Stip. at 1.) Here, for clarity and ease of reference, the Court refers to the defendants separately as "JadooTV" and "Sohail."

On May 31, 2019, a week after Defendants filed the Motion, Jadoo filed a Suggestion of Bankruptcy indicating that it had filed a voluntary petition for relief in the United States Bankruptcy Court for the Northern District of California. (Dkt. No. 78.) On June 12, 2019, Defendant Sohail filed a Supplemental Memorandum regarding the Motion ("Dft's Supp. Memo."). (Dkt. No. 80.)

On June 26, 2019, the Court heard oral argument on the Motion. (Dkt. No. 85.) At the hearing, Plaintiff's counsel confirmed that, due to JadooTV's bankruptcy filing, this action is stayed as to JadooTV and the motion to compel is now only directed at Sohail in his individual capacity. (*Id.*) Accordingly, the Court determined that "in light of [JadooTV's] bankruptcy filing, it would be helpful to have supplemental briefing from the parties on whether Sohail may be compelled to produce emails and other documents that he created in his capacity as a corporate officer of [JadooTV]." (*Id.*) On July 3, 2019, Plaintiff submitted **[*3]** a supplemental brief citing authority that addresses whether a corporate officer of a company that is subject to a bankruptcy stay can be compelled to produce corporate documents related to the individual's work activities for the bankrupt debtor and whether any such documents are considered to be in the possession, custody, or control of the individual officer for the purposes of discovery as to that person in his individual capacity. (Dkt No 87.) On July 9, 2019, Defendant Sohail filed a Supplemental Opposition regarding the Motion along with a Declaration of Sajid Sohail in Support of Supplemental Opposition to the Motion ("Dft's Supp. Opp'n"). (Dkt. Nos. 90, 91.) Upon receipt of Defendant Sohail's Supplemental Opposition, the Court took the matter under submission for decision.

RELEVANT BACKGROUND

Plaintiff's Complaint in this copyright infringement action, alleges that defendant JadooTV's engaged in "a wide-ranging, deliberate, multi-year effort . . . to transmit television channels it failed to license in blatant disregard of DISH's exclusive rights." (Complaint ¶ 1.) Specifically, Plaintiff alleges that JadooTV initially "designed its service to directly stream unlicensed television **[*4]** channels through the Jadoo branded set-top box," but later "changed the way it offered unlicensed channels by requiring users to download extra software files to their Jadoo set-top boxes to integrate those channels." (*Id.* at ¶ 2.) Plaintiff alleges that "[t]oday, the latest model Jadoo set-top boxes are sold to users preconfigured to locate and install software files needed to integrate the unlicensed television channels and seamlessly incorporate those channels into the Jadoo on-screen electronic program guide." (*Id.* at ¶ 3.) Plaintiff further alleges that JadooTV and defendant Haseeb Shah "provide unlicensed video on demand content to Jadoo users, including infringing versions of the programs that air on the unlicensed television channels." (*Id.* at ¶ 4.) On that basis, Plaintiff alleges that "JadooTV and its co-defendants are liable for copyright infringement." (*Id.* at ¶ 5.)

Plaintiff identifies Sohail as "the founder, chief executive officer, president, and an owner of Jadoo TV, Inc." and alleges that "Sohail authorized, controlled, participated in, and received direct financial benefits from the infringing activities of Jadoo TV, Inc.[.]" (*Id.* at ¶ 8.) The Complaint asserts claims **[*5]** against JadooTV and Sohail for direct copyright infringement under *17 U.S.C. § 501* (Count I); inducing and materially contributing to copyright infringement under *17 U.S.C. § 501* (Count II); and vicarious copyright infringement under *17 U.S.C. § 501* (Count III, (alternative to Count I)). (*Id.* at ¶¶ 63-93.) Plaintiff seeks permanent injunctive relief under *17 U.S.C. § 502*, statutory damages or profits attributable to the infringement of registered and unregistered works under *17 U.S.C. § 504(b)*; attorneys' fees and costs under *17 U.S.C. § 505*; and impoundment and disposition of all infringing articles under *17 U.S.C. § 503*. (*Id.* at pp. 26-27.)

THE MOTION

I. The Disputed Discovery Requests and Jadoo TV, Inc.'s Opposition

The Motion as initially filed sought an order compelling "JadooTV"—meaning both JadooTV and Sohail, individually—to produce documents in response to Plaintiff's Request for Production of Documents ("RFPs") served on February 7, 2019. (*Id.* at 2.) In RFP Nos. 71 and 73, Plaintiff seeks documents relating to JadooTV's eMedia technology:

(1) "the use, design, structure, and operation of eMedia from January 2014 to present"; and
(2) "the design, structure, or operation of eMedia from January 2014 to present."

(*Id.*) Plaintiff also seeks an order compelling defendants to "produce all non-privileged documents **[*6]** that it agreed to produce as a result of the parties' meet and confer discussions. (*Id.*) Specifically, the Motion seeks an order compelling defendants to respond to Plaintiff's RFP Nos. 1-3, 6-7, 14-21, 23-28, 32, 34-41, 44-46, 48, 50-53, 55, 57-65, 68-70. 72 74-81, 83, 85-86, 89-103, 105, and 111-112.)[1] Plaintiff contends the information sought is highly relevant to the claims and defense at issue in the lawsuit and "JadooTV has not produced a single document in this case . . . has not gathered, and does not intend to gather, documents from Defendant Sohail or any other custodians[.]" (*Id.* at 2.) Plaintiff seeks an award of attorneys' fees costs related to the Motion. (*Id.*)

JadooTV's primary argument in opposition was that Motion was "pointless" because JadooTV expected to file for bankruptcy protection that "will automatically stay DISH's case against Jadoo TV, Inc., "well before June 26 when this motion is noticed to be heard." (Joint Stip. at 4.) Therefore, Jadoo TV urged that the Motion be denied without prejudice and Plaintiff's request for attorneys' fee should be denied. (*Id.* at 5.)

II. Jadoo TV's Bankruptcy Filing and Automatic Stay of this Lawsuit

True to its promise, JadooTV filed a Suggestion **[*7]** of Bankruptcy on May 31, 2019, which automatically stayed this litigation as to debtor JadooTV, pursuant to *11 U.S.C. § 362(a)*. (*See* Dkt. No. 78.) On June 12, 2019, Defendant Sohail filed a Supplemental. Memorandum regarding the Motion ("Supp. Opp'n") in which he acknowledged that JadooTV's petition for bankruptcy "operated to stay this case against JadooTV" and suggested that "[t]he case against Sohail is also very likely to be stayed." (Supp. Opp'n at 2.) Sohail further argued that "[e]ven if the case against Mr. Sohail is not stayed, the Court should refrain from compelling Mr. Sohail to produce any documents in this case because most, if not all, of the documents DISH seeks in its motion are in JadooTV's possession, custody, or control — not Mr. Sohail's." (*Id.*)

III. The Parties' Supplemental Briefing After Oral Argument

As noted above, after hearing oral argument on the Motion, the Court requested supplemental briefing from the parties on the impact, if any, of JadooTV's bankruptcy petition and stay on Sohail's individual obligation to respond to Plaintiff's RFPs. (Dkt. No. 85.) Plaintiff's Supplemental Brief in Support of the Motion to Compel Sajid Sohail's Production of Documents ("Plt's Supp. **[*8]** Br." [Dkt. No. 87]) argues that the bankruptcy stay against debtor JadooTV does not apply to non-debtor Sohail in his individual capacity. (Plt's Supp. Br. at 2-3.) Therefore, Plaintiff argues, Sohail can be compelled to "respond to discovery requests aimed at establishing his individual liability." (*Id.*)

Plaintiff acknowledges that "some courts have extended the automatic stay to non-bankrupt co-defendants when 'unusual circumstances' warranted," but emphasizes that the Ninth Circuit has not adopted the "unusual circumstances exception." (*Id.* at 4.) Plaintiff further argues that even if he Ninth Circuit had adopted the "unusual circumstances" exception, "to apply the exception, Sohail and JadooTV would need to request the bankruptcy court to 'extend the automatic stay under its equity jurisdiction.'" (*Id.* (citing *In re Chugach Forest Prods., Inc., 23 F.3d 241, 247 n.6 (9th Cir. 1994))*.) Finally, Plaintiff contends that as the founder, CEO and owner of JadooTV, "Sohail is

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[1] Because of the voluminous nature of the disputed RFPs and responses, the Court will not recite each of the requests and objections in this Order, but has attached the relevant requests, along with Sohail's responses and objections as Appendix A.

in control of the relevant JadooTV documents for purposes of discovery relating to Sohail" in his individual capacity and he should be compelled to produce these documents. (Plt's Supp. Br. at 6.)

In his Supplemental Brief ("Deft's Supp. Br." [Dkt. No. 90]), Sohail contends that Plaintiff's effort **[*9]** to obtain discovery from Sohail "subverts the automatic stay" resulting from JadooTV's chapter 11 case. (Deft's. Supp. Br. at 1.) Sohail urges that he should not be compelled to respond to Plaintiff's discovery requests because of an indemnity agreement between Sohail and JadooTV. (*Id.*) Sohail also maintains that the allegations against Sohail in his official capacity as CEO and president of JadooTV are indistinguishable from Plaintiff's claims against debtor JadooTV and render Sohail "indispensable to JadooTV's successful reorganization efforts in the chapter 11 case." (*Id.*) Sohail contends, therefore, that the Court should find that discovery and other litigation against Sohail should be stayed "as an extension of the automatic stay in favor of JadooTV" and the Motion should be denied. (*Id.*)

LEGAL STANDARD

Under *Rule 26 of the Federal Rules of Civil Procedure*, a party may obtain discovery concerning any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case. *Fed. R. Civ. P. 26(b)(1)*. As amended in December 2015, *Rule 26(b)(1)* identifies six factors to be considered when determining if the proportionality requirement has been met, namely, the importance of the issues at stake in the action, the amount in controversy, **[*10]** the parties' relative access to the relevant information, the parties' resources, the importance of the discovery in resolving the issues and whether the burden or expense of the proposed discovery outweighs its likely benefit. *Id.* Relevant information need not be admissible to be discoverable. *Id.*

Rule 37 provides that "[a] party seeking discovery may move for an order compelling an answer, designation, production, or inspection." *Fed. R. Civ. P. 37(a)(3)*. The party seeking to compel production of documents under *Rule 34* has the "burden of informing the court why the opposing party's objections are not justified or why the opposing party's responses are deficient." *Best Lockers, LLC v. American Locker Group, Inc., Case. No. SACV 12-00403 CJC (ANx), 2013 WL 12131586, at *4 (C.D. Cal. Mar. 27, 2013)*.

District courts have broad discretion in controlling discovery. *See Hallett v. Morgan, 296 F.3d 732, 751 (9th Cir. 2002)*. When considering a motion to compel, the Court has similarly broad discretion in determining relevancy for discovery purposes. *Surfvivor Media, Inc. v. Survivor Productions, 406 F.3d 625, 635 (9th Cir. 2005)* (citing *Hallet, 296 F.3d at 751*).

DISCUSSION

I. The Discovery Sought is Relevant and Proportional to the Needs of the Case Against Sohail Individually

Notably, Sohail does not argue that the discovery sought with respect to his potential individual liability is not relevant to the claims or defenses in the action or that **[*11]** the requests are not proportional to the needs of the case within the meaning of *Rule 26*. Indeed, Plaintiff argues that in meet and confer discussions held prior to JadooTV's bankruptcy filing, the parties reached agreements regarding a majority of the RFPs that are the subject of the Motion including RFP Nos. 1-3, 6-7, 14-21, 23-28, 32, 34-41, 44-46, 48, 50-53, 55, 57-65, 68-70. 72 74-81, 83, 85-86, 89-103, 105, and 111-112. (*See* Joint Stip. at 10-65.) Plaintiff now asks that Sohail be compelled to produce what "JadooTV" already agreed to produce. (*Id.* at 2.)

It is undisputed that JadooTV's bankruptcy petition automatically stayed this litigation and all discovery as to JadooTV. *See* *11 U.S.C. § 362(a)*1). The Ninth Circuit has emphasized that "[t]he sweep of the automatic stay is broad and 'serves as one of the most important protections in bankruptcy law.'" *Porter v. Nabors Drilling USA L.P., 854 F.3d 1057, 1061 (9th Cir. 2017)*. But the Motion is no longer directed at the debtor, JadooTV. Rather, the

Motion seeks to compel co-defendant Sohail respond to the RFPs in his individual capacity.[2] Further, the Complaint clearly asserts individual claims against Sohail. (*See* Complaint, Counts I, II, III.) That said, the Complaint expressly alleges that Plaintiff's copyright infringement allegations **[*12]** against Sohail, arise directly out of Sohail's role as founder, CEO, president, and owner of JadooTV. (Complaint at ¶ 8.) Further, Plaintiff alleges that "[t]he acts Sohail engaged in as an agent of JadooTV, Inc. are believed to have been within the scope of such agency." (*Id.*)

Thus, the resolution of the Motion turns on whether the scope of the automatic stay of litigation as to JadooTV also precludes Plaintiff's ability to seek discovery against Sohail individually. For the reasons discussed below, the Court concludes it does not.

II. Automatic Bankruptcy Stay Does Not Extend to Non-Debtor Sohail

It is well established that an automatic bankruptcy stay does not extend to non-debtors. *In re Chugach Forest Prods., Inc., 23 F.3d 241, 246 (9th Cir. 1994)* ("as a general rule, the automatic state of *section 362(a)* protects only the debtor, property of the debtor or property of the estate. It does not protect non-debtor parties or their property.") (internal quotation marks and citation omitted). This principle applies even when the individual co-defendant is closely associated with the bankrupt debtor or even a senior executive of the debtor. *See, e.g., In re Related Asbestos Cases, 23 B.R. 523, 529 (N.D. Cal. 1982)* (collecting cases and noting that stay under *section 362* does "not encompass actions against related but independent codefendants"); **[*13]** *Seiko Epson Corp. v. Nu-Kote Int'l, Inc., 190 F.3d 1360, 1364 (Fed. Cir. 1999)* ("It is clearly established that the automatic stay does not apply to non-bankrupt co-defendants of a debtor even if they are in a similar legal or factual nexus with the debtor.") (internal quotations and citations omitted).

Sohail, an officer and owner of JadooTV, insists that his individual interests are so intertwined with the debtor corporation's property that the "exceptional circumstances" doctrine should be applied to extend the bankruptcy stay to preclude discovery as to him. (Deft's Supp. Br. at 2.) In particular, Sohail argues that an indemnity agreement between himself and JadooTV, among other things, "warrants the finding that discovery and other litigation against Sohail should be stayed[.]" (Deft's Supp. Opp'n at 1.) But mere fact of the indemnity agreement does not preclude Plaintiff from seeking discovery from Sohail.

Indeed, should any judgement of liability be ultimately found against Sohail individually, the indemnity agreement may provide the basis for Sohail to file his own proof of claim in the JadooTV bankruptcy proceeding. *See, e.g., In Re Meruelo Madduz Properties, Inc. Nos. CC-12-1479-TaPaKi, 09-13356-VK, 2013 Bankr. LEXIS 4672, 2013 WL 1615784 at *8 (B.A.P. 9th Cir. Apr. 15, 2013)* (discussing advancement claims included in "timely filed **[*14]** Proofs of Claim which were based, in part on the Indemnity Agreement.")

III. The Ninth Circuit Has Not Adopted the "Unusual Circumstances" Exception

Some courts have recognized an "unusual circumstances" exception to the general rule that a bankruptcy stay does not extend to non-debtor defendants. The Fourth Circuit has held that "unusual circumstances" may justify an extension of the stay to nonbankrupt codefendants when

> There is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgement or finding against the debtor.

A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.), 788 F.2d 994, 999 (4th Cir.), *cert. denied*, *479 U.S. 876, 107 S. Ct. 251, 93 L. Ed. 2d 177 (1986)*; and see *Matter of S.I. Acquisition, Inc., 817 F.2d 1142, 1148 (5th Cir. 1987)*

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[2] Based on the Court's review of the RFPs at issue, it appears that neither the Motion nor Plaintiff's Supplemental Brief makes any distinction between RFPs that are directed at JadooTV and those that may be more specifically targeted to obtain information regarding Sohail's potential liability in an individual capacity.

(noting Fourth Circuit's recognition of "very limited situations" where a section 362(a) stay may apply to actions against nonbankrupt defendants). At least one court in this circuit has noted that "unusual circumstances" may be found "when proceeding against non-debtor defendants would impose a substantial discovery burden on the debtor defendant." *Bradford Technologies, Inc. v. Biggers*, No. C 11-4621 EDL, 2014 WL 12641953, at *6 (N.D. Cal. May 27, 2014) (internal citations omitted). That said, even in *Bradford*, **[*15]** the court ultimately concluded that there was "no evidence of unusual circumstances here sufficient to overcome the general rule" that the stay only applies to the debtor. (*Id.*) This Court reaches the same conclusion here.

As Plaintiff points out, the Ninth Circuit has not adopted the "unusual circumstances" exception. *See Chugach Forest Prods. Inc., 23 F.3d at 247* (stating "[i]n the Ninth Circuit, the vitality of the 'unusual circumstances' exception is not clear," citing decisions that have not recognized the exception, and declining to resolve the issue); *see also* *Klinkenborg Aerial Spraying and Seeding, Inc. v. Rotorcraft Dev. Corp. 690 Fed Appx. 540, 541 (9th Cir. 2017)* ("We have never adopted the 'unusual circumstances' exception in the Ninth Circuit and we decline to do so here."). Sohail argues that although the Ninth Circuit has not adopted the "unusual circumstances" exception, it has also not explicitly rejected it either. (Deft's Suppl. Opp'n at 1-2.) This argument is unpersuasive. Sohail cites *In re O'Reilly, 2014 U.S. Dist. LEXIS 13264, 2014 WL 460767, at *10 (N.D. Cal. Feb. 3, 2014)* noting that the District Court in that unpublished case "affirmed the bankruptcy court's ruling that the 'unusal circumstances') exception applied to say the case against a law firm shareholder[.]" (Deft's Suppl. Opp'n at 2.) *O'Reilly*, however, affirmed a decision of the bankruptcy court, in a case involving allegations of fraudulent **[*16]** transfer and alter ego claims. *O'Reilly, 2014 U.S. Dist. LEXIS 13264, 2017 WL 460767, at * 4*. Further, and more importantly, *O'Reilly* was not a case where the district court itself applied the "unusual circumstances" doctrine, but instead specifically noted that "section 362(d) gives the *bankruptcy court* wide latitude in crafting relief from the automatic stay[.]" *2014 U.S. Dist. LEXIS 13264, [WL] at *3* (internal citation and quotation marks omitted (emphasis added).) The other cases on which Sohail relies are equally distinguishable because they are not binding on this Court, pre-date *Chugach*, and were based on findings by the bankruptcy courts exercising their unique jurisdiction with respect with respect to the automatic stay. *See, e.g., In re Family Health Servs., Inc. 105 B.R. 937, 942 (Bankr. C.D. Cal. 1989)*; *In re Circle K Corp., 121 B.R. 257, 261 (Bankr. D. Ariz 1990)*. Accordingly, the Court here declines to step into a breach where the Ninth Circuit has, thus far, expressly declined to do so.

Finally, as emphasized in *Klinkenborg*, "even if we were to adopt 'unusual circumstances' exception, the exception requires the bankruptcy court to extend the automatic stay using its equity jurisdiction." (*Id. at 540-41*.) The bankruptcy court has not done so here.

IV. Plaintiff's Request for Attorneys' Fees

Rule 37 requires that when a motion to compel is denied, the court "must, after giving an opportunity to be heard, require the movant, the attorney **[*17]** filing the motion, or both to pay the party or deponent who opposed the motion, its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust." *Fed. R. Civ. P. 37(a)(5)(B)*. Discovery conduct is "substantially justified if it is a response to a genuine dispute or it reasonable people could differ as to the appropriateness of the contested action." *Pierce v. Underwood, 487 U.S. 552, 563, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988)*.

Here, Plaintiff seeks an award of costs and attorney's fees incurred in bringing the motion. (Joint Stip. at 2.) The Court finds that Sohail's wholesale refusal to produce documents in response to Plaintiff's properly served discovery requests is unjustified. First, in the months prior to JadooTV's bankruptcy, Sohail had no principled basis to refuse to comply with Plaintiff's discovery requests seeking information relevant and proportionate to Plaintiff's claims against Sohail in his individual capacity. Further, in light of well-settled authority confirming that an automatic bankruptcy stay does not extend to a non-debtor co-defendant, even one who may be closely affiliated with the debtor, Sohail's opposition **[*18]** to the Motion based on the assertion that "the case against Sohail is also very likely to be stayed" was tenuous at best. (Deft's Supp. Br. at 2 [Dkt No. 80].) Consequently, an award of reasonable expenses, including attorneys' fees, that Plaintiff incurred in bringing the Motion is warranted.

CONCLUSION

Accordingly, in the absence of an order of the bankruptcy court expressly extending the automatic stay to Sohail, the Motion is GRANTED as to Defendant Sohail in his individual capacity. No later than ten (10) days from the date of this Order, Sohail shall produce any non-privileged responsive documents in his personal possession, custody, and control in response to Plaintiff's RFP Nos. 1-3, 6-7, 14-21, 23-28, 32, 34-41, 44-46, 48, 50-53, 55, 57-65, 68-70, 72 74-81, 83, 85-86, 89-103, 105, and 111-112. This Order specifically requires Sohail to search any personal email accounts or other electronically stored databases, home offices or other locations and/or repositories that are separate from facilities owned and/or controlled by JadooTV. To the extent that Sohail, after a reasonable and diligent search, asserts that he has no responsive documents in his possession, custody or control, **[*19]** Sohail must provide supplemental written responses so indicating within ten (10) days of the date of this Order. Any documents for which Sohail asserts a privilege must be listed on a Privilege Log.

Further, pursuant to *Rule 37(a)(5)(A)*, Plaintiff's request for its expenses, including attorney's fees, incurred in bringing the Motion is GRANTED. Therefore, the following briefing schedule governs a motion for an award of expenses incurred in bringing the Motion to Compel: (1) **Plaintiff shall file and serve his opening brief on or before August 21, 2019; (2) Defendant Sohail shall file an Opposition no later than 21 days after service of the motion; and (3) Plaintiff shall file an optional Reply (of no more than 5 pages) to the Opposition no later than 14 days after service of the Opposition**. A hearing is scheduled on the motion for expenses for October 2, 2019 at 11:00 a.m. in Courtroom 580 of the Roybal Federal Building, 255 E. Temple Street, Los Angeles, California 90012.

IT IS SO ORDERED.

APPENDIX A

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UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA WESTERN DIVISION

DISH NETWORK L.L.C.,

Plaintiff,

v.

JADOOTV, INC., SAJID SOHAIL, HASEEB SHAH, EAST WEST AUDIO VIDEO, INC., and PUNIT BHATT,

Defendants.

JADOO DEFENDANTS' RESPONSES AND OBJECTIONS TO PLAINTIFF DISH NETWORK L.L.C.'S FIRST SET OF REQUESTS FOR PRODUCTION TO DEFENDANTS JADOOTV, INC. AND SAJID SOHAIL (NOS. 1-103)

PROPOUNDING PARTY: PLAINTIFF DISH NETWORK L.L.C.

RESPONDING PARTY: DEFENDANTS JADOOTV, INC. AND SAJID SOHAIL

SET NUMBER: ONE (NOS. 1-103)

Pursuant to *Federal Rule of Civil Procedure 34*, Defendants JadooTV, Inc. ("JadooTV") and Sajid Sohail ("Sohail") (collectively. "Jadoo Defendants"), hereby submit the following Responses and Objections to Plaintiff DISH Network, L.L.C.'s ("DISH") First Set of Requests for Production to Defendants JadooTV. Inc. and Sajid Sohail (the "Requests") as follows:

PRELIMINARY STATEMENT

This case is still in the early stages of discovery. Despite diligent efforts to respond to these Requests, Jadoo Defendants reserve the right to amend or supplement their objections and responses herein if necessary at **[*21]** a later date, and to use subsequently discovered documents and documents now known but whose relevance, significance, or applicability has not yet been ascertained. Furthermore, Jadoo Defendants' responses are made without in any way intending to waive, but, on the contrary, intending to preserve:

1. The right to raise all questions of authenticity, foundation, relevancy, materiality, privilege and admissibility as evidence for any purpose of the documents produced in response to DISH's Requests that may arise in any subsequent proceeding in, or the trial of, this or any other action;

2. The right to object to the use of the documents produced in response to DISH's Requests in any subsequent proceeding in, or the trial date of. this or any other action on any grounds;

3. The right to object to introduction into evidence of these responses; and

4. The right to object on any ground at any time to other discovery involving the subject matter thereof.

GENERAL OBJECTIONS

Jadoo Defendants incorporate the following General Objections into each and every objection and/or individualized response contained herein, and into each and every amendment, supplement or modification to these responses:

1. **[*22]** Jadoo Defendants object to the Requests to the extent that they purport to impose obligations beyond those set forth in the Local Rules of the United States District Court for the Central District of California and the Federal Rules of Civil Procedure.

2. Jadoo Defendants object to each Request and the Definitions and Instructions to the extent they purport to require the production of documents beyond the scope of permissible discovery because they are neither relevant to a claim or defense of a party nor proportional to the needs of the case, considering the importance of the issues

at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

3. Jadoo Defendants object to each Request and the Definitions and Instructions to the extent they purport to require the production of documents that are not in Jadoo Defendants' possession, custody, or control, and thereby seeks to expand obligations of Jadoo Defendants beyond those imposed by law.

4. Jadoo Defendants object to each **[*23]** Request and the Definitions and Instructions to the extent they seek unreasonably cumulative and duplicative documents for which the burden, expense, and intrusiveness of production outweighs the likelihood of further discovery of admissible evidence.

5. Jadoo Defendants object to each Request and the Definitions and Instructions to the extent they are vague and ambiguous and fail to describe the documents requested with reasonable particularity.

6. Jadoo Defendants object to each Request and the Definitions and Instructions as unduly burdensome, expensive, and oppressive to the extent they seek documents that are currently in DISH's possession, custody or control, including but not limited to documents that are publicly available or can be obtained from some other source that is more convenient, less burdensome or less expensive than Jadoo Defendants.

7. Jadoo Defendants object to each Request and the Definitions and Instructions to the extent they seek information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, or similar privileges or protections. Jadoo Defendants hereby assert all such applicable privileges **[*24]** and protections. In the event that any privileged or protected document is inadvertently produced, such production shall not be deemed or construed to constitute a waiver of any privilege or right of Jadoo Defendants, who reserve their rights to demand that DISH return any such document and copies thereof and to prevent the use of such documents. Jadoo Defendants also object to each and every individual request for production to the extent that it seeks proprietary or confidential business or personal information or other sensitive information protected from disclosure by applicable authorities. Jadoo Defendants further object to each and every individual request for production to the extent that it seeks information or the production of documents that are within the scope of a confidentiality agreement, employment agreement, protective order or settlement agreement. Any production of information or documents subject to one or more of the aforementioned privileges or rights belonging to Jadoo Defendants should not be considered a waiver of such privileges or rights, which Jadoo Defendants reserve the right to exercise. And Jadoo Defendants will produce such information or document, **[*25]** if at all, only after entry of a suitable protective order.

8. Jadoo Defendants object to each Request and the Definitions and Instructions to the extent they seek information protected by rights of privacy under federal law.

9. Jadoo Defendants object to each Request and the Definitions and Instructions to the extent they seek trade secrets, confidential and/or proprietary information of Jadoo Defendants or any other third party. Jadoo Defendants further object to each and every Request to the extent that it seeks information falling within the scope of a confidentiality agreement, protective order or settlement agreement, or that otherwise requires the consent of any third part prior to production. No such information will be provided unless DISH secures the required consent from the appropriate third parties. In addition, no confidential, proprietary or trade secret information will be produced except pursuant to the terms of a protective order.

10. By submitting these objections, Jadoo Defendants do not in any way adopt the purported definitions of words and phrases contained in the Requests and Instructions. Jadoo Defendants object to those definitions to the extent that they are **[*26]** inconsistent with either (i) the definitions used by Jadoo Defendants or (ii) the ordinary and customary meaning of such words and phrases. Likewise, Jadoo Defendants object to the purported definitions in the Requests and Instructions to the extent that the definitions seek to impose any obligations or duties broader than, or inconsistent with, those contemplated by the Federal Rules of Civil Procedure.

11. Jadoo Defendants object to DISH's Definition of "JadooTV" to the extent that definition includes persons or entities other than Jadoo Defendants and those within their control. Jadoo Defendants will respond to a Request that uses that term only with respect to JadooTV, Inc. and Sajid Sohail, and those within their control.

12. Jadoo Defendants object to DISH's Definition of "Jadoo Box" to the extent that the definition includes Jadoo set top boxes other than the Jadoo4, Jadoo5, and Jadoo5S set top boxes as identified in DISH's Complaint. Jadoo Defendants will respond to a Request that uses that term only with respect to Jadoo4, Jadoo5, and Jadoo5S set top boxes.

13. Jadoo Defendants object to DISH's Definition of "Jadoo Service" and all Definitions using that term to the extent that **[*27]** "Jadoo Service" includes streaming services accessed on platforms other than the Jadoo4, Jadoo5, and Jadoo5S set top boxes as identified in DISH's Complaint. Jadoo Defendants will respond to a Request that uses that term or other Definitions incorporating that term only with respect to Jadoo4, Jadoo5, and Jadoo5S set top boxes.

14. Jadoo Defendants object to DISH's Definition of "SASP" as vague and ambiguous. Neither the Requests nor the cited paragraphs of DISH's complaint provide a definition of the term "SASP" or "South Asian Super Pack."

15. Jadoo Defendants object to Instruction No. 13 on the grounds that the specified period ("January 2015 to the present") for the Requests is overbroad and unduly burdensome, and seeks information not relevant to the claim or defense of any party or not proportional to the needs of the case. For the purpose of responding to the Requests, unless otherwise specified in their responses and objections, Jadoo Defendants define the relevant time period to be the three years before DISH filed its Complaint in this litigation, i.e., November 20, 2015 to November 20, 2018.

16. Jadoo Defendants object to each and every request for production to the extent **[*28]** they seek the production of "all" documents, or similar phrases, on the ground that such requests for production are overbroad, unduly burdensome, oppressive and, consequently, call for production of documents and things not relevant to a claim or defense of a party or not proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

17. Jadoo Defendants object to each and every request for production to the extent they seek the production of information or documents "concerning" a subject matter on the ground that such requests for production are overbroad, unduly burdensome, oppressive and, consequently, call for production of documents and things not relevant to a claim or defense of a party or not proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' **[*29]** resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

18. Jadoo Defendants object to each and every request for production to the extent that they seek the production of documents or things without any limitation as to time period and are therefore overbroad, unduly burdensome, and, consequently, call for the production of documents and things not proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit

19. As used in each objection and response made herein, "and" or "or" shall be construed both conjunctively and disjunctively, and each will include the other whenever such a dual construction would serve to bring within a category documents or information that would not otherwise be within its scope; "each" means "each and every."

20. As used in each objection and response made herein, "produce" **[*30]** shall mean either to make available for inspection and copying or to produce copies.

21. Any objection Jadoo Defendants make to any particular Request in no way limits the application of the foregoing objections to each Request. Jadoo Defendants expressly assert the objections set forth above with respect to each Request that follows.

SPECIFIC OBJECTIONS AND RESPONSES TO REQUESTS FOR PRODUCTION (SET ONE)

REQUEST NO. 1:

Documents sufficient to identify all owners of JadooTV and their percentage of ownership.

RESPONSE TO REQUEST NO. 1

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information about every owner of JadooTV, regardless of any relevance to the present litigation.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents **[*31]** that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 2:

Documents sufficient to identify all current and former officers and directors of JadooTV.

RESPONSE TO REQUEST NO. 2

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information about every current and former officer and director of JadooTV, regardless of any relevance to the present litigation.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 3:

Documents sufficient to **[*32]** identify all employees, technical support agents, customer service agents, and contractors of JadooTV that have or had managerial or supervisory responsibilities or duties concerning eMedia. SASP, VOD. or the manufacture, distribution, marketing, sale, customer support, or network design of the Jadoo Box or Jadoo Service.

RESPONSE TO REQUEST NO. 3

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek identification of essentially anyone with "managerial or supervisory responsibilities" regarding the Jadoo Box or Jadoo Service. Jadoo Defendants further object to the request because the term "managerial or supervisory responsibilities" is vague and ambiguous. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar **[*33]** privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce (i) non-privileged documents sufficient to identify employees of JadooTV in charge of the creation of the eMedia application and (ii) non-privileged documents sufficient to identify employees of JadooTV in charge of the manufacture and distribution of Jadoo4, Jadoo5, and Jadoo5S set top boxes in the United States that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 4:

Documents sufficient to identify each business involved in television products or services, whether incorporated or fictitious, that JadooTV held ownership in, operated, managed, or has been affiliated with at any time.

RESPONSE TO REQUEST NO. 4

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and **[*34]** not proportional to the needs of the case. For example, the request purports to seek the identification of any television-related business JadooTV has ever been "affiliated with," regardless of any relevance to the present litigation. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks documents identifying "each business involved in television products or services" that JadooTV has "held ownership in, operated, managed, or has been affiliated with" without any limit as to time period. Jadoo Defendants further object to the request because the term "affiliated with" is vague and ambiguous. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this **[*35]** litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 5:

Documents sufficient to identify all monetary payments and any other benefits that JadooTV provided to Sajid Sohail.

RESPONSE TO REQUEST NO. 5

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information about every payment or benefit ever provided to Mr. Sohail, at any time and regardless of any relevance to the present litigation. Jadoo Defendants further object to this request as vague and ambiguous with respect to the term "any other benefits." Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, **[*36]** Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 6:

Documents sufficient to identify all monetary payments and any other benefits that JadooTV provided to Haseeb Shah at any time.

RESPONSE TO REQUEST NO. 6

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information about every payment or benefit ever provided to Mr. Shah, at any time and regardless of any relevance to the present litigation. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks documents identifying "all monetary payments" and "any other benefits that JadooTV provided to Haseeb **[*37]** Shah" without any limit as to time period. Jadoo Defendants further object to this request as vague and ambiguous with respect to the term "any other benefits." Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 7:

Documents sufficient to identify each email address that Sajid Sohail uses or has used to conduct business.

RESPONSE TO REQUEST NO. 7

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any **[*38]** party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information about every email address Mr. Sohail has ever used to conduct any business whatsoever, at any time and regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents sufficient to identify each email address that Sajid Sohail has used to conduct business pertaining to distribution of Jadoo4, Jadoo5, and Jadoo5S set top boxes in the United States that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 8:

Documents sufficient to identify each domain name and website that JadooTV registered, **[*39]** held ownership in, paid for, or operated at any time.

RESPONSE TO REQUEST NO. 8

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information about every domain name or website ever used by JadooTV, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks documents identifying "each domain name and website" that "JadooTV registered, held ownership in, paid for, or operated" without any limit as to time period. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants **[*40]** will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 9:

Documents sufficient to identify each YouTube, DailyMotion, and GitHub username and account that JadooTV has used at any time.

RESPONSE TO REQUEST NO. 9

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information about every YouTube, DailyMotion, or GitHub account ever used by JadooTV, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks documents identifying "each YouTube, DailyMotion, and GitHub username and account that JadooTV has used" without any limit as to time period. Jadoo Defendants **[*41]** further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections. Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 10:

Documents sufficient to identify each server that JadooTV leased, held ownership in, paid for, operated, or used.

RESPONSE TO REQUEST NO. 10

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information about every server ever used in any way by **[*42]** JadooTV, regardless of any relevance to the present litigation. Jadoo Defendants further object to the term "used" as vague and ambiguous. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 11:

Documents sufficient to identify each Content Delivery Network ("CDN") that JadooTV uses or has used.

RESPONSE TO REQUEST NO. 11

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, **[*43]** and not proportional to the needs of the case. For example, the request purports to seek information about every CDN ever used in any way by JadooTV. regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 12:

All documents, including emails, that JadooTV exchanged with Verizon Trademark Services, LLC; Verizon Digital Media Services; Verizon Business Services; MCI Communications Services, Inc.; EdgeCast Networks, Inc.; INXY Ltd.; Highwinds Network Group, Inc.; StackPath, LLC; Lease Web CDN B.V.; Akamai Technologies, Inc.; **[*44]** Fishnet Communications; WorldStream B.V.; CDN.tm; or any other CDN concerning the Protected Channels, eMedia, SASP, alleged copyright infringement, or Haseeb Shah.

RESPONSE TO REQUEST NO. 12

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information about any communications with a CDN regarding eMedia, without any limitation rendering the request relevant to the present litigation. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to **[*45]** the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 13:

All documents exchanged between JadooTV and Haseeb Shah.

RESPONSE TO REQUEST NO. 13

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek every communication between JadooTV and Mr. Shah, at any time and regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents sufficient to show Jadoo Defendants' communications with Haseeb Shah pertaining to the Protected Channels **[*46]** and SASP that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 14:

All documents exchanged with Google, Inc. or YouTube concerning the Protected Channels, eMedia, SASP, copyright infringement, or Haseeb Shah.

RESPONSE TO REQUEST NO. 14

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek any documents exchanged with Google, Inc. or YouTube regarding eMedia. without any limitation rendering the request relevant to the present litigation.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or **[*47]** defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 15:

All documents that JadooTV exchanged with GitHub. Inc. or Dropbox Inc. concerning the Protected Channels, eMedia, SASP, copyright infringement, or Haseeb Shah.

RESPONSE TO REQUEST NO. 15

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek any documents exchanged with GitHub, Inc. or Dropbox, Inc. regarding eMedia, without any limitation rendering the request relevant to the present litigation.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden **[*48]** on Jadoo Defendants.

REQUEST NO. 16:

All documents that JadooTV exchanged with DailyMotion concerning the Protected Channels, eMedia, SASP, copyright infringement, or Haseeb Shah.

RESPONSE TO REQUEST NO. 16

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek any documents exchanged with DailyMotion regarding eMedia, without any limitation rendering the request relevant to the present litigation.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 17:

All documents, including diagrams, charts, maps, and schematics, concerning the process by which JadooTV's **[*49]** Live TV channels are made available on the Jadoo Service or Jadoo Box.

RESPONSE TO REQUEST NO. 17

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek "all documents" relating to the making available of Live TV channels on the Jadoo Service or Jadoo Box, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the request because the term "the process" is vague and ambiguous. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, **[*50]** Jadoo Defendants will produce non-privileged documents sufficient to describe the overall manner by which JadooTV's Live channels are made available on the Jadoo4, Jadoo5, and Jadoo5S set top boxes that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 18:

All documents, including diagrams, charts, maps, and schematics, concerning the process, at any time, by which SASP is made available on the Jadoo Service or Jadoo Box.

RESPONSE TO REQUEST NO. 18

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request could be read to require all documents relating in any way to the technical functioning of the way channels are loaded on the Jadoo Service or Jadoo Box, regardless of any relevance to the present litigation. Jadoo **[*51]** Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks "[a]ll documents, including diagrams, charts, maps, and schematics, concerning the process" "by which SASP is made available on the Jadoo Service or Jadoo Box" without any limit as to time period. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the request because the term "the process" is vague and ambiguous. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents concerning making SASP available on the Jadoo4, Jadoo5, and Jadoo5S set top boxes that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their **[*52]** possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 19:

All documents, including diagrams, charts, maps, and schematics, concerning the process, at any time, by which eMedia files, including SASP, are created for use on the Jadoo Service and Jadoo Box.

RESPONSE TO REQUEST NO. 19

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request could be read to require all documents relating in any way to the technical functioning of the way eMedia files are created, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks "[a]ll documents, including diagrams, charts, maps, and schematics, concerning the process" "by which eMedia files, including SASP, are created for use on the Jadoo Service and Jadoo Box" without any limit as to time period. Jadoo Defendants further **[*53]** object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the request because the term "the process" is vague and ambiguous. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents sufficient to describe the overall manner by which eMedia files are created that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 20:

All documents, including diagrams, charts, maps, and schematics, concerning the process by which SASP is added to the Jadoo Box at any time.

RESPONSE TO REQUEST NO. 20

Jadoo Defendants incorporate by reference each of the General **[*54]** Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request could be read to require all documents relating in any way to the technical functioning of the way channels are loaded on the Jadoo Service or Jadoo Box, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks "[a]ll documents, including diagrams, charts, maps, and schematics, concerning the process by which SASP is added to the Jadoo Box" without any limit as to time period. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the request as duplicative of Request No. 18 above. Jadoo Defendants further object to the request because the term "the process" is vague and ambiguous, Jadoo Defendants further object to the request to the extent it seeks documents **[*55]** protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents concerning adding SASP to the Jadoo4, Jadoo5, and Jadoo5S set top boxes that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 21:

All documents concerning the creation or potential creation, at any time, of XML files for eMedia, including how to use CDNs or encrypt files.

RESPONSE TO REQUEST NO. 21

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek all documents about the creation of any XML **[*56]** file for eMedia at any time, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks "[a]ll documents concerning the creation or potential creation" "of XML files for eMedia, including how to use CDNs or encrypt files" without any limit as to time period. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants object to the term "including how to use CDNs or encrypt files" as unclear and ambiguous in the context of the request. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections. Jadoo Defendants will produce non-privileged documents sufficient to describe the overall manner in which XML files are created for eMedia that are discovered after a reasonable search and diligent **[*57]** inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 22:

Documents sufficient to identify the authors and contributors to each document concerning the creation or potential creation, at any time, of XML files for eMedia.

RESPONSE TO REQUEST NO. 22

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information about the authorship of every document relating to the creation of any XML file for eMedia, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks documents "sufficient to identify the authors and contributors to each document concerning the creation or potential creation" "of XML files for eMedia" without any limit as to time period. **[*58]** Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 23:

All documents, including diagrams, charts, maps, and schematics concerning the process by which VOD content is made available on the Jadoo Service or Jadoo Box. including the selection, incorporation, and arrangement of such content.

RESPONSE TO REQUEST NO. 23

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not **[*59]** proportional to the needs of the case. For example, the request could be read to seek all documents concerning the way that VOD content is made available on the Jadoo Service or Jadoo Box, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the request because the term "the process" is vague and ambiguous. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 24:

Documents **[*60]** sufficient to identify the dates on which each Protected Channel was transmitted or otherwise made available for viewing on the Jadoo Service or Jadoo Box.

RESPONSE TO REQUEST NO. 24

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. Jadoo Defendants further object to the request because the term "transmitted or otherwise made available for viewing" is vague and ambiguous in the context of the request. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents sufficient to identify the dates on which each Protected Channel was purportedly transmitted on the Jadoo4, Jadoo5, and Jadoo5S set top boxes that are discovered **[*61]** after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 25:

Documents sufficient to identify each source or location from which JadooTV acquired each of the Protected Channels that were transmitted or otherwise made available for viewing on the Jadoo Service or Jadoo Box.

RESPONSE TO REQUEST NO. 25

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. In Jadoo Defendants object to the terms "source or location," "acquired," and "transmitted or otherwise made available for viewing" as vague and ambiguous in the context of the request. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest **[*62]** privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents sufficient to identify the source of each of the Protected Channels purportedly transmitted on the Jadoo4, Jadoo5, and Jadoo5S set top boxes that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 26:

All documents concerning making the Protected Channels available on the Jadoo Service or Jadoo Box.

RESPONSE TO REQUEST NO. 26

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, **[*63]** common-interest privilege, or similar privileges or protections. Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents regarding making the Protected Channels available on the Jadoo4, Jadoo5, and Jadoo5S set top boxes that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 27:

All documents, including any agreements or communications, that JadooTV alleges gives JadooTV the rights to transmit or provide access to the Protected Channels.

RESPONSE TO REQUEST NO. 27

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product **[*64]** doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents responsive to this request that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 28:

Documents sufficient to identify each payment that JadooTV made to acquire the rights to transmit or provide access to the Protected Channels.

RESPONSE TO REQUEST NO. 28

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest **[*65]** privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents responsive to this request that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 29:

All cease and desist correspondence, notices of claimed infringement, and other documents and communications requesting that JadooTV stop transmitting or providing access to a channel or program.

RESPONSE TO REQUEST NO. 29

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, this request purports to seek documents relating to channels and programs that are not at issue in the litigation.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: **[*66]** Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 30:

All responses and documents concerning each cease and desist correspondence, notices of claimed infringement, and other documents and communications requesting that JadooTV stop transmitting or providing access to a channel or program.

RESPONSE TO REQUEST NO. 30

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, this request purports to seek documents relating to channels and programs that are not at issue in the litigation. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client **[*67]** privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 31:

Documents sufficient to identify each advertisement for the Jadoo Service or Jadoo Box that was made by JadooTV, or for which JadooTV paid, either in whole or in part.

RESPONSE TO REQUEST NO. 31

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, this request purports to seek documents regarding every single advertisement for the Jadoo Service or Jadoo Box, regardless of any relevance to the present litigation. In addition, Jadoo Defendants object to the **[*68]** request as duplicative, unduly burdensome, expensive, and oppressive on the ground that it seeks documents currently in DISH's possession, custody or control, or that are obtainable from some other source that is more convenient, less burdensome or less expensive than Jadoo Defendants. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 32:

Documents sufficient to identify each advertisement for eMedia, SASP, or Protected Channel VOD that was made by JadooTV, or for which JadooTV paid, either in whole or in part.

RESPONSE TO REQUEST NO. 32

Jadoo Defendants incorporate by reference **[*69]** each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, this request purports to seek documents regarding every single advertisement for eMedia by JadooTV, regardless of any relevance to the present litigation. In addition, Jadoo Defendants object to the request as duplicative, unduly burdensome, expensive, and oppressive on the ground that it seeks documents currently in DISH's possession, custody or control, or that are obtainable from some other source that is more convenient, less burdensome or less expensive than Jadoo Defendants. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents sufficient to identify advertisements by JadooTV, or **[*70]** for which JadooTV paid, for SASP or Protected Channel VOD that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 33:

Documents sufficient to identify all of JadooTV's present and former resellers in the United States.

RESPONSE TO REQUEST NO. 33

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information about every one of JadooTV's resellers in the United States, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure **[*71]** by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 34:

All documents concerning communications with JadooTV's customers or resellers concerning the Protected Channels.

RESPONSE TO REQUEST NO. 34

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client **[*72]** privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents responsive to this request that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 35:

All documents concerning communications with JadooTV's customers or resellers concerning eMedia, SASP, or Protected Channel VOD.

RESPONSE TO REQUEST NO. 35

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information about any communications with JadooTV's customers or resellers concerning eMedia. regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks **[*73]** documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents concerning communications with JadooTV's customers or resellers concerning SASP or Protected Channel VOD that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 36:

All documents concerning communications with JadooTV's customers or resellers concerning the addition or removal of channels or programs from the Jadoo Service or Jadoo Box.

RESPONSE TO REQUEST NO. 36

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, **[*74]** the request purports to seek documents concerning any change in channels or programs, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 37:

All documents concerning communications with JadooTV's employees or agents concerning eMedia, SASP, or Protected Channel VOD at any time.

RESPONSE TO REQUEST NO. 37

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant **[*75]** to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information about any communications with JadooTV's employees or agents concerning eMedia, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks all documents "concerning communications with

JadooTV's employees or agents concerning eMedia. SASP, or Protected Channel VOD" without any limit as to time period. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections. Jadoo Defendants will produce non-privileged documents concerning communications with JadooTV's employees or agents concerning SASP or Protected Channel VOD that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, **[*76]** custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 38:

All documents concerning efforts JadooTV made to ensure that the Protected Channels are not transmitted or otherwise accessed using the Jadoo Service or Jadoo Box.

RESPONSE TO REQUEST NO. 38

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections. Jadoo Defendants will produce non-privileged documents sufficient to describe efforts JadooTV made to ensure **[*77]** that the Protected Channels are not transmitted or otherwise accessed on the Jadoo4, Jadoo5, and Jadoo5S set top boxes that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 39:

All documents concerning unfavorable comments, reviews, or criticisms about the Jadoo Service or Jadoo Box.

RESPONSE TO REQUEST NO. 39

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek all negative commentary about the Jadoo Service or Box, regardless of any relevance to the present litigation. In addition, Jadoo Defendants object to the request as duplicative, unduly burdensome, expensive, and oppressive on the ground that it seeks documents currently in DISH's possession, custody or control, or that are obtainable **[*78]** from some other source that is more convenient, less burdensome or less expensive than Jadoo Defendants. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 40:

All documents that reference the Jadoo Service or Jadoo Box, and also reference the Protected Channels.

RESPONSE TO REQUEST NO. 40

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs **[*79]** of the case. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents that reference Jadoo4, Jadoo5, and Jadoo5S set top boxes and that also reference the Protected Channels that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 41:

All documents that reference the Jadoo Service or Jadoo Box, and also reference eMedia, SASP, or Protected Channel VOD at any time.

RESPONSE TO REQUEST NO. 41

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional **[*80]** to the needs of the case. For example, the request purports to seek documents that reference the Jadoo Service or Jadoo Box, and also reference eMedia, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks "[a]ll documents that reference the Jadoo Service or Jadoo Box, and also reference eMedia, SASP. or Protected Channel VOD" without any limit as to time period. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents that reference Jadoo4, Jadoo5, and Jadoo5S set top boxes and that also reference SASP or Protected Channel VOD that are discovered after a reasonable search and diligent **[*81]** inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 42:

All documents concerning the creation, domain registration, ownership, or design of the website www.jadootv.com.

RESPONSE TO REQUEST NO. 42

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek all documents concerning the design of the JadooTV website, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest **[*82]** privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (if) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 43:

Documents sufficient to identify each person involved in designing, updating, or supplying content for the website *www.jadootv.com.*

RESPONSE TO REQUEST NO. 43

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek the identities of every person involved in supplying content for JadooTV's website, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks confidential business information, **[*83]** trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 44:

Documents sufficient to identify each social media account, including Facebook, Twitter, Instagram, and Snapchat. that JadooTV registered or used at any time.

RESPONSE TO REQUEST NO. 44

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional **[*84]** to the needs of the case. For example, the request purports to seek documents identifying all of JadooTV's social media accounts, regardless of any relevance to the present litigation. In addition, Jadoo Defendants object to the request as duplicative, unduly burdensome, expensive, and oppressive on the ground that it seeks documents currently in DISH's possession, custody or control, or that are obtainable from some other source that is more convenient, less burdensome or less expensive than Jadoo Defendants. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks "[d]ocuments sufficient to identify each social media account, including Facebook. Twitter, Instagram. and Snapchat. that JadooTV registered or used" without any limit as to time period.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants. **[*85]**

REQUEST NO. 45:

Documents sufficient to identify all posts made to JadooTV's social media pages, including Facebook, Twitter, Instagram. and Snapchat, concerning the Protected Channels.

RESPONSE TO REQUEST NO. 45

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. In addition, Jadoo Defendants object to the request as duplicative, unduly burdensome, expensive, and oppressive on the ground that it seeks documents currently in DISH's possession, custody or control, or that are obtainable from some other source that is more convenient, less burdensome or less expensive than Jadoo Defendants. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce **[*86]** non-privileged documents responsive to this request that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 46:

Documents sufficient to identify all posts made to JadooTV's social media pages, including Facebook. Twitter, Instagram, and Snapchat, concerning eMedia, SASP, or Protected Channel VOD.

RESPONSE TO REQUEST NO. 46

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not

relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek documents identifying every post made on every one of JadooTV's social media pages concerning eMedia, regardless of any relevance to the present litigation. In addition, Jadoo Defendants object to the request as duplicative, unduly burdensome, expensive, and oppressive on the ground that it seeks documents currently in DISH's **[*87]** possession, custody or control, or that are obtainable from some other source that is more convenient, less burdensome or less expensive than Jadoo Defendants. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents sufficient to identify all posts made to JadooTV's social media pages concerning SASP or Protected Channel VOD that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 47:

Documents sufficient to identify JadooTV's monthly and annual unit and dollar sales separately for each type or line of product or service that JadooTV sold.

RESPONSE TO REQUEST NO. 47

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo **[*88]** Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information regarding JadooTV's sales of any product or service, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 48:

Documents sufficient to identify each purchaser of JadooTV's products or services, the type of product or service purchased, and amount paid.

RESPONSE TO REQUEST NO. 48

Jadoo Defendants incorporate by reference each of the General Objections set forth **[*89]** above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek the identities of each of JadooTV's customers, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants. **[*90]**

REQUEST NO. 49:

Documents sufficient to identify JadooTV's revenues, costs, and gross profits, including advertising revenue, relating to the Jadoo Service and Jadoo Box.

RESPONSE TO REQUEST NO. 49

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek financial information regarding any Jadoo Service and Jadoo Box, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden **[*91]** on Jadoo Defendants.

REQUEST NO. 50:

Documents sufficient to identify each type of Jadoo Box that JadooTV acquired or distributed.

RESPONSE TO REQUEST NO. 50

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information regarding any Jadoo Box, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the terms "type" and "acquired or distributed" as vague and ambiguous. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, **[*92]** Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 51:

Documents sufficient to identify the total number of each type of Jadoo Box that JadooTV acquired or distributed.

RESPONSE TO REQUEST NO. 51

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information regarding any Jadoo Box, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the terms "type" and "acquired or distributed" as vague and ambiguous. **[*93]** Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 52:

Documents sufficient to identify all costs that JadooTV incurred to acquire and distribute each type of Jadoo Box.

RESPONSE TO REQUEST NO. 52

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek the identification of every individual **[*94]** cost related to acquisition and distribution of any Jadoo Box, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the terms "type" and "acquired and distributed" as vague and ambiguous. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 53:

Documents sufficient to identify each payment that JadooTV received from its sale of each type of Jadoo Box.

RESPONSE TO REQUEST [*95] NO. 53

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request could be read as seeking information about every single payment associated with any Jadoo Box, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the terms "each payment ' and "type" as vague and ambiguous. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request **[*96]** may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 54:

Documents sufficient to identify each source or supplier of each type of Jadoo Box that JadooTV acquired or distributed.

RESPONSE TO REQUEST NO. 54

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek the identities of every source of any Jadoo Box, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the terms "source or supplier." "type." and "acquired or distributed" as vague and ambiguous. Jadoo Defendants further object to the request to the extent it **[*97]** seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 55:

Documents sufficient to identify each payment that JadooTV made to each source or supplier from which JadooTV acquired each type of Jadoo Box.

RESPONSE TO REQUEST NO. 55

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request could be read as seeking information about every single individual payment made to one of **[*98]** the sources or suppliers at issue in the request, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the terms "source or supplier," "type," and "acquired" as vague and ambiguous. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 56:

All documents concerning actual or potential uses of each type of Jadoo Box.

RESPONSE TO REQUEST NO. 56

Jadoo Defendants incorporate **[*99]** by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek every document detailing any functionality of any Jadoo Box. regardless of any relevance to the present litigation. In addition. Jadoo Defendants object to the request as duplicative, unduly burdensome, expensive, and oppressive on the ground that it seeks documents currently in DISH's possession, custody or control, or that are obtainable from some other source that is more convenient, less burdensome or less expensive than Jadoo Defendants. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the terms "actual or potential uses" and "type as vague and ambiguous. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney **[*100]** work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 57:

All documents that JadooTV exchanged with each supplier or source from whom JadooTV acquired each type of Jadoo Box.

RESPONSE TO REQUEST NO. 57

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek every document exchanged with a "source or supplier" of any Jadoo Box, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent **[*101]** it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the terms "source or supplier," "type," and "acquired" as vague and ambiguous. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 58:

Documents sufficient to identify each iteration of the JadooTV App and JadooGO App that JadooTV acquired or distributed.

RESPONSE TO REQUEST NO. 58

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that **[*102]** it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information regarding the Jadoo IV App and JadooGO App, regardless of any relevance to the present litigation. In addition, Jadoo Defendants object to the request as duplicative, unduly burdensome, expensive, and oppressive on the ground that it seeks documents currently in DISH's possession, custody or control, or that are obtainable from some other source that is more convenient, less burdensome or less expensive than Jadoo Defendants. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will **[*103]** meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 59:

Documents sufficient to identify the total number of each iteration of the JadooTV App and JadooGO App that JadooTV acquired or distributed.

RESPONSE TO REQUEST NO. 59

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information regarding the JadooTV App and JadooGO App, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the **[*104]** attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 60:

Documents sufficient to identify all costs that JadooTV incurred to acquire and distribute each iteration of the JadooTV App and JadooGO App.

RESPONSE TO REQUEST NO. 60

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request could be read as seeking information about every single one of the costs described in the request, regardless of any relevance to the present **[*105]** litigation. Jadoo Defendants further object to the request to the extent it seeks confidential business information. trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to this request because the term "acquire and distribute" is vague and ambiguous in the context of the request. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 61:

Documents sufficient to identify each payment that JadooTV received from its sale of each iteration of the JadooTV App and JadooGO App.

RESPONSE TO REQUEST NO. 61

Jadoo Defendants incorporate by **[*106]** reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request could be read as seeking information about each individual instance in which JadooTV received a payment relating to JadooTV App or JadooGO App, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims **[*107]** or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 62:

Documents sufficient to identify each source or supplier of each iteration of the JadooTV App and JadooGO App that JadooTV acquired or distributed.

RESPONSE TO REQUEST NO. 62

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek the identities of every "source or supplier" of every iteration of the JadooTV App and JadooGO App, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the terms "source or supplier" and "acquired or distributed" as vague and ambiguous in the context of the request. Jadoo Defendants further object to the request to **[*108]** the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 63:

Documents sufficient to identify each payment that JadooTV made to each source or supplier from which JadooTV acquired each iteration of the JadooTV App or JadooGO App.

RESPONSE TO REQUEST NO. 63

Jadoo Defendants incorporate by reference each of the General Objections set forth above Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request could be read as seeking documents relating to each **[*109]** individual payment set forth in the request, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the term "source or supplier" as vague and ambiguous in the context of the request. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 64:

All documents concerning actual or potential uses of each iteration of the JadooTV App and JadooGO App.

RESPONSE TO REQUEST NO. 64 [*110]

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not

relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek every document detailing any functionality of the JadooTV App or JadooGO App, regardless of any relevance to the present litigation. In addition. Jadoo Defendants object to the request as duplicative, unduly burdensome, expensive, and oppressive on the ground that it seeks documents currently in DISH's possession, custody or control, or that are obtainable from some other source that is more convenient, less burdensome or less expensive than Jadoo Defendants. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the term "actual or potential uses" as vague and ambiguous in the context of the request. Jadoo Defendants further object to the request to the extent it seeks documents protected **[*111]** from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 65:

All documents, including emails, that JadooTV exchanged with each supplier or source from whom JadooTV acquired each iteration of the JadooTV App and JadooGO App.

RESPONSE TO REQUEST NO. 65

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request could be read as seeking, potentially, a large swath of documents regarding the JadooTV App and **[*112]** JadooGO App, regardless of any relevance to the litigation. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the term "source or supplier" as vague and ambiguous in the context of the request. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 66:

Documents sufficient to identify each iteration of eMedia that JadooTV acquired or distributed at any time.

RESPONSE TO REQUEST NO. 66

Jadoo Defendants incorporate by reference **[*113]** each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information regarding eMedia, regardless of any relevance to the present litigation. In addition, Jadoo Defendants object to the request as duplicative, unduly burdensome, expensive, and oppressive on the ground that it seeks documents currently in DISH's possession, custody or control, or that are obtainable from some other source that is more convenient, less burdensome or less expensive than Jadoo Defendants. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks "[d]ocuments sufficient to identify each iteration of eMedia that JadooTV acquired or distributed" without any limit as to time period. Jadoo Defendants further object to the request because the term "acquired or distributed" is vague and ambiguous in the context of the request. Jadoo Defendants further object to the request to the extent it seeks confidential business **[*114]** information, trade secrets, or competitively or technically sensitive information.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 67:

Documents sufficient to identify the total number of each iteration of eMedia that JadooTV acquired or distributed at any time.

RESPONSE TO REQUEST NO. 67

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information regarding eMedia, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks "[d]ocuments sufficient **[*115]** to identify the total number of each iteration of eMedia that JadooTV acquired or distributed" without any limit as to time period. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISK to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 68:

Documents sufficient to identify all costs that JadooTV incurred to acquire and distribute each iteration of eMedia at any time.

RESPONSE TO REQUEST NO. 68

Jadoo Defendants incorporate by reference each of the General Objections set forth above Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request could **[*116]** be read as seeking information about each of the individual payments at issue in the request, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks "[d]ocuments sufficient to identify ail costs that JadooTV incurred to acquire and distribute each iteration of eMedia" without any limit as to time period. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the request because the term "acquire and distribute" is vague and ambiguous in the context of the request. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified **[*117]** to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 69:

Documents sufficient to identify each source or supplier of each iteration of eMedia that JadooTV acquired or distributed at any time.

RESPONSE TO REQUEST NO. 69

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek the identities of each source of eMedia, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks "[d]ocuments sufficient to identify each source or supplier of each iteration of eMedia that JadooTV acquired or distributed" without any limit as to time period. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, **[*118]** or competitively or technically sensitive information. Jadoo Defendants further object to the terms "source or supplier" and "acquired or distributed" as vague and ambiguous in the context of the request. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 70:

Documents sufficient to identify each payment that JadooTV made to each source or supplier from which JadooTV acquired each iteration of eMedia at any time.

RESPONSE TO REQUEST NO. 70

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the **[*119]** grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request could be read as seeking information about each of the individual payments at issue in the request, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks "[d]ocuments sufficient to identify each payment that JadooTV made to each source or supplier from which JadooTV acquired each iteration of eMedia" without any limit as to time period. Jadoo

Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the terms "source or supplier" and "acquired" as vague and ambiguous in the context of the request. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar **[*120]** privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 71:

All documents concerning actual or potential uses of each iteration of eMedia at any time.

RESPONSE TO REQUEST NO. 71

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request could be read as seeking every document detailing any functionality of eMedia, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks "[a]ll documents concerning actual or potential uses of each iteration of eMedia" **[*121]** without any limit as to time period, Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the term "actual or potential uses" as vague and ambiguous in the context of the request. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 72:

All documents that JadooTV exchanged with each supplier or source from whom JadooTV acquired each iteration of eMedia at any time.

RESPONSE TO REQUEST NO. 72

Jadoo Defendants incorporate by **[*122]** reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request could be read as seeking almost every document relating to the development of eMedia, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks "[a]ll documents that JadooTV exchanged with each supplier or source from whom JadooTV acquired each iteration of eMedia" without any limit as to time period. Jadoo Defendants further object to the terms "source or supplier" and "acquired" as vague and ambiguous in the context of the request. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client **[*123]** privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 73:

All documents concerning the design, structure, or operation of each iteration of eMedia at any time.

RESPONSE TO REQUEST NO. 73

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek every document regarding the functionality of eMedia, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks "[a]ll documents concerning **[*124]** the design, structure, or operation of each iteration of eMedia" without any limit as to time period. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (it) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 74:

All documents providing information or instructions about eMedia at any time, including the creation of eMedia files.

RESPONSE TO REQUEST NO. 74

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants **[*125]** object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request could be read as seeking all documents containing any information about eMedia, regardless of any relevance to the present litigation. In addition, Jadoo Defendants object to the request as duplicative, unduly burdensome, expensive, and oppressive on the ground that it seeks documents currently in DISH's possession, custody or control, or that are obtainable from some other source that is more convenient, less burdensome or less expensive than Jadoo Defendants. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks "[a]ll documents providing information or instructions about eMedia" "including the creation of eMedia files" without any limit as to time period. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the term "information or instructions about **[*126]** eMedia" as vague and ambiguous in the context of the request. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents sufficient to describe the overall manner in which eMedia functions that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 75:

All documents concerning software or firmware updates to eMedia or SASP at any time.

RESPONSE TO REQUEST NO. 75

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For **[*127]** example, the request purports to seek all documents regarding updates to eMedia, regardless of relevance to the present litigation. In addition, Jadoo Defendants object to the request as duplicative, unduly burdensome, expensive, and oppressive on the ground that it seeks documents currently in DISH's possession, custody or control, or that are obtainable from some other source that is more convenient, less burdensome or less expensive than Jadoo Defendants. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks "[a]ll documents concerning software or firmware updates to eMedia or SASP" without any limit as to time period. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the term "software or firmware updates to . . . SASP" as vague and ambiguous in the context of the request. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client **[*128]** privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents relating to software updates made by JadooTV to eMedia pertaining to making SASP available on the Jadoo4, Jadoo5, and Jadoo5S set top boxes that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 76:

All documents concerning SASP at any time.

RESPONSE TO REQUEST NO. 76

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. In addition, Jadoo Defendants object to the request as duplicative, unduly burdensome, expensive, and oppressive on the ground that it seeks documents currently in DISH's possession, custody or control, or that are obtainable from some **[*129]** other source that is more convenient, less burdensome or less expensive than Jadoo Defendants. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks "[a]ll documents concerning SASP" without any limit as to time period. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections. Jadoo Defendants will produce non-privileged documents concerning SASP that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 77:

All documents concerning making SASP available on the Jadoo Box or Jadoo Service at any time.

RESPONSE TO REQUEST NO. 77

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds **[*130]** that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. In addition, Jadoo Defendants object to the request as duplicative, unduly burdensome, expensive, and oppressive on the ground that it seeks documents currently in DISH's possession, custody or control, or that are obtainable from some other source that is more convenient, less burdensome or less expensive than Jadoo Defendants. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks "[a]ll documents concerning making SASP available on the Jadoo Box or Jadoo Service" without any limit as to time period. Jadoo Defendants further object to the request as duplicative of Request Nos. 18, 20, and 76 above. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections. Jadoo Defendants will produce non-privileged documents **[*131]** concerning making SASP available on the Jadoo4, Jadoo5, and Jadoo5S set top boxes that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 78:

All documents concerning the design, structure, or operation of SASP at any time.

RESPONSE TO REQUEST NO. 78

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. In addition, Jadoo Defendants object to the request as duplicative, unduly burdensome, expensive, and oppressive on the ground that it seeks documents currently in DISH'S possession, custody or control, or that are obtainable from some other source that is more convenient, less burdensome or less expensive than Jadoo Defendants. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks **[*132]** "[a]ll documents concerning the design, structure, or operation of SASP" without any limit as to time period. Jadoo

Defendants further object to the request as duplicative of Request Nos. 75 and 76 above. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents concerning the design, structure, or operation of SASP that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 79:

All documents providing information or instructions about adding SASP or Protected Channel VOD to the Jadoo Service or Jadoo Box at any time.

RESPONSE TO REQUEST NO. 79

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request **[*133]** on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. In addition, Jadoo Defendants object to the request as duplicative, unduly burdensome, expensive, and oppressive on the ground that it seeks documents currently in DISH's possession, custody or control, or that are obtainable from some other source that is more convenient, less burdensome or less expensive than Jadoo Defendants. Jadoo Defendants further object to the request as overbroad and unduly burdensome to the extent that it seeks "[a]ll documents providing information or instructions about adding SASP or Protected Channel VOD to the Jadoo Service or Jadoo Box" without any limit as to time period. Jadoo Defendants further object to the request as duplicative of Request Nos. 76-78 above. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, **[*134]** Jadoo Defendants will produce non-privileged documents providing instructions about adding SASP or Protected Channel VOD to Jadoo4, Jadoo5, and Jadoo5S set top boxes that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 80:

All documents concerning the provision of information or instructions to customers, potential customers, and resellers about how to add channels to the Jadoo Service or Jadoo Box.

RESPONSE TO REQUEST NO. 80

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information relating to the addition of any channel to the Jadoo Service or Jadoo Box, regardless of any relevance to the present litigation. In addition, Jadoo Defendants object to the request as duplicative, unduly **[*135]** burdensome, expensive, and oppressive on the ground that it seeks documents currently in DISH's possession, custody or control, or that are obtainable from some other source that is more convenient, less burdensome or less expensive than Jadoo Defendants. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 81:

All Jadoo customer service chat logs, recordings, and call notes concerning eMedia, Protected Channel VOD, SASP, or the Protected Channels.

RESPONSE TO REQUEST NO. 81

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants **[*136]** object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information regarding any contact between JadooTV and its customers regarding eMedia, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents sufficient to describe customer service logs or communications concerning Protected Channels, Protected Channel VOD, or SASP that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 82:

All documents concerning training and instructions **[*137]** provided to Jadoo technical support and customer service agents.

RESPONSE TO REQUEST NO. 82

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request seeks all training materials, regardless of any relevance to the litigation. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims **[*138]** or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 83:

All documents concerning the design, structure, or operation of the VOD feature of the Jadoo Service.

RESPONSE TO REQUEST NO. 83

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request seeks all documents concerning the VOD feature, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their **[*139]** objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 84:

All documents providing information or instructions about VOD on the Jadoo Service.

RESPONSE TO REQUEST NO. 84

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request seeks all documents providing information about VOD on the Jadoo Service, regardless of any relevance to the present litigation. In addition, Jadoo Defendants object to the request as duplicative, unduly burdensome, expensive, and oppressive on the ground that it seeks documents currently in DISH's possession, custody or control, or that are obtainable from some other source that is more convenient, **[*140]** less burdensome or less expensive than Jadoo Defendants. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 85:

All documents concerning the supplier or source of Protected Channel VOD on the Jadoo Service.

RESPONSE TO REQUEST NO. 85

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond **[*141]** the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. In addition. Jadoo Defendants object to the request as duplicative, unduly burdensome, expensive, and oppressive on the ground that it seeks documents currently in DISH's possession, custody or control, or that are obtainable from some other source that is more convenient, less burdensome or less expensive than Jadoo Defendants. Jadoo defendants further object to the term "supplier or source" as vague and ambiguous as used in the request. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents concerning the source of Protected Channel VOD on the Jadoo4, Jadoo5, and Jadoo5S set top boxes that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist **[*142]** within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 86:

All documents concerning communications between JadooTV and any person about indemnification related to, or payment of attorneys' fees related to, the claims in DISH's complaint.

RESPONSE TO REQUEST NO. 86

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, communications between Jadoo Defendants' counsel and Jadoo Defendants regarding payment of attorneys' fees is irrelevant (in addition to being privileged). Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants further object to the term "the claims in DISH's complaint" as vague and ambiguous. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client **[*143]** privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 87:

JadooTV's financial statements, including balance sheets, income statements, profit and loss statements, cash flow statements, and change in equity statements.

RESPONSE TO REQUEST NO. 87

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek financial information regarding JadooTV, regardless of any relevance to the present litigation. Jadoo Defendants further **[*144]** object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information. Jadoo Defendants object to the term "financial statements" as vague and ambigous.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 88:

JadooTV's federal and state income tax returns.

RESPONSE TO REQUEST NO. 88

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses. and not proportional to the needs of the case. Jadoo Defendants further object to the request to the extent it seeks confidential business information, trade secrets, or competitively or technically sensitive information.

REQUEST NO. [*145] 89:

All documents that support your First Affirmative Defense that "Jadoo Defendants have not engaged in any acts that would constitute direct, indirect, or vicarious infringement of any valid claim of copyright, willfully, or otherwise."

RESPONSE TO REQUEST NO. 89

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents responsive to this request that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order **[*146]** has been entered by the Court.

REQUEST NO. 90:

All documents that support your Second Affirmative Defense that "[t]he Complaint fails to state a cause of action against Jadoo Defendants on which relief may be granted."

RESPONSE TO REQUEST NO. 90

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents responsive to this request that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by **[*147]** the Court.

REQUEST NO. 91:

All documents that support your Third Affirmative Defense that "Plaintiffs claims are barred, in whole or in part, by the applicable statutes of limitations."

RESPONSE TO REQUEST NO. 91

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents responsive to this request that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 92:

All documents **[*148]** that support your Fourth Affirmative Defense that "Plaintiff's claims are barred, in whole or in part, by the doctrines of waiver, lathes, and/or estoppel."

RESPONSE TO REQUEST NO. 92

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents responsive to this request that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 93:

All documents that support your Fifth **[*149]** Affirmative Defense that "Plaintiffs claims are barred by the doctrine of unclean hands."

RESPONSE TO REQUEST NO. 93

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents responsive to this request that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 94:

All documents that support your Sixth Affirmative Defense that "Plaintiff's claims are barred, in whole **[*150]** or in part, because Plaintiff lacks injury in fact and lacks standing under Article III of the U.S. Constitution."

RESPONSE TO REQUEST NO. 94

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents responsive to this request that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 95:

All documents that support your Seventh Affirmative Defense that "[a]ny losses or damages allegedly caused by Jadoo **[*151]** Defendants and sustained by Plaintiff are *de minimis*, remote, speculative, or transient and not cognizable at law."

RESPONSE TO REQUEST NO. 95

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents responsive to this request that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 96:

All documents that support your Eighth Affirmative Defense that "Plaintiffs **[*152]** claims are barred, in whole or in part, because Plaintiff has failed to mitigate any of its alleged damages."

RESPONSE TO REQUEST NO. 96

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents responsive to this request that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 97

All documents that support your Ninth Affirmative Defense that "Plaintiff's claims **[*153]** are barred, in whole or in part, because at least certain of the allegedly copyrighted material allegedly accessed is not owned by or registered to Plaintiff"

RESPONSE TO REQUEST NO. 97

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents responsive to this request that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 98:

All documents that support your **[*154]** Tenth Affirmative Defense that 'Plaintiffs claims are barred, in whole or in part, because the alleged copyrighted works fail to comprise copyrightable subject matter, in whole or in part, whether through the doctrine of merger or otherwise."

RESPONSE TO REQUEST NO. 98

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents responsive to this request that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective **[*155]** order has been entered by the Court.

REQUEST NO. 99:

All documents that support your Eleventh Affirmative Defense that "Plaintiff's claims are barred, in whole or in part, because the copyright registrations are fraudulent, improper, or invalid."

RESPONSE TO REQUEST NO. 99

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents responsive to this request that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective **[*156]** order has been entered by the Court.

REQUEST NO. 100:

All documents that support your Twelfth Affirmative Defense that "Plaintiffs claims are barred, in whole or in part, because Jadoo Defendants licensed, explicitly or implicitly, the alleged copyrighted works."

RESPONSE TO REQUEST NO. 100

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not

relevant to any party's claims or defenses, and not proportional to the needs of the case. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents responsive to this request that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once **[*157]** a valid protective order has been entered by the Court.

REQUEST NO. 101:

All documents that support your Thirteenth Affirmative Defense that "Plaintiffs claims are barred, in whole or in part, because the activities of Jadoo Defendants are a fair use of the alleged copyrighted works under Section 107 of the Copyright Act."

RESPONSE TO REQUEST NO. 101

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents responsive to this request that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist **[*158]** within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 102:

All documents that support your Fourteenth Affirmative Defense that "Plaintiff's claims are barred, in whole or in part, on the grounds that Plaintiff misused its copyright in violation of ***antitrust law*** and public policy."

RESPONSE TO REQUEST NO. 102

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents responsive to this request that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, **[*159]** to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

REQUEST NO. 103:

All documents that support your Fifteenth Affirmative Defense that "[t]o the extent that Plaintiff's claims of copyright infringement are directed to acts occurring wholly outside the United States, those claims for relief are barred, in whole or in part, by the doctrine of territoriality."

RESPONSE TO REQUEST NO. 103

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents responsive to this request that are discovered **[*160]** after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control, once a valid protective order has been entered by the Court.

Dated: March 25, 2019

DARIN W. SNYDER

BILL TRAC

ASHISH SUDHAKARAN

O'MELVENY & MYERS LLP

By: *_/s/ Darin W. Snyder_*

Darin W. Snyder

Attorneys for Defendants

JadooTV, Inc. and Sajid Sohail

JADOO DEFENDANTS' RESPONSES AND OBJECTIONS TO PLAINTIFF DISH NETWORK L.L.C.'S SECOND SET OF REQUESTS FOR PRODUCTION TO DEFENDANTS JADOOTV, INC. AND SAJID SOHAIL (NOS. 104-113)

PROPOUNDING PARTY: PLAINTIFF DISH NETWORK L.L.C.

RESPONDING PARTY: DEFENDANTS JADOOTV, INC. AND SAJID SOHAIL

SET NUMBER: SET TWO (NOS. 104-113)

Pursuant to *Federal Rule of Civil Procedure 34*, Defendants JadooTV, Inc. ("JadooTV") and Sajid Sohail ("Sohail") (collectively, "Jadoo Defendants"), hereby submit the following Responses and Objections to Plaintiff DISH Network, L.L.C.'s ("DISH") Second Set of Requests for Production to Defendants JadooTV. Inc. and Sajid Sohail (the "Requests") as follows:

PRELIMINARY STATEMENT

This case is still in the early stages of discovery. Despite diligent efforts to respond to these Requests, Jadoo Defendants reserve **[*161]** the right to amend or supplement their objections and responses herein if necessary at a later date, and to use subsequently discovered documents and documents now known but whose relevance, significance, or applicability has not yet been ascertained. Furthermore. Jadoo Defendants' responses are made without in any way intending to waive, but, on the contrary, intending to preserve:

1. The right to raise all questions of authenticity, foundation, relevancy, materiality, privilege and admissibility as evidence for any purpose of the documents produced in response to DISH's Requests that may arise in any subsequent proceeding in, or the trial of, this or any other action;

2. The right to object to the use of the documents produced in response to DISH's Requests in any subsequent proceeding in, or the trial date of, this or any other action on any grounds;

3. The right to object to introduction into evidence of these responses; and

4. The right to object on any ground at any time to other discovery involving the subject matter thereof.

GENERAL OBJECTIONS

Jadoo Defendants incorporate the following General Objections into each and every objection and/or individualized response contained herein, **[*162]** and into each and every amendment, supplement or modification to these responses:

1. Jadoo Defendants object to the Requests to the extent that they purport to impose obligations beyond those set forth in the Local Rules of the United States District Court for the Central District of California and the Federal Rules of Civil Procedure.

2. Jadoo Defendants object to each Request and the Definitions and Instructions to the extent they purport to require the production of documents beyond the scope of permissible discovery because they are neither relevant to a claim or defense of a party nor proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

3. Jadoo Defendants object to each Request and the Definitions and Instructions to the extent they purport to require the production of documents that are not in Jadoo Defendants' possession, custody, or control, and thereby seeks to expand obligations **[*163]** of Jadoo Defendants beyond those imposed by law.

4. Jadoo Defendants object to each Request and the Definitions and Instructions to the extent they seek unreasonably cumulative and duplicative documents for which the burden, expense, and intrusiveness of production outweighs the likelihood of further discovery of admissible evidence.

5. Jadoo Defendants object to each Request and the Definitions and Instructions to the extent they are vague and ambiguous and fail to describe the documents requested with reasonable particularity.

6. Jadoo Defendants object to each Request and the Definitions and Instructions as unduly burdensome, expensive, and oppressive to the extent they seek documents that are currently in DISH's possession, custody or control, including but not limited to documents that are publicly available or can be obtained from some other source that is more convenient, less burdensome or less expensive than Jadoo Defendants.

7. Jadoo Defendants object to each Request and the Definitions and Instructions to the extent they seek information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client

privilege, or similar **[*164]** privileges or protections. Jadoo Defendants hereby assert all such applicable privileges and protections. In the event that any privileged or protected document is inadvertently produced, such production shall not be deemed or construed to constitute a waiver of any privilege or right of Jadoo Defendants, who reserve their rights to demand that DISH return any such document and copies thereof and to prevent the use of such documents. Jadoo Defendants also object to each and every individual request for production to the extent that it seeks proprietary or confidential business or personal information or other sensitive information protected from disclosure by applicable authorities. Jadoo Defendants further object to each and every individual request for production to the extent that it seeks information or the production of documents that are within the scope of a confidentiality agreement, employment agreement, protective order or settlement agreement. Any production of information or documents subject to one or more of the aforementioned privileges or rights belonging to Jadoo Defendants should not be considered a waiver of such privileges or rights, which Jadoo Defendants reserve **[*165]** the right to exercise. And Jadoo Defendants will produce such information or document, if at all, only after entry of a suitable protective order.

8. Jadoo Defendants object to each Request and the Definitions and Instructions to the extent they seek information protected by rights of privacy under federal law.

9. Jadoo Defendants object to each Request and the Definitions and Instructions to the extent they seek trade secrets, confidential and/or proprietary information of Jadoo Defendants or any other third party. Jadoo Defendants further object to each and every Request to the extent that it seeks information falling within the scope of a confidentiality agreement, protective order or settlement agreement, or that otherwise requires the consent of any third party prior to production. No such information will be provided unless DISH secures the required consent from the appropriate third parties. In addition, no confidential, proprietary or trade secret information will be produced except pursuant to the terms of a protective order.

10. By submitting these objections, Jadoo Defendants do not in any way adopt the purported definitions of words and phrases contained in the Requests and **[*166]** Instructions. Jadoo Defendants object to those definitions to the extent that they are inconsistent with either (i) the definitions used by Jadoo Defendants or (ii) the ordinary and customary meaning of such words and phrases. Likewise, Jadoo Defendants object to the purported definitions in the Requests and Instructions to the extent that the definitions seek to impose any obligations or duties broader than, or inconsistent with, those contemplated by the Federal Rules of Civil Procedure.

11. Jadoo Defendants object to DISH's Definition of "JadooTV" to the extent that definition includes persons or entities other than Jadoo Defendants and those within their control. Jadoo Defendants will respond to a Request that uses that term only with respect to JadooTV, Inc. and Sajid Sohail, and JadooTV's United States employees.

12. Jadoo Defendants object to DISH's Definition of "Jadoo Box" to the extent that the definition includes Jadoo set top boxes other than the Jadoo4, Jadoo5, and Jadoo5S set top boxes as identified in DISH's Complaint. Jadoo Defendants will respond to a Request that uses that term only with respect to Jadoo4, Jadoo5, and Jadoo5S set top boxes.

13. Jadoo Defendants object **[*167]** to DISH's Definition of "Jadoo Service." Jadoo Defendants use the term "Jadoo Service," and will respond to a Request or other Definitions incorporating that term, as referring to only the JadooTV smart TV applications and the JadooGO mobile device applications.

14. Jadoo Defendants object to DISH's Definition of "SASP" as vague and ambiguous. Neither the Requests nor the cited paragraphs of DISH's complaint provide a definition of the term "SASP" or "South Asian Super Pack."

15. Jadoo Defendants object to Instruction No. 13 on the grounds that the specified period for the Requests is overbroad and unduly burdensome, and seeks information not relevant to the claim or defense of any party or not proportional to the needs of the case. For the purpose of responding to the Requests, unless otherwise specified in their responses and objections, Jadoo Defendants will respond for the time period of January 1, 2015 to the present.

16. Jadoo Defendants object to each and every request for production to the extent they seek the production of "all" documents, or similar phrases, on the ground that such requests for production are overbroad, unduly burdensome, oppressive and, consequently, call for **[*168]** production of documents and things not relevant to a claim or defense of a party or not proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

17. Jadoo Defendants object to each and every request for production to the extent they seek the production of information or documents "concerning" a subject matter on the ground that such requests for production are overbroad, unduly burdensome, oppressive and, consequently, call for production of documents and things not relevant to a claim or defense of a party or not proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

18. Jadoo Defendants object **[*169]** to each and every request for production to the extent that they seek the production of documents or things without any limitation as to time period and are therefore overbroad, unduly burdensome, and, consequently, call for the production of documents and things not proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

19. As used in each objection and response made herein. "and" or "or" shall be construed both conjunctively and disjunctively, and each will include the other whenever such a dual construction would serve to bring within a category documents or information that would not otherwise be within its scope; "each" means "each and every."

20. As used in each objection and response made herein, "produce" shall mean either to make available for inspection and copying or to produce copies.

21. Any objection Jadoo Defendants make to any particular Request in no way limits the application **[*170]** of the foregoing objections to each Request. Jadoo Defendants expressly assert the objections set forth above with respect to each Request that follows.

SPECIFIC OBJECTIONS AND RESPONSES TO REOUESTS FOR PRODUCTION

(SET TWO) REOUEST NO. 104:

Documents sufficient to identify all monetary payments and any other benefits that JadooTV provided to IDC Resources Pvt Ltd., Faisal Aftab, and Awais Malik from January 2014 to the present.

RESPONSE TO REOUEST NO. 104:

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information about every payment or benefit ever provided to IDC Resources Pvt Ltd., Faisal Aftab, and Awais Malik, regardless of any relevance to the present litigation. Jadoo Defendants further object to this request as vague and ambiguous with respect to the term "any other benefits."

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants **[*171]** will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are reievant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 105:

All version of the software or "patch" designed or developed by JadooTV to block access to Protected Channels in SASP or eMedia VOD.

RESPONSE TO REOUEST NO. 105:

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek production of all versions of the software or "patch" designed or developed by JadooTV, despite the fact that only the final version of the software or "patch" is even arguably relevant. Jadoo Defendants further object to the phrase "Protected Channels in SASP or eMedia VOD" as unclear, vague, and ambiguous. Jadoo Defendants further object to the request to the extent it seeks documents protected **[*172]** from disclosure by the attorney-client privilege, the attorney work product doctrine. the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections. Jadoo Defendants will produce a non-privileged, final version of the software or "patch" designed or developed by JadooTV to block access to content added by third parties to the general purpose eMedia external media player once a source code addendum to the Protective Order has been entered by the Court.

REQUEST NO. 106:

All documents concerning Peter May, pmay360, pmay360@gmail.com, or rayred@gmail.com.

RESPONSE TO REQUEST NO. 106:

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek production of all documents concerning an individual named "Peter May." and a series of user names and email accounts, but provides no context as to their connection or relevance **[*173]** to the present litigation. Without additional context, Jadoo Defendants are unable to determine how this request is relevant, whether the request is overly burdensome, whether the request is proportional to the needs of the case, what relevant documents may exist, and if they do exist, who might have custody or control of such documents. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections. Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 107:

All documents concerning ali85one or ali85one@gmail.com.

RESFONSE TO REQUEST NO. 107:

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants **[*174]** object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek production of all documents concerning "ali85one or ali85one@gmail.com," but provides no context as to their connection or relevance to the present litigation. Without additional context, Jadoo Defendants are unable to determine how this request is relevant, whether the request is overly burdensome, whether the request is proportional to the needs of the case, what relevant documents may exist, and if they do exist, who might have custody or control of such documents. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek **[*175]** documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 108:

All documents concerning betacdnzone.com, tlismoo.com, orseethen.net.

RESFONSE TO REQUEST NO. 108:

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek production of all documents concerning "betacdnzone.com, tlismoo.com, or seethen.net," but provides no context as to their connection or relevance to the present litigation. Without additional context, Jadoo Defendants are unable to determine how this request is relevant, whether the request is overly burdensome, whether the request is proportional to the needs of the case, what relevant documents may exist, and if they do exist, who might have custody or control of such documents. Jadoo Defendants further object to the request to the extent it seeks documents **[*176]** protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protection.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are reievant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 109:

All documents concerning Robert Endrison, erobert8200@gmail.com, or robert@10pennycdn.net.

RESPONSE TO REQUEST NO. 109:

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek production of all documents concerning an individual named "Robert Endrison" and a series of email accounts, but provides no context as to **[*177]** their connection or relevance to the present litigation. Without additional context, Jadoo Defendants are unable to determine how this request is reievant, whether the request is overly burdensome, whether the request is proportional to the needs of the case, what relevant documents may exist, and if they do exist, who might have custody or control of such documents. Jadoo Defendants further object to the request to the extent it seeks documents protected from disciosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 110:

All documents concerning CDN.tm, Rafa Abdul, and DV3 Electronics Inc.

RESPONSE TO REQUEST NO. 110:

Jadoo Defendants incorporate by reference each of the General **[*178]** Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek production of all documents concerning DV3 Electronics Inc., but this is a Canadian electronics store. It is not clear why any documents relating to DV3 Electronics Inc. would be relevant to this litigation, let alone all documents. As another example, the request purports to seek production of all documents concerning "CDN.tm [and] Rafa Abdul" but provides no context as to their connection or relevance to the present litigation. Without additional context, Jadoo Defendants are unable to determine how this request is relevant, whether the request is overly burdensome, whether the request is proportional to the needs of the case, what relevant documents may exist, and if they do exist, who might have custody or control of such documents. Jadoo Defendants further object to the request to the extent it seeks documents protected from disciosure by the attorney-client privilege, the attorney work product doctrine, **[*179]** the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

REQUEST NO. 111:

Documents sufficient to identify all current and former addresses and phone numbers of Haseeb Shah.

RESPONSE TO REQUEST NO. 111:

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissibie discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information about every past address and phone number Mr. Shah has ever used, regardless of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks documents protected **[*180]** from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents sufficient to identify the current address and phone number of Haseeb Shah.

REQUEST NO. 112:

Documents sufficient to identify all email addresses of Haseeb Shah.

RESPONSE TO REQUEST NO. 112:

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissibie discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information about every email address Mr. Shah has ever used, regardiess of any relevance to the present litigation. Jadoo Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges **[*181]** or protections.

Subject to and without waiving any of their objections, Jadoo Defendants will produce non-privileged documents sufficient to identify each email address that Haseeb Shah has used to conduct business pertaining to distribution of Jadoo4, Jadoo5, and Jadoo5S set top boxes in the United States that are discovered after a reasonable search and diligent inquiry and that are within the permissible scope of discovery, to the extent any exist within their possession, custody or control.

REQUEST NO. 113:

Documents sufficient to identify all JadooTV financial accounts in which Haseeb Shah has been a user or held any privileges on the account.

RESPONSE TO REQUEST NO. 113:

Jadoo Defendants incorporate by reference each of the General Objections set forth above. Jadoo Defendants object to the request on the grounds that it seeks documents beyond the scope of permissible discovery, not relevant to any party's claims or defenses, and not proportional to the needs of the case. For example, the request purports to seek information about all JadooTV financial accounts in which Haseeb Shah has been a user or held any privileges on the account, regardless of any relevance to the present litigation. **[*182]** Whether or not Haseeb Shah has been "a user or held any privileges" on a JadooTV financial account is irrelevant to the claims and defenses in the litigation. Jadoo Defendants further object to the terms "user" and "privileges" as vague and ambiguous in the context of the request. Defendants further object to the request to the extent it seeks documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the accountant-client privilege, common-interest privilege, or similar privileges or protections.

Subject to and without waiving any of their objections, Jadoo Defendants respond as follows: Jadoo Defendants will meet and confer with DISH to address how this Request may be limited and/or clarified to (i) seek documents that are relevant to the claims or defenses in this litigation and proportional to the needs of this case; and (ii) avoid placing an undue burden on Jadoo Defendants.

Dated: May 10, 2019

DARIN W. SNYDER

ALEXANDER B. PARKER

BILL TRAC

ASHISH SUDHAKARAN

O'MELVENY & MYERS LLP

By: */s/ Darin W. Snyder*

Darin W. Snyder

Attorneys for Defendants

JadooTV, Inc. and Sajid Sohail

Entrata, Inc. v. Yardi Sys.

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

August 14, 2019, Decided; August 14, 2019, Filed

Case No. 2:15-cv-00102

Reporter

2019 U.S. Dist. LEXIS 156126 *; 2019-2 Trade Cas. (CCH) P80,880; 2019 WL 4597519

ENTRATA, INC., a Delaware corporation, Plaintiff, v. YARDI SYSTEMS, INC., a California corporation, Defendant.

Prior History: Property Solutions Int'l v. Yardi Sys., 2016 U.S. Dist. LEXIS 48006 (D. Utah, Apr. 7, 2016)

Core Terms

argues, custom, summary judgment, interface, profits, antitrust, damages, intellectual property, injection, summary adjudication, undisputed, software, injurious falsehood, no evidence, decompilation, short-term, products, entitled to summary judgment, valid business, anticompetitive, discontinuation, misrepresented, announcement, monopolist's, preexisting, false advertising, antitrust claim, tort claim, competitor, factfinder

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For Yardi Systems a California corporation, Defendant: Brett L. Foster, David B. Barlow, Monica S. Call, LEAD ATTORNEYS, Jordan C. Bledsoe, DORSEY & WHITNEY LLP, Salt Lake City, UT USA; Cristina M. Fernandez, LEAD ATTORNEY, PRO HAC VICE, AXINN VELTROP & HARKRIDER LLP, New York, NY USA; David Allan Geiger, LEAD ATTORNEY, SIDLEY AUSTIN LLP, Chicago, IL USA; Fredric C. Nelson, Irene Yang, Matthew A. Richards, Michael J. Bettinger, Ryan M. Sandrock, LEAD ATTORNEYS, PRO HAC VICE, John R. Foote, NIXON PEABODY LLP, San Francisco, CA USA; Gwen Hochman Stewart, **[*2]** LEAD ATTORNEY, PRO HAC VICE, SIDLEY AUSTIN LLP, Chicago, IL USA; Jason P. Gonzalez, Shawn G. Hansen, Theodore W. Chandler, LEAD ATTORNEYS, PRO HAC VICE, NIXON PEABODY LLP, Los Angeles, CA USA; Kenina J. Lee, LEAD ATTORNEY, AXINN VELTROP & HARKRIDER LLP, Washington, DC USA; Nathan A. Greenblatt, LEAD ATTORNEY, SIDLEY AUSTIN LLP, Palo Alto, CA USA; Rachel J. Adcox, PRO HAC VICE, AXINN VELTROP & HARKRIDER LLP, Washington, DC USA.

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Judges: Clark Waddoups, United States District Court Judge.

Opinion by: Clark Waddoups

Opinion

ORDER GRANTING IN PART, AND DEYING IN PART, YARDI'S MOTION FOR SUMMARY JUDGMENT

Before the court is Yardi's Motion for Summary Judgment, (ECF No. 527). At the time Yardi originally filed its Motion, it moved for summary adjudication of (I) Entrata's business tort claims—claims 1, 2, 3, and 4; (II) Entrata's contract claims—claims 8 and 9; and (III) Entrata's antitrust claims—claims 5, 6, and 7. Entrata has since dismissed its seventh claim, (ECF No. 515) and its third, fourth, and eighth claims. (ECF No. 833.) The remaining claims before the court are therefore Entrata's first, second, fifth, sixth, and ninth claims. As explained below, the court GRANTS Yardi's Motion for Summary Adjudication of Entrata's first and ninth claims but DENIES Yardi's Motion for Summary Adjudication of Entrata's second, fifth, and sixth claims.

Facts

In support of its Motion for Summary Judgment, Yardi included sixty exhibits spanning approximately 1,900 pages. In support of its Opposition, Entrata included 264 exhibits spanning approximately 5,400 **[*4]** pages. The facts at issue are largely in dispute. (*See* ECF No. 596 at 9 ("Entrata disputes all but the following 'facts' alleged in Yardi's Motion: Nos. 2,4,10, 17, 22, 24, 25, 27 and 33."); *see also* (ECF No. 629 at 7 ("Yardi disputes as irrelevant, immaterial, misleading, and/or lacking in foundation all but the following 'facts' alleged in Entrata's Opposition: Nos. 31, 33, 39, 61, 63.").) Given the case's extensive factual background, the court discusses only those facts necessary for the court's resolution of Yardi's Summary Judgment Motion.

Summary Judgment Standard

Yardi, as the movant, "bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law." *Libertarian Party of N.M. v. Herrera, 506 F.3d 1303, 1309 (10th Cir. 2007)* (citing *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986))*. Because Yardi does not bear the burden of persuasion at trial, it may satisfy this burden "by pointing out to the court a lack of evidence on an essential element of" Entrata's claims. *Id.* (citing *Celotex, 477 U.S. at 325, 106 S. Ct. 2548*).

If Yardi meets "this initial burden, the burden then shifts to" Entrata "to set forth specific facts from which a rational trier of fact could find for the nonmovant." *Id.* (quotations omitted) (citing, among others, *Celotex, 477 U.S. at 324, 106 S. Ct. 2548*). To satisfy **[*5]** this burden, Entrata must identify facts "by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein." *Id.* (citation omitted). These facts "must establish, at a minimum, an inference of the presence of each element essential to the case." *Bausman v. Interstate Brands Corp., 252 F.3d 1111, 1115 (10th Cir. 2001)*; *see also* *Celotex, 477 U.S. at 323, 106 S. Ct. 2548* (explaining that a movant is entitled to summary judgment when "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof").

Analysis

Yardi moves for summary adjudication of (I) Entrata's remaining business tort claims—claims 1 and 2; (II) Entrata's remaining contract claim—claim 9; and (III) Entrata's remaining antitrust claims—claims 5 and 6.

I. Business Tort Claims

Entrata's remaining tort claims against Yardi are for: (A) Injurious Falsehoods (*see* First Amended Complaint (FAC) ¶ 109, ECF No. 55 at 47) and (B) False Advertising (*see* FAC ¶ 117, ECF No. 55 at 48). For these tort claims, Entrata argues that Yardi made public announcements about Entrata that Yardi knew were false.[1] Yardi argues that these tort claims fail because "[e]ven assuming Yardi made false statements," "Entrata cannot show that these statements caused **[*6]** Entrata any economic loss." (ECF No. 528 at 35.)

A. Injurious Falsehoods

Entrata alleges that "Yardi's assertions in the Yardi January 14 Announcement that Entrata engages in SQL injection and arbitrary alteration of Yardi .dll files in the Yardi Voyager code are false." (FAC ¶ 110, ECF No. 55 at 47.) Entrata argues that "the injurious falsehoods described herein have resulted in, among other things: (a) Entrata losing customers; (b) Entrata not gaining prospective customers who otherwise would have engaged with Entrata, but for the injurious falsehoods disseminated by Yardi described herein; and (c) Entrata's current customers reducing or discontinuing their business with Entrata." (FAC ¶ 113, ECF No. 55 at 47.)

As it does with the other tort claim, Yardi argues that Entrata's Injurious Falsehood claim fails because "Entrata cannot show that [Yardi's] statements caused Entrata any economic loss." (*See* ECF No. 528 at 35.) "To establish a claim for injurious falsehood" under Utah law, a "plaintiff 'must prove falsity of the statements made, malice, and **special damages**.'" *IHC Health Servs. Inc. v. ELAP Servs., LLC, No. 217CV01245JNPEJF, 2018 U.S. Dist. LEXIS 168459, 2018 WL 4688358, at *7 (D. Utah Sept. 28, 2018* **[*7]**) (bold added) (quoting *Direct Imp. Buyers Ass'n v. KSL, Inc., 538 P.2d 1040, 1042 (Utah 1975)*, *overruled on other grounds in later appeal sub nom. Direct Import Buyers Ass'n v. KSL, Inc., 572 P.2d 692 (Utah 1977))*. "The damages must specifically relate to the economic harm *caused by the disparagement* of title, product, or business." *Id.* (emphasis added). The briefing on this cause of action was limited and largely inadequate on both sides; nevertheless, the court agrees with Yardi that Entrata points to no evidence that the damages Entrata complains of—losing customers, not gaining customers, and customers discontinuing their business with Entrata—were caused by the disparaging statements regarding SQL injection. The court GRANTS Yardi's Motion for Summary Adjudication of Entrata's first claim for Injurious Falsehoods.

B. False Advertising *15 U.S.C. § 1125(a)(1)(B)*

Entrata alleges that Yardi's "January 14 Announcement and Yardi's other false and misleading communications to the industry constitute commercial speech, in that they were made by Yardi in connection with its offering a variety of software products that compete with those offered by Entrata." (FAC ¶ 119, ECF No. 55 at 48-49.) Entrata further alleges that "[a]s a direct and proximate result of Yardi's . . . misleading communications to the industry, Entrata has **[*8]** suffered injury and damages." (FAC ¶ 119, ECF No. 55 at 49.) Entrata argues that Yardi's communications "constitute actionable false advertising under *15 U.S.C. § 1125(a)(1)(B)* . . . ." (FAC ¶ 120, ECF No. 55 at 49.) Entrata further argues that it "is entitled to injunctive and monetary relief . . . pursuant to, at the least, *sections 34*, *35*, and *43 of the Lanham* Act, *15 U.S.C. §§ 1116*, *1117*, and *1125*." (FAC ¶ 123, ECF No. 55 at 50.)

"In order to succeed on its false advertising claim under *15 U.S.C. § 1125(a)(1)(B)*, [Entrata] must show:"

> (1) defendant made false or misleading representations of fact in connection with the commercial or promotion of its product or services;
> (2) in commerce;

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[1] (FAC ¶ 110, ECF No. 55 at 47 ("Yardi's assertions in the Yardi January 14 Announcement that Entrata engages in SQL injection and arbitrary alteration of Yardi .dll files in the Yardi Voyager code **are false**." (bold added).); (FAC ¶ 118, ECF No. 55 at 48 ("Yardi, in interstate commerce and in commercial promotion of its Voyager and Plug-In Products, **has made materially false or misleading representations of fact**, including but not limited to those found in the Yardi January 14 Announcement accusing Entrata of engaging in SQL injection and alteration of .dll files in the Voyager code, as well as stating that newer versions of the Voyager application do not integrate with Entrata's Point Solutions Products." (bold added).)

(3) the misrepresentations are material, *i.e.*, likely to influence the purchasing decision;

(4) that are either likely to cause confusion or mistake as to (a) the origin, association or approval of the product or services with or by another; or (b) the characteristics of the goods or services; and

(5) injured plaintiff.

Electrology Lab., Inc. v. Kunze, 169 F. Supp. 3d 1119, 1157 (D. Colo. 2016). Yardi argues that Entrata cannot satisfy the last element because it cannot show economic loss resulting from Yardi's false advertising. (*See* ECF No. 528 at 36.)

In support of its argument, Yardi cites an Eighth Circuit case for the proposition that "[a] 'heightened level of **[*9]** proof of causation and specific injury' is required when the plaintiff is seeking money damages" under the Lanham Act.[2] (ECF No. 528 at 36 (quoting *Porous Media Corp. v. Pall Corp., 110 F.3d 1329, 1335-36 (8th Cir. 1997)*.) The language Yardi quotes regarding the "heightened level of proof of injury" relates to "suit[s] for money damages where a defendant misrepresents its *own* product . . . ." *Porous, 110 F.3d at 1336* (emphasis added).

But Entrata does not argue that Yardi misrepresented one of Yardi's own products. Rather, Entrata argues that Yardi sent out a notice to mutual Entrata and Yardi customers on January 14, 2015, that misrepresented *Entrata's* products. Entrata argues that Yardi falsely alleged that Entrata's custom interface uses SQL injection. (*See* ECF No. 596 at 18.[3]) Courts have made clear that a plaintiff's burden when a defendant misrepresents its own products is different than when a defendant misrepresents a competitor's products. *See* *Porous, 110 F.3d at 1334* ("In *Harper House*, the defendant made false statements about its own product with no reference to another's product. Under the circumstances, the court required specific proof of causation and damage. This is in contrast to a case of comparative advertising where the plaintiff's product is specifically targeted."). "[I]n cases **[*10]** where there is no comparative advertising involved, the plaintiff must shoulder the full burden of proof of both cause in fact and injury." *Id.* But "in comparative advertising cases where money damages are sought and where there exists proof of willful deception," a plaintiff is entitled to a "presumption of causation and harm to the plaintiff." *See* *id. at 1336*.

The Tenth Circuit has discussed the "presumption of causation and injury" "that allows a factfinder to presume injury caused by representations which are literally false or demonstratively deceptive." *Hutchinson v. Pfeil, 211 F.3d 515, 522 (10th Cir. 2000)*. "[T]his presumption is . . . invoked primarily to resolve the merits of Lanham Act claims—to establish injury as an essential element of the claim . . . ." *Id.* The Tenth Circuit has provided that "the presumption is properly limited to circumstances in which injury would indeed likely flow from the defendant's objectionable statements, i.e., when the defendant has explicitly compared its product to the plaintiff's or the plaintiff is an obvious competitor with respect to the misrepresented product." *Id.*

Viewing the evidence in the light most favorable to Entrata, the court finds that there are sufficient facts to allow a factfinder to presume **[*11]** Entrata's injury. Yardi's own witness admitted that the representation that "Entrata's customer interface is known to use SQL injection" "was a wording choice . . . that was incorrect." (*See* ECF No. 597-4 at 129, Schindelbeck 131: 2-3.) This is sufficient evidence for a factfinder to determine that Yardi's statement was false.

Yardi's (possibly) false statement was that Entrata's "custom interface" "is known to use SQL injection." (ECF No. 597-13 at 9.) Entrata has presented evidence that "SQL injection" "is a term used typically by hackers and attackers

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[2] Yardi does not address the fact that Entrata, in its First Amended Complaint, seeks injunctive relief under the Lanham Act. (*See* FAC ¶ 123, ECF No. 55 at 50.) Yardi's own cited authority provides that "cases involving injunctive relief and those seeking monetary damages under the Lanham Act have different standards of proof." *Porous Media Corp., 110 F.3d at 1335*. Because Yardi does not seek summary adjudication of Entrata's request for injunctive relief, the court only focuses on Yardi's arguments related to monetary damages.

[3] Entrata agues: "Yardi's January 2015 Notice claimed that Entrata's custom interface 'is known to use SQL injection and to make .dll modifications without notice.' This was untrue." (ECF No. 596 at 18) (citations omitted).)

to attack a system. It is a technique used to attack a system intentionally. So it does have negative connotations to the public, for certain." (ECF No. 597-14 at 247.) Yardi's announcement to mutual customers was that Yardi's "standard interface application" "does not allow SQL injection . . . ." (ECF No. 597-13 at 9.) In contrast, as discussed above, Yardi's announcement made clear that Entrata "custom interface" applications were "known to use SQL injection." (ECF No. 597-13 at 9.) Yardi's announcement associated Entrata's custom interfaces with illegal hacking while simultaneously making clear that Yardi's standard interface did **[*12]** not suffer from that vulnerability. In short, Yardi made an objectionable statement that compared its standard interface to Entrata's custom interface. A reasonable factfinder could therefore apply the presumption of causation and injury. With the presumption in place, Entrata has established its entitlement to damages at this stage of the proceedings.

Of course, at trial, Yardi can overcome the presumption "by proof that customers and/or prospective customers were not deceived" by the statements related to SQL injection "and/or that [Entrata] has not suffered any damages as a result of" Yardi's statements. *Porous, 110 F.3d at 1333*. Moreover, even if Entrata establishes its claim at trial, it will "still [bear] the burden of proving an evidentiary basis to justify any monetary recovery." *Id. at 1336*.

The court DENIES Yardi's Motion for Summary Adjudication of Entrata's second claim.

II. Contract Claim

Entrata brings one remaining contract claim against Yardi for Breach of Express Contract—2006 NDA (*See* FAC ¶ 172, ECF No. 55 at 60.)

A. Breach of Express Contract

In its ninth claim, Entrata alleges that Yardi breached a 2006 non-disclosure agreement (NDA) when it "modified, reverse engineered, duplicated, simulated, decompiled, **[*13]** [and] created derivative works from, or disassembled one or more of Entrata's software programs without Entrata's prior written consent . . . ." (FAC ¶ 175, ECF No. 55 at 60.) Entrata argues that Yardi breached the NDA in two ways. (*See* FAC ¶¶ 176-177, ECF No. 55 at 60.) First, Entrata argues that Yardi's CEO in 2009 "instruct[ed] his software developers to decompile the Entrata custom integration to obtain its source code . . . ." (FAC ¶ 176, ECF No. 55 at 60.) Second, Entrata argues that "Yardi purposefully" modified, removed, renamed, or disabled "the diagnostics.asmx file located within Entrata's custom interface files" in 2015. (FAC ¶ 177, ECF No. 55 at 60.)

The NDA provided that it "shall be construed and enforced in accordance with the laws of the State of California." (ECF No. 597-10 at 303.) In this case, there is complete diversity of citizenship. (*See* FAC ¶¶ 1-2, ECF No. 55 at 2.) "A federal court sitting in diversity applies the . . . choice of law rules . . . of the forum state." *Barrett v. Tallon, 30 F.3d 1296, 1300 (10th Cir.1994)*. The forum state is Utah. "Under Utah's choice of law rules, a contractual provision selecting a particular state's law will be upheld." *Wakefield Kennedy, LLC v. State Capital Holdings, LLC, 614 F. App'x 929, 933 (10th Cir. 2015)* (citing *Jacobsen Constr. Co. v. Teton Builders, 2005 UT 4, 106 P.3d 719, 723 (Utah 2005))*. California law governs Entrata's breach of express **[*14]** contract claim.

In California, "the elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." *Oasis W. Realty, LLC v. Goldman, 51 Cal. 4th 811, 821, 124 Cal. Rptr. 3d 256, 250 P.3d 1115, 1121 (2011)*. Yardi argues that Entrata is unable to satisfy the last element because Entrata "fails to show any damage resulting from [Yardi's] alleged breach." (ECF No. 528 at 46.)

Yardi argues that "Entrata provides no evidence that the 2009 decompilation or 2015 Quarantine caused Entrata any harm." (ECF No. 528 at 46.) With respect to the 2009 decompilation, Yardi argues that "it is undisputed that Entrata voluntarily allowed Yardi to review the Custom interface source code" in 2007, and "it is also undisputed that decompilation reveals no more information about source code than does direct source code review itself." (ECF No. 528 at 46.) Yardi further argues that Entrata has offered "no evidence that the specific version that Yardi decompiled" in 2009 had, "in fact, been upgraded or otherwise changed since 2007." (ECF No. 528 at 46 n. 154.)

In response, Entrata argues that its harm from the 2015 Quarantine is the same harm that it described **[*15]** with respect to its tort damage. (ECF No. 596 at 45.) The court agrees with Yardi that Entrata's conclusory response on this issue is insufficient to survive summary judgment. Regarding the 2009 decompilation, Entrata relies on two cases—*Artifex Software, Inc. v. Hancom, Inc., No. 16-CV-06982-JSC, 2017 U.S. Dist. LEXIS 147637, 2017 WL 4005508 (N.D. Cal. Sept. 12, 2017)* and *Foster Poultry Farms, Inc. v. SunTrust Bank, 377 F. App'x 665 (9th Cir. 2010)*.

Entrata cites *Foster Poultry* for the proposition that "a violation of a confidentiality obligation can be harmful in and of itself, which is a fact in dispute for the jury." (ECF No. 596 at 45.) But in *Foster Poultry*, the defendant "misused" the plaintiff's "information *for its own profit." Foster Poultry, 377 F. App'x at 669* (emphasis in original). Moreover, the "gains from the breach" of the confidentiality agreement were "specifically quantifiable." *Id. at 668*. It was for this reason that the Ninth Circuit held that "under California law, a defendant's unjust enrichment can satisfy the 'damages' element of a breach of contract claim, such that disgorgement is a proper remedy." *Id. at 669*. But Entrata has pointed to no specific evidence that Yardi gained an unfair profit from its breach. Entrata's reliance on *Foster Poultry* is therefore misplaced.

Entrata also cites to *Artifex* in support of its argument that "Yardi gained valuable, proprietary **[*16]** information about Entrata's superior technology, which has harmed Entrata and precludes summary judgment." (ECF No. 596 at 45.) But in *Artifex*, the court held that the defendant "failed to establish as a matter of law that unjust enrichment or disgorgement [were] not available as a measure of Plaintiff's damages" because in that case "a party obtained a benefit they would not have otherwise obtained *and profited from that benefit* without providing a corresponding benefit to the other party." *Artifex, 2017 U.S. Dist. LEXIS 147637, 2017 WL 4005508, at *4* (emphasis added).

Unlike in *Artifex* and *Foster Poultry*, Entrata has pointed to no evidence that Yardi profited from its breach. Based on the arguments made, the court holds that Yardi is entitled to summary judgment on Entrata's direct breach of contract claim. Yardi's Motion for Summary Adjudication of Entrata's ninth claim is GRANTED.

III. Antitrust Claims

Entrata's fifth and sixth claims allege violations of *Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2*. (*See* FAC ¶ 143, ECF No. 55 at 54; FAC ¶ 151; ECF No. 55 at 56.) *Section 2* of the Sherman Act prohibits monopolization or attempted monopolization of "any part of the trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 2*. "Illegal monopolization under **[*17]** *§ 2* of the Sherman Act has two distinct elements: '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *SOLIDFX, LLC v. Jeppesen Sanderson, Inc., 841 F.3d 827, 841 (10th Cir. 2016)* (citation omitted). "'A refusal to deal may be one of the mechanisms by which a monopolist maintains its power.'" *Id.* (citation omitted). Entrata brings its antitrust claims under the refusal to deal doctrine.

To invoke the refusal to deal doctrine, the Supreme Court and the Tenth Circuit have explained that "at least two features" "must be present." *Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1074 (10th Cir. 2013)*. First, "there must be a preexisting voluntary and presumably profitable course of dealing between the monopolist and rival." *Id.* Second, "the monopolist's discontinuation of the preexisting course of dealing must suggest a willingness to forsake shortterm profits to achieve an anti-competitive end." *Id. at 1075* (internal quotation marks omitted) (citations omitted). That is, "the monopolist's conduct must be irrational but for its anticompetitive effect." *Id.*

Yardi makes several arguments in support of its position for summary adjudication of Entrata's antitrust **[*18]** claims. The court addresses each in turn.

A. Entrata's Antitrust Claims Are Not Foreclosed by Tenth Circuit Precedent

Yardi argues that two Tenth Circuit cases require summary judgment—*Novell* and *SOLIDFX. (See* ECF No. 629 at 8 ("*Novell* Requires Summary Judgment."); *see also* ECF No. 629 at 17 ("*Jeppesen* Requires Summary Judgment.").)

Preexisting Course of Dealing

Yardi argues that Entrata cannot satisfy the first feature of a refusal to deal claim—a preexisting voluntary and profitable course of dealing. (*See* ECF No. 629 at 11.) Yardi argues that Entrata changed the preexisting course of dealing when "it introduced Entrata Core to compete head-to-head with Voyager." (*See* ECF No. 629 at 12.) But on this point, Entrata has pointed to ample evidence of a preexisting, profitable course of dealing and provides evidence that Yardi unilaterally ended the relationship. (*See e.g.*, ECF No. 597-16 at 40.) Entrata's evidence creates a dispute that precludes summary judgment.

Some Evidence that Yardi Was Willing to Sacrifice Short-Term Profits

Next, Yardi argues that "there is no evidence that Yardi gave up short-term profits." (ECF No. 629 at 12.) In *Novell*, the plaintiff "presented **no evidence** from **[*19]** which a reasonable jury could infer that Microsoft's discontinuation of [a prior] arrangement suggested a willingness to sacrifice short-term profits . . . ." *Novell, 731 F.3d at 1076* (bold added). In *Novell*, the cotemporaneous evidence presented demonstrated that Bill Gates' decision was motivated by a desire to increase Microsoft's profits—and did not "suggest Microsoft intended to forgo profits." *Id. at 1078*; *see also id. at 1076* ("[I]t's not clear Microsoft lost **or expected** to lose revenues in the short term." (bold added)). *Novell* does not require summary judgment on this issue because—viewing the evidence in the light most favorable to Entrata, as this court must—Entrata has presented at least some contemporaneous evidence that Yardi was willing "to forsake short-term profits to achieve an anti-competitive end." *Novell, 731 F.3d at 1075*. For example, Entrata has provided evidence that Yardi's CEO was willing to lose 100 customers to "cut off" Entrata's "custom integration." (ECF No. 597-8 at 76.[4]) And Entrata has pointed to evidence that Yardi offered substantial discounts to mutual Entrata/Yardi customers to persuade them to remain with Yardi after Yardi cutoff Entrata. Because Entrata has provided some evidence of Yardi's willingness to sacrifice **[*20]** short-term profits, the factfinders will have to weigh Yardi's competing evidence and decide whether Yardi's decision was motivated by a desire to increase its profits.

Some Evidence that Yardi's Conduct Was Irrational

Next, Yardi argues that "there is no evidence that Yardi acted irrationally." (ECF No. 629 at 16.) In addition to a willingness to give up short-term profits, *Novell* "require[s] a showing that the monopolist's refusal to deal was part of a larger anticompetitive enterprise, such as . . . seeking to drive a rival from the market or discipline it for daring to compete on price." *Novell, 731 F.3d at 1075*. "Put simply, the monopolist's conduct must be irrational but for its anticompetitive effect." *Id. at 1075*.

Yardi argues that "[e]ven if Yardi accepted that it would lose profits, Yardi still had multiple rational justifications to end its relationship with Entrata—reasons which . . . support summary judgment." (ECF No. 629 at 16.) A refusal to deal with a competitor does not violate *Section 2* if "valid business reasons exist for that refusal." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 597, 105 S. Ct. 2847, 2854, 86 L. Ed. 2d 467 (1985)*. Yardi argues that it "need only have a single valid business reason to defeat Entrata's claims." (ECF No. 629 at 16.)

Yardi's argument presupposes that the reasons it now **[*21]** offers for refusing to deal with Entrata were valid. But *Aspen* makes clear that that is a question for the jury to decide—not the court—so long as there is some evidence in the record that could support a finding that Yardi's proffered business reasons for its refusal to deal with Entrata were invalid. *See Aspen, 472 U.S. at 604-05* ("Since the jury was unambiguously instructed that Ski Co.'s refusal to deal with Highlands 'does not violate *Section 2* if valid business reasons exist for that refusal,' we must assume that

[4] Entrata has presented evidence that Yardi's CEO made this statement to a (previously) mutual Entrata/Yardi customer shortly after Yardi's November 2015 announcement that it would no longer host custom interfaces. (*See* ECF No. 597-8 at 72-73.)

the jury concluded that there were no valid business reasons for the refusal. The question then is whether that conclusion finds support in the record."). The court cannot at this time hold, as a matter of law, that Yardi's justifications are valid.[5]

Factual Disputes Preclude Yardi's Invocation of SOLIDFX

In its Motion for Summary Judgment, Yardi argued that "[i]t is undisputed that, at the time Yardi made its decision to no longer work with Entrata," it "believed that Entrata had violated Yardi's intellectual property rights . . . ." (ECF No. 528 at 23.) Yardi argues that **[*22]** its "decision to discontinue Entrata's access to its intellectual property is shielded from antitrust liability" because that decision is a presumptively valid business justification that Entrata cannot rebut. (*See* ECF No. 528 at 23-24.)

Yardi relies on *SOLIDFX, LLC v. Jeppesen Sanderson, Inc., 841 F.3d 827 (10th Cir. 2016)* in support of its argument. In *SOLIDFX*, the Tenth Circuit referenced decisions from the First and Federal Circuits stating that a company's "unilateral refusal to sell or license copyrighted expression" to a competitor triggers a "presumptively rational business justification for a unilateral refusal to deal." *See* *SOLIDFX, 841 F.3d at 841-42*. Although the Tenth Circuit stated that it agreed with that approach, it was not required to resolve what facts would be necessary to rebut the presumption because "SOLIDFX did not present any rebuttal evidence to prove [the defendant] acted solely with an anticompetitive motivation." *Id. at 843*. Thus, the metes and bounds of what evidence is required to rebut any presumption remains to be resolved in an appropriate case presenting that factual issue.

In *SOLIDFX*, it was undisputed that the antitrust plaintiff required access to the antitrust defendant's copyrighted toolkits in order to develop an Ipad app that would allow the antitrust **[*23]** plaintiff to develop software that would allow end users to display the defendant's copyrighted terminal charts. *See* *SolidFX, LLC v. Jeppesen Sanderson, Inc., 935 F. Supp. 2d 1069, 1082 (D. Colo. 2013)* ("it is undisputed that, in order to develop its app, Plaintiff needs access to Defendant's JIT, for which Defendant also holds a copyright.").[6] After previously granting the plaintiff

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[5] In order to answer this question, "perhaps [the] most significant" consideration for the fact finder "is the evidence relating to" Yardi itself, and whether Yardi's conduct "was justified by any normal business purpose." *Aspen, 472 U.S. at 608*. Yardi argues that it had multiple rational business purposes to end its relationship with Entrata—among them that Entrata misappropriated and lied about possessing a copy of Voyager and also that it was protecting its own intellectual property. Entrata argues that Yardi's "proffered business justifications" "are pretextual," as evidenced by Yardi's "shifting" and "inconsistent" positions. (*See* ECF No. 596 at 33.) The court agrees with Entrata that there is evidence that Yardi has offered shifting justifications for its conduct. As in *Aspen*, there is at least some evidence that from which a jury could conclude that Yardi's justifications are invalid.

Additionally, in determining whether Yardi's "refusal to deal was part of a larger anticompetitive enterprise," *Novell, 731 F.3d at 1075*, "it is [also] relevant [for the fact finder] to consider the impact on consumers and whether [Yardi] has impaired competition in an unnecessarily restrictive way." *See* *Aspen, 472 U.S at 605*. "If a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory." *Id.* (internal quotation marks omitted) (citation omitted). "It is, accordingly, appropriate to examine the effect of the challenged conduct on consumers . . . ." *Id.*

Entrata has offered ample evidence that mutual customers preferred Entrata's integration products and were displeased at being forced to choose between Yardi and Entrata—especially because that choice increased costs for some customers. (*See e.g*, ECF No. 597-14 at 40 (An email from a (previously) mutual Yardi/Entrata customer to a Yardi representative provided, in relevant part: "Given our history with Yardi, and the reputation management Marisa has cultivated over the past two decades, Sentinel chose to align itself with Yardi **at a greater financial cost than we were paying to Entrata**. To now tell our executive committee that the **increased cost comes with decreased functionality** is going to damage that reputation within our company." (bold added).))

The effect of Yardi's conduct on consumers, and the evidence that Yardi was willing to damage its own reputation in order to cut off Entrata, provides further evidence of Yardi's irrational conduct.

[6] *See also* *SolidFX, LLC v. Jeppesen Sanderson, Inc., 935 F. Supp. 2d 1069, 1076 (D. Colo. 2013)* ("In addition to the Terminal Charts, the Agreement gave Plaintiff a license to use Defendant's **copyrighted Jeppesen Integration Toolkits** ("JIT") which

access to the copyrighted toolkits to develop software for e-readers, the defendant decided to not grant the plaintiff access to the copyrighted toolkits to develop software for the Ipad apps.[7] Rather, the defendant decided to develop its own application using its own intellectual property. Thus, it used its own intellectual property to innovate and compete in the relevant market.

As explained below, the court holds that Yardi is not entitled to summary judgment based on SOLIDFX because unlike in that case, it is not undisputed that Entrata requires access to any of Yardi's copyrighted materials in order for its custom integration to function or that Yardi took the challenged action to use its intellectual property to innovate a new competitive product.

As an initial matter, the court notes that Yardi, in its Motion for Summary **[*24]** Judgment, failed to specifically identify the intellectual property that it (purportedly) refused to license to Entrata. Instead it simply stated, in a conclusory fashion, that "Yardi's decision to discontinue Entrata's access to its intellectual property is shielded from antitrust liability." (ECF No. 528 at 24.) A prerequisite to the invocation of *SOLIDFX's* presumption is that the antitrust defendant had refused to license or sell a copyrighted or patented technology. Yardi cannot invoke the presumption and argue that it is entitled to summary judgment without identifying the copyrighted technology, and the scope of protection afforded by such a copyright, in its Motion for Summary Judgment. Because it did not, it is not entitled to summary judgment based on its invocation of *SOLIDFX*.

In its Reply, with the benefit of new counsel, Yardi did specifically identify two technologies that it argues entitles it to the *SOLIDFX* presumption. Yardi argued that its "refusal to license its intellectual property to Entrata, whether through [1] **SIPP** or [2] **a custom interface**, is a *per se* valid business justification that defeats Entrata's claims." (ECF No. 629 at 17 (bold added).) Yardi argues **[*25]** that "it is undisputed that Entrata would have access to Yardi's intellectual property as a SIPP partner." (ECF No. 629 at 19 n. 16.) But Entrata disputes that claim. At oral argument, Entrata's counsel argued that "the standard interface, the purpose of the way it's designed, is to protect access to the Voyager program as well as the databases. And vendors that use the standard interface[-] they don't have access to the Voyager program or even the databases beyond what a customer might allow. That's the design of the standard interface. So there is *nothing that is copyrighted here that is needed to keep this relationship alive* and make the products work together." (ECF No. 835 at 173 (emphasis added).) In its Opposition to Yardi's Motion in Limine No. 2, Entrata similarly argues that it would not need to access any of Yardi's copyrighted software to continue its own custom interface. (*See* ECF No. 775 at 12 ("Yardi's unilateral modification and ultimate block of Entrata's own intellectual property underlie Entrata's antitrust claims. Entrata *did not want a license to any Yardi copyrighted software*—it simply sought to stop Yardi from blocking Entrata's own interface.") (emphasis added).) **[*26]**

Thus, unlike in *SOLIDFX*, it is not "undisputed that, in order" for Entrata to develop its custom integration products, it "needs to access" Yardi's copyrighted materials. *See* SOLIDFX, 935 F. Supp. 2d at 1082. This disputed fact precludes summary judgment on this issue.

B. Triable Issues of Fact Regarding Market Definition and Injury Preclude Summary Judgment

Yardi argues that "Entrata cannot carry its burden to define a relevant market," and argues that "Entrata cannot show that its alleged injury flows from a harm to competition." (ECF No. 528 at 25.) "It is well settled that defining the relevant market is an issue of fact." Telecor Communs., Inc. v. Southwestern Bell Tel. Co., 305 F.3d 1124, 1131 (10th Cir. 2002). The court agrees with Entrata that its market definition boundaries constitute material fact disputes for the jury.

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are proprietary products that allow the integration of the Terminal Charts in third party systems." (emphases added)); *see* id. at 1077 ("In January 2010, Plaintiff requested the JIT from Defendant so that Plaintiff could develop an app for the iPad."); *see id* ("Plaintiff repeatedly informed Defendant that it was moving forward with plans to develop an iPad app that would display Defendant's Terminal Charts.").

[7] *See* id. at 1077 ("On May 26, 2010, Defendant informed Plaintiff that it would not allow others, including Plaintiff, to have the JIT for the iPad.").

Yardi cites *Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 641 (3d Cir. 1996)* for the proposition that "[a]n antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality of goods or services, not just his own welfare." (ECF No. 528 at 34 (citation omitted).) "In other words, because '***antitrust law*** aims to protect competition, not competitors, [a court] must analyze the antitrust injury question from the viewpoint of the consumer.'" *Mathews, 87 F.3d at 641*. Entrata has pointed to ample evidence that Yardi's actions have harmed consumers. **[*27]** (*See e.g.*, ECF No. 596 at 21-22.) Yardi is not entitled to summary judgment on these points.

SO ORDERED this 14th day of August 2019.

BY THE COURT:

/s/ Clark Waddoups

Clark Waddoups

United States District Court Judge

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3Shape Trios A/S v. Align Tech., Inc.

United States District Court for the District of Delaware

August 15, 2019, Decided; August 15, 2019, Filed

C.A. No. 18-1332-LPS

Reporter
2019 U.S. Dist. LEXIS 137982 *; 2019 WL 3824209

3SHAPE TRIOS A/S, Plaintiff, v. ALIGN TECHNOLOGY, INC., Defendant.

Subsequent History: Adopted by, Objection overruled by, Dismissed by, in part, Dismissed by, Without prejudice, in part *3shape Trios A/S v. Align Tech., Inc., 2019 U.S. Dist. LEXIS 165242 (D. Del., Sept. 26, 2019)*

Related proceeding at *Simon & Simon v. Align Tech., Inc., 2019 U.S. Dist. LEXIS 178125 (D. Del., Oct. 15, 2019)*

Magistrate's recommendation at *3Shape Trios A/S v. Align Tech., Inc., 2020 U.S. Dist. LEXIS 88709 (D. Del., May 20, 2020)*

Core Terms

Align, scanner, anticompetitive, antitrust, anticompetitive conduct, discount, pricing, iTero, monopolization, competitors, dental, scans, termination, patent, allegations, predatory, parties, price discount, courts, anti trust law, monopoly, bundled, digital, orders, rivals, patent infringement, general rule, unilateral, retail, sham

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Judges: Jennifer L. Hall, UNITED STATES MAGISTRATE JUDGE.

Opinion by: Jennifer L. Hall

Opinion

REPORT AND RECOMMENDATION

This is an antitrust case. Plaintiff 3Shape Trios A/S ("3Shape" or "Plaintiff") filed suit against Defendant Align Technology, Inc. ("Defendant" or "Align") on August 28, 2018, alleging violations of *Section 2* of the Sherman Act, *15 U.S.C. § 2*. (D.I. 1.) Align sells the Invisalign system, an orthodontic treatment for straightening teeth without metal braces. It involves the use of custom-made, plastic dental aligners. To make the aligners, Align requires a dental professional to obtain an impression of the patient's teeth and transmit that impression to Align. One way to take an impression is with a digital intraoral scanner. In September 2015, Align introduced a scanner **[*2]** called the iTero Element, which can be used to order Invisalign from Align. When the iTero Element entered the market, 3Shape was already selling a competing scanner called the Trios. This dispute ensued.

This case is not the only litigation between these two parties. On November 14, 2017, Align filed four separate patent infringement lawsuits (asserting 26 patents) against 3Shape, all of which relate to 3Shape's Trios scanner. (Nos. 17-1646, -1647, -1648, -1649 (D. Del.).) 3Shape then filed two patent infringement lawsuits against Align, both of which relate to Align's iTero Element scanner. (Nos. 18-697, -886 (D. Del.).)

This case is the parties' latest dispute in this Court. Here, 3Shape alleges that Align has (1) attempted to monopolize the market for scanners and (2) monopolized the market for aligners. Unlike many antitrust cases filed against patent-wielding competitors, 3Shape does not allege that Align's infringement suits against 3Shape were baseless or that Align obtained its patents through fraud. Instead, 3Shape points to several actions taken by Align (including patent litigation activity) that, according to 3Shape, together amount to an anticompetitive scheme that violates **[*3]** the antitrust laws.

Pending before the Court is Align's motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*. Because 3Shape has failed to allege acts that—taken individually or together—constitute anticompetitive conduct, I recommend that Align's motion be GRANTED.

I. BACKGROUND[1]

Defendant Align is a Delaware corporation that sells Invisalign, a system of clear plastic aligners for straightening teeth. (D.I. 1 ¶¶ 13-14.) Align is the leading seller of dental aligners in the United States and has over 80% of the market. (*Id.* ¶¶ 15, 29-30.) Align originally obtained market dominance as a result of numerous patents covering its Invisalign technology. (*Id.* ¶¶ 29-31.) Many of those patents have now expired and more will be expiring this year. (*Id.* ¶ 31.)

Invisalign aligners are custom made and must be obtained from dental professionals, who order them from Align. (*Id.* ¶¶ 14, 18.) To order Invisalign, a dental professional must send a digital or physical impression of a patient's teeth to Align. (*Id.* ¶ 34.) Align also sells the iTero Element digital intraoral scanner, which can be used to obtain a digital impression for ordering aligners. (*Id.* ¶ 20.)

Plaintiff 3Shape is a Danish corporation that designs and manufactures **[*4]** dental equipment and software, including digital intraoral scanners. (*Id.* ¶¶ 12, 25.) 3Shape sells the Trios digital intraoral scanner, which "can be used for scanning, designing and ordering of clear aligners and a number of other orthodontic treatments or dental products." (*Id.* ¶ 25.) 3Shape's Trios scanner was already on the market when Align introduced the iTero Element scanner in September 2015. (*Id.* ¶¶ 20, 25-26.)

According to the Complaint, Align's iTero Element and 3Shape's Trios are the only two scanners on the market that can effectively and efficiently be used to order clear aligners. (*Id.* ¶ 28.) There are other digital scanners on the market, including the 3M True Definition and Sirona CEREC Omnicam. According to the Complaint, those scanners were designed to scan individual teeth for crowns and for other local dental restorative work, and they are not viable options for ordering clear aligners. (*Id.* ¶¶ 38-39, 42.)

The Complaint describes the following categories of conduct that, 3Shape contends, demonstrate Align's anticompetitive scheme to monopolize the scanner and aligner markets. (D.I. 17 at 6-8, 10-12.) The first category includes Align's patent litigation activities. **[*5]** (D.I. 1 ¶ 64.) Align filed patent infringement suits against OrthoClear and SmileDirectClub, two smaller aligner manufacturers. (*Id.* ¶¶ 65-66.) The OrthoClear case settled in 2006, resulting in OrthoClear going out of business. (*Id.* ¶ 65.) The SmileDirectClub case settled in 2016, resulting in

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[1] I assume the facts alleged in the Complaint to be true for purposes of resolving this motion. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

SmileDirectClub going into business with Align. (*Id.* ¶ 66.) Subsequently, in November 2017, Align sued 3Shape for infringement of Align's scanner technology. (*Id.* ¶ 50.) The Complaint alleges that these lawsuits were designed to drive Align's competitors out of business. But it does not allege that any of the litigations were objectively baseless or that Align's patents were obtained through fraud.

The second category relates to Align's unsuccessful attempts to enter into business deals with 3Shape. From 2015 to 2017, Align repeatedly asked 3Shape to configure its Trios scanners to send scans exclusively to Align (and not to other clear aligner manufacturers). (*Id.* ¶¶ 44-49.) 3Shape refused. (*Id.*) In 2016, Align asked 3Shape to enter into a joint business venture, but 3Shape again refused. (*Id.*)

The third category of conduct relates to the execution and termination of a 2015 agreement between Align **[*6]** and 3Shape, which the parties refer to as the "Interoperability Agreement." Prior to the agreement, 3Shape's Trios scanners were incapable of sending digital scans directly to Align. (*Id.* ¶ 35.) Under the agreement, Trios scanners could (but were not required to) send scans directly to Align, and Align agreed to accept Invisalign orders directly from Trios scanners. (*Id.* ¶ 35.) The parties signed the agreement in December 2015, and Align "certified" the Trios scanner to send scans directly to Align beginning in October 2016. (*Id.*) Between October 2016 and January 2018, dental professionals sent over 40,000 Invisalign orders using Trios scanners. (*Id.* ¶ 36.)

In December 2017, the month after Align filed four patent infringement lawsuits against 3Shape relating to the Trios scanner, Align notified 3Shape that it was terminating the Interoperability Agreement. (*Id.* ¶¶ 50-53.) Since the termination, which became effective in January 2018, Align no longer accepts scans sent directly from Trios scanners. (*Id.* ¶¶ 53, 59.) Align still has interoperability agreements with two other scanner manufacturers, 3M and Sirona. (*Id.* ¶ 38.) But Align told 3Shape in November 2017 that it "will not validate **[*7]** any additional intraoral scanners for use with Invisalign." (*Id.* ¶ 60.)

The fourth category of conduct relates to Align's introduction of the iTero Element Scanner in 2015. (*Id.* ¶ 20.) Align designed the iTero Element with the capability to send digital scans directly to Align for orders of Invisalign. (*Id.* ¶ 22.) The iTero Element cannot send scans directly to Align's competitors in the aligner market. (*Id.* ¶¶ 22-23.) However, a dental professional can send iTero Element scans to other aligner manufacturers by taking additional "steps" and paying Align a "fee." (*Id.* ¶ 23.) The Complaint does not provide any further information about the additional steps or the fees.

The fifth and final category of conduct involves Align's offering of price discounts. Around the time it terminated the Interoperability Agreement with 3Shape, Align launched a discount program for its iTero Element scanner. (*Id.* ¶ 57.) Under the program, owners of 3Shape's Trios scanners received a "steep" discount on the purchase of an iTero Element scanner, conditioned on the purchaser meeting a "target" number of Invisalign orders over three years.[2] (*Id.*) The Complaint contains no further details about the size of the **[*8]** discount or the target number.

According to the Complaint, Align's conduct has harmed 3Shape's scanner business. Dental professionals have stopped buying 3Shape's Trios scanner because it cannot send scans directly to Align. (*Id.* ¶¶ 68-69.) For the same reason, 3Shape has experienced some order cancellations and returns of the Trios scanner, and 3Shape lost a bid to supply scanners to a large Dental Service Organization. (*Id.* ¶¶ 68, 70.)

3Shape's Complaint sets forth the following claims: monopolization of the clear aligner market under *Section 2* of the Sherman Act, *15 U.S.C. § 2* (Count 1); and attempted monopolization of the market for scanners for orthodontic treatment under *Section 2* of the Sherman Act (Count 2).[3] (D.I. 1 ¶¶ 87, 96, 104.)

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[2] The Complaint alleges that Align "improperly" used 3Shape's customer list in connection with the discount program, but it doesn't say what Align did or why it was improper. (*Id.* ¶ 57.) There are no allegations that Align employed bad faith, deceptive, or illegal conduct.

[3] The Complaint also contains a request styled as "Count Three," in which 3Shape seeks an anti-suit injunction against Align. (D.I. 1 ¶¶ 104-113.) 3Shape does not oppose dismissal of this Count. (D.I. 17 at 3 n.2.) Accordingly, I recommend dismissal of Count 3.

Align filed the pending motion to dismiss on October 17, 2018 (D.I. 11), and the parties have completed the briefing. (D.I. 12, 17, 18.) Both parties requested oral argument (D.I. 19, 20), and I heard oral argument on August 1, 2019. ("Tr. __".)

II. LEGAL STANDARDS

A defendant may move to dismiss a complaint under *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that **[*9]** is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. A claim is plausible on its face when the complaint contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A possibility of relief is not enough. *Id.* "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly, 550 U.S. at 557*). In determining the sufficiency of the complaint under the plausibility standard, all "well-pleaded facts" are assumed to be true, but legal conclusions are not. *Id. at 679*.

"[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court." *Twombly, 550 U.S. at 558* (internal marks omitted). "Antitrust claims in particular must be reviewed carefully at the pleading stage because false condemnation of competitive conduct threatens to 'chill the very conduct the antitrust laws are designed to protect.'" *In re Keurig Green Mt. Singleserve Coffee Antitrust Litig., 383 F. Supp. 3d 187, 218 (S.D.N.Y. 2019)* (quoting *Verizon Commc'ns., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004))*. However, the same *Twombly* plausibility standard applies. *W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 98 (3d Cir. 2010)* ("[I]t is inappropriate **[*10]** to apply Twombly's plausibility standard with extra bite in antitrust and other complex cases.").

III. DISCUSSION

Section 2 of the Sherman Act, *15 U.S.C. § 2*, makes it unlawful to "monopolize" or "attempt to monopolize."[4] It does not prohibit monopolies. Indeed, the possession of monopoly power is not only legal, "it is an important element of the free-market system." *Trinko, 540 U.S. at 407* ("The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth.").

A *Section 2* plaintiff must therefore do more than just prove a monopoly. To succeed on a monopolization claim, the plaintiff must demonstrate both (1) the defendant's possession of monopoly power in a relevant market and (2) anticompetitive conduct. *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007)*. To establish attempted monopolization, the plaintiff must show (1) anticompetitive conduct, (2) a specific intent to monopolize, and (3) a dangerous probability of achieving monopoly power in a relevant market. *Phila. Taxi Ass'n, Inc. v. Uber Techs., Inc., 886 F.3d 332, 339 (3d Cir. 2018)*. Importantly, both types of claims require "anticompetitive conduct." *See id. at 338* ("Anticompetitive conduct is the hallmark of an antitrust claim."). A private plaintiff (as opposed to a government plaintiff) **[*11]** must also demonstrate that it suffered injuries caused by the defendant's anticompetitive

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[4] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court." *15 U.S.C. § 2*.

conduct. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977); ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 281 (3d Cir. 2012).

Align argues that the Complaint fails to plausibly allege anticompetitive conduct. I agree. Anticompetitive conduct is "generally defined as conduct to obtain or maintain monopoly power as a result of competition on some basis other than the merits." Broadcom, 501 F.3d at 308. On the other hand, "[c]onduct that merely harms competitors, . . . while not harming the competitive process itself, is not anticompetitive." *Id.;* W. Penn, 627 F.3d at 108 ("The line between anticompetitive conduct and vigorous competition is sometimes blurry, but distinguishing between the two is critical, because the Sherman Act 'directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.'"). Accordingly, in order to be deemed exclusionary, a monopolist's conduct must have an anticompetitive effect on the market. United States v. Microsoft Corp., 253 F.3d 34, 58, 346 U.S. App. D.C. 330 (D.C. Cir. 2001).

"'Anticompetitive conduct' can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties." LePage's Inc. v. 3M, 324 F.3d 141, 152 (3d Cir. 2003) (quoting Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1087, 331 U.S. App. D.C. 226 (D.C.Cir.1998)). Examples of agreements that may constitute anticompetitive **[*12]** conduct under Section 2 include conspiracies to exclude a rival, W. Penn, 627 F.3d at 109, exclusive dealing arrangements, United States v. Dentsply, 399 F.3d 181, 187 (3d Cir. 2005), and tying agreements, Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 483, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992).

As a general rule, however, "purely unilateral conduct does not run afoul of section 2 - 'businesses are free to choose' whether or not to do business with others and free to assign what prices they hope to secure for their own products." Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1072 (10th Cir. 2013) (citing Pac. Bell Tel. Co. v. linkLine Commc'ns, 555 U.S. 438, 448, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)); *see also* Trinko, 540 U.S. at 408 ("[A]s a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'" (quoting United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)); Broadcom, 501 F.3d at 316 ("A firm is generally under no obligation to cooperate with its rivals.").

But general rules generally have exceptions, and the rule protecting unilateral conduct does too. One exception is predatory pricing. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-23, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993). A more controversial exception (albeit one recognized in the Third Circuit) is bundled discounts. LePage's, 324 F.3d at 154-58. Another is antitrust duty to deal. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 600-01, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985). Courts also recognize that deceptive or bad faith conduct can be anticompetitive. *See* Broadcom, 501 F.3d at 314 (patentee's deception of a standards setting organization can be anticompetitive); Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993) ("*PRE*") (sham litigation can **[*13]** be anticompetitive). As explained in more detail below, there are legal rules that govern the application of each of these exceptions.

The Complaint in this case sets forth five categories of conduct that, 3Shape alleges, are anticompetitive: (1) Align's institution of patent infringement suits against its competitors; (2) Align's unsuccessful attempts to enter into business deals with 3Shape; (3) Align's termination of the agreement to accept scans directly from 3Shape's Trios scanners; (4) Align's introduction of the iTero Element scanner; and (5) Align's provision of price discounts on iTero Element scanners. For the reasons set forth below, I agree with Align that those actions do not constitute actionable anticompetitive conduct, viewed either alone or together.

A. Patent litigation

"A patent . . . is an exception to the general rule against monopolies." King Drug Co. of Florence, Inc. v. SmithKline Beecham Corp., 791 F.3d 388, 394 (3d Cir. 2015) (quoting Walker Process Equip., Inc. v. Food Mach. & Chem

Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)). Because a party petitioning the government for redress is immune from antitrust liability under the *Noerr-Pennington* doctrine, the institution of patent infringement litigation generally cannot violate the antitrust laws. *See* PRE, 508 U.S. at 56; *see also* In re Wellbutrin XL Antitrust Litigation Indirect Purchaser Class, 868 F.3d 132, 147-48 (3d Cir. 2017).

There are only two exceptions to that general rule, and they are narrow. Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1068 (Fed. Cir. 1998); *see also* ***[*14]*** In re Wellbutrin, 868 F.3d at 147 ("A plaintiff claiming that a lawsuit is, by its very existence, anticompetitive and unlawful faces an uphill battle."). The first exception is when the patent infringement litigation is a "sham." PRE, 508 U.S. at 60-61. Litigation is a sham, and therefore not immune from antitrust scrutiny, only when the antitrust plaintiff can establish that the patent infringement suit was both objectively baseless and brought with an improper subjective motivation. *Id.* The second exception requires the antitrust plaintiff to show that the asserted patent was obtained through fraud. *See* Walker Process, 382 U.S. at 176-78; Nobelpharma, 141 F.3d at 1068.

In this case, the Complaint alleges that Align instituted "harassing" and "aggressive" patent suits against its competitors. (D.I. 1 ¶¶ 64-66.) But the Complaint does not allege that the suits were shams or that Align's patents were obtained by fraud. Nor does it allege any facts that plausibly suggest either theory. *See, e.g.,* Pac. Biosci. of Cal. v. Oxford Nanopore Techs., Inc., Nos. 17-275, 17-1353, 2019 U.S. Dist. LEXIS 25578, 2019 WL 668843, *3-4 (D. Del. Feb. 19, 2019) (dismissing sham litigation and *Walker Process* claims when the complaint failed to plausibly allege improper subjective motivation or deceptive intent).

Because the Complaint fails to plausibly allege sham litigation or *Walker Process* ***[*15]*** fraud, Align's litigation activity is protected by *Noerr-Pennington* immunity and cannot by itself constitute anticompetitive conduct.

B. Unaccepted proposals

The next category of conduct alleged to be anticompetitive involves Align's proposals to enter into exclusive dealing arrangements with 3Shape. The parties dispute whether Align's proposed arrangements would have been anticompetitive if consummated, but it is undisputed that 3Shape never agreed to them.

Conduct is not considered anticompetitive under Section 2 unless it has an anticompetitive effect. Dentsply, 399 F.3d at 187; Microsoft, 253 F.3d at 58. It follows that a mere offer to enter into a business deal—absent something more, like a threat that might affect the offeree's conduct—does not amount to anticompetitive conduct.

3Shape's allegations about Align's unaccepted proposals do not suggest a plausible harm to competition, nor has 3Shape explained how an unaccepted offer to enter into a business arrangement could have resulted in any harm to competition.[5] Accordingly, Align's proposals do not by themselves constitute anticompetitive conduct.[6]

C. Termination of the agreement with 3Shape

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[5] Nor has 3Shape explained how Align's offers, which 3Shape rejected, could have possibly resulted in any injury to 3Shape. *See* Brunswick Corp., 429 U.S. at 489 (requiring antitrust plaintiffs to prove injury "that flows from that which makes defendants' acts unlawful").

[6] 3Shape does not argue that Align's "attempt" to enter into an exclusive dealing arrangement qualifies as anticompetitive conduct that supports 3Shape's claim that Align "attempted monopolization" of the scanner market. Which makes sense. For one thing, the proposed arrangement would have kept 3Shape on the market. *See* Oxbow Carbon & Minerals LLC v. Union Pacific R. Co., 926 F. Supp. 2d 36, 46 (D.D.C. 2013) ("In enacting the prohibitions on monopolies, Congress was concerned about 'the complete domination of a market by a *single* economic entity,' and therefore did not include 'shared monopolies' or oligopolies within the purview of Section 2." (quoting Sun Dun, Inc. of Washington v. Coca-Cola Co., 740 F. Supp. 381, 391 (D. Md. 1990))). Nor did 3Shape suffer any injury as a result of Align's mere proposal. *See* n.5, *supra*.

The third category of conduct alleged to be anticompetitive is Align's termination **[*16]** of its agreement to accept scans sent directly from 3Shape's Trios scanners. (D.I. 1 ¶¶ 53-55.) As explained above, a firm generally has no duty to cooperate with its rivals. Firms can usually choose to do business with their rivals or they can choose not to, and they can change their minds. *See* *linkLine, 555 U.S. at 448* ("As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing."); *Christy Sports, LLC v. Deer Valley Resort Co., Ltd., 555 F.3d 1188, 1198 (10th Cir. 2009)* ("The antitrust laws should not be allowed to stifle a business's ability to experiment in how it operates, nor forbid it to change course upon discovering a preferable path."). Thus, the mere termination of a contract with a rival, while potentially invoking contract remedies, does not constitute anticompetitive conduct. *See, e.g.,* *In re Adderall XR Antitrust Litig., 754 F.3d 128, 135 (2d Cir. 2014)* ("The mere existence of a contractual duty to supply goods does not by itself give rise to an antitrust 'duty to deal.'"); *Insight Equity A.P. X, LP v. Transitions Optical, Inc., No. 10-635, 2016 U.S. Dist. LEXIS 85751, 2016 WL 3610155, at *13 (D. Del. July 1, 2016)*.

If there is any requirement that Align cooperate with 3Shape, it must fall under the narrow refusal to deal doctrine created by the Supreme Court in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*. In that case, the plaintiff and defendant ski operators had previously cooperated to offer joint passes to both companies' mountains, **[*17]** until the defendant terminated the arrangement. *Id. at 587-95*. When the plaintiff tried to recreate the multi-mountain pass by offering to pay the defendant market price for its tickets, the defendant refused. *Id. at 593-94*.

The Supreme Court affirmed a jury verdict finding that the defendant's termination of the arrangement was anticompetitive and violated *Section 2*. While *Aspen* could be interpreted to require a competitor to continue to engage in a pre-existing course of dealing once it starts, the Supreme Court has since held that *Aspen* "is at or near the outer boundary of *§ 2* liability." *Trinko, 540 U.S. at 409*. To proceed under the limited duty to deal exception created by *Aspen*, not only must the plaintiff show a pre-existing business relationship with the defendant, the circumstances surrounding the termination of that relationship must "suggest[] a willingness to forsake short-term profits to achieve an anticompetitive end." *Trinko, 540 U.S. at 409*.

In *Aspen*, the circumstances suggested that the preexisting joint ticket arrangement was profitable for the defendant, and the defendant was unwilling to renew the ticket even if compensated at its own retail price. *472 U.S. at 589-94*; *Trinko, 540 U.S. at 409*. Those facts permitted an inference that the defendant acted solely to reduce the value of the plaintiff's **[*18]** ski mountain and force it to sell. *Trinko, 540 U.S. at 409*. In other words, the defendant's conduct was "irrational but for its anticompetitive effect." *Novell, 731 F.3d at 1075*; *see also* Areeda & Hovencamp, ***Antitrust Law*** ¶ 772d3 (Supp. 2019) ("[B]efore a unilateral refusal to deal is unlawful under *§2*, the refusal must be 'irrational' in the sense that the defendant sacrificed an opportunity to make a profitable sale only because of the adverse impact the refusal would have on a rival.").

Limiting antitrust scrutiny of refusals to deal to circumstances where the defendant's conduct is economically irrational is potentially underinclusive, *i.e.*, it may allow some refusals to deal to evade antitrust scrutiny even when they actually have anticompetitive effects. *See* *Novell, 731 F.3d at 1073, 1076*. But the Supreme Court has concluded that the benefits of expanding the refusal to deal doctrine do not outweigh the costs, including (1) the risk of false positives, which may harm innovation, (2) the risk of collusion between companies forced to deal, (3) the inability of courts to supervise the terms and conditions of forced dealing, and (4) the absence of fair notice to business people. *linkLine, 555 U.S. at 452-453*; *Trinko, 540 U.S. at 408, 414*; *see also* *Novell, 731 F.3d at 1076* ("If the [refusal to deal] doctrine fails to capture every **[*19]** nuance, if it must err still to some slight degree, perhaps it is better that it should err on the side of firm independence—given its demonstrated value to the competitive process and consumer welfare—than on the other side where we face the risk of inducing collusion and inviting judicial central planning.").

Because companies are generally free to choose with whom they deal, the only path forward for 3Shape's allegations about Align's termination of their agreement is under the refusal to deal doctrine. But 3Shape's allegations lack the essential feature of an anticompetitive refusal to deal. Assuming the parties' prior agreement was profitable for Align (as alleged in the Complaint), that does not by itself lead to a plausible inference that Align's termination of the agreement was economically irrational, as required by *Aspen*. Rather, Align's conduct, as alleged, is equally consistent with an inference that Align wanted to increase sales of its own scanner. *See* *Novell, 731 F.3d at 1075* (explaining that a firm may choose to withdraw from a profitable course of dealing for procompetitive reasons, such as when a firm desires "to pursue an innovative replacement product of its own," and that courts should **[*20]** look at profits across business lines to determine if conduct is economically irrational); *Viamedia, Inc. v. Comcast Corp., No. 16-5486, 2017 U.S. Dist. LEXIS 24213, 2017 WL 698681, *5-6 (N.D. Ill. Feb. 22, 2017)* (dismissing refusal to deal claim when complaint failed to plead facts plausibly suggesting that the defendants' conduct was economically irrational); *VBR Tours, LLC v. Yankee Leisure Grp., Inc., No. 14-00804, 2015 U.S. Dist. LEXIS 130455, 2015 WL 5693735, *8-9 (N.D. Ill. Sept. 28, 2015)* (same).

Because the Complaint does not plausibly allege circumstances invoking the refusal to deal doctrine, Align's termination of its agreement with 3Shape by itself is not anticompetitive.

D. Introduction of the iTero Element scanner

The fourth category of conduct alleged to be anticompetitive covers Align's introduction of its iTero Element scanner in 2015. (D.I. 1 ¶¶ 20-24.) 3Shape takes issue with the design of Align's iTero Element scanner, which is capable of sending scans directly to Align. (*Id.* ¶¶ 22-23.) If a dental professional desires to send a scan taken by the iTero Element to one of Align's competitors, the dental professional must take additional steps and pay a fee. (*Id.* ¶ 23.) In essence, 3Shape contends that Align should have designed its scanner to make it easier for dental professionals to order scans from Align's competitors.

That is just another refusal to deal claim. 3Shape is asking Align to deal with its rivals in the aligner **[*21]** market by designing its iTero Element scanner to send them business on favorable terms, namely, (1) directly from the scanner and (2) without charge to the user. However, as already explained, "[a]s a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *linkLine, 555 U.S. at 448*.

Once again, the only path forward for 3Shape is under the refusal to deal doctrine set forth in *Aspen Skiing*. But the Complaint here fails to plausibly allege the first requirement of *Aspen*: "a preexisting voluntary and presumably profitable course of dealing between the monopolist and the rival." *Novell, 731 F.3d at 1074*. Align never had a deal with its rivals in the aligner market governing the terms and conditions under which the iTero Element could be used to send them business.[7]

Absent a duty to deal, ***antitrust law*** does not require a firm to lend its competitors a helping hand. *See* *Novell, 731 F.3d at 1072*. Align's design of its iTero Element scanner by itself does not constitute anticompetitive conduct.

E. Scanner discounts

The final category of alleged anticompetitive conduct relates to Align's offering of price discounts on its scanners. The Complaint alleges that shortly after **[*22]** it terminated its agreement with 3Shape, Align offered current owners of 3Shape's Trios scanners a "steep" discount on Align's iTero Element scanner conditioned on the purchaser meeting a "target" number of Invisalign orders over a three-year period. (D.I. 1 ¶ 57.) The Complaint contains no further details about the size of the "steep" discount or the "target" number of orders. As alleged, Align's discount program is not an exclusive dealing arrangement, since the purchaser is not required to buy only Invisalign aligners.[8] It is not a traditional tying arrangement, since the scanner purchaser is not required to buy any Invisalign

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[7] The Complaint does not allege that the design of Align's iTero Element scanner has ever changed. The Court is therefore not confronted with an allegation of anticompetitive product redesign.

aligners at all; it only must do so if it wants the discount. As pled, the arrangement is merely a price discount conditioned on the purchaser taking two of the seller's products.

Price discounts are generally not anticompetitive. *linkLine, 555 U.S. at 451*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; *Philadelphia Taxi Ass'n, 886 F.3d at 340* ("It is well established that lower prices, as long as they are not predatory, benefit consumers—'regardless of how those prices are set.'" (quoting *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990))*. That general rule has exceptions too.

The first exception is predatory pricing, which is when a monopolist prices its goods below cost in order to drive other **[*23]** competitors out of the market. Once its competitors have been eliminated, the monopolist raises its prices to supracompetitive levels.

Actual predatory pricing schemes are rare, and firms who try them rarely succeed. *Brooke Grp., 509 U.S. at 226*; *Cargill, Inc. v. Monfort of Colo., 479 U.S. 104, 121 n.17, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*. And, "because cutting prices in order to increase business often is the very essence of competition[,] mistaken inferences are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Brooke Grp., 509 U.S. at 226* (internal marks omitted). For these reasons, the predatory pricing exception to the rule protecting unilateral conduct is narrow, and it requires the antitrust plaintiff to show both (1) "that the prices complained of are below an appropriate measure of [the defendant's] costs"; and (2) that the defendant had "a dangerous probability[] of recouping its investment in below-cost prices." *Id. at 222-24*; *ZF Meritor, 696 F.3d at 272*. The rule is underinclusive in the sense that it may not capture all anticompetitive pricing schemes. But a broader rule would allow "intolerable risks of chilling legitimate price-cutting." *Brooke Grp., 509 U.S. at 223*.

3Shape's Complaint in this case does not allege predatory pricing. The Complaint contains no allegations about the cost of Align's scanner, or the amount of the discounts, **[*24]** other than to say they were "steep." (D.I. 1 ¶ 57.) Nor has 3Shape alleged that Align sold its scanners below cost. On that basis alone, 3Shape has failed to plausibly allege that the Align's scanner discounts were predatory. *See* *Varentec, Inc. v. Gridco, Inc., No. 16-217-RGA-MPT, 2017 U.S. Dist. LEXIS 86185, 2017 WL 2438846, at *4-5 (D. Del. June 6, 2017)* ("Without alleging plaintiff's actual costs, or industry standard costs, it is impossible to plausibly conclude that those alleged discounts resulted in below-cost pricing.").

The Third Circuit (but not the Supreme Court) has also recognized a bundled discount exception to the general rule protecting price discounts. A bundled discount is when a firm sells a bundle of goods for a lower price than the seller charges for the goods purchased individually. In *LePage's*, the Third Circuit held that bundled discounts can constitute anticompetitive conduct even when the predatory pricing test is not met (for example, because the goods are sold above cost). *324 F.3d at 154-157*. Under the *LePage's* standard, the antitrust plaintiff must show that the effect of the discounts is to "foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer." **[*25]** *Id. at 155*. The *LePage's* standard for bundled discounts has not been adopted by any other Circuit, and it has not been expanded in the Third Circuit. *See Cascade Health Solutions v. Peacehealth, 515 F.3d 883, 894-903, 908-09 (9th Cir. 2008)* (discussing the controversy over *LePage's*). The Third Circuit has instructed courts to interpret *LePage's* narrowly in light of more recent Supreme Court precedent. *See* *ZF Meritor, 696 F.3d at 274 n.11* (acknowledging the Supreme Court's recent emphasis on adherence to the predatory pricing test to assess the legality of price discounts).

In this case, 3Shape disclaims any reliance on a bundled discounts theory. (Tr. 25:7-13.) Even if I were to analyze Align's conduct as a bundled discount, the facts alleged in the Complaint do not satisfy the standard set forth in

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[8] At oral argument, 3Shape's counsel suggested that Align's scanner discount program operated as a *de facto* exclusive dealing arrangement. (Tr. 25:9-26:22.) According to 3Shape's counsel, the "target" number of Invisalign orders was so high that a scanner purchaser was essentially unable to order any other types of aligners. The problem with that argument, which counsel acknowledged, is that the Complaint does not allege that fact. (*Id.*) Nor does it allege any facts about the size of the target number or, more importantly, its size in relation to a dental professional's total number of aligner orders.

LePage's. The Complaint fails to allege facts permitting a plausible inference that 3Shape was unable to offer a comparable discount on its own scanners. Nor has 3Shape explained how the discounting program could have plausibly foreclosed it from the scanner market, as required by *LePage's*, because the program was restricted to dental professionals who had already purchased 3Shape's scanner. The Third Circuit has instructed lower courts not to extend *LePage's*, and I see no basis to do so on the limited allegations **[*26]** here.

In sum, 3Shape has failed to allege that Align's scanner discount program was itself anticompetitive.

F. Anticompetitive scheme

Not so fast, says 3Shape: Align's acts viewed individually may not be anticompetitive, but they must be examined together. And when they are, 3Shape argues, they demonstrate an anticompetitive scheme cognizable under *Section 2*.

The case law is replete with language that appears to support 3Shape's argument. The Supreme Court, for example, has stated that "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*. Likewise, the Third Circuit has stated that "courts must look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation." *LePage's, 324 F.3d at 162*.

Read in context, however, those statements stand for the proposition that courts must look at anticompetitive acts in combination to assess their anticompetitive effect. Those cases do not hold that unilateral acts otherwise insulated from antitrust scrutiny can be pled together to state a *Section 2* violation. *Continental Ore* involved an exclusive dealing conspiracy, not unilateral conduct. **[*27]** *370 U.S. at 698-99*. *LePage's* dealt with an anticompetitive bundled discount arrangement. *324 F.3d at 158*.

The other cases cited by 3Shape do not address the circumstances here either. In *Rochester Drug Coop. v. Braintree Laboratories*, the plaintiff alleged sham litigation, which is recognized anticompetitive conduct. *712 F. Supp. 2d 308, 318-19 (D. Del. May 19, 2010)*. Likewise in *In re Gabapentin Patent Litigation, 649 F. Supp. 2d 340, 361-65 (D.N.J. 2009)* and *In re Neurontin Antitrust Litigation, No. 02-1830, 2009 U.S. Dist. LEXIS 77475, 2009 WL 2751029, *13 (D.N.J. Aug. 28, 2009)*. In *In re Remeron Antitrust Litigation*, the Court concluded that the complaint alleged standalone anticompetitive conduct in addition to an overall scheme. *335 F. Supp. 2d 522, 528 (D.N.J. 2004)* (stating that the court was "reserv[ing] judgment" on the viability of the scheme claim). In *Microsoft Mobile Inc. v. Interdigital, Inc.*, the plaintiff alleged the type of bad faith conduct that was recognized as anticompetitive in *Broadcom. No. 15-723, 2016 U.S. Dist. LEXIS 49498, 2016 WL 8302609, *2 (D. Del. Apr. 13, 2016)*. In *American Tobacco Co. v. United States*, the Supreme Court affirmed a *Section 2* violation based on a conspiracy, not unilateral conduct. *328 U.S. 781, 809, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*. The monopolization claim in *West Penn Allegheny Health Systems* also involved a conspiracy. *627 F.3d at 109*.

As 3Shape has not pointed to any controlling authority, this question remains: can (1) patent litigation activity that does not satisfy the sham litigation or *Walker Process* rules, (2) an unaccepted offer to enter into a business deal that had no effect on the market, (3) refusals **[*28]** to deal that do not satisfy the *Aspen Skiing* rule, and (4) price discounts that don't meet the *Brooke Group* predatory pricing rules or invoke the circumstances of *LePage's*, all be combined to state an antitrust claim? The Supreme Court's analysis in *linkLine* suggests that the answer is no.

In *linkLine*, the Supreme Court considered whether antitrust plaintiffs could state a monopolization claim under a "price-squeeze" theory that consisted of two types of conduct otherwise protected from antitrust scrutiny. In that case, the defendant operated in two markets: it sold services to consumers in the retail market; and it sold wholesale services to its retail competitors. *linkLine, 555 U.S. at 442-43*. The plaintiffs, competitors in the retail market, alleged that the defendant charged them a high wholesale price and simultaneously charged consumers a low retail price. Because the plaintiffs had to match the defendant's low retail price to make sales, the plaintiffs argued that the defendants set the wholesale and retail prices to "squeeze" the plaintiffs' profit margins and force them to out of business. *Id. at 443-44*.

The Supreme Court rejected the plaintiffs' monopolization claim, reasoning that the allegations were essentially **[*29]** an amalgamation of two claims—the defendant's refusal to deal with its competitors at the wholesale level and the defendant's low pricing at the retail level—both of which are theories of anticompetitive conduct for which the Supreme Court has set forth specific legal rules. *Id. at 448-52*. Applying the refusal to deal rule set forth in *Aspen* and *Trinko* and the predatory pricing rule set forth in *Brooke Group*, the Supreme Court concluded that the plaintiffs' complaint stated neither type of claim. *Id. at 452*. Consequently, the Supreme Court refused to recognize the "price squeeze" claim, reasoning that "[t]wo wrong claims do not make one that is right." *Id. at 457*. In so doing, the Supreme Court acknowledged "the importance of clear rules in ***antitrust law***[,]" noting specifically the inability of courts to supervise generalized duties to deal, the risk of chilling price discounts, and the need to provide guidance to businesses. *Id. at 452-53*.

Although *linkLine* was framed as a "price-squeeze" claim, the plaintiffs in that case could have just as easily characterized it as a scheme of anticompetitive conduct consisting of a refusal to deal and price discounting. *linkLine*, however, is consistent with the proposition that, when there **[*30]** are developed legal rules that restrict when otherwise-protected conduct can be scrutinized under the antitrust laws, an antitrust plaintiff must satisfy at least one of those rules in order to proceed under a theory that the combined conduct is anticompetitive.[9]

Just as the rules governing refusal to deal claims and pricing claims are underinclusive in capturing conduct with anticompetitive effects, as explained above, so too is a rule requiring an antitrust plaintiff to plead more than just unilateral conduct that is otherwise protected from antitrust scrutiny. It could be the case that a defendant's refusals to deal with its competitors, combined with its patent litigation and its offering of above-cost discounts in fact has an adverse effect on competition, as 3Shape contends here. But the Supreme Court's rules governing those types of conduct are not based on its determination that they could never harm competition. The rules are based on other considerations, including *First Amendment* rights, the risk of false positives, the inability of courts to administer forced dealing, and the need to give fair notice to businesses. *linkLine, 555 U.S. at 452-453, 455*; *Trinko, 540 U.S. at 408, 414*; *PRE, 508 U.S. at 56* *Brooke Grp., 509 U.S. at 223*; *see also* Daniel Crane, **[*31]** *Does Monopoly Broth Make Bad Soup*?, 76 Antitrust L.J. 663, 668 (2010) ("To reduce all monopolization law to a case-by-case inquiry on whether the sum of the defendant's conduct harms competition is to miss a much more complex set of policy and juridical inputs into monopolization law and to create excessive uncertainty in adjudication.").

A rule requiring plaintiffs to plead at least one instance of conduct not otherwise insulated from antitrust scrutiny is also consistent with the approach taken by other courts. *See, e.g., Eatoni Ergonomics, Inc. v. Research in Motion Corp., 486 Fed. Appx. 186, 191 (2d Cir. 2012)* (affirming dismissal of an antitrust scheme claim; "[b]ecause these alleged instances of misconduct are not independently anti-competitive, we conclude that they are not cumulatively anti-competitive either"); *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. 14-md-02503-DJC, 2015 U.S. Dist. LEXIS 125999, 2015 WL 5458570, at *12 (D. Mass. Sept. 16, 2015)* (concluding that a complaint failed to state a *Section 2* claim under an "overarching scheme" theory when none of the alleged conduct was independently anticompetitive); *In re Lipitor Antitrust Litig., No. 13-2389, 2013 U.S. Dist. LEXIS 126468, 2013 WL 4780496, *23 (D.N.J. Sept. 5, 2013)* ("Having already determined that all of the specific allegations of conduct in violation of *Section 2* . . . are meritless and insufficient to state a claim for relief, the Court finds that a claim based on the purported 'combined' impact of Plaintiffs' claims is also **[*32]** without merit."); *cf. Valassis Comm'ns, Inc. v. News Corp., No-17-7378 (PKC), 2019 U.S. Dist. LEXIS 27770, 2019 WL 802093, *9-10 (S.D.N.Y. Feb. 21, 2019)* (price discounts not anticompetitive by themselves could not be considered as part of an antitrust scheme claim).

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[9] The question of whether non-sham patent litigation can support a claim of an overall scheme to monopolize when the there are other alleged instances of anticompetitive conduct does not need to be addressed here, since the Complaint does not allege any other anticompetitive conduct. For the same reason, the Court need not answer the related question of whether unilateral conduct otherwise insulated from antitrust review can be combined with anticompetitive conduct when analyzing an antitrust scheme claim.

In short, two wrong claims did not make a right in *linkLine* and five wrong claims do not make a right here. 3Shape's contention that Align engaged in a scheme consisting of acts otherwise insulated from antitrust scrutiny is insufficient to allege anticompetitive conduct under *Section 2*.

As 3Shape's failure to plead anticompetitive conduct fully supports granting Align's motion to dismiss, the Court need not decide whether the other grounds raised by Align (lack of standing[10] and failure to allege relevant product markets) would also support dismissal.

IV. CONCLUSION

For the reasons set forth above, 3Shape's Complaint fails to plausibly allege anticompetitive conduct, a required element of monopolization and attempted monopolization under *Section 2* of the Sherman Act. I recommend that Align's motion be GRANTED, that the Complaint be DISMISSED without prejudice, and that 3Shape be granted leave to amend the Complaint within 21 days.[11]

This Report and Recommendation is filed pursuant to *28 U.S.C. § 636(b)(1)(B)*,*(C)*, *Federal Rule of Civil Procedure 72(b)(1)*, and *District of Delaware Local Rule 72.1* **[*33]** . Any objections to the Report and Recommendation shall be filed within fourteen days and limited to ten pages. Any response shall be filed within fourteen days thereafter and limited to ten pages. The failure of a party to object to legal conclusions may result in the loss of the right to *de novo* review in the district court.

The parties are directed to the Court's "Standing Order for Objections Filed Under *Fed. R. Civ. P. 72*," dated October 9, 2013, a copy of which can be found on the Court's website.

Dated: August 15, 2019

/s/ Jennifer L. Hall

Jennifer L. Hall

UNITED STATES MAGISTRATE JUDGE

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[10] Antitrust standing is a prudential limitation. As it does not affect subject matter jurisdiction, there is no requirement that the Court consider it at this time. *See* *Shionogi Pharma, Inc. v. Mylan, Inc., No. 10-1077, 2011 U.S. Dist. LEXIS 58774, 2011 WL 2174499, *3 (D. Del. May 26, 2011)* (dismissing *Section 2* claim for failure to state a claim without addressing the parties' dispute over antitrust standing).

[11] Align requests that the Complaint be dismissed without leave to amend because any amendment would be futile. However, it is not clear on this limited record that amendment would necessarily be futile. *See* *Alston v. Parker, 363 F.3d 229, 235-36 (3d Cir. 2004)* (holding that leave to amend should be granted "unless a curative amendment would be inequitable, futile, or untimely").

LexisNexis

State AG Litig. v. Acavis Holdco U.S. (In re Generic Pharms. Pricing Antitrust Litig.)

United States District Court for the Eastern District of Pennsylvania

August 15, 2019, Decided; August 15, 2019, Filed

MDL 2724; 16-MD-2724; Civil Action Nos. 17-3768; 18-284; 18-2401; 18-2533; 18-2641; 18-3299; 18-4137

Reporter

394 F. Supp. 3d 509 *; 2019 U.S. Dist. LEXIS 138007 **; 2019-2 Trade Cas. (CCH) P80,898; 2019 WL 3842901

IN RE: GENERIC PHARMACEUTICALS PRICING ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: The State Attorneys General Litigation, The Kroger Co. v. Actavis Holdco U.S., Inc., 1199SEIU Nat'l Benefit Fund v. Actavis Holdco US, Inc., West Val Pharmacy v. Actavis Holdco U.S., Inc., Ahold USA, Inc. v. Actavis Holdco U.S., Inc., Humana Inc. v. Actavis Elizabeth, LLC, Marion Diagnostic Center, LLC v. McKesson Corp.

Prior History: *In re Generic Drug Pricing Antitrust Litig., 227 F. Supp. 3d 1402, 2016 U.S. Dist. LEXIS 103005, 2016 WL 4153602 (J.P.M.L., Aug. 5, 2016)*

Core Terms

overarching, conspiracy, Pharmaceuticals, drugs, prices, generic, allegations, Plaintiffs', competitors, Complaints, generic drug, increased price, manufacturers, fair share, overlap, Defendants', doxycycline, acetazolamide, trade association, customer, common goal, nystatin, theophylline, communications, employees, meetings, amended complaint, glyburide, hyclate, markets

LexisNexis® Headnotes

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

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

Fed. R. Civ. P. 12(b)(6) provides for dismissal of a complaint for failure to state a claim when a plaintiff's plain statement lacks enough substance to show that it is entitled to relief. Judging the sufficiency of a pleading is a context-dependent exercise. On a motion to dismiss, the Court considers plausibility, not probability. Plaintiffs must allege enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. Speculative or conjectural assertions are not sufficient. However, Plaintiffs are not required to plead facts that, if true, definitively rule out all possible innocent explanations. It is improper at this stage of the proceedings to weigh alternatives and decide which is more plausible. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.

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

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

With respect to a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, the task of the district court is not to sustain or dismiss a complaint based on whether the Court feels it is a winner or has curb appeal. The Court's task is to determine whether the facts alleged in the complaint rise above mere speculation, even if the Court has doubts about them, and whether they plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > Conspiracy to Monopolize

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

So long as an alleged conspiracy is supported by enough facts to make it plausible, it is of no matter whether it involves three conspirators or a score or more. Mere size or breadth alone is not a reason to peremptorily jettison a conspiracy allegation.

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

HN4[] **Conspiracy to Monopolize, Sherman Act**

To state a claim for a Sherman Act conspiracy, Plaintiffs must allege enough factual matter (taken as true) to suggest that an agreement was made. In the absence of allegations of direct evidence of such an agreement, Plaintiffs may allege parallel conduct plus a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action. The necessary context may be shown through allegations of plus factors that serve as proxies for direct evidence of an agreement. Plaintiffs are not required to plead simultaneous price increases — or that the price increases were identical — in order to demonstrate parallel conduct. At least three plus factors support a finding that there is a suggestion of a preceding agreement: (1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy. The conspiracy must not be compartmentalized. The character and effect of the conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

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

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

HN5[] **Motions to Dismiss, Failure to State Claim**

A complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > Conspiracy to Monopolize

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

HN6[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Twombly sets the bar for reviewing overarching conspiracy allegations at the motion to dismiss stage.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > Conspiracy to Monopolize

HN7[] **Monopolies & Monopolization, Conspiracy to Monopolize**

To determine whether conspirators shared a common goal, a court should consider the purpose of the alleged conspiracy in a fairly broad sense.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > Conspiracy to Monopolize

HN8[] **Monopolies & Monopolization, Conspiracy to Monopolize**

A common goal may exist even when conspirators individually or in groups perform different tasks in pursuing the common goal, and a single conspiracy may attract different members at different times or involve different sub-groups committing acts in furtherance of the overall plan. A defendant need not be accused of having engaged in all activities alleged to have advanced the conspiracy. In other words, one conspiracy can involve multiple subsidiary schemes.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > Conspiracy to Monopolize

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

HN9[] **Monopolies & Monopolization, Conspiracy to Monopolize**

With respect to the sufficiency of a complaint alleging an overarching conspiracy, to evaluate interdependence, the court engages in an inquiry focused on the extent to which the success or failure of one conspiracy is independent of a corresponding success or failure by the other. Courts consider how helpful one individual's contribution is to another's goals. Interdependence helps establish whether the alleged coconspirators are all committed to the same set of objectives in a single conspiracy.

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For United States of America, Intervenor (2:16md2724): JAY OWEN, U.S. DEPT OF JUSTICE - ANTITRUST DIV, Washington, DC USA; NATHAN D BRENNER, U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, Washington, DC USA; RYAN J. DANKS, U.S. DEPARTMENT OF JUSTICE, Antittrust Division, Washington, DC USA.

For STATE ATTORNEYS GENERAL LITIGATION, IN RE (2:17-cv-03768-CMR): CARL J HAMMAKER, III, MICHIGAN DEPARTMENT OF ATTORNEY GENERAL, LANSING, MI.

For STATE OF CONNECTICUT, Plaintiff (2:17-cv-03768-CMR): ANTONIA CARABILLO CONTI, MICHAEL E. COLE, LEAD ATTORNEYS, OFFICE OF THE CONNECTICUT ATTORNEY GENERAL, HARTFORD, CT; LAURA JOHNSON MARTELLA, LEAD ATTORNEY, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W.

JOSEPH NIELSEN, LEAD ATTORNEY, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT; RACHEL O DAVIS, OFFICE OF THE ATTORNEY GENERAL, HARTFORD, CT.

For STATE OF DELAWARE, Plaintiff (2:17-cv-03768-CMR): MICHAEL CLARKE, MICHAEL A. UNDORF, LEAD ATTORNEYS, DELAWARE DEPT OF JUSTICE, WILMINGTON, DE; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S **[**6]** OFFICE - ELM, HARTFORD, CT.

For STATE OF FLORIDA, Plaintiff (2:17-cv-03768-CMR): LIZABETH A. BRADY, LEAD ATTORNEY, STATE OF FLORIDA OFFICE OF ATTORNEY GENERAL, TALLAHASSEE, FL; TIMOTHY M. FRASER, LEAD ATTORNEY, FL OFFICE OF THE ATTORNEY GENERAL, TALLAHASSEE, FL; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF HAWAII, Plaintiff (2:17-cv-03768-CMR): RODNEY I. KIMURA, LEAD ATTORNEY, DEPT OF THE ATTORNEY GENERAL STATE OF HAWAII, HONOLULU, HI; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF IDAHO, Plaintiff (2:17-cv-03768-CMR): JOHN K OLSON, LEAD ATTORNEY, IDAHO ATTORNEY GENERAL, BOISE, ID; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF IOWA, Plaintiff (2:17-cv-03768-CMR): MAX M. MILLER, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL OF IOWA, DES MOINES, IA; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For **[**7]** STATE OF KANSAS, Plaintiff (2:17-cv-03768-CMR): LYNETTE R. BAKKER, LEAD ATTORNEY, OFFICE OF THE KANSAS ATTORNEY GENERAL, TOPEKA, KS; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For COMMONWEALTH OF KENTUCKY, Plaintiff (2:17-cv-03768-CMR): LEEANNE APPLEGATE, LEAD ATTORNEY, KENTUCKY OFFICE OF THE ATTORNEY GENERAL, FRANKFORT, KY; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF LOUISIANA, Plaintiff (2:17-cv-03768-CMR): STACIE LAMBERT DEBLIEUX, LEAD ATTORNEY, LOUISIANA DEPT OF JUSTICE, BATON ROUGE, LA; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF MAINE, Plaintiff (2:17-cv-03768-CMR): CHRISTINA M. MOYLAN, LEAD ATTORNEY, MAINE ATTORNEY GENERAL, 6 STATE HOUSE STATION, AUGUSTA, ME; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF MARYLAND, Plaintiff (2:17-cv-03768-CMR): JOHN R. TENNIS, LEAD ATTORNEY, STATE **[**8]** OF MARYLAND OFFICE OF ATTORNEY GENERAL, BALTIMORE, MD; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; SCHONETTE J WALKER, MD OFFICE OF THE ATTORNEY GENERAL, BALTIMORE, MD; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For COMMONWEALTH OF MASSACHUSETTS, Plaintiff (2:17-cv-03768-CMR): DANIEL H. LEFF, LEAD ATTORNEY, MASSACHUSETTS AGO, ANTITURST DIV, BOSTON, MA; MICHAEL B. MACKENZIE, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL OF MASSACHUSETTS, BOSTON, MA; WILLIAM T. MATLACK, LEAD ATTORNEY, MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL, BOSTON, MA;

LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF MINNESOTA, Plaintiff (2:17-cv-03768-CMR): JAMES CANADAY, LEAD ATTORNEY, STATE OF MINNESOTA OFFICE OF ATTORNEY GENERAL, ST PAUL, MN; JUSTIN R. ERICKSON, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL OF MN, ST PAUL, MN; ROBERT CARY, LEAD ATTORNEY, STATE OF MINNESOTA OFFICE OF ATTORNEY GENERAL, ST PAUL, MN; ERIN R ELDRIDGE, OFFICE OF THE MINNESOTA ATTORNEY GENERAL, ST. PAUL, MN; JOSEPH C. MEYER, MINNESOTA ATTORNEY GENERAL, ST. PAUL, MN; LAURA JOHNSON MARTELLA, **[**9]** ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF NEVADA, Plaintiff (2:17-cv-03768-CMR): LUCAS J. TUCKER, LEAD ATTORNEY, STATE OF NEVADA OFFICE OF ATTORNEY GENERAL, LAS VEGAS, NV; SHERI ANN FORBES, LEAD ATTORNEY, STATE OF NEVADA OFFICE OF ATTORNEY GENERAL, LAS VEGAS, NV; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF NEW YORK, Plaintiff (2:17-cv-03768-CMR): ROBERT L. HUBBARD, LEAD ATTORNEY, ATTORNEY GENERAL OF NEW YORK, NEW YORK, NY; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF NORTH DAKOTA, Plaintiff (2:17-cv-03768-CMR): PARRELL D. GROSSMAN, LEAD ATTORNEY, STATE OF NORTH DAKOTA OFFICE OF ATTORNEY GENERAL, GATEWAY PROFESSIONAL CTR, BISMARCK, ND; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF OHIO, Plaintiff (2:17-cv-03768-CMR): BETH A. FINNERTY, LEAD ATTORNEY, OFFICE OF THE OHIO ATTORNEY GENERAL ANTITRUST SECTION, **[**10]** COLUMBUS, OH; BRIAN F. JORDAN, LEAD ATTORNEY, OFFICE OF THE OHO ATTORNEY GENERAL ANTITRUST SECTION, COLUMBUS, OH; EDWARD J. OLSZEWSKI, LEAD ATTORNEY, STATE OF OHIO OFFICE OF ATTORNEY GENERAL, COLUMBUS, OH; JAMES C. ROBERTS, LEAD ATTORNEY, STATE OF OHIO OFFICE OF ATTORNEY GENERAL, COLUMBUS, OH; MATTHEW K. MCKINLEY, LEAD ATTORNEY, OFFICE OF THE OHIO ATTORNEY GENERAL ANTITRUST SECTION, COLUMBUS, OH; THOMAS N. ANGER, LEAD ATTORNEY, OFFICE OF THE OHIO ATTORNEY GENERAL ANTITRUST SECTION, COLUMBUS, OH; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For COMMONWEALTH OF PENNSYLVANIA, Plaintiff (2:17-cv-03768-CMR): JENNIFER JANE KIRK, LEAD ATTORNEY, OFFICE THE ATTORNEY GENERAL - PA, HARRISBURG, PA; JOSEPH STEPHEN BETSKO, LEAD ATTORNEY, PA OFFICE OF ATTORNEY GENERAL, HARRISBURG, PA; TRACY W. WERTZ, LEAD ATTORNEY, PA OFFICE OF ATTORNEY GENERAL, HARRISBURG, PA; ABIGAIL U. WOOD, PA OFFICE OF ATTORNEY GENERAL, HARRISBURG, PA; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For COMMONWEALTH OF VIRGINIA, Plaintiff (2:17-cv-03768-CMR): **[**11]** SARAH OXENHAM ALLEN, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL, RICHMOND, VA; TYLER T. HENRY, LEAD ATTORNEY, OFFICE OF THE VIRGINIA ATTORNEY GENERAL, RICHMOND, VA; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF WASHINGTON, Plaintiff (2:17-cv-03768-CMR): ERICA A. KOSCHER, LEAD ATTORNEY, STATE OF WASHINGTON OFFICE OF ATTORNEY GENERAL, SEATTLE, WA; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; TRAVIS A. KENNEDY, WA ATTORNEY GENERAL OFFICE, SEATTLE, WA; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF ALABAMA, Plaintiff (2:17-cv-03768-CMR): BILLINGTON M. GARRETT, LEAD ATTORNEY, STATE OF ALABAMA OFFICE OF THE ATTORNEY GENERAL, MONTGOMERY, AL; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF ARIZONA, Plaintiff (2:17-cv-03768-CMR): DANA R. VOGEL, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL - STATE OF ARIZONA, PHOENIX, AZ; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE **[**12]** - ELM, HARTFORD, CT.

For STATE OF CALIFORNIA, Plaintiff (2:17-cv-03768-CMR): PAULA LAUREN GIBSON, CALIFORNIA OFFICE OF THE ATTORNEY GENERAL, LOS ANGELES, CA; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF COLORADO, Plaintiff (2:17-cv-03768-CMR): ABIGAIL L. SMITH, LEAD ATTORNEY, COLORADO DEPT OF LAW, RALPH L CARR COLORADO JUDICIAL CENTER, DENVER, CO; DEVIN MICHAEL LAIHO, LEAD ATTORNEY, COLORADO DEPT OF LAW, RALPH L CARR COLORADO JUDICIAL CENTER, DENVER, CO; JENNIFER H. HUNT, LEAD ATTORNEY, COLORADO DEPT OF LAW, RALPH L CARR COLORADO JUDICIAL CENTER, DENVER, CO; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF ILLINOIS, Plaintiff (2:17-cv-03768-CMR): CHADWICK O. BROOKER, LEAD ATTORNEY, OFFICE OF THE ILLINOIS ATTORNEY GENERAL, CHICAGO, IL; ROBERT W. PRATT, LEAD ATTORNEY, OFFICE OF THE ILLINOIS ATTORNEY GENERAL, CHICAGO, IL; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF INDIANA, Plaintiff (2:17-cv-03768-CMR): AMANDA J. LEE, LEAD ATTORNEY, OFFICE OF THE ATTORNEY **[**13]** GENERAL OF IN, INDIANAPOLIS, IN; JUSTIN G. HAZLETT, LEAD ATTORNEY, OFFICE OF THE INDIANA ATTORNEY GENERAL, INDIANAPOLIS, IN; TAMARA L. WEAVER, LEAD ATTORNEY, OFFICE OF THE INDIANA ATTORNEY GENERAL, INDIANAPOLIS, IN; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF MICHIGAN, Plaintiff (2:17-cv-03768-CMR): D. J. PASCOE, LEAD ATTORNEY, MICHIGAN DEPT OF ATTORNEY GENERAL, CORPORATE OVERSIGHT DIVISION, LANSING, MI; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF MISSISSIPPI, Plaintiff (2:17-cv-03768-CMR): CRYSTAL UTLEY SECOY, LEAD ATTORNEY, MS ATTORNEY GENERAL'S OFFICE, JACKSON, MS; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF MONTANA, Plaintiff (2:17-cv-03768-CMR): CHARLES R. MUNSON, LEAD ATTORNEY, STATE OF MONTANA, HELENA, MT; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF NEBRASKA, Plaintiff **[**14]** (2:17-cv-03768-CMR): SHEREECE DENDY-SANDERS, LEAD ATTORNEY, NEBRASKA ATTORNEY GENERAL'S OFFICE, LINCOLN, NE; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF NEW HAMPSHIRE, Plaintiff (2:17-cv-03768-CMR): BROOKSLEY C. BELANGER, LEAD ATTORNEY, NEW HAMPSHIRE DEPT OF JUSTICE, MEDICAID FRAUD CONTROL UNIT CRIMINAL BUREAU, CONCORD, NH; JENNIFER FOLEY, LEAD ATTORNEY, NEW HAMPSHIRE DEPT OF JUSTICE, CONCORD, NH; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF NEW JERSEY, Plaintiff (2:17-cv-03768-CMR): JODIE E. VANWERT, LEAD ATTORNEY, STATE OF NEW JERSEY OFFICE OF ATTORNEY GENERAL, NEWARK, NJ; RUSSELL M. SMITH, JR., LEAD ATTORNEY, STATE OF NEW JERSEY OFFICE OF ATTORNEY GENERAL, NEWARK, NJ; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF NORTH CAROLINA, Plaintiff (2:17-cv-03768-CMR): JESSICA V. SUTTON, LEAD ATTORNEY, NORTH CAROLINA DEPT OF JUSTICE, RALEIGH, NC; KIMBERLEY A. D'ARRUDA, LEAD ATTORNEY, NORTH **[**15]** CAROLINA DEPT OF JUSTICE, RALEIGH, NC; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF OKLAHOMA, Plaintiff (2:17-cv-03768-CMR): JULIE A. BAYS, LEAD ATTORNEY, OFFICE OF THE OKLAHOMA ATTY GENERAL, OKLAHOMA CITY, OK; RACHEL A. IRWIN, LEAD ATTORNEY, OFFICE OF THE OKLAHOMA ATTY GENERAL, OKLAHOMA CITY, OK; CALEB J. SMITH, OKLAHOMA OFFICE OF THE ATTORNEY GENERAL, OKLAHOMA CITY, OK; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF OREGON, Plaintiff (2:17-cv-03768-CMR): LAURA JOHNSON MARTELLA, LEAD ATTORNEY, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; CHERYL FAYE HIEMSTRA, OREGON DEPT OF JUSTICE, SALEM, OR; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF SOUTH CAROLINA, Plaintiff (2:17-cv-03768-CMR): CLARK C. KIRKLAND, JR., LEAD ATTORNEY, SC ATTORNEY GENERAL'S OFFICE, COLUMBIA, SC; REBECCA MAGILL MCCORMACK, LEAD ATTORNEY, STATE OF SOUTH CAROLINA OFFICE OF ATTORNEY GENERAL, COLUMBIA, SC; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH **[**16]** NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF TENNESSEE, Plaintiff (2:17-cv-03768-CMR): J. DAVID MCDOWELL, LEAD ATTORNEY, OFFICE OF THE TENNESSEE ATTORNY GENERAL & REPORTER, NASHVILLE, TN; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF UTAH, Plaintiff (2:17-cv-03768-CMR): DAVID N. SONNENREICH, LEAD ATTORNEY, UTAH OFFICE OF THE ATTORNEY GENERAL, SALT LAKE CITY, UT; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF VERMONT, Plaintiff (2:17-cv-03768-CMR): JILL S. ABRAMS, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL OF VERMONT, MONTPELIER, VT; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF WISCONSIN, Plaintiff (2:17-cv-03768-CMR): GWENDOLYN J. COOLEY, LEAD ATTORNEY, ATTORNEY GENERAL OF WISCONSIN, MADISON, WI; LAURA JOHNSON MARTELLA, ATTORNEY GENERAL'S OFFICE- ELM, HARTFORD, CT; W. JOSEPH NIELSEN, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF WYOMING, Plaintiff **[**17]** (2:17-cv-03768-CMR): W. JOSEPH NIELSEN, LEAD ATTORNEY, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT; BENJAMIN M BURNINGHAM, OFFICE OF THE WYOMING ATTORNEY GENERAL, CHEYENNE, WY.

For STATE OF WEST VIRGINIA, Plaintiff (2:17-cv-03768-CMR): W. JOSEPH NIELSEN, LEAD ATTORNEY, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF RHODE ISLAND, Plaintiff (2:17-cv-03768-CMR): W. JOSEPH NIELSEN, LEAD ATTORNEY, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For COMMONWEALTH OF PUERTO RICO, Plaintiff (2:17-cv-03768-CMR): W. JOSEPH NIELSEN, LEAD ATTORNEY, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF NEW MEXICO, Plaintiff (2:17-cv-03768-CMR): W. JOSEPH NIELSEN, LEAD ATTORNEY, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF MISSOURI, Plaintiff (2:17-cv-03768-CMR): MICHAEL SCHWALBERT, LEAD ATTORNEY, OFFICE OF MISSOURI ATTORNEY GENERAL, ST LOUIS, MO; W. JOSEPH NIELSEN, LEAD ATTORNEY, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF ALASKA, Plaintiff (2:17-cv-03768-CMR): MARGARET PATON WALSH, LEAD ATTORNEY, ALASKA DEPARTMENT OF LAW, ANCHORAGE, AK; W. JOSEPH NIELSEN, LEAD ATTORNEY, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For DISTRICT OF COLUMBIA, Plaintiff **[**18]** (2:17-cv-03768-CMR): W. JOSEPH NIELSEN, LEAD ATTORNEY, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For STATE OF ARKANSAS, Plaintiff (2:17-cv-03768-CMR): W. JOSEPH NIELSEN, LEAD ATTORNEY, ATTORNEY GENERAL'S OFFICE - ELM, HARTFORD, CT.

For AUROBINDO PHARMA USA, INC., Defendant (2:17-cv-03768-CMR): ELIZABETH M. LACOMBE, LEAD ATTORNEY, DUANE MORRIS LLP, HARTFORD, CT; KIM E. RINEHART, LEAD ATTORNEY, WIGGIN & DANA LLP, NEW HAVEN, CT; SETH A. GOLDBERG, LEAD ATTORNEY, DUANE MORRIS LLP, PHILADELPHIA, PA; WAYNE A. MACK, LEAD ATTORNEY, DUANE MORRIS LLP, PHILADELPHIA, PA; BENJAMIN F. HOLT, HOGAN LOVELLS US LLP, WASHINGTON, DC; SARAH O'LAUGHLIN KULIK, DUANE MORRIS LLP, PHILADELPHIA, PA.

For CITRON PHARMA, LLC, Defendant (2:17-cv-03768-CMR): KIM E. RINEHART, LEAD ATTORNEY, WIGGIN & DANA LLP, NEW HAVEN, CT; KRYSTYNA BLAKESLEE, LEAD ATTORNEY, DECHERT LLP, HARTFORD, CT; STEVEN E. BIZAR, LEAD ATTORNEY, DECHERT LLP, PHILADELPHIA, PA; BENJAMIN F. HOLT, HOGAN LOVELLS US LLP, WASHINGTON, DC; JOHN MCCLAM, DECHERT LLP, PHILADELPHIA, PA; TIFFANY ELLEN ENGSELL, DECHERT LLP, PHILADELPHIA, PA.

For HERITAGE PHARMACEUTICALS, INC., Defendant (2:17-cv-03768-CMR): EDWARD B. SCHWARTZ, LEAD ATTORNEY, REED SMITH LLP, **[**19]** WASHINGTON, DC; JAMES T. SHEARIN, LEAD ATTORNEY, PULLMAN & COMLEY, BRIDGEPORT, CT; KIM E. RINEHART, LEAD ATTORNEY, WIGGIN & DANA LLP, NEW HAVEN, CT; NATHANIEL JOHN GENTILE, LEAD ATTORNEY, PULLMAN & COMLEY, HARTFORD, CT; ANDREW C BERNASCONI, REED SMITH LLP, WASHINGTON, DC; BENJAMIN F. HOLT, HOGAN LOVELLS US LLP, WASHINGTON, DC; COURTNEY B AVERBACH, REED SMITH LLP, PITTSBURGH, PA; JENNIFER M DRISCOLL, REED SMITH LLP, WASHINGTON, DC; WILLIAM J SHERIDAN, REED SMITH LLP, PITTSBURGH, PA.

For MAYNE PHARMA INC., Defendant (2:17-cv-03768-CMR): BRIAN J SMITH, LEAD ATTORNEY, K&L GATES LLP, CHICAGO, IL; KIM E. RINEHART, LEAD ATTORNEY, WIGGIN & DANA LLP, NEW HAVEN, CT; LAUREN NORRIS DONAHUE, LEAD ATTORNEY, K&L GATES LLP, CHICAGO, IL; MICHAEL E. MARTINEZ, LEAD ATTORNEY, K&L GATES LLP, CHICAGO, IL; SEAN R. HIGGINS, LEAD ATTORNEY, K&L GATES LLP, BOSTON, MA; STEVEN M KOWAL, LEAD ATTORNEY, K&L GATES LLP, CHICAGO, IL; BENJAMIN F. HOLT, HOGAN LOVELLS US LLP, WASHINGTON, DC.

For MYLAN PHARMACEUTICALS, INC., Defendant (2:17-cv-03768-CMR): ADAM K. LEVIN, LEAD ATTORNEY, HOGAN & LOVELLS US LLP, WASHINGTON, DC; BENJAMIN F. HOLT, LEAD ATTORNEY, HOGAN LOVELLS US LLP, WASHINGTON, DC; JUSTIN W. BERNICK, LEAD ATTORNEY, **[**20]** HOGAN LOVELLS US LLP, WASHINGTON, DC; KIM E. RINEHART, LEAD ATTORNEY, WIGGIN & DANA LLP, NEW HAVEN, CT; MITCHELL E. ZAMOFF, LEAD ATTORNEY, HOGAN & LOVELLS US L.L.P., MINNEAPOLIS, MN; ROBERT M. LANGER, LEAD ATTORNEY, WIGGIN & DANA LLP, HARTFORD, CT.

For TEVA PHARMACEUTICALS USA, INC., Defendant (2:17-cv-03768-CMR): DAVID EVAN ROSS, LEAD ATTORNEY, KASOWITZ BENSON TORRES & FRIEDMAN LLP, NEW YORK, NY; HECTOR TORRES, LEAD

ATTORNEY, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; JAMES W. BERGENN, LEAD ATTORNEY, SHIPMAN & GOODWIN LLP, HARTFORD, CT; JILL M. O'TOOLE, LEAD ATTORNEY, SHIPMAN & GOODWIN LLP, HARTFORD, CT; KIM E. RINEHART, LEAD ATTORNEY, WIGGIN & DANA LLP, NEW HAVEN, CT; MARC E. KASOWITZ, LEAD ATTORNEY, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; SETH B. DAVIS, LEAD ATTORNEY, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; THOMAS J. AMBURGY, LEAD ATTORNEY, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; ALISON TANCHYK, MORGAN LEWIS & BOKIUS LLP, MIAMI, FL; AMANDA B. ROBINSON, MORGAN, LEWIS & BOCKIUS LLP, WASHINGTON, DC; BENJAMIN F. HOLT, HOGAN LOVELLS US LLP, WASHINGTON, DC; J. GORDON COONEY, JR., MORGAN, LEWIS,& BOCKIUS LLP, PHILADELPHIA, PA; JOHN J. PEASE, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, **[**21]** PA; MICHAELA DRAGALIN, MORGAN LEWIS & BOCKIUS, PHILADELPHIA, PA; WILLIAM T MCENROE, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PA.

For ACTAVIS HOLDCO U.S., INC., Defendant (2:17-cv-03768-CMR): SHERON KORPUS, LEAD ATTORNEY, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; BENJAMIN F. HOLT, HOGAN LOVELLS US LLP, WASHINGTON, DC; DAVID M. MAX, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; HECTOR TORRES, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; MARC E. KASOWITZ, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; SETH B. DAVIS, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; SETH A. MOSKOWITZ, KASOWITZ BENSON TORRES LLP, NEW YORK, NY.

For ACTAVIS PHARMA, INC., Defendant (2:17-cv-03768-CMR): SHERON KORPUS, LEAD ATTORNEY, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; BENJAMIN F. HOLT, HOGAN LOVELLS US LLP, WASHINGTON, DC; DAVID M. MAX, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; HECTOR TORRES, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; MARC E. KASOWITZ, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; SETH B. DAVIS, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; SETH A. MOSKOWITZ, KASOWITZ BENSON TORRES LLP, NEW YORK, NY.

For ASCEND LABORATORIES, LLC, Defendant (2:17-cv-03768-CMR): WILLIAM GORDON DOBIE, LEAD ATTORNEY, WINSTON & STRAWN LLP, **[**22]** CHICAGO, IL; BENJAMIN F. HOLT, HOGAN LOVELLS US LLP, WASHINGTON, DC.

For APOTEX CORP., Defendant (2:17-cv-03768-CMR): JAMES W. MATTHEWS, LEAD ATTORNEY, FOLEY & LARDNER LLP, BOSTON, MA; BENJAMIN F. HOLT, HOGAN LOVELLS US LLP, WASHINGTON, DC; ELIZABETH A.N. HAAS, FOLEY & LARDNER, MILWAUKEE, WI; JAMES T. MCKEOWN, FOLEY & LARDNER, MILWAUKEE, WI; JOHN F. NAGLE, FOLEY & LARDNER LLP, BOSTON, MA.

For DR. REDDY'S LABORATORIES, INC., Defendant (2:17-cv-03768-CMR): BENJAMIN F. HOLT, HOGAN LOVELLS US LLP, WASHINGTON, DC; BRIAN T. FEENEY, GREENBERG TRAURIG, LLP, PHILADELPHIA, PA.

For EMCURE PHARMACEUTICALS, LTD., Defendant (2:17-cv-03768-CMR): ALLYSON M. MALTAS, LATHAM & WATKINS LLP, WASHINGTON, DC; BENJAMIN F. HOLT, HOGAN LOVELLS US LLP, WASHINGTON, DC; ELIZABETH ANNA PARVIS, LATHAM & WATKINS LLP, NEW YORK, NY; MARGUERITE M. SULLIVAN, LATHAM WATKINS LLP, WASHINGTON, DC; MICHAEL LACOVARA, LATHAM & WATKINS LLP, NEW YORK, NY.

For GLENMARK PHARMACEUTICALS, INC., Defendant (2:17-cv-03768-CMR): STEVEN A. REED, LEAD ATTORNEY, MORGAN LEWIS, PHILADELPHIA, PA; ANDREW S WELLIN, MORGAN, LEWIS & BOCKIUS LLP, NEW YORK, NY; BENJAMIN F. HOLT, HOGAN LOVELLS US LLP, WASHINGTON, DC; MELINA R. DIMATTIO, MORGAN LEWIS **[**23]** & BOCKIUS LLP, PHILADELPHIA, PA; R. BRENDAN FEE, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PA.

For LANNETT COMPANY, INC., Defendant (2:17-cv-03768-CMR): GERALD E. ARTH, LEAD ATTORNEY, FOX ROTHSCHILD LLP, PHILADELPHIA, PA; RYAN THOMAS BECKER, LEAD ATTORNEY, FOX ROTHSCHILD LLP, PHILADELPHIA, PA; BENJAMIN F. HOLT, HOGAN LOVELLS US LLP, WASHINGTON, DC; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA.

For RAJIV MALIK, Defendant (2:17-cv-03768-CMR): DAVID A. MUNKITTRICK, LEAD ATTORNEY, PROSKAUER ROSE LLP, NEW YORK, NY; EDWARD J. CANTER, LEAD ATTORNEY, PROSKAUER ROSE LLP, NEW YORK,

NY; ROBERT J. CLEARY, LEAD ATTORNEY, PROSKAUER ROSE LLP, NEW YORK, NY; BENJAMIN F. HOLT, HOGAN LOVELLS US LLP, WASHINGTON, DC.

For SATISH MEHTA, Defendant (2:17-cv-03768-CMR): ALLYSON M. MALTAS, LATHAM & WATKINS LLP, WASHINGTON, DC; BENJAMIN F. HOLT, HOGAN LOVELLS US LLP, WASHINGTON, DC; ELIZABETH ANNA PARVIS, LATHAM & WATKINS LLP, NEW YORK, NY; MARGUERITE M. SULLIVAN, LATHAM WATKINS LLP, WASHINGTON, DC; MICHAEL LACOVARA, LATHAM & WATKINS LLP, NEW YORK, NY.

For PAR PHARMACEUTICAL COMPANIES, INC., Defendant (2:17-cv-03768-CMR): JOHN E. SCHMIDTLEIN, LEAD ATTORNEY, WILLIAMS & CONNOLLY LLP, WASHINGTON, DC; BENJAMIN F. HOLT, **[**24]** HOGAN LOVELLS US LLP, WASHINGTON, DC; SARAH F. TEICH, WILLIAMS & CONNOLLY LLP, WASHINGTON, DC.

For SANDOZ, INC., Defendant (2:17-cv-03768-CMR): ADA VICTORIA ANON, LEAD ATTORNEY, ARONLD & PORTER, NEW YORK, NY; AMANDA C CROUSHORE, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLER LLP, NEW YORK, NY; KATHRYN L. ROSENBERG, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLAR LLP, NEW YORK, NY; LAURA S. SHORES, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLER LLP, WASHINGTON, DC; MARGARET A. ROGERS, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLER LLP, NEW YORK, NY; SAUL P MORGENSTERN, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLER LLP, NEW YORK, NY; BENJAMIN F. HOLT, HOGAN LOVELLS US LLP, WASHINGTON, DC.

For SUN PHARMACEUTICAL INDUSTRIES, INC., Defendant (2:17-cv-03768-CMR): JOHN MARTIN TALADAY, LEAD ATTORNEY, BAKER BOTTS LLP, WASHINGTON, DC; LAURI A. KAVULICH, LEAD ATTORNEY, CLARK HILL PLC, PHILADELPHIA, PA; ANN LEMMO, CLARK HILL PLC, PHILADELPHIA, PA; BENJAMIN F. HOLT, HOGAN LOVELLS US LLP, WASHINGTON, DC; CHRISTOPHER PAGE WILSON, BAKER BOTTS LLP, WASHINGTON, DC; ERIK THOMAS KOONS, BAKER BOTTS LLP, WASHINGTON, DC; LINDSAY S. FOUSE, CLARK HILL PLC, PITTSBURGH, PA; S TURNER, BAKER BOTTS LLP, WASHINGTON, DC.

For ZYDUS **[**25]** PHARMACEUTICALS (USA), INC., Defendant (2:17-cv-03768-CMR): JASON R. PARISH, LEAD ATTORNEY, BUCHANAN INGERSALL & ROONEY PC, WASHINGTON, DC; BENJAMIN F. HOLT, HOGAN LOVELLS US LLP, WASHINGTON, DC; BRADLEY J. KITLOWSKI, BUCHANAN INGERSOLL & ROONEY PC, PITTSBURGH, PA.

For STATE ATTORNEYS GENERAL PLAINTIFFS, Respondent (2:17-cv-03768-CMR): ROBERT L. HUBBARD, ATTORNEY GENERAL OF NEW YORK, NEW YORK, NY.

For UNITED STATES OF AMERICA, Intervenor (2:17-cv-03768-CMR): ELLEN R. CLARKE, LEAD ATTORNEY, U.S. DEPT OF JUSTICE, WASHINGTON, DC; JAY OWEN, LEAD ATTORNEY, U.S. DEPT OF JUSTICE - ANTITRUST DIV, WASHINGTON, DC; NATHAN D BRENNER, U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, WASHINGTON, DC.

For THE KROGER CO., ALBERTSONS COMPANIES, LLC, H.E. BUTT GROCERY COMPANY L.P., Plaintiffs (2:18-cv-00284-CMR): SCOTT E. PERWIN, LEAD ATTORNEY, BRANDON S FLOCH, KENNY NACHWALTER, P.A., MIAMI, FL; WILLIAM J. BLECHMAN, LEAD ATTORNEY, ANNA T. NEILL, KENNY NACHWALTER PA, MIAMI, FL; JOSHUA BARTON GRAY, KENNY NACHWALTER, P.A., WASHINGTON, DC.

For ACTAVIS HOLDCO U.S., INC., ACTAVIS PHARMA, INC., Defendant (2:18-cv-00284-CMR): SHERON KORPUS, LEAD ATTORNEY, DAVID M. MAX, HECTOR TORRES, MARC E. KASOWITZ, SETH B. DAVIS, **[**26]** SETH A. MOSKOWITZ, KASOWITZ BENSON TORRES LLP, NEW YORK, NY.

For AKORN, INC., HI-TECH PHARMACAL CO., INC., Defendants (2:18-cv-00284-CMR): ANTHONY C. PORCELLI, LEAD ATTORNEY, POLSINELLI PC, CHICAGO, IL; AMY D FITTS, POLSINELLI PC, KANSAS CITY, MO.

For APOTEX CORP., Defendant (2:18-cv-00284-CMR): JAMES W. MATTHEWS, LEAD ATTORNEY, JOHN F. NAGLE, FOLEY & LARDNER LLP, BOSTON, MA; ELIZABETH A.N. HAAS, JAMES T. MCKEOWN, FOLEY & LARDNER, MILWAUKEE, WI.

For AUROBINDO PHARMA USA, INC., Defendant (2:18-cv-00284-CMR): SARAH O'LAUGHLIN KULIK, SEAN PATRICK MCCONNELL, SETH A. GOLDBERG, WAYNE A. MACK, DUANE MORRIS LLP, PHILADELPHIA, PA.

For BRECKENRIDGE PHARMACEUTICAL, INC., Defendant (2:18-cv-00284-CMR): CHARLES J. REITMEYER, LEAD ATTORNEY, MORGAN LEWIS & BOCKIUS, PHILADELPHIA, PA; STACEY ANNE MAHONEY, LEAD ATTORNEY, MORGAN, LEWIS & BOCKIUS LLP, NEW YORK, NY; ANTHONY VAN VUREN, MORGAN LEWIS & BOCKIUS LLP, WASHINGTON, DC.

For CITRON PHARMA, LLC, Defendant (2:18-cv-00284-CMR): STEVEN E. BIZAR, LEAD ATTORNEY, DECHERT LLP, CIRA CENTRE, PHILADELPHIA, PA; JOHN MCCLAM, DECHERT LLP, PHILADELPHIA, PA; TIFFANY ELLEN ENGSELL, DECHERT LLP, PHILADELPHIA, PA.

For DR. REDDY'S LABORATORIES, INC., Defendant (2:18-cv-00284-CMR): **[**27]** BRIAN T. FEENEY, LEAD ATTORNEY, GREENBERG TRAURIG, LLP, PHILADELPHIA, PA.

For FOUGERA PHARMACEUTICALS, INC., SANDOZ, INC., Defendants (2:18-cv-00284-CMR): ADA VICTORIA ANON, LEAD ATTORNEY, ARONLD & PORTER, NEW YORK, NY; AMANDA C CROUSHORE, MARGARET A. ROGERS, SAUL P MORGENSTERN, LEAD ATTORNEYS, ARNOLD & PORTER KAYE SCHOLER LLP, NEW YORK, NY; KATHRYN L. ROSENBERG, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLAR LLP, NEW YORK, NY; LAURA S. SHORES, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLER LLP, WASHINGTON, DC.

For GLENMARK PHARMACEUTICALS, INC., USA, Defendant (2:18-cv-00284-CMR): STEVEN A. REED, LEAD ATTORNEY, MORGAN LEWIS, PHILADELPHIA, PA; ANDREW S WELLIN, MORGAN, LEWIS & BOCKIUS LLP, NEW YORK, NY; MELINA R. DIMATTIO, R. BRENDAN FEE, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PA.

For HERITAGE PHARMACEUTICALS, INC., Defendant (2:18-cv-00284-CMR): EDWARD B. SCHWARTZ, LEAD ATTORNEY, ANDREW C BERNASCONI, JENNIFER M DRISCOLL, REED SMITH LLP, WASHINGTON, DC; COURTNEY B AVERBACH, WILLIAM J SHERIDAN, REED SMITH LLP, REED SMITH CENTRE, PITTSBURGH, PA.

For IMPAX LABORATORIES, INC., Defendant (2:18-cv-00284-CMR): DAVID L. HANSELMAN, MCDERMOTT WILL & EMERY LLP, CHICAGO, IL; RAYMOND A. JACOBSEN, MCDERMOTT **[**28]** WILL & EMERY LLP, WASHINGTON, DC.

For LANNETT COMPANY, INC., Defendant (2:18-cv-00284-CMR): GERALD E. ARTH, LEAD ATTORNEY, FOX ROTHSCHILD LLP, PHILADELPHIA, PA; RYAN THOMAS BECKER, LEAD ATTORNEY, FOX ROTHSCHILD LLP, STONE MANOR CORP CENTER, PHILADELPHIA, PA; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA.

For LUPIN PHARMACEUTICALS, INC., Defendant (2:18-cv-00284-CMR): ARIO FAZLI, LEIV H. BLAD, ZAREMA A. JARAMILLO, LOWENSTEIN SANDLER LLP, WASHINGTON, DC; KATIE ROSE GLYNN, LOWENSTEIN SANDLER LLP, PALO ALTO, CA.

For MAYNE PHARMA USA INC., Defendant (2:18-cv-00284-CMR): MICHAEL E. MARTINEZ, LEAD ATTORNEY, BRIAN J SMITH, KENN BROTMAN, LAUREN NORRIS DONAHUE, STEVEN M KOWAL, K&L GATES LLP, CHICAGO, IL.

For MORTON GROVE PHARMACEUTICALS, INC., WOCKHARDT USA LLC, Defendants (2:18-cv-00284-CMR): WILLIAM A. ESCOBAR, LEAD ATTORNEY, CLIFFORD KATZ, DAMON W. SUDEN, KELLEY DRYE & WARREN LLP, NEW YORK, NY.

For PAR PHARMACEUTICAL, INC., Defendant (2:18-cv-00284-CMR): JOHN E. SCHMIDTLEIN, SARAH F. TEICH, WILLIAMS & CONNOLLY LLP, WASHINGTON, DC.

For PERRIGO NEW YORK, INC., Defendant (2:18-cv-00284-CMR): J. CLAYTON EVERETT, JR., LEAD ATTORNEY, MORGAN LEWIS & BOCKIUS LLP, WASHINGTON, DC; SCOTT A. STEMPEL, LEAD ATTORNEY, **[**29]** MORGAN LEWIS & BOCKIUS, WASHINGTON, DC; FRANK DESIMONE, MORGAN LEWIS AND BOCKIUS, PHILADELPHIA, PA; HARVEY BARTLE, IV, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PA; TRACEY F MILICH, MORGAN. LEWIS & BOCKIUS LLP, WASHINGTON, DC.

For SUN PHARMACEUTICAL INDUSTRIES, INC., TARO PHARMACEUTICALS USA, INC., Defendants (2:18-cv-00284-CMR): JOHN MARTIN TALADAY, LEAD ATTORNEY, CHRISTOPHER PAGE WILSON, ERIK THOMAS

KOONS, S TURNER, BAKER BOTTS LLP, WASHINGTON, DC; LAURI A. KAVULICH, LEAD ATTORNEY, ANN LEMMO, CLARK HILL PLC, PHILADELPHIA, PA; LINDSAY S. FOUSE, CLARK HILL PLC, PITTSBURGH, PA.

For TELIGENT, INC., Defendant (2:18-cv-00284-CMR): HEATHER K. MCDEVITT, LEAD ATTORNEY, BRYAN DANIEL GANT, WHITE & CASE LLP, NEW YORK, NY.

For TEVA PHARMACEUTICALS USA, INC., Defendant (2:18-cv-00284-CMR): AMANDA B. ROBINSON, LEAD ATTORNEY, MORGAN, LEWIS & BOCKIUS LLP, WASHINGTON, DC; ALISON TANCHYK, MORGAN LEWIS & BOKIUS LLP, MIAMI, FL; J. GORDON COONEY, JR., MORGAN, LEWIS,& BOCKIUS LLP, PHILADELPHIA, PA; JOHN J. PEASE, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PA; MICHAELA DRAGALIN, MORGAN LEWIS & BOCKIUS, PHILADELPHIA, PA.

For UPSHER-SMITH LABORATORIES, LLC, Defendant (2:18-cv-00284-CMR): DEVORA W. ALLON, LEAD **[**30]** ATTORNEY, ERIN OGBURN, KIRKLAND & ELLIS LLP, NEW YORK, NY; JAY P. LEFKOWITZ, LEAD ATTORNEY, KIRKLAND & ELLIS, NEW YORK, NY; ALEXIA R BRANCATO, KIRKLAND & ELLIS LLP, FI45, NEW YORK, NY.

For WEST-WARD PHARMACEUTICALS CORP., Defendant (2:18-cv-00284-CMR): JAN P. LEVINE, LEAD ATTORNEY, CONNIE LEE, DENNIE BENJIMAN ZASTROW, ROBIN P. SUMNER, PEPPER HAMILTON LLP, PHILADELPHIA, PA; JEFFREY A. CARR, PEPPER HAMILTON LLP, PRINCETON, NJ; MICHAEL JAY HARTMAN, PEPPER HAMILTON LLP, EIGHTEENTH & ARCH STS, PHILADELPHIA, PA.

For ZYDUS PHARMACEUTICALS (USA) INC., Defendant (2:18-cv-00284-CMR): JASON R. PARISH, LEAD ATTORNEY, BUCHANAN INGERSALL & ROONEY PC, WASHINGTON, DC; BRADLEY J. KITLOWSKI, BUCHANAN INGERSOLL & ROONEY PC, PITTSBURGH, PA.

For G&W LABORATORIES, INC., Defendant (2:18-cv-00284-CMR): ANNA M. RATHBUN, LATHAM & WATKINS LLP, WASHINGTON, DC; MARGUERITE M. SULLIVAN, LATHAM WATKINS LLP, WASHINGTON, DC.

For OCEANSIDE PHARMACEUTICALS, INC., VALEANT PHARMACEUTICALS NORTH AMERICA LLC, VALEANT PHARMACEUTICALS INTERNATIONAL, Defendants (2:18-cv-00284-CMR): GERALD STEIN, MARK A. ROBERTSON, MATTHEW C LAMB, ROBIN D. ADELSTEIN, NORTON ROSE FULBRIGHT US LLP, NEW YORK, NY.

For 1199SEIU NATIONAL BENEFIT FUND, **[**31]** Plaintiff (2:18-cv-02401-CMR): BONNY SWEENEY, LEAD ATTORNEY, HAUSFELD LLP, SAN FRANCISCO, CA; DAN DRACHLER, LEAD ATTORNEY, ZWERLING SCHACHTER & ZWERLING LLP, SEATTLE, WA; GREGORY S. ASCIOLLA, LEAD ATTORNEY, LABATON SUCHAROW LLP, NEW YORK, NY; IRVING SCHER, LEAD ATTORNEY, HAUSFELD, NEW YORK, NY; JEANNINE M. KENNEY, LEAD ATTORNEY, HAUSFELD LLP, WASHINGTON, DC; MICHAEL P. LEHMANN, LEAD ATTORNEY, HAUSFELD LLP, SAN FRANCISCO, CA; ROBERTA D. LIEBENBERG, LEAD ATTORNEY, FINE, KAPLAN AND BLACK, PHILADELPHIA, PA; SATHYA S. GOSSELIN, LEAD ATTORNEY, HAUSFELD LLP, WASHINGTON, DC; SCOTT ALLAN MARTIN, LEAD ATTORNEY, HAUSFELD LLP, NEW YORK, NY; ADAM C. BELSKY, GROSS BELSKY PC, SAN FRANCISCO, CA; ADAM PESSIN, FINE KAPLAN & BLACK, PHILADELPHIA, PA; ANNA M HORNING NYGREN, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; ARIELLE S. WAGNER, LOCKRIDGE GRINDAL NAUEN P.L.L.P., MINNEAPOLIS, MN; AUSTIN BLAIR COHEN, LEVIN SEDRAN & BERMAN, PHILADELPHIA, PA; CHAD ALLEN CARDER, BARRACK, RODOS & BACINE, PHILADELPHIA, PA; CHAD B. HOLTZMAN, GRANT & EISENHOFER P.A., WILMINGTON, DE; CHRISTINA SHARP, GIRARD SHARP LLP, SAN FRANCISCO, CA; CHRISTOPHER T. HEFFELFINGER, BERMAN TABACCO, SAN FRANCISCO, CA; CHRISTOPHER J. MCDONALD, **[**32]** LABATON SUCHAROW LLP, NEW YORK, NY; COLLEEN L. CLEARY, BERMAN TABACCO, SAN FRANCISCO, CA; DAVID LAWLER, TYCKO & ZAVAREEI LLP, WASHINGTON, DC; ELIZABETH A. KRAMER, GIRARD SHARP LLP, SAN FRANCISCO, CA; ERIK L. SHAWN, GROSS BELSKY ALONSO LLP, SAN FRANCISCO, CA; ERIN DURBA, MOTLEY RICE LLC, NEW YORK, NY; HASSAN A. ZAVAREEI, TYCKO & ZAVAREEI LLP, WASHINGTON, DC; HEIDI M SILTON, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; HOWARD J. SEDRAN, LEVIN SEDRAN & BERMAN, PHILADELPHIA, PA; JAMES R. DUGAN, II, THE DUGAN LAW FIRM, NEW ORLEANS, LA; JASON S. HARTLEY, STUEVE SIEGEL HANSON LLP, SAN DIEGO, CA; JAY L. HIMES, LABATON SUCHAROW LLP, NEW YORK, NY; JAYNE A. GOLDSTEIN, SHEPHERD FINKELMAN MILLER & SHAH LLP, MEDIA, PA; JEFFREY A.

BARRACK, BARRACK, RODOS & BACINE, PHILADELPHIA, PA; JEFFREY B. GITTLEMAN, BARRACK, RODOS & BACINE, PHILADELPHIA, PA; JEFFREY S. ISTVAN, FINE, KAPLAN AND BLACK, PHILA, PA; JESSICA N. SERVAIS, Lockridge Grindal Nauen PLLP, Minneapolis, MN; JOHN E. SINDONI, BON, ZACK & SNYDER LLC, BALA CYNWYD, PA; JORDAN ELIAS, GIRARD SHARP LLP, SAN FRANCISCO, CA; JOSEPH GENTILE, SARRAF GENTILE LLP, GREAT NECK, NY; JOSEPH J. TABACCO, JR., BERMAN TABACCO, SAN FRANCISCO, CA; JOSHUA D. SNYDER, **[**33]** BONI, ZACK & SNYDER LLC, BALA CYNWYD, PA; KAREN HANSON RIEBEL, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; KARIN E. GARVEY, LABATON SUCHAROW LLP, NEW YORK, NY; KEITH J. VERRIER, LEVIN SEDRAN & BERMAN, PHILADELPHIA, PA; LIBERATO P. VERDERAME, EDELSON & ASSOCIATES, NEWTOWN, PA; MARC H. EDELSON, EDELSON & ASSOCIATES, LLC, NEWTOWN, PA; MATTHEW J. PEREZ, LABATON SUCHAROW LLP, NEW YORK, NY; MICHAEL J. BONI, BONI, ZACK & SNYDER LLC, BALA CYNWYD, PA; MICHAEL M. BUCHMAN, MOTLEY RICE LLC, NEW YORK, NY; MICHELLE C. CLERKIN, MOTLEY RICE LLC, NEW YORK, NY; MINDEE J. REUBEN, LITE DEPALMA GREENBERG LLC, PHILADELPHIA, PA; NATALIE FINKELMAN BENNETT, SHEPHERD FINKELMAN MILLER & SHAH LLC, MEDIA, PA; PAUL COSTA, FINE, KAPLAN & BLACK, RPC, PHILADELPHIA, PA; RENAE D. STEINER, HEINS MILLS & OLSON PLC, MINNEAPOLIS, MN; ROBERT G. EISLER, GRANT & EISENHOFER PA, WILMINGTON, DE; ROBIN ANN VANDERMEULEN, LABATON SUCHAROW LLP, NEW YORK, NY; RONEN SARRAF, SARRAF GENTILE LLP, GREAT NECK, NY; SCOTT M. GRZENCZYK, GIRARD SHARP LLP, SAN FRANCISCO, CA; STEPHANIE A. CHEN, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; STEPHANIE Y CHO, HAUSFELD LLP, SAN FRANCISCO, CA; STEVEN J. GREENFOGEL, LITE DEPALMA GREENBERG, PHILADELPHIA, **[**34]** PA; TERRY GROSS, GROSS & BELSKY P.C., SAN FRANCISCO, CA; TODD A. SEAVER, BERMAN TABACCO, SAN FRANCISCO, CA; W. JOSEPH BRUCKNER, LOCKRIDGE GRINDAL NAUEN & HOLSTEIN P.L.L.P., MINNEAPOLIS, MN.

For 1199SEIU GREATER NEW YORK BENEFIT FUND, Plaintiff (2:18-cv-02401-CMR): AUSTIN BLAIR COHEN, LEAD ATTORNEY, LEVIN SEDRAN & BERMAN, PHILADELPHIA, PA; DAN DRACHLER, LEAD ATTORNEY, ZWERLING SCHACHTER & ZWERLING LLP, SEATTLE, WA; GREGORY S. ASCIOLLA, LEAD ATTORNEY, LABATON SUCHAROW LLP, NEW YORK, NY; HOWARD J. SEDRAN, LEAD ATTORNEY, LEVIN SEDRAN & BERMAN, PHILADELPHIA, PA; ROBERTA D. LIEBENBERG, LEAD ATTORNEY, FINE, KAPLAN AND BLACK, PHILADELPHIA, PA; ADAM C. BELSKY, GROSS BELSKY PC, SAN FRANCISCO, CA; ADAM PESSIN, FINE KAPLAN & BLACK, PHILADELPHIA, PA; ANNA M HORNING NYGREN, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; ARIELLE S. WAGNER, LOCKRIDGE GRINDAL NAUEN P.L.L.P., MINNEAPOLIS, MN; CHAD ALLEN CARDER, BARRACK, RODOS & BACINE, PHILADELPHIA, PA; CHAD B. HOLTZMAN, GRANT & EISENHOFER P.A., WILMINGTON, DE; CHRISTINA SHARP, GIRARD SHARP LLP, SAN FRANCISCO, CA; CHRISTOPHER T. HEFFELFINGER, BERMAN TABACCO, SAN FRANCISCO, CA; CHRISTOPHER J. MCDONALD, LABATON SUCHAROW LLP, NEW YORK, NY; COLLEEN L. CLEARY, **[**35]** BERMAN TABACCO, SAN FRANCISCO, CA; DAVID LAWLER, TYCKO & ZAVAREEI LLP, WASHINGTON, DC; ELIZABETH A. KRAMER, GIRARD SHARP LLP, SAN FRANCISCO, CA; ERIK L. SHAWN, GROSS BELSKY ALONSO LLP, SAN FRANCISCO, CA; ERIN DURBA, MOTLEY RICE LLC, NEW YORK, NY; HASSAN A. ZAVAREEI, TYCKO & ZAVAREEI LLP, WASHINGTON, DC; HEIDI M SILTON, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; JAMES R. DUGAN, II, THE DUGAN LAW FIRM, NEW ORLEANS, LA; JASON S. HARTLEY, STUEVE SIEGEL HANSON LLP, SAN DIEGO, CA; JAY L. HIMES, LABATON SUCHAROW LLP, NEW YORK, NY; JAYNE A. GOLDSTEIN, SHEPHERD FINKELMAN MILLER & SHAH LLP, MEDIA, PA; JEFFREY A. BARRACK, BARRACK, RODOS & BACINE, PHILADELPHIA, PA; JEFFREY B. GITTLEMAN, BARRACK, RODOS & BACINE, PHILADELPHIA, PA; JEFFREY S. ISTVAN, FINE, KAPLAN AND BLACK, PHILA, PA; JESSICA N. SERVAIS, Lockridge Grindal Nauen PLLP, Minneapolis, MN; JOHN E. SINDONI, BON, ZACK & SNYDER LLC, BALA CYNWYD, PA; JORDAN ELIAS, GIRARD SHARP LLP, SAN FRANCISCO, CA; JOSEPH GENTILE, SARRAF GENTILE LLP, GREAT NECK, NY; JOSEPH J. TABACCO, JR., BERMAN TABACCO, SAN FRANCISCO, CA; JOSHUA D. SNYDER, BONI, ZACK & SNYDER LLC, BALA CYNWYD, PA; KAREN HANSON RIEBEL, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; **[**36]** KARIN E. GARVEY, LABATON SUCHAROW LLP, NEW YORK, NY; KEITH J. VERRIER, LEVIN SEDRAN & BERMAN, PHILADELPHIA, PA; LIBERATO P. VERDERAME, EDELSON & ASSOCIATES, NEWTOWN, PA; MARC H. EDELSON, EDELSON & ASSOCIATES, LLC, NEWTOWN, PA; MATTHEW J. PEREZ, LABATON SUCHAROW LLP, NEW YORK, NY; MICHAEL J. BONI, BONI, ZACK & SNYDER LLC, BALA CYNWYD, PA; MICHAEL M. BUCHMAN, MOTLEY RICE LLC, NEW YORK,

NY; MICHELLE C. CLERKIN, MOTLEY RICE LLC, NEW YORK, NY; MINDEE J. REUBEN, LITE DEPALMA GREENBERG LLC, PHILADELPHIA, PA; NATALIE FINKELMAN BENNETT, SHEPHERD FINKELMAN MILLER & SHAH LLC, MEDIA, PA; PAUL COSTA, FINE, KAPLAN & BLACK, RPC, PHILADELPHIA, PA; RENAE D. STEINER, HEINS MILLS & OLSON PLC, MINNEAPOLIS, MN; ROBERT G. EISLER, GRANT & EISENHOFER PA, WILMINGTON, DE; ROBIN ANN VANDERMEULEN, LABATON SUCHAROW LLP, NEW YORK, NY; RONEN SARRAF, SARRAF GENTILE LLP, GREAT NECK, NY; SCOTT M. GRZENCZYK, GIRARD SHARP LLP, SAN FRANCISCO, CA; STEVEN J. GREENFOGEL, LITE DEPALMA GREENBERG, PHILADELPHIA, PA; TERRY GROSS, GROSS & BELSKY P.C., SAN FRANCISCO, CA; TODD A. SEAVER, BERMAN TABACCO, SAN FRANCISCO, CA; W. JOSEPH BRUCKNER, LOCKRIDGE GRINDAL NAUEN & HOLSTEIN P.L.L.P., MINNEAPOLIS, MN.

For 1199SEIU NATIONAL BENEFIT **[**37]** FUND FOR HOME CARE WORKERS, 1199SEIU LICENSED PRACTICAL NURSES WELFARE FUND, Plaintiffs (2:18-cv-02401-CMR): AUSTIN BLAIR COHEN, LEAD ATTORNEY, LEVIN SEDRAN & BERMAN, PHILADELPHIA, PA; DAN DRACHLER, LEAD ATTORNEY, ZWERLING SCHACHTER & ZWERLING LLP, SEATTLE, WA; GREGORY S. ASCIOLLA, LEAD ATTORNEY, LABATON SUCHAROW LLP, NEW YORK, NY; HOWARD J. SEDRAN, LEAD ATTORNEY, LEVIN SEDRAN & BERMAN, PHILADELPHIA, PA; ROBERTA D. LIEBENBERG, LEAD ATTORNEY, FINE, KAPLAN AND BLACK, PHILADELPHIA, PA; ADAM C. BELSKY, GROSS BELSKY PC, SAN FRANCISCO, CA; ADAM PESSIN, FINE KAPLAN & BLACK, PHILADELPHIA, PA; ANNA M HORNING NYGREN, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; ARIELLE S. WAGNER, LOCKRIDGE GRINDAL NAUEN P.L.L.P., MINNEAPOLIS, MN; CHAD ALLEN CARDER, BARRACK, RODOS & BACINE, PHILADELPHIA, PA; CHAD B. HOLTZMAN, GRANT & EISENHOFER P.A., WILMINGTON, DE; CHRISTINA SHARP, GIRARD SHARP LLP, SAN FRANCISCO, CA; CHRISTOPHER T. HEFFELFINGER, BERMAN TABACCO, SAN FRANCISCO, CA; CHRISTOPHER J. MCDONALD, LABATON SUCHAROW LLP, NEW YORK, NY; COLLEEN L. CLEARY, BERMAN TABACCO, SAN FRANCISCO, CA; DAVID LAWLER, TYCKO & ZAVAREEI LLP, WASHINGTON, DC; ELIZABETH A. KRAMER, GIRARD SHARP LLP, SAN FRANCISCO, CA; ERIK **[**38]** L. SHAWN, GROSS BELSKY ALONSO LLP, SAN FRANCISCO, CA; ERIN DURBA, MOTLEY RICE LLC, NEW YORK, NY; HASSAN A. ZAVAREEI, TYCKO & ZAVAREEI LLP, WASHINGTON, DC; HEIDI M SILTON, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; JAMES R. DUGAN, II, THE DUGAN LAW FIRM, NEW ORLEANS, LA; JASON S. HARTLEY, STUEVE SIEGEL HANSON LLP, SAN DIEGO, CA; JAY L. HIMES, LABATON SUCHAROW LLP, NEW YORK, NY; JAYNE A. GOLDSTEIN, SHEPHERD FINKELMAN MILLER & SHAH LLP, MEDIA, PA; JEFFREY A. BARRACK, BARRACK, RODOS & BACINE, PHILADELPHIA, PA; JEFFREY B. GITTLEMAN, BARRACK, RODOS & BACINE, PHILADELPHIA, PA; JEFFREY S. ISTVAN, FINE, KAPLAN AND BLACK, PHILA, PA; JESSICA N. SERVAIS, Lockridge Grindal Nauen PLLP, Minneapolis, MN; JOHN E. SINDONI, BON, ZACK & SNYDER LLC, BALA CYNWYD, PA; JORDAN ELIAS, GIRARD SHARP LLP, SAN FRANCISCO, CA; JOSEPH GENTILE, SARRAF GENTILE LLP, GREAT NECK, NY; JOSEPH J. TABACCO, JR., BERMAN TABACCO, SAN FRANCISCO, CA; JOSHUA D. SNYDER, BONI, ZACK & SNYDER LLC, BALA CYNWYD, PA; KAREN HANSON RIEBEL, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; KARIN E. GARVEY, LABATON SUCHAROW LLP, NEW YORK, NY; KEITH J. VERRIER, LEVIN SEDRAN & BERMAN, PHILADELPHIA, PA; LIBERATO P. VERDERAME, EDELSON & ASSOCIATES, **[**39]** NEWTOWN, PA; MARC H. EDELSON, EDELSON & ASSOCIATES, LLC, NEWTOWN, PA; MATTHEW J. PEREZ, LABATON SUCHAROW LLP, NEW YORK, NY; MICHAEL J. BONI, BONI, ZACK & SNYDER LLC, BALA CYNWYD, PA; MICHAEL M. BUCHMAN, MOTLEY RICE LLC, NEW YORK, NY; MICHELLE C. CLERKIN, MOTLEY RICE LLC, NEW YORK, NY; MINDEE J. REUBEN, LITE DEPALMA GREENBERG LLC, PHILADELPHIA, PA; NATALIE FINKELMAN BENNETT, SHEPHERD FINKELMAN MILLER & SHAH LLC, MEDIA, PA; PAUL COSTA, FINE, KAPLAN & BLACK, RPC, PHILADELPHIA, PA; RENAE D. STEINER, HEINS MILLS & OLSON PLC, MINNEAPOLIS, MN; ROBERT G. EISLER, GRANT & EISENHOFER PA, WILMINGTON, DE; ROBIN ANN VANDERMEULEN, LABATON SUCHAROW LLP, NEW YORK, NY; RONEN SARRAF, SARRAF GENTILE LLP, GREAT NECK, NY; SCOTT M. GRZENCZYK, GIRARD SHARP LLP, SAN FRANCISCO, CA; STEPHANIE A. CHEN, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; STEVEN J. GREENFOGEL, LITE DEPALMA GREENBERG, PHILADELPHIA, PA; TERRY GROSS, GROSS & BELSKY P.C., SAN FRANCISCO, CA; TODD A. SEAVER, BERMAN TABACCO, SAN FRANCISCO, CA; W. JOSEPH BRUCKNER, LOCKRIDGE GRINDAL NAUEN & HOLSTEIN P.L.L.P., MINNEAPOLIS, MN.

For AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN, Plaintiff **[**40]** (2:18-cv-02401-CMR): AUSTIN BLAIR COHEN, LEAD ATTORNEY, LEVIN SEDRAN & BERMAN, PHILADELPHIA, PA; DAN DRACHLER, LEAD ATTORNEY, ZWERLING SCHACHTER & ZWERLING LLP, SEATTLE, WA; GREGORY S. ASCIOLLA, LEAD ATTORNEY, LABATON SUCHAROW LLP, NEW YORK, NY; HOWARD J. SEDRAN, LEAD ATTORNEY, LEVIN SEDRAN & BERMAN, PHILADELPHIA, PA; ROBERTA D. LIEBENBERG, LEAD ATTORNEY, FINE, KAPLAN AND BLACK, PHILADELPHIA, PA; ADAM C. BELSKY, GROSS BELSKY PC, SAN FRANCISCO, CA; ADAM PESSIN, FINE KAPLAN & BLACK, PHILADELPHIA, PA; ANNA M HORNING NYGREN, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; ARIELLE S. WAGNER, LOCKRIDGE GRINDAL NAUEN P.L.L.P., MINNEAPOLIS, MN; BRUCE W. LEPPLA, LIEFF CABRASER HEIMANN & BERNSTEIN. LLP, SAN FRANCISCO, CA; CHAD ALLEN CARDER, BARRACK, RODOS & BACINE, PHILADELPHIA, PA; CHAD B. HOLTZMAN, GRANT & EISENHOFER P.A., WILMINGTON, DE; CHRISTINA SHARP, GIRARD SHARP LLP, SAN FRANCISCO, CA; CHRISTOPHER T. HEFFELFINGER, BERMAN TABACCO, SAN FRANCISCO, CA; CHRISTOPHER J. MCDONALD, LABATON SUCHAROW LLP, NEW YORK, NY; COLLEEN L. CLEARY, BERMAN TABACCO, SAN FRANCISCO, CA; DAVID LAWLER, TYCKO & ZAVAREEI LLP, WASHINGTON, DC; DAVID TAYLOR RUDOLPH, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, SAN FRANCISCO, **[**41]** CA; DEAN M. HARVEY, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, EMBARCADERO WEST, SAN FRANCISCO, CA; ELIZABETH JOAN CABRASER, LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP, EMBARCADERO CENTER WEST, SAN FRANCISCO, CA; ELIZABETH A. KRAMER, GIRARD SHARP LLP, SAN FRANCISCO, CA; ERIK L. SHAWN, GROSS BELSKY ALONSO LLP, SAN FRANCISCO, CA; ERIN DURBA, MOTLEY RICE LLC, NEW YORK, NY; HASSAN A. ZAVAREEI, TYCKO & ZAVAREEI LLP, WASHINGTON, DC; HEIDI M SILTON, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; JASON S. HARTLEY, STUEVE SIEGEL HANSON LLP, SAN DIEGO, CA; JAY L. HIMES, LABATON SUCHAROW LLP, NEW YORK, NY; JAYNE A. GOLDSTEIN, SHEPHERD FINKELMAN MILLER & SHAH LLP, MEDIA, PA; JEFFREY A. BARRACK, BARRACK, RODOS & BACINE, PHILADELPHIA, PA; JEFFREY B. GITTLEMAN, BARRACK, RODOS & BACINE, PHILADELPHIA, PA; JEFFREY S. ISTVAN, FINE, KAPLAN AND BLACK, PHILA, PA; JESSICA N. SERVAIS, Lockridge Grindal Nauen PLLP, Minneapolis, MN; JOHN E. SINDONI, BON, ZACK & SNYDER LLC, BALA CYNWYD, PA; JORDAN ELIAS, GIRARD SHARP LLP, SAN FRANCISCO, CA; JOSEPH GENTILE, SARRAF GENTILE LLP, GREAT NECK, NY; JOSEPH J. TABACCO, JR., BERMAN TABACCO, SAN FRANCISCO, CA; JOSHUA D. SNYDER, BONI, ZACK & SNYDER LLC, BALA CYNWYD, PA; KAREN **[**42]** HANSON RIEBEL, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; KARIN E. GARVEY, LABATON SUCHAROW LLP, NEW YORK, NY; KEITH J. VERRIER, LEVIN SEDRAN & BERMAN, PHILADELPHIA, PA; LAURA B. HEIMAN, LIEFF CABRASER HEIMANN & BERNSTEIN, LLP, NASHVILLE, TN; LIBERATO P. VERDERAME, EDELSON & ASSOCIATES, NEWTOWN, PA; MARC H. EDELSON, EDELSON & ASSOCIATES, LLC, NEWTOWN, PA; MATTHEW J. PEREZ, LABATON SUCHAROW LLP, NEW YORK, NY; MICHAEL J. BONI, BONI, ZACK & SNYDER LLC, BALA CYNWYD, PA; MICHAEL M. BUCHMAN, MOTLEY RICE LLC, NEW YORK, NY; MICHELLE C. CLERKIN, MOTLEY RICE LLC, NEW YORK, NY; MICHELLE LAMY, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, SAN FRANCISCO, CA; MINDEE J. REUBEN, LITE DEPALMA GREENBERG LLC, PHILADELPHIA, PA; NATALIE FINKELMAN BENNETT, SHEPHERD FINKELMAN MILLER & SHAH LLC, MEDIA, PA; PAUL COSTA, FINE, KAPLAN & BLACK, RPC, PHILADELPHIA, PA; RENAE D. STEINER, HEINS MILLS & OLSON PLC, MINNEAPOLIS, MN; ROBERT G. EISLER, GRANT & EISENHOFER PA, WILMINGTON, DE; ROBIN ANN VANDERMEULEN, LABATON SUCHAROW LLP, NEW YORK, NY; RONEN SARRAF, SARRAF GENTILE LLP, GREAT NECK, NY; SCOTT M. GRZENCZYK, GIRARD SHARP LLP, SAN FRANCISCO, CA; STEPHANIE A. CHEN, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; STEVEN **[**43]** J. GREENFOGEL, LITE DEPALMA GREENBERG, PHILADELPHIA, PA; TERRY GROSS, GROSS & BELSKY P.C., SAN FRANCISCO, CA; TODD A. SEAVER, BERMAN TABACCO, SAN FRANCISCO, CA; W. JOSEPH BRUCKNER, LOCKRIDGE GRINDAL NAUEN & HOLSTEIN P.L.L.P., MINNEAPOLIS, MN.

For LOUISIANA HEALTH SERVICE & INDEMNITY COMPANY, doing business as, BLUE CROSS AND BLUE SHIELD OF LOUISIANA and HMO LOUISIANA, INC., Plaintiff (2:18-cv-02401-CMR): AUSTIN BLAIR COHEN, LEAD ATTORNEY, LEVIN SEDRAN & BERMAN, PHILADELPHIA, PA; DAN DRACHLER, LEAD ATTORNEY, ZWERLING SCHACHTER & ZWERLING LLP, SEATTLE, WA; GREGORY S. ASCIOLLA, LEAD ATTORNEY, LABATON SUCHAROW LLP, NEW YORK, NY; HOWARD J. SEDRAN, LEAD ATTORNEY, LEVIN SEDRAN &

BERMAN, PHILADELPHIA, PA; ROBERTA D. LIEBENBERG, LEAD ATTORNEY, FINE, KAPLAN AND BLACK, PHILADELPHIA, PA; ADAM C. BELSKY, GROSS BELSKY PC, SAN FRANCISCO, CA; ADAM PESSIN, FINE KAPLAN & BLACK, PHILADELPHIA, PA; ANNA M HORNING NYGREN, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; ARIELLE S. WAGNER, LOCKRIDGE GRINDAL NAUEN P.L.L.P., MINNEAPOLIS, MN; CHAD ALLEN CARDER, BARRACK, RODOS & BACINE, PHILADELPHIA, PA; CHAD B. HOLTZMAN, GRANT & EISENHOFER P.A., WILMINGTON, DE; CHRISTINA SHARP, GIRARD SHARP LLP, SAN FRANCISCO, **[**44]** CA; CHRISTOPHER T. HEFFELFINGER, BERMAN TABACCO, SAN FRANCISCO, CA; CHRISTOPHER J. MCDONALD, LABATON SUCHAROW LLP, NEW YORK, NY; COLLEEN L. CLEARY, BERMAN TABACCO, SAN FRANCISCO, CA; DAVID LAWLER, TYCKO & ZAVAREEI LLP, WASHINGTON, DC; DAVID S. SCALIA, THE DUGAN LAW FIRM, APLC, NEW ORLEANS, LA; DOUGLAS R. PLYMALE, THE DUGAN LAW FIRM, NEW ORLEANS, LA; ELIZABETH A. KRAMER, GIRARD SHARP LLP, SAN FRANCISCO, CA; ERIK L. SHAWN, GROSS BELSKY ALONSO LLP, SAN FRANCISCO, CA; ERIN DURBA, MOTLEY RICE LLC, NEW YORK, NY; HASSAN A. ZAVAREEI, TYCKO & ZAVAREEI LLP, WASHINGTON, DC; HEIDI M SILTON, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; JAMES R. DUGAN, II, THE DUGAN LAW FIRM, NEW ORLEANS, LA; JASON S. HARTLEY, STUEVE SIEGEL HANSON LLP, SAN DIEGO, CA; JAY L. HIMES, LABATON SUCHAROW LLP, NEW YORK, NY; JAYNE A. GOLDSTEIN, SHEPHERD FINKELMAN MILLER & SHAH LLP, MEDIA, PA; JEFFREY A. BARRACK, BARRACK, RODOS & BACINE, PHILADELPHIA, PA; JEFFREY B. GITTLEMAN, BARRACK, RODOS & BACINE, PHILADELPHIA, PA; JEFFREY S. ISTVAN, FINE, KAPLAN AND BLACK, PHILA, PA; JESSICA N. SERVAIS, Lockridge Grindal Nauen PLLP, Minneapolis, MN; JOHN E. SINDONI, BON, ZACK & SNYDER LLC, BALA CYNWYD, PA; JORDAN ELIAS, GIRARD SHARP **[**45]** LLP, SAN FRANCISCO, CA; JOSEPH GENTILE, SARRAF GENTILE LLP, GREAT NECK, NY; JOSEPH J. TABACCO, JR., BERMAN TABACCO, SAN FRANCISCO, CA; JOSHUA D. SNYDER, BONI, ZACK & SNYDER LLC, BALA CYNWYD, PA; KAREN HANSON RIEBEL, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; KARIN E. GARVEY, LABATON SUCHAROW LLP, NEW YORK, NY; KEITH J. VERRIER, LEVIN SEDRAN & BERMAN, PHILADELPHIA, PA; LIBERATO P. VERDERAME, EDELSON & ASSOCIATES, NEWTOWN, PA; MATTHEW J. PEREZ, LABATON SUCHAROW LLP, NEW YORK, NY; MICHAEL J. BONI, BONI, ZACK & SNYDER LLC, BALA CYNWYD, PA; MICHAEL M. BUCHMAN, MOTLEY RICE LLC, NEW YORK, NY; MICHELLE C. CLERKIN, MOTLEY RICE LLC, NEW YORK, NY; MINDEE J. REUBEN, LITE DEPALMA GREENBERG LLC, PHILADELPHIA, PA; NATALIE FINKELMAN BENNETT, SHEPHERD FINKELMAN MILLER & SHAH LLC, MEDIA, PA; PAUL COSTA, FINE, KAPLAN & BLACK, RPC, PHILADELPHIA, PA; RENAE D. STEINER, HEINS MILLS & OLSON PLC, MINNEAPOLIS, MN; ROBERT G. EISLER, GRANT & EISENHOFER PA, WILMINGTON, DE; ROBIN ANN VANDERMEULEN, LABATON SUCHAROW LLP, NEW YORK, NY; RONEN SARRAF, SARRAF GENTILE LLP, GREAT NECK, NY; SCOTT M. GRZENCZYK, GIRARD SHARP LLP, SAN FRANCISCO, CA; STEPHANIE A. CHEN, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; STEVEN **[**46]** J. GREENFOGEL, LITE DEPALMA GREENBERG, PHILADELPHIA, PA; TERRY GROSS, GROSS & BELSKY P.C., SAN FRANCISCO, CA; TODD A. SEAVER, BERMAN TABACCO, SAN FRANCISCO, CA; W. JOSEPH BRUCKNER, LOCKRIDGE GRINDAL NAUEN & HOLSTEIN P.L.L.P., MINNEAPOLIS, MN.

For SELF-INSURED SCHOOLS OF CALIFORNIA, Plaintiff (2:18-cv-02401-CMR): AUSTIN BLAIR COHEN, LEAD ATTORNEY, LEVIN SEDRAN & BERMAN, PHILADELPHIA, PA; DAN DRACHLER, LEAD ATTORNEY, ZWERLING SCHACHTER & ZWERLING LLP, SEATTLE, WA; GREGORY S. ASCIOLLA, LEAD ATTORNEY, LABATON SUCHAROW LLP, NEW YORK, NY; HOWARD J. SEDRAN, LEAD ATTORNEY, LEVIN SEDRAN & BERMAN, PHILADELPHIA, PA; ROBERTA D. LIEBENBERG, LEAD ATTORNEY, FINE, KAPLAN AND BLACK, PHILADELPHIA, PA; ADAM C. BELSKY, GROSS BELSKY PC, SAN FRANCISCO, CA; ADAM PESSIN, FINE KAPLAN & BLACK, PHILADELPHIA, PA; ANNA M HORNING NYGREN, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; ARIELLE S. WAGNER, LOCKRIDGE GRINDAL NAUEN P.L.L.P., MINNEAPOLIS, MN; CHAD ALLEN CARDER, BARRACK, RODOS & BACINE, PHILADELPHIA, PA; CHAD B. HOLTZMAN, GRANT & EISENHOFER P.A., WILMINGTON, DE; CHRISTINA SHARP, GIRARD SHARP LLP, SAN FRANCISCO, CA; CHRISTOPHER T. HEFFELFINGER, BERMAN TABACCO, SAN FRANCISCO, CA; CHRISTOPHER J. MCDONALD, **[**47]** LABATON SUCHAROW LLP, NEW YORK, NY; COLLEEN L. CLEARY, BERMAN TABACCO, SAN FRANCISCO, CA; DAVID LAWLER, TYCKO & ZAVAREEI LLP, WASHINGTON, DC; DEMETRIUS X. LAMBRINOS, JOSEPH SAVERI LAW FIRM, INC., SAN FRANCISCO, CA; ELIZABETH A. KRAMER, GIRARD SHARP LLP, SAN FRANCISCO, CA; ERIK L. SHAWN, GROSS BELSKY ALONSO LLP, SAN FRANCISCO, CA;

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For SERGEANTS BENEVOLENT ASSOCIATION OF THE POLICE DEPARTMENT OF THE CITY OF NEW YORK HEALTH AND WELFARE FUND, Plaintiff (2:18-cv-02401-CMR): AUSTIN BLAIR COHEN, LEAD ATTORNEY, LEVIN SEDRAN & BERMAN, PHILADELPHIA, PA; DAN DRACHLER, LEAD ATTORNEY, ZWERLING SCHACHTER & ZWERLING LLP, SEATTLE, WA; GREGORY S. ASCIOLLA, LEAD ATTORNEY, LABATON SUCHAROW LLP, NEW YORK, NY; HOWARD J. SEDRAN, LEAD ATTORNEY, LEVIN SEDRAN & BERMAN, PHILADELPHIA, PA; ROBERTA D. LIEBENBERG, LEAD ATTORNEY, FINE, KAPLAN AND BLACK, PHILADELPHIA, PA; ADAM C. BELSKY, GROSS BELSKY PC, SAN FRANCISCO, CA; ADAM PESSIN, FINE KAPLAN & BLACK, PHILADELPHIA, PA; ANNA M HORNING NYGREN, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; ARIELLE S. WAGNER, LOCKRIDGE GRINDAL NAUEN P.L.L.P., MINNEAPOLIS, **[**50]** MN; CHAD ALLEN CARDER, BARRACK, RODOS & BACINE, PHILADELPHIA, PA; CHAD B. HOLTZMAN, GRANT & EISENHOFER P.A., WILMINGTON, DE; CHRISTINA SHARP, GIRARD SHARP LLP, SAN FRANCISCO, CA; CHRISTOPHER T. HEFFELFINGER, BERMAN TABACCO, SAN FRANCISCO, CA; CHRISTOPHER J. MCDONALD, LABATON SUCHAROW LLP, NEW YORK, NY; COLLEEN L. CLEARY, BERMAN TABACCO, SAN FRANCISCO, CA; DAVID LAWLER, TYCKO & ZAVAREEI LLP, WASHINGTON, DC; ELIZABETH A. KRAMER, GIRARD SHARP LLP, SAN FRANCISCO, CA; ERIK L. SHAWN, GROSS BELSKY ALONSO LLP, SAN FRANCISCO, CA; ERIN DURBA, MOTLEY RICE LLC, NEW YORK, NY; HASSAN A. ZAVAREEI, TYCKO & ZAVAREEI LLP, WASHINGTON, DC; HEIDI M SILTON, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; JASON S. HARTLEY, STUEVE SIEGEL HANSON LLP, SAN DIEGO, CA; JAY L. HIMES, LABATON SUCHAROW LLP, NEW YORK, NY; JAYNE A. GOLDSTEIN, SHEPHERD FINKELMAN MILLER & SHAH LLP, MEDIA, PA; JEFFREY A. BARRACK, BARRACK, RODOS & BACINE, PHILADELPHIA, PA; JEFFREY B. GITTLEMAN, BARRACK, RODOS & BACINE, PHILADELPHIA, PA; JEFFREY S. ISTVAN, FINE, KAPLAN AND BLACK, PHILA, PA; JESSICA N. SERVAIS, Lockridge Grindal Nauen PLLP, Minneapolis, MN; JOHN E. SINDONI, BON, ZACK & SNYDER LLC, BALA CYNWYD, PA; JORDAN ELIAS, GIRARD SHARP **[**51]**

LLP, SAN FRANCISCO, CA; JOSEPH GENTILE, SARRAF GENTILE LLP, GREAT NECK, NY; JOSEPH J. TABACCO, JR., BERMAN TABACCO, SAN FRANCISCO, CA; JOSHUA D. SNYDER, BONI, ZACK & SNYDER LLC, BALA CYNWYD, PA; KAREN HANSON RIEBEL, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; KARIN E. GARVEY, LABATON SUCHAROW LLP, NEW YORK, NY; KEITH J. VERRIER, LEVIN SEDRAN & BERMAN, PHILADELPHIA, PA; LIBERATO P. VERDERAME, EDELSON & ASSOCIATES, NEWTOWN, PA; MARC H. EDELSON, EDELSON & ASSOCIATES, LLC, NEWTOWN, PA; MATTHEW J. PEREZ, LABATON SUCHAROW LLP, NEW YORK, NY; MICHAEL J. BONI, BONI, ZACK & SNYDER LLC, BALA CYNWYD, PA; MICHAEL M. BUCHMAN, MOTLEY RICE LLC, NEW YORK, NY; MICHELLE C. CLERKIN, MOTLEY RICE LLC, NEW YORK, NY; MINDEE J. REUBEN, LITE DEPALMA GREENBERG LLC, PHILADELPHIA, PA; NATALIE FINKELMAN BENNETT, SHEPHERD FINKELMAN MILLER & SHAH LLC, MEDIA, PA; PAUL COSTA, FINE, KAPLAN & BLACK, RPC, PHILADELPHIA, PA; RENAE D. STEINER, HEINS MILLS & OLSON PLC, MINNEAPOLIS, MN; ROBERT G. EISLER, GRANT & EISENHOFER PA, WILMINGTON, DE; ROBIN ANN VANDERMEULEN, LABATON SUCHAROW LLP, NEW YORK, NY; RONEN SARRAF, SARRAF GENTILE LLP, GREAT NECK, NY; SCOTT M. GRZENCZYK, GIRARD SHARP LLP, SAN FRANCISCO, CA; STEPHANIE A. **[**52]** CHEN, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; STEVEN J. GREENFOGEL, LITE DEPALMA GREENBERG, PHILADELPHIA, PA; TERRY GROSS, GROSS & BELSKY P.C., SAN FRANCISCO, CA; TODD A. SEAVER, BERMAN TABACCO, SAN FRANCISCO, CA; W. JOSEPH BRUCKNER, LOCKRIDGE GRINDAL NAUEN & HOLSTEIN P.L.L.P., MINNEAPOLIS, MN.

For UNITE HERE HEALTH, on behalf of, THEMSELVES AND ALL OTHERS SIMILARY SITUATED, Plaintiff (2:18-cv-02401-CMR): ADAM J. ZAPALA, LEAD ATTORNEY, COTCHETT PITRE & MCCARTHY LLP, BURLINGAME, CA; ALEXANDER E. BARNETT, LEAD ATTORNEY, COTCHETT PITRE & MCCARTHY LLP, NEW YORK, NY; AUSTIN BLAIR COHEN, LEAD ATTORNEY, LEVIN SEDRAN & BERMAN, PHILADELPHIA, PA; DAN DRACHLER, LEAD ATTORNEY, ZWERLING SCHACHTER & ZWERLING LLP, SEATTLE, WA; ELIZABETH T. TRAN, LEAD ATTORNEY, COTCHETT, PITRE & MCCARTHY, LLP, BURLINGAME, CA; GREGORY S. ASCIOLLA, LEAD ATTORNEY, LABATON SUCHAROW LLP, NEW YORK, NY; HOWARD J. SEDRAN, LEAD ATTORNEY, LEVIN SEDRAN & BERMAN, PHILADELPHIA, PA; ROBERTA D. LIEBENBERG, LEAD ATTORNEY, FINE, KAPLAN AND BLACK, PHILADELPHIA, PA; ADAM C. BELSKY, GROSS BELSKY PC, SAN FRANCISCO, CA; ADAM PESSIN, FINE KAPLAN & BLACK, PHILADELPHIA, PA; ANNA M HORNING NYGREN, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, **[**53]** MN; ARIELLE S. WAGNER, LOCKRIDGE GRINDAL NAUEN P.L.L.P., MINNEAPOLIS, MN; CHAD ALLEN CARDER, BARRACK, RODOS & BACINE, PHILADELPHIA, PA; CHAD B. HOLTZMAN, GRANT & EISENHOFER P.A., WILMINGTON, DE; CHRISTINA SHARP, GIRARD SHARP LLP, SAN FRANCISCO, CA; CHRISTOPHER T. HEFFELFINGER, BERMAN TABACCO, SAN FRANCISCO, CA; CHRISTOPHER J. MCDONALD, LABATON SUCHAROW LLP, NEW YORK, NY; COLLEEN L. CLEARY, BERMAN TABACCO, SAN FRANCISCO, CA; DAVID LAWLER, TYCKO & ZAVAREEI LLP, WASHINGTON, DC; ELIZABETH A. KRAMER, GIRARD SHARP LLP, SAN FRANCISCO, CA; ERIK L. SHAWN, GROSS BELSKY ALONSO LLP, SAN FRANCISCO, CA; ERIN DURBA, MOTLEY RICE LLC, NEW YORK, NY; HASSAN A. ZAVAREEI, TYCKO & ZAVAREEI LLP, WASHINGTON, DC; HEIDI M SILTON, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; JASON S. HARTLEY, STUEVE SIEGEL HANSON LLP, SAN DIEGO, CA; JAY L. HIMES, LABATON SUCHAROW LLP, NEW YORK, NY; JAYNE A. GOLDSTEIN, SHEPHERD FINKELMAN MILLER & SHAH LLP, MEDIA, PA; JEFFREY A. BARRACK, BARRACK, RODOS & BACINE, PHILADELPHIA, PA; JEFFREY B. GITTLEMAN, BARRACK, RODOS & BACINE, PHILADELPHIA, PA; JEFFREY S. ISTVAN, FINE, KAPLAN AND BLACK, PHILA, PA; JESSICA N. SERVAIS, Lockridge Grindal Nauen PLLP, Minneapolis, MN; JOHN E. SINDONI, **[**54]** BON, ZACK & SNYDER LLC, BALA CYNWYD, PA; JORDAN ELIAS, GIRARD SHARP LLP, SAN FRANCISCO, CA; JOSEPH GENTILE, SARRAF GENTILE LLP, GREAT NECK, NY; JOSEPH J. TABACCO, JR., BERMAN TABACCO, SAN FRANCISCO, CA; JOSHUA D. SNYDER, BONI, ZACK & SNYDER LLC, BALA CYNWYD, PA; KAREN HANSON RIEBEL, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; KARIN E. GARVEY, LABATON SUCHAROW LLP, NEW YORK, NY; KEITH J. VERRIER, LEVIN SEDRAN & BERMAN, PHILADELPHIA, PA; LIBERATO P. VERDERAME, EDELSON & ASSOCIATES, NEWTOWN, PA; MARC H. EDELSON, EDELSON & ASSOCIATES, LLC, NEWTOWN, PA; MATTHEW J. PEREZ, LABATON SUCHAROW LLP, NEW YORK, NY; MICHAEL J. BONI, BONI, ZACK & SNYDER LLC, BALA CYNWYD, PA; MICHAEL M. BUCHMAN, MOTLEY RICE LLC, NEW YORK, NY; MICHELLE C. CLERKIN, MOTLEY RICE LLC, NEW YORK, NY; MINDEE J. REUBEN, LITE DEPALMA GREENBERG LLC, PHILADELPHIA, PA; NATALIE

FINKELMAN BENNETT, SHEPHERD FINKELMAN MILLER & SHAH LLC, MEDIA, PA; PAUL COSTA, FINE, KAPLAN & BLACK, RPC, PHILADELPHIA, PA; RENAE D. STEINER, HEINS MILLS & OLSON PLC, MINNEAPOLIS, MN; ROBERT G. EISLER, GRANT & EISENHOFER PA, WILMINGTON, DE; ROBIN ANN VANDERMEULEN, LABATON SUCHAROW LLP, NEW YORK, NY; RONEN SARRAF, SARRAF GENTILE LLP, GREAT NECK, NY; SCOTT **[**55]** M. GRZENCZYK, GIRARD SHARP LLP, SAN FRANCISCO, CA; STEPHANIE A. CHEN, LOCKRIDGE GRINDAL NAUEN PLLP, MINNEAPOLIS, MN; STEVEN J. GREENFOGEL, LITE DEPALMA GREENBERG, PHILADELPHIA, PA; TERRY GROSS, GROSS & BELSKY P.C., SAN FRANCISCO, CA; TODD A. SEAVER, BERMAN TABACCO, SAN FRANCISCO, CA; W. JOSEPH BRUCKNER, LOCKRIDGE GRINDAL NAUEN & HOLSTEIN P.L.L.P., MINNEAPOLIS, MN.

For ACTAVIS HOLDCO US, INC., ACTAVIS ELIZABETH LLC, ACTAVIS PHARMA, INC., Defendants (2:18-cv-02401-CMR): SHERON KORPUS, LEAD ATTORNEY, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; DAVID M. MAX, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; HECTOR TORRES, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; MARC E. KASOWITZ, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; SETH B. DAVIS, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; SETH A. MOSKOWITZ, KASOWITZ BENSON TORRES LLP, NEW YORK, NY.

For APOTEX CORP., Defendant (2:18-cv-02401-CMR): JAMES W. MATTHEWS, LEAD ATTORNEY, FOLEY & LARDNER LLP, BOSTON, MA; ELIZABETH A.N. HAAS, FOLEY & LARDNER, MILWAUKEE, WI; JAMES T. MCKEOWN, FOLEY & LARDNER, MILWAUKEE, WI; JOHN F. NAGLE, FOLEY & LARDNER LLP, BOSTON, MA.

For AUROBINDO PHARMA USA, INC., Defendant (2:18-cv-02401-CMR): SARAH O'LAUGHLIN KULIK, DUANE MORRIS **[**56]** LLP, PHILADELPHIA, PA.

For CITRON PHARMA LLC, Defendant (2:18-cv-02401-CMR): STEVEN E. BIZAR, LEAD ATTORNEY, DECHERT LLP, CIRA CENTRE, PHILADELPHIA, PA; JOHN MCCLAM, DECHERT LLP, PHILADELPHIA, PA; TIFFANY ELLEN ENGSELL, DECHERT LLP, PHILADELPHIA, PA.

For DAVA PHARMACEUTICALS, LLC, GENERICS BIDCO I, LLC, PAR PHARMACEUTICAL, INC., Defendants (2:18-cv-02401-CMR): JOHN E. SCHMIDTLEIN, LEAD ATTORNEY, WILLIAMS & CONNOLLY LLP, WASHINGTON, DC; SARAH F. TEICH, WILLIAMS & CONNOLLY LLP, WASHINGTON, DC.

For DR. REDDY'S LABORATORIES, INC., Defendant (2:18-cv-02401-CMR): BRIAN T. FEENEY, GREENBERG TRAURIG, LLP, PHILADELPHIA, PA.

For FOUGERA PHARMACEUTICALS INC., SANDOZ, INC., Defendants (2:18-cv-02401-CMR): ADA VICTORIA ANON, LEAD ATTORNEY, ARONLD & PORTER, NEW YORK, NY; AMANDA C CROUSHORE, MARGARET A. ROGERS, SAUL P MORGENSTERN, LEAD ATTORNEYS, ARNOLD & PORTER KAYE SCHOLER LLP, NEW YORK, NY; KATHRYN L. ROSENBERG, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLAR LLP, NEW YORK, NY; LAURA S. SHORES, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLER LLP, WASHINGTON, DC.

For GLENMARK PHARMACEUTICALS, INC., Defendant (2:18-cv-02401-CMR): STEVEN A. REED, LEAD ATTORNEY, MORGAN LEWIS, PHILADELPHIA, PA; ANDREW S WELLIN, **[**57]** MORGAN, LEWIS & BOCKIUS LLP, NEW YORK, NY; MELINA R. DIMATTIO, R. BRENDAN FEE, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PA.

For HERITAGE PHARMACEUTICALS, INC., Defendant (2:18-cv-02401-CMR): EDWARD B. SCHWARTZ, LEAD ATTORNEY, ANDREW C BERNASCONI, JENNIFER M DRISCOLL, REED SMITH LLP, WASHINGTON, DC; COURTNEY B AVERBACH, WILLIAM J SHERIDAN, REED SMITH LLP, REED SMITH CENTRE, PITTSBURGH, PA.

For LANNETT COMPANY, INC., Defendant (2:18-cv-02401-CMR): GERALD E. ARTH, LEAD ATTORNEY, FOX ROTHSCHILD LLP, PHILADELPHIA, PA; RYAN THOMAS BECKER, LEAD ATTORNEY, FOX ROTHSCHILD LLP, STONE MANOR CORP CENTER, PHILADELPHIA, PA; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA.

For MAYNE PHARMA INC., Defendant (2:18-cv-02401-CMR): MICHAEL E. MARTINEZ, LEAD ATTORNEY, BRIAN J SMITH, KENN BROTMAN, LAUREN NORRIS DONAHUE, STEVEN M KOWAL, K&L GATES LLP, CHICAGO, IL.

For MUTUAL PHARMACEUTICAL COMPANY, INC., SUN PHARMACEUTICAL INDUSTRIES, INC., TARO PHARMACEUTICALS USA, INC., Defendants (2:18-cv-02401-CMR): JOHN MARTIN TALADAY, LEAD ATTORNEY, CHRISTOPHER PAGE WILSON, ERIK THOMAS KOONS, S TURNER, BAKER BOTTS LLP, WASHINGTON, DC; LAURI A. KAVULICH, LEAD ATTORNEY, CLARK HILL PLC, PHILADELPHIA, PA; LINDSAY S. FOUSE, CLARK **[**58]** HILL PLC, PITTSBURGH, PA.

For MYLAN INC., MYLAN PHARMACEUTICALS, INC., Defendants (2:18-cv-02401-CMR): CHUL PAK, LEAD ATTORNEY, WILSON SONSINI GOODRICH & ROSATI PC, NEW YORK, NY; JEFFREY C. BANK, LEAD ATTORNEY, WILSON SONSINI GOODRICH & ROSATI, NEW YORK, NY; SETH C. SILBER, LEAD ATTORNEY, WILSON SONSINI GOODRICH & ROSATI PC, WASHINGTON, DC.

For PERRIGO NEW YORK, INC., Defendant (2:18-cv-02401-CMR): J. CLAYTON EVERETT, JR., LEAD ATTORNEY, MORGAN LEWIS & BOCKIUS LLP, WASHINGTON, DC; SCOTT A. STEMPEL, LEAD ATTORNEY, MORGAN LEWIS & BOCKIUS, WASHINGTON, DC; FRANK DESIMONE, MORGAN LEWIS AND BOCKIUS, PHILADELPHIA, PA; HARVEY BARTLE, IV, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PA; TRACEY F MILICH, MORGAN. LEWIS & BOCKIUS LLP, WASHINGTON, DC.

For RAJIV MALIK, Defendant (2:18-cv-02401-CMR): DAVID A. MUNKITTRICK, LEAD ATTORNEY, PROSKAUER ROSE LLP, NEW YORK, NY; EDWARD J. CANTER, ROBERT J. CLEARY, LEAD ATTORNEYS, PROSKAUER ROSE LLP, NEW YORK, NY.

For TEVA PHARMACEUTICALS USA, INC., Defendant (2:18-cv-02401-CMR): ALISON TANCHYK, MORGAN LEWIS & BOKIUS LLP, MIAMI, FL; AMANDA B. ROBINSON, MORGAN, LEWIS & BOCKIUS LLP, WASHINGTON, DC; J. GORDON COONEY, JR., MORGAN, LEWIS,& BOCKIUS LLP, PHILADELPHIA, PA; **[**59]** JOHN J. PEASE, WILLIAM T MCENROE, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PA; MICHAELA DRAGALIN, MORGAN LEWIS & BOCKIUS, PHILADELPHIA, PA.

For WEST-WARD PHARMACEUTICALS CORP., Defendant (2:18-cv-02401-CMR): JAN P. LEVINE, LEAD ATTORNEY, CONNIE LEE, ROBIN P. SUMNER, PEPPER HAMILTON LLP, PHILADELPHIA, PA; JEFFREY A. CARR, PEPPER HAMILTON LLP, PRINCETON, NJ; MICHAEL JAY HARTMAN, PEPPER HAMILTON LLP, EIGHTEENTH & ARCH STS, PHILADELPHIA, PA.

For ZYDUS PHARMACEUTICALS (USA) INC., Defendant (2:18-cv-02401-CMR): JASON R. PARISH, LEAD ATTORNEY, BUCHANAN INGERSALL & ROONEY PC, WASHINGTON, DC; BRADLEY J. KITLOWSKI, BUCHANAN INGERSOLL & ROONEY PC, PITTSBURGH, PA.

For WEST VAL PHARMACY, Plaintiff (2:18-cv-02533-CMR): PETER GIL-MONTLLOR, LEAD ATTORNEY, CUNEO GILBERT & LADUCA, LLP, BROOKLYN, NY; JONATHAN W. CUNEO, CUNEO GILBERT & LADUCA LLP, WASHINGTON, DC.

For HALLIDAY'S & KOIVISTO'S PHARMACY, RUSSELL'S MR. DISCOUNT DRUGS, FALCONER PHARMACY, CHET JOHNSON DRUG, Plaintiffs (2:18-cv-02533-CMR): PETER GIL-MONTLLOR, LEAD ATTORNEY, CUNEO GILBERT & LADUCA, LLP, BROOKLYN, NY.

For ACTAVIS HOLDCO U.S., INC., ACTAVIS ELIZABETH LLC, ACTAVIS PHARMA, INC., Defendants (2:18-cv-02533-CMR): SHERON KORPUS, LEAD ATTORNEY, **[**60]** KASOWITZ BENSON TORRES LLP, NEW YORK, NY; DAVID M. MAX, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; HECTOR TORRES, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; MARC E. KASOWITZ, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; SETH B. DAVIS, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; SETH A. MOSKOWITZ, KASOWITZ BENSON TORRES LLP, NEW YORK, NY.

For APOTEX CORP., Defendant (2:18-cv-02533-CMR): JAMES W. MATTHEWS, LEAD ATTORNEY, FOLEY & LARDNER LLP, BOSTON, MA; ELIZABETH A.N. HAAS, FOLEY & LARDNER, MILWAUKEE, WI; JAMES T. MCKEOWN, FOLEY & LARDNER, MILWAUKEE, WI; JOHN F. NAGLE, FOLEY & LARDNER LLP, BOSTON, MA.

For AUROBINDO PHARMA USA, INC., Defendant (2:18-cv-02533-CMR): SARAH O'LAUGHLIN KULIK, DUANE MORRIS LLP, PHILADELPHIA, PA.

For CITRON PHARMA LLC, Defendant (2:18-cv-02533-CMR): STEVEN E. BIZAR, LEAD ATTORNEY, DECHERT LLP, CIRA CENTRE, PHILADELPHIA, PA; JOHN MCCLAM, DECHERT LLP, PHILADELPHIA, PA; TIFFANY ELLEN ENGSELL, DECHERT LLP, PHILADELPHIA, PA.

For DAVA PHARMACEUTICALS, LLC, GENERICS BIDCO I, LLC, PAR PHARMACEUTICAL, INC., Defendants (2:18-cv-02533-CMR): JOHN E. SCHMIDTLEIN, LEAD ATTORNEY, WILLIAMS & CONNOLLY LLP, WASHINGTON, DC; SARAH F. TEICH, WILLIAMS & CONNOLLY LLP, WASHINGTON, DC.

For DR. **[**61]** REDDY'S LABORATORIES, INC., Defendant (2:18-cv-02533-CMR): BRIAN T. FEENEY, LEAD ATTORNEY, GREENBERG TRAURIG, LLP, PHILADELPHIA, PA.

For FOUGERA PHARMACEUTICALS, INC., SANDOZ, INC., Defendants (2:18-cv-02533-CMR): ADA VICTORIA ANON, LEAD ATTORNEY, ARONLD & PORTER, NEW YORK, NY; AMANDA C CROUSHORE, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLER LLP, NEW YORK, NY; KATHRYN L. ROSENBERG, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLAR LLP, NEW YORK, NY; LAURA S. SHORES, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLER LLP, WASHINGTON, DC; MARGARET A. ROGERS, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLER LLP, NEW YORK, NY; SAUL P MORGENSTERN, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLER LLP, NEW YORK, NY.

For GLENMARK PHARMACEUTICALS, INC., Defendant (2:18-cv-02533-CMR): STEVEN A. REED, LEAD ATTORNEY, MORGAN LEWIS, PHILADELPHIA, PA; ANDREW S WELLIN, MORGAN, LEWIS & BOCKIUS LLP, NEW YORK, NY; MELINA R. DIMATTIO, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PA; R. BRENDAN FEE, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PA.

For HERITAGE PHARMACEUTICALS, INC., Defendant (2:18-cv-02533-CMR): EDWARD B. SCHWARTZ, LEAD ATTORNEY, REED SMITH LLP, WASHINGTON, DC; ANDREW C BERNASCONI, REED SMITH LLP, WASHINGTON, DC; COURTNEY **[**62]** B AVERBACH, REED SMITH LLP, REED SMITH CENTRE, PITTSBURGH, PA; JENNIFER M DRISCOLL, REED SMITH LLP, WASHINGTON, DC; WILLIAM J SHERIDAN, REED SMITH LLP, REED SMITH CENTRE, PITTSBURGH, PA.

For LANNETT COMPANY, INC., Defendant (2:18-cv-02533-CMR): GERALD E. ARTH, LEAD ATTORNEY, FOX ROTHSCHILD LLP, PHILADELPHIA, PA; RYAN THOMAS BECKER, LEAD ATTORNEY, FOX ROTHSCHILD LLP, STONE MANOR CORP CENTER, PHILADELPHIA, PA; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA.

For MAYNE PHARMA INC., Defendant (2:18-cv-02533-CMR): MICHAEL E. MARTINEZ, LEAD ATTORNEY, K&L GATES LLP, CHICAGO, IL; BRIAN J SMITH, K&L GATES LLP, CHICAGO, IL; KENN BROTMAN, K&L GATES LLP, CHICAGO, IL; LAUREN NORRIS DONAHUE, K&L GATES LLP, CHICAGO, IL; STEVEN M KOWAL, K&L GATES LLP, CHICAGO, IL.

For MUTUAL PHARMACEUTICAL CO., INC., SUN PHARMACEUTICAL IND., INC., TARO PHARMACEUTICALS U.S.A., INC., Defendants (2:18-cv-02533-CMR): JOHN MARTIN TALADAY, LEAD ATTORNEY, BAKER BOTTS LLP, WASHINGTON, DC; LAURI A. KAVULICH, LEAD ATTORNEY, CLARK HILL PLC, PHILADELPHIA, PA; ANN LEMMO, CLARK HILL PLC, PHILADELPHIA, PA; CHRISTOPHER PAGE WILSON, BAKER BOTTS LLP, WASHINGTON, DC; ERIK THOMAS KOONS, BAKER BOTTS LLP, WASHINGTON, DC; LINDSAY S. FOUSE, CLARK **[**63]** HILL PLC, PITTSBURGH, PA; S TURNER, BAKER BOTTS LLP, WASHINGTON, DC.

For PERRIGO NEW YORK, INC., Defendant (2:18-cv-02533-CMR): J. CLAYTON EVERETT, JR., LEAD ATTORNEY, MORGAN LEWIS & BOCKIUS LLP, WASHINGTON, DC; SCOTT A. STEMPEL, LEAD ATTORNEY, MORGAN LEWIS & BOCKIUS, WASHINGTON, DC; FRANK DESIMONE, MORGAN LEWIS AND BOCKIUS, PHILADELPHIA, PA; HARVEY BARTLE, IV, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PA; TRACEY F MILICH, MORGAN. LEWIS & BOCKIUS LLP, WASHINGTON, DC.

For RAJIV MALIK, Defendant (2:18-cv-02533-CMR): DAVID A. MUNKITTRICK, LEAD ATTORNEY, PROSKAUER ROSE LLP, ELEVEN TIMES SQUARE, NEW YORK, NY; EDWARD J. CANTER, LEAD ATTORNEY,

PROSKAUER ROSE LLP, ELEVEN TIMES SQUARE, NEW YORK, NY; ROBERT J. CLEARY, LEAD ATTORNEY, PROSKAUER ROSE LLP, NEW YORK, NY.

For TEVA PHARMACEUTICALS USA, INC., Defendant (2:18-cv-02533-CMR): ALISON TANCHYK, MORGAN LEWIS & BOKIUS LLP, MIAMI, FL; AMANDA B. ROBINSON, MORGAN, LEWIS & BOCKIUS LLP, WASHINGTON, DC; J. GORDON COONEY, JR., MORGAN, LEWIS,& BOCKIUS LLP, PHILADELPHIA, PA; JOHN J. PEASE, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PA; MICHAELA DRAGALIN, MORGAN LEWIS & BOCKIUS, PHILADELPHIA, PA; WILLIAM T MCENROE, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, **[**64]** PA.

For WEST-WARD PHARMACEUTICALS CORP., Defendant (2:18-cv-02533-CMR): JAN P. LEVINE, LEAD ATTORNEY, PEPPER HAMILTON LLP, PHILADELPHIA, PA; CONNIE LEE, PEPPER HAMILTON LLP, PHILADELPHIA, PA; DENNIE BENJIMAN ZASTROW, PEPPER HAMILTON LLP, PHILADELPHIA, PA; JEFFREY A. CARR, PEPPER HAMILTON LLP, PRINCETON, NJ; MICHAEL JAY HARTMAN, PEPPER HAMILTON LLP, EIGHTEENTH & ARCH STS, PHILADELPHIA, PA; ROBIN P. SUMNER, PEPPER HAMILTON LLP, PHILADELPHIA, PA.

For ZYDUS PHARMACEUTICALS (USA), INC., Defendant (2:18-cv-02533-CMR): JASON R. PARISH, LEAD ATTORNEY, BUCHANAN INGERSALL & ROONEY PC, WASHINGTON, DC; BRADLEY J. KITLOWSKI, BUCHANAN INGERSOLL & ROONEY PC, PITTSBURGH, PA.

For AHOLD USA, INC., CESAR CASTILLO, INC., FWK HOLDINGS, L.L.C., KPH HEALTH CARE SERVICES, INC., also known as, KINNEY DRUGS, INC., ROCHESTER DRUG CO-OPERATIVE, INC., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, Plaintiffs (2:18-cv-02641-CMR): DIANNE M. NAST, LEAD ATTORNEY, NASTLAW LLC, PHILADELPHIA, PA.

For ACTAVIS HOLDCO U.S., INC., Defendant (2:18-cv-02641-CMR): SHERON KORPUS, LEAD ATTORNEY, DAVID M. MAX, HECTOR TORRES, MARC E. KASOWITZ, SETH B. DAVIS, SETH A. MOSKOWITZ, KASOWITZ BENSON TORRES LLP, NEW YORK, NY.

For **[**65]** APOTEX CORP., Defendant (2:18-cv-02641-CMR): ELIZABETH A.N. HAAS, JAMES T. MCKEOWN, FOLEY & LARDNER, MILWAUKEE, WI; JAMES W. MATTHEWS, JOHN F. NAGLE, FOLEY & LARDNER LLP, BOSTON, MA.

For AUROBINDO PHARMA USA, INC., Defendant (2:18-cv-02641-CMR): SARAH O'LAUGHLIN KULIK, DUANE MORRIS LLP, PHILADELPHIA, PA.

For CITRON PHARMA LLC, Defendant (2:18-cv-02641-CMR): STEVEN E. BIZAR, LEAD ATTORNEY, DECHERT LLP, CIRA CENTRE, PHILADELPHIA, PA; JOHN MCCLAM, DECHERT LLP, PHILADELPHIA, PA; TIFFANY ELLEN ENGSELL, DECHERT LLP, PHILADELPHIA, PA.

For FOUGERA PHARMACEUTICALS INC., SANDOZ, INC., Defendants (2:18-cv-02641-CMR): ADA VICTORIA ANON, LEAD ATTORNEY, ARONLD & PORTER, NEW YORK, NY; AMANDA C CROUSHORE, MARGARET A. ROGERS, SAUL P MORGENSTERN, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLER LLP, NEW YORK, NY; KATHRYN L. ROSENBERG, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLAR LLP, NEW YORK, NY; LAURA S. SHORES, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLER LLP, WASHINGTON, DC.

For G&W LABORATORIES, INC., Defendant (2:18-cv-02641-CMR): ANNA M. RATHBUN, LATHAM & WATKINS LLP, WASHINGTON, DC; MARGUERITE M. SULLIVAN, LATHAM WATKINS LLP, WASHINGTON, DC.

For GLENMARK PHARMACEUTICALS, INC., Defendant (2:18-cv-02641-CMR): **[**66]** STEVEN A. REED, LEAD ATTORNEY, MORGAN LEWIS, PHILADELPHIA, PA; ANDREW S WELLIN, MORGAN, LEWIS & BOCKIUS LLP, NEW YORK, NY; MELINA R. DIMATTIO, R. BRENDAN FEE, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PA.

For HERITAGE PHARMACEUTICALS, INC., Defendant (2:18-cv-02641-CMR): EDWARD B. SCHWARTZ, LEAD ATTORNEY, ANDREW C BERNASCONI, JENNIFER M DRISCOLL, REED SMITH LLP, WASHINGTON, DC;

COURTNEY B AVERBACH, WILLIAM J SHERIDAN, REED SMITH LLP, REED SMITH CENTRE, PITTSBURGH, PA.

For IMPAX LABORATORIES, INC., Defendant (2:18-cv-02641-CMR): DAVID L. HANSELMAN, MCDERMOTT WILL & EMERY LLP, CHICAGO, IL; RAYMOND A. JACOBSEN, MCDERMOTT WILL & EMERY LLP, WASHINGTON, DC.

For LANNETT COMPANY, INC., Defendant (2:18-cv-02641-CMR): GERALD E. ARTH, LEAD ATTORNEY, FOX ROTHSCHILD LLP, PHILADELPHIA, PA; RYAN THOMAS BECKER, LEAD ATTORNEY, FOX ROTHSCHILD LLP, STONE MANOR CORP CENTER, PHILADELPHIA, PA; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA.

For OCEANSIDE PHARMACEUTICALS, INC., VALEANT PHARMACEUTICALS NORTH AMERICA LLC, VALEANT PHARMACEUTICALS INTERNATIONAL, Defendants (2:18-cv-02641-CMR): GERALD STEIN, MARK A. ROBERTSON, MATTHEW C LAMB, ROBIN D. ADELSTEIN, NORTON ROSE FULBRIGHT US LLP, NEW YORK, NY.

For RAJIV **[**67]** MALIK, Defendant (2:18-cv-02641-CMR): DAVID A. MUNKITTRICK, EDWARD J. CANTER, ROBERT J. CLEARY, LEAD ATTORNEYS, PROSKAUER ROSE LLP, NEW YORK, NY.

For PAR PHARMACEUTICAL COMPANY, INC., Defendant (2:18-cv-02641-CMR): JOHN E. SCHMIDTLEIN, LEAD ATTORNEY, WILLIAMS & CONNOLLY LLP, WASHINGTON, DC; SARAH F. TEICH, WILLIAMS & CONNOLLY LLP, WASHINGTON, DC.

For PERRIGO NEW YORK, INC., Defendant (2:18-cv-02641-CMR): J. CLAYTON EVERETT, JR., LEAD ATTORNEY, MORGAN LEWIS & BOCKIUS LLP, WASHINGTON, DC; SCOTT A. STEMPEL, LEAD ATTORNEY, MORGAN LEWIS & BOCKIUS, WASHINGTON, DC; FRANK DESIMONE, MORGAN LEWIS AND BOCKIUS, PHILADELPHIA, PA; HARVEY BARTLE, IV, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PA; TRACEY F MILICH, MORGAN. LEWIS & BOCKIUS LLP, WASHINGTON, DC.

For SUN PHARMACEUTICAL INDUSTRIES, INC., TARO PHARMACEUTICALS U.S.A., INC., Defendants (2:18-cv-02641-CMR): JOHN MARTIN TALADAY, LEAD ATTORNEY, CHRISTOPHER PAGE WILSON, ERIK THOMAS KOONS, S TURNER, BAKER BOTTS LLP, WASHINGTON, DC; LAURI A. KAVULICH, LEAD ATTORNEY, ANN LEMMO, CLARK HILL PLC, PHILADELPHIA, PA; LINDSAY S. FOUSE, CLARK HILL PLC, PITTSBURGH, PA.

For TEVA PHARMACEUTICUALS USA, INC., Defendant (2:18-cv-02641-CMR): ALISON TANCHYK, MORGAN LEWIS **[**68]** & BOKIUS LLP, MIAMI, FL; AMANDA B. ROBINSON, MORGAN, LEWIS & BOCKIUS LLP, WASHINGTON, DC; J. GORDON COONEY, JR., MORGAN, LEWIS,& BOCKIUS LLP, PHILADELPHIA, PA; JOHN J. PEASE, WILLIAM T MCENROE, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PA; MICHAELA DRAGALIN, MORGAN LEWIS & BOCKIUS, PHILADELPHIA, PA.

For ZYDUS PHARMACEUTICALS (USA), INC., Defendant (2:18-cv-02641-CMR): JASON R. PARISH, LEAD ATTORNEY, BUCHANAN INGERSALL & ROONEY PC, WASHINGTON, DC; BRADLEY J. KITLOWSKI, BUCHANAN INGERSOLL & ROONEY PC, PITTSBURGH, PA.

For HUMANA INC., Plaintiff (2:18-cv-03299-CMR): PETER D. ST. PHILLIP, LEAD ATTORNEY, LOWEY DANNENBERG, P.C., WHITE PLAINS, NY; TODD M. SCHNEIDER, LEAD ATTORNEY, SCHNEIDER WALLACE COTTRELL KONECKY WOTKYN LLP, EMERYVILLE, CA; WILLIAM J. BLECHMAN, LEAD ATTORNEY, KENNY NACHWALTER PA, MIAMI, FL; ANTHONY M. CHRISTINA, LOWEY DANNENBERG PC, ONE TOWER BRIDGE, WEST CONSHOHOCKEN, PA; CHARLES Z. KOPEL, LOWEY DANNENBERG PC, ONE TOWER BRIDGE, WEST CONSHOHOCKEN, PA; GARRETT W. WOTKYNS, SCHNEIDER WALLACE COTTRELL KONECKY WOTKYNS LLP, SCOTTSDALE, AZ; JASON H. KIM, SCHNEIDER WALLACE COTTRELL KONECKY WOTKYNS, EMERYVILLE, CA; JENNIFER RISENER, LOWEY DANNENBERG P.C., WHITE PLAINS, NY; KYLE G. **[**69]** BATES, SCHNEIDER WALLACE COTTRELL KONECKY WOTKYNS LLP, EMERYVILLE, CA; LAURA KILLIAN MUMMERT, LOWEY DANNENBERG PC, ONE TOWER BRIDGE, WEST CONSHOHOCKEN, PA; LEE YUN KIM, LOWEY DANNENBERG, P.C., WHITE PLAINS, NY; WILLIAM J. OLSON, One Tower Bridge, West Conshohocken, PA.

For ACTAVIS ELIZABETH, LLC, Defendant (2:18-cv-03299-CMR): SHERON KORPUS, LEAD ATTORNEY, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; DAVID M. MAX, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; HECTOR TORRES, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; MARC E. KASOWITZ, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; SETH B. DAVIS, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; SETH A. MOSKOWITZ, KASOWITZ BENSON TORRES LLP, NEW YORK, NY.

For ACTAVIS HOLDCO US, INC., Defendant (2:18-cv-03299-CMR): SHERON KORPUS, LEAD ATTORNEY, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; DAVID M. MAX, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; HECTOR TORRES, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA; MARC E. KASOWITZ, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; SETH B. DAVIS, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; SETH A. MOSKOWITZ, KASOWITZ BENSON TORRES LLP, NEW YORK, NY.

For ACTAVIS PHARMA, INC., Defendant (2:18-cv-03299-CMR): **[**70]** SHERON KORPUS, LEAD ATTORNEY, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; DAVID M. MAX, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; HECTOR TORRES, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA; MARC E. KASOWITZ, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; SETH B. DAVIS, KASOWITZ BENSON TORRES LLP, NEW YORK, NY; SETH A. MOSKOWITZ, KASOWITZ BENSON TORRES LLP, NEW YORK, NY.

For AKORN, INC., Defendant (2:18-cv-03299-CMR): AMY D FITTS, LEAD ATTORNEY, POLSINELLI PC, KANSAS CITY, MO; ANTHONY C. PORCELLI, LEAD ATTORNEY, POLSINELLI PC, CHICAGO, IL; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA.

For APOTEX CORP., Defendant (2:18-cv-03299-CMR): JAMES W. MATTHEWS, LEAD ATTORNEY, FOLEY & LARDNER LLP, BOSTON, MA; ELIZABETH A.N. HAAS, FOLEY & LARDNER, MILWAUKEE, WI; JAMES T. MCKEOWN, FOLEY & LARDNER, MILWAUKEE, WI; JOHN F. NAGLE, FOLEY & LARDNER LLP, BOSTON, MA; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA.

For BRECKENRIDGE PHARMACEUTICAL, INC., Defendant (2:18-cv-03299-CMR): CHARLES J. REITMEYER, LEAD ATTORNEY, MORGAN LEWIS & BOCKIUS, PHILADELPHIA, PA; ANTHONY VAN VUREN, MORGAN LEWIS & BOCKIUS LLP, WASHINGTON, DC; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA; STACEY **[**71]** ANNE MAHONEY, MORGAN, LEWIS & BOCKIUS LLP, NEW YORK, NY.

For DR. REDDY'S LABORATORIES, INC., Defendant (2:18-cv-03299-CMR): JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA.

For ENDO INTERNATIONAL PLC, Defendant (2:18-cv-03299-CMR): JOHN E. SCHMIDTLEIN, LEAD ATTORNEY, WILLIAMS & CONNOLLY LLP, WASHINGTON, DC; SARAH F. TEICH, WILLIAMS & CONNOLLY LLP, WASHINGTON, DC.

For EPIC PHARMA, LLC, Defendant (2:18-cv-03299-CMR): JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA.

For FOUGERA PHARMACEUTICALS INC., Defendant (2:18-cv-03299-CMR): ADA VICTORIA ANON, LEAD ATTORNEY, ARONLD & PORTER, NEW YORK, NY; AMANDA C CROUSHORE, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLER LLP, NEW YORK, NY; KATHRYN L. ROSENBERG, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLAR LLP, NEW YORK, NY; LAURA S. SHORES, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLER LLP, WASHINGTON, DC; MARGARET A. ROGERS, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLER LLP, NEW YORK, NY; SAUL P MORGENSTERN, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLER LLP, NEW YORK, NY; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA.

For GLENMARK PHARMACEUTICALS INC., USA, Defendant (2:18-cv-03299-CMR): STEVEN A. REED, LEAD ATTORNEY, MORGAN LEWIS, PHILADELPHIA, PA; ANDREW S WELLIN, **[**72]** MORGAN, LEWIS & BOCKIUS LLP, NEW YORK, NY; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA; MELINA R. DIMATTIO, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PA; R. BRENDAN FEE, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PA.

For HERITAGE PHARMACEUTICALS INC., Defendant (2:18-cv-03299-CMR): EDWARD B. SCHWARTZ, LEAD ATTORNEY, REED SMITH LLP, WASHINGTON, DC; ANDREW C BERNASCONI, REED SMITH LLP, WASHINGTON, DC; COURTNEY B AVERBACH, REED SMITH LLP, REED SMITH CENTRE, PITTSBURGH, PA; JENNIFER M DRISCOLL, REED SMITH LLP, WASHINGTON, DC; WILLIAM J SHERIDAN, REED SMITH LLP, REED SMITH CENTRE, PITTSBURGH, PA.

For HI-TECH PHARMACAL CO., INC., Defendant (2:18-cv-03299-CMR): AMY D FITTS, LEAD ATTORNEY, POLSINELLI PC, KANSAS CITY, MO; ANTHONY C. PORCELLI, LEAD ATTORNEY, POLSINELLI PC, CHICAGO, IL; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA.

For LANNETT COMPANY, INC., Defendant (2:18-cv-03299-CMR): GERALD E. ARTH, LEAD ATTORNEY, FOX ROTHSCHILD LLP, PHILADELPHIA, PA; RYAN THOMAS BECKER, LEAD ATTORNEY, FOX ROTHSCHILD LLP, STONE MANOR CORP CENTER, PHILADELPHIA, PA; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA.

For LUPIN PHARMACEUTICALS, INC., Defendant (2:18-cv-03299-CMR): ARIO FAZLI, LOWENSTEIN SANDLER LLP, **[**73]** WASHINGTON, DC; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA; KATIE ROSE GLYNN, LOWENSTEIN SANDLER LLP, PALO ALTO, CA; LEIV H. BLAD, LOWENSTEIN SANDLER LLP, WASHINGTON, DC.

For MAYNE PHARMA, INC., Defendant (2:18-cv-03299-CMR): MICHAEL E. MARTINEZ, LEAD ATTORNEY, K&L GATES LLP, CHICAGO, IL; BRIAN J SMITH, K&L GATES LLP, CHICAGO, IL; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA; KENN BROTMAN, K&L GATES LLP, CHICAGO, IL; LAUREN NORRIS DONAHUE, K&L GATES LLP, CHICAGO, IL; STEVEN M KOWAL, K&L GATES LLP, CHICAGO, IL.

For MORTON GROVE PHARMACEUTICALS, INC., Defendant (2:18-cv-03299-CMR): WILLIAM A. ESCOBAR, LEAD ATTORNEY, KELLEY DRYE & WARREN LLP, NEW YORK, NY; CLIFFORD KATZ, KELLEY DRYE & WARREN LLP, NEW YORK, NY; DAMON W. SUDEN, KELLEY DRYE & WARREN LLP, NEW YORK, NY; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA.

For MYLAN PHARMACEUTICALS, INC., Defendant (2:18-cv-03299-CMR): CHUL PAK, LEAD ATTORNEY, WILSON SONSINI GOODRICH & ROSATI PC, NEW YORK, NY; JEFFREY C. BANK, LEAD ATTORNEY, WILSON SONSINI GOODRICH & ROSATI, NEW YORK, NY; SETH C. SILBER, LEAD ATTORNEY, WILSON SONSINI GOODRICH & ROSATI PC, WASHINGTON, DC; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA.

For MYLAN INC., Defendant (2:18-cv-03299-CMR): **[**74]** CHUL PAK, LEAD ATTORNEY, WILSON SONSINI GOODRICH & ROSATI PC, NEW YORK, NY; JEFFREY C. BANK, LEAD ATTORNEY, WILSON SONSINI GOODRICH & ROSATI, NEW YORK, NY; SETH C. SILBER, LEAD ATTORNEY, WILSON SONSINI GOODRICH & ROSATI PC, WASHINGTON, DC; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA.

For MYLAN, N.V., Defendant (2:18-cv-03299-CMR): CHUL PAK, LEAD ATTORNEY, WILSON SONSINI GOODRICH & ROSATI PC, NEW YORK, NY; JEFFREY C. BANK, LEAD ATTORNEY, WILSON SONSINI GOODRICH & ROSATI, NEW YORK, NY; SETH C. SILBER, LEAD ATTORNEY, WILSON SONSINI GOODRICH & ROSATI PC, WASHINGTON, DC; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA.

For PAR PHARMACEUTICAL, INC., Defendant (2:18-cv-03299-CMR): JOHN E. SCHMIDTLEIN, LEAD ATTORNEY, WILLIAMS & CONNOLLY LLP, WASHINGTON, DC; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA; SARAH F. TEICH, WILLIAMS & CONNOLLY LLP, WASHINGTON, DC.

For PAR PHARMACEUTICAL COMPANIES, INC., Defendant (2:18-cv-03299-CMR): JOHN E. SCHMIDTLEIN, LEAD ATTORNEY, WILLIAMS & CONNOLLY LLP, WASHINGTON, DC; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA; SARAH F. TEICH, WILLIAMS & CONNOLLY LLP, WASHINGTON, DC.

For PERRIGO COMPANY PLC, Defendant (2:18-cv-03299-CMR): JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, **[**75]** PA.

For PERRIGO NEW YORK, INC., Defendant (2:18-cv-03299-CMR): J. CLAYTON EVERETT, JR., LEAD ATTORNEY, MORGAN LEWIS & BOCKIUS LLP, WASHINGTON, DC; SCOTT A. STEMPEL, LEAD ATTORNEY, MORGAN LEWIS & BOCKIUS, WASHINGTON, DC; FRANK DESIMONE, MORGAN LEWIS AND BOCKIUS,

PHILADELPHIA, PA; HARVEY BARTLE, IV, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PA; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA; TRACEY F MILICH, MORGAN. LEWIS & BOCKIUS LLP, WASHINGTON, DC.

For SANDOZ, INC., Defendant (2:18-cv-03299-CMR): ADA VICTORIA ANON, LEAD ATTORNEY, ARONLD & PORTER, NEW YORK, NY; AMANDA C CROUSHORE, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLER LLP, NEW YORK, NY; KATHRYN L. ROSENBERG, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLAR LLP, NEW YORK, NY; LAURA S. SHORES, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLER LLP, WASHINGTON, DC; MARGARET A. ROGERS, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLER LLP, NEW YORK, NY; SAUL P MORGENSTERN, LEAD ATTORNEY, ARNOLD & PORTER KAYE SCHOLER LLP, NEW YORK, NY; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA.

For SUN PHARMACEUTICAL INDUSTRIES, INC., TARO PHARMACEUTICAL INDUSTRIES LTD., TARO PHARMACEUTICALS USA, INC., Defendants (2:18-cv-03299-CMR): JOHN MARTIN TALADAY, LEAD ATTORNEY, **[**76]** BAKER BOTTS LLP, WASHINGTON, DC; LAURI A. KAVULICH, LEAD ATTORNEY, CLARK HILL PLC, PHILADELPHIA, PA; ANN LEMMO, CLARK HILL PLC, PHILADELPHIA, PA; CHRISTOPHER PAGE WILSON, BAKER BOTTS LLP, WASHINGTON, DC; ERIK THOMAS KOONS, BAKER BOTTS LLP, WASHINGTON, DC; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA; LINDSAY S. FOUSE, CLARK HILL PLC, PITTSBURGH, PA; S TURNER, BAKER BOTTS LLP, WASHINGTON, DC.

For TEVA PHARMACEUTICALS USA, INC., Defendant (2:18-cv-03299-CMR): ALISON TANCHYK, MORGAN LEWIS & BOKIUS LLP, MIAMI, FL; AMANDA B. ROBINSON, MORGAN, LEWIS & BOCKIUS LLP, WASHINGTON, DC; J. GORDON COONEY, JR., MORGAN, LEWIS,& BOCKIUS LLP, PHILADELPHIA, PA; JOHN J. PEASE, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PA; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA; MICHAELA DRAGALIN, MORGAN LEWIS & BOCKIUS, PHILADELPHIA, PA; WILLIAM T MCENROE, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PA.

For UDL LABORATORIES INC., Defendant (2:18-cv-03299-CMR): CHUL PAK, LEAD ATTORNEY, WILSON SONSINI GOODRICH & ROSATI PC, NEW YORK, NY; JEFFREY C. BANK, LEAD ATTORNEY, WILSON SONSINI GOODRICH & ROSATI, NEW YORK, NY; SETH C. SILBER, LEAD ATTORNEY, WILSON SONSINI GOODRICH & ROSATI PC, WASHINGTON, DC; JULIA CHAPMAN, DECHERT **[**77]** LLP, PHILADELPHIA, PA.

For UPSHER-SMITH LABORATORIES, LLC, Defendant (2:18-cv-03299-CMR): DEVORA W. ALLON, LEAD ATTORNEY, KIRKLAND & ELLIS LLP, NEW YORK, NY; JAY P. LEFKOWITZ, LEAD ATTORNEY, KIRKLAND & ELLIS, NEW YORK, NY; ALEXIA R BRANCATO, KIRKLAND & ELLIS LLP, FI45, NEW YORK, NY; ERIN OGBURN, KIRKLAND & ELLIS LLP, NEW YORK, NY; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA.

For WEST-WARD PHARMACEUTICALS CORP., Defendant (2:18-cv-03299-CMR): JAN P. LEVINE, LEAD ATTORNEY, PEPPER HAMILTON LLP, PHILADELPHIA, PA; CONNIE LEE, PEPPER HAMILTON LLP, PHILADELPHIA, PA; JEFFREY A. CARR, PEPPER HAMILTON LLP, PRINCETON, NJ; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA; MICHAEL JAY HARTMAN, PEPPER HAMILTON LLP, EIGHTEENTH & ARCH STS, PHILADELPHIA, PA; ROBIN P. SUMNER, PEPPER HAMILTON LLP, PHILADELPHIA, PA.

For ZYDUS PHARMACEUTICALS (USA) INC., Defendant (2:18-cv-03299-CMR): JASON R. PARISH, LEAD ATTORNEY, BUCHANAN INGERSALL & ROONEY PC, WASHINGTON, DC; BRADLEY J. KITLOWSKI, BUCHANAN INGERSOLL & ROONEY PC, PITTSBURGH, PA; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA.

For WOCKHARDT USA LLC, Defendant (2:18-cv-03299-CMR): WILLIAM A. ESCOBAR, LEAD ATTORNEY, KELLEY DRYE & WARREN LLP, NEW YORK, NY; CLIFFORD **[**78]** KATZ, KELLEY DRYE & WARREN LLP, NEW YORK, NY; DAMON W. SUDEN, KELLEY DRYE & WARREN LLP, NEW YORK, NY; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA.

For TELIGENT, INC., Defendant (2:18-cv-03299-CMR): HEATHER K. MCDEVITT, LEAD ATTORNEY, WHITE & CASE LLP, NEW YORK, NY; BRYAN DANIEL GANT, WHITE & CASE LLP, NEW YORK, NY; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA.

For IMPAX PHARMACEUTICALS, LLC, F/K/A IMPAX LABORATORIES, INC., Defendant (2:18-cv-03299-CMR): JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA; RAYMOND A. JACOBSEN, MCDERMOTT WILL & EMERY LLP, WASHINGTON, DC.

For MARION DIAGNOSTIC CENTER, LLC, MARION HEALTHCARE, LLC, Plaintiffs (2:18-cv-04137-CMR): EDITH M. KALLAS, LEAD ATTORNEY, WHATLEY KALLAS, LLP, NEW YORK, NY; ROBERT STEPHEN BERRY, LEAD ATTORNEY, BERRY LAW PLLC, WASHINGTON, DC; HENRY C QUILLEN, WHATLEY KALLAS, LLP, PORTSMOUTH, NH.

For MCKESSON CORPORATION, MCKESSON MEDICAL-SURGICAL, INC., Defendants (2:18-cv-04137-CMR): ABRAM J. ELLIS, SIMPSON THACHER & BARTLETT LLP, WASHINGTON, DC; PETER C. THOMAS, SIMPSON THACHER & BARTLETT LLP, WASHINGTON, DC; SARA YOUNG RAZI, SIMPSON THACHER & BARTLETT LLP, WASHINGTON, DC.

For ASCEND LABORATORIES, LLC, Defendant (2:18-cv-04137-CMR): WILLIAM **[**79]** GORDON DOBIE, WINSTON & STRAWN LLP, CHICAGO, IL.

For APOTEX CORP., Defendant (2:18-cv-04137-CMR): JAMES W. MATTHEWS, LEAD ATTORNEY, FOLEY & LARDNER LLP, BOSTON, MA; ELIZABETH A.N. HAAS, FOLEY & LARDNER, MILWAUKEE, WI; JAMES T. MCKEOWN, FOLEY & LARDNER, MILWAUKEE, WI; JOHN F. NAGLE, FOLEY & LARDNER LLP, BOSTON, MA.

For AUROBINDO PHARMA USA, INC., Defendant (2:18-cv-04137-CMR): SARAH O'LAUGHLIN KULIK, DUANE MORRIS LLP, PHILADELPHIA, PA; SEAN PATRICK MCCONNELL, DUANE MORRIS LLP, PHILADELPHIA, PA; SETH A. GOLDBERG, DUANE MORRIS LLP, PHILADELPHIA, PA; WAYNE A. MACK, DUANE MORRIS LLP, PHILADELPHIA, PA.

For CITRON PHARMA, LLC, Defendant (2:18-cv-04137-CMR): STEVEN E. BIZAR, LEAD ATTORNEY, DECHERT LLP, CIRA CENTRE, PHILADELPHIA, PA; JOHN MCCLAM, DECHERT LLP, PHILADELPHIA, PA; TIFFANY ELLEN ENGSELL, DECHERT LLP, PHILADELPHIA, PA.

For DR. REDDY'S LABORATORIES, INC., Defendant (2:18-cv-04137-CMR): BRIAN T. FEENEY, LEAD ATTORNEY, GREENBERG TRAURIG, LLP, PHILADELPHIA, PA.

For GLENMARK PHARMACEUTICALS, INC., USA, Defendant (2:18-cv-04137-CMR): STEVEN A. REED, LEAD ATTORNEY, MORGAN LEWIS, PHILADELPHIA, PA; ANDREW S WELLIN, MORGAN, LEWIS & BOCKIUS LLP, NEW YORK, NY; MELINA R. DIMATTIO, MORGAN LEWIS & BOCKIUS **[**80]** LLP, PHILADELPHIA, PA; R. BRENDAN FEE, MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PA.

For HERITAGE PHARMACEUTICALS, INC., Defendant (2:18-cv-04137-CMR): EDWARD B. SCHWARTZ, LEAD ATTORNEY, REED SMITH LLP, WASHINGTON, DC; ANDREW C BERNASCONI, REED SMITH LLP, WASHINGTON, DC; COURTNEY B AVERBACH, REED SMITH LLP, REED SMITH CENTRE, PITTSBURGH, PA; JENNIFER M DRISCOLL, REED SMITH LLP, WASHINGTON, DC; WILLIAM J SHERIDAN, REED SMITH LLP, REED SMITH CENTRE, PITTSBURGH, PA.

For LANNETT COMPANY, INC., Defendant (2:18-cv-04137-CMR): GERALD E. ARTH, LEAD ATTORNEY, FOX ROTHSCHILD LLP, PHILADELPHIA, PA; RYAN THOMAS BECKER, LEAD ATTORNEY, FOX ROTHSCHILD LLP, STONE MANOR CORP CENTER, PHILADELPHIA, PA; JULIA CHAPMAN, DECHERT LLP, PHILADELPHIA, PA.

For MAYNE PHARMA INC., Defendant (2:18-cv-04137-CMR): MICHAEL E. MARTINEZ, LEAD ATTORNEY, K&L GATES LLP, CHICAGO, IL; BRIAN J SMITH, K&L GATES LLP, CHICAGO, IL; KENN BROTMAN, K&L GATES LLP, CHICAGO, IL; LAUREN NORRIS DONAHUE, K&L GATES LLP, CHICAGO, IL; STEVEN M KOWAL, K&L GATES LLP, CHICAGO, IL.

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Judges: HON. CYNTHIA M. RUFE, J.

Opinion by: CYNTHIA M. RUFE

Opinion

[*513] Rufe, J.

This is a multidistrict antitrust litigation involving allegations that certain pharmaceutical companies engaged in an unlawful scheme or schemes to fix, maintain, and stabilize prices, rig bids, and engage in market and customer allocations of certain generic pharmaceutical products. In this Opinion, the Court considers Defendants' joint motion to dismiss claims asserting the existence of an overarching multi-drug conspiracy in the following pleadings (collectively, the "Overarching Complaints"): Direct Purchaser Plaintiffs' First Amended Class Action **[**83]** Complaint ¶¶ 108-121[1]; End Payor Plaintiffs' Amended Class Action Complaint ¶¶ 99-181[2]; Indirect Reseller

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[1] The Direct Purchaser Plaintiffs ("DPPs") allege they directly purchased generic pharmaceuticals from Defendants. They include the following drug purchasing cooperatives and retail pharmacy operators: Ahold, USA, Inc.; César Castillo, Inc.; FWK Holdings, LLC; KPH Healthcare Services, Inc. a/k/a Kinney Drugs, Inc.; and Rochester Drug Co-Operative, Inc. DPP Am. Class Action Compl. ¶¶ 43-47.

[2] The End Payer Plaintiffs ("EPPs") are employee welfare benefits funds, labor unions, and private insurers that allege either that they indirectly purchased generic pharmaceuticals manufactured by one or more Defendants or that they provided reimbursements for some or all of the purchase price for certain generic drugs. Specifically, they are: American Federation of State, County and Municipal Employees District Council 37 Health & Security Plan; Detectives Endowment Association of the City of New York; Louisiana Health Service & Indemnity Company d/b/a Blue Cross and Blue Shield of Louisiana and HMO Louisiana, Inc; Self-Insured Schools of California; Sergeants Benevolent Association of the Police Department of the City of New York Health and Welfare Fund; Unite Here Health; 1199SEIU National Benefit Fund; 1199SEIU Greater New York Benefit Fund; 1199SEIU National Benefit Fund for Home Care Workers; and 1199SEIU Licensed Practical Nurses Welfare Fund. EPP Am. Class Action Compl. ¶¶ 37-42.

Plaintiffs' Amended Overarching Complaint ¶¶ 65-72[3]; Kroger Plaintiffs' Amended Complaint ¶¶ 813-32[4]; Marion Plaintiffs' Second Amended Complaint, ¶¶ 51-59[5]; Humana Inc.'s Second Amended Complaint ¶¶ 261-72[6]; and the Plaintiff **[*514]** States' Consolidated Amended Complaint[7] ¶¶ 89-109. For the reasons set forth below, the motion will be denied.[8]

I. BACKGROUND

The first complaints filed in this multidistrict litigation were drug-specific and alleged a scheme or schemes to allocate markets and fix prices for various individual drugs. In August 2016, the United States Judicial Panel on Multidistrict Litigation ("JPML") transferred actions regarding digoxin and doxycycline to this Court for coordinated or consolidated pretrial proceedings.[9] When the JPML transferred actions regarding additional generic drugs (clobetasol, desonide, fluocinonide, econazole, levothyroxine, and propranolol) into this MDL in April 2017, it noted that the separate conspiracies alleged in the individual complaints "may overlap significantly" because they "stem from the same **[**84]** government investigation into price fixing, market allocation, and other anticompetitive conduct in the generic pharmaceuticals industry."[10]

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[3] The Indirect Reseller Plaintiffs ("IRPs") are the following independent pharmacies that allege they acquire drugs indirectly through drug wholesalers rather than directly from drug manufacturers: Chet Johnson Drug, Inc.; Falconer Pharmacy, Inc.; Halliday's & Kovisto's Pharmacy; Russell's Mr. Discount Drugs, Inc.; and WestVal Pharmacy. IRP Am. Overarching Compl ¶¶ 12-16.

[4] The Kroger Plaintiffs are Kroger Co., on its own behalf and as the assignee of Cardinal Health, Inc.; Albertsons Companies, LLC; and H.E. Butt Grocery Company. Kroger Am. Compl. ¶¶ 60-62. Kroger Plaintiffs allege they own and operate retail stores and pharmacies that sell generic drugs and that they purchased generic drugs directly from Defendants and/or Defendants' co-conspirators. *Id.*

[5] The Marion Plaintiffs are Marion Diagnostic Center LLC and Marion HealthCare, LLC. Marion Second Am. Compl. ¶¶ 12-13. Marion Diagnostic alleges that it "operates a multidisciplinary healthcare facility including an outpatient surgery practice, a diagnostic center, and a walk-in clinic," and that it purchased generic drugs through distributor McKesson-Medical-Surgical, Inc. *Id.* ¶ 12. Marion HealthCare alleges that it "operates a multi-specialty surgery center" and that it purchased generic drugs through distributor McKesson-Medical-Surgical, Inc. *Id.* ¶ 13.

[6] "Humana, either directly or through its health plan subsidiaries, insure[s] and administers health plan benefits for its members and group customers, including self-funded group customers that contract with Humana to administer claims on their behalf and pursue recoveries related to those claims. Many of these health plan benefits provide members with prescription drug coverage under which claims for drugs manufactured by Defendants were submitted and paid." Humana Second Am. Compl. ¶ 48.

[7] The Plaintiff States' claims are brought by and through the Attorneys General for the following 49 jurisdictions: Connecticut, Arkansas, Alabama, Alaska, Arizona, California, Colorado, Delaware, the District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *See* Plaintiff States' Consol. Am. Compl. (Civ. A. No. 17-3768, Dkt. No. 14). This Opinion does not address the States' complaint in *Connecticut v. Teva Pharmaceuticals USA* (Civ. A. No. 19-2407), a separate case filed by the State of Connecticut and 43 other jurisdictions that was transferred into this MDL on May 30, 2019.

[8] Certain individual Defendants have filed separate motions seeking to dismiss the claims against them in the Overarching Complaints. Those motions are not addressed in this Opinion.

[9] *See In re Generic Drug Pricing Antitrust Litig., 227 F. Supp. 3d 1402, 1403-04 (J.P.M.L. 2016)*.

[10] *In re Generic Digoxin & Doxycycline Antitrust Litig., 222 F. Supp. 3d 1341, 1343 (J.P.M.L. 2017)*.

After Plaintiff States joined the MDL with a complaint asserting claims regarding two additional drugs (glyburide and doxycycline hyclate delayed release),[11] they moved for leave to file a consolidated amended complaint alleging an overarching conspiracy by manufacturers seeking to minimize or prevent competition across the generic drug industry. Pursuant to *Rule 15 of the Federal Rules of Civil Procedure*, the Court granted the motion in June 2018, finding that Plaintiff States had "not acted with undue delay, bad faith, or dilatory motives" and that amendment would not be futile and would not prejudice Defendants.[12] The Court explained that Defendants' prejudice arguments, including arguments regarding the imposition of joint and several liability would "be **[*515]** carefully assessed, whether in the context of a consolidated complaint or a single-pharmaceutical complaint."[13]

In October 2018, the Court considered motions to dismiss drug-specific complaints for clobetasol, digoxin, divalproex ER, doxycycline hyclate, econazole, and pravastatin (the "Group **[**85]** 1" drugs) and determined that Group 1 Plaintiffs' individual drug conspiracy allegations were sufficient to permit most of their Sherman Act claims to withstand dismissal.[14] In deciding those motions, the Court declined to consider allegations in the Plaintiff States' then-operative complaint regarding an overarching conspiracy.[15] Thereafter, DPPs, EPPs, IRPs, Humana, Kroger Plaintiffs, and Marion Plaintiffs filed their own Overarching Complaints alleging a multi-drug conspiracy or series of conspiracies involving multiple generic pharmaceuticals and multiple generic pharmaceutical manufacturers. Defendants now ask the Court to decide the sufficiency of Plaintiffs' claims that there was an overarching scheme to fix prices or otherwise interfere with the market for generic drugs.

Not every Overarching Complaint names the same Defendants[16] or asserts claims regarding the same individual drugs, drug formulations, and/or dosages.[17] But each of the Overarching Complaints alleges that Defendants pursued a common goal — to achieve artificially-inflated generic drug prices through the allocation of markets and through price-fixing agreements — and that they did so through a wide-ranging "fair share" **[**86]** arrangement.[18] EPPs allege that "subsidiary agreements among the manufacturing Defendants relating to each of the" individual drugs involved sprang from the overarching "fair share" understanding.[19] DPPs allege that the existence of the overarching conspiracy is supported by the sheer number of generic drugs that are a part of this MDL.[20] The claims asserted in the Overarching Complaints would impose joint and several liability on Defendants not just for their participation in any individual drug conspiracy, but also for their participation in the alleged overarching scheme.

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[11] *See* *In re Generic Pharms. Pricing Antitrust Litig., No. 16-MD-2724, 2017 U.S. Dist. LEXIS 151228, 2017 WL 4582710 (J.P.M.L. Aug. 3, 2017)*. The JMPL explained that the State Action involved "common questions of fact" with the other actions that had been transferred to the MDL, noting that the States' claims "stem from the same government investigation into anticompetitive conduct in the generic pharmaceuticals industry." *2017 U.S. Dist. LEXIS 151228, [WL] at *2*.

[12] *In re Generic Pharms. Pricing Antitrust Litig., 315 F. Supp. 3d 848, 853-54 (E.D. Pa. 2018)*.

[13] *Id. at 854*.

[14] *In re Generic Pharms. Pricing Antitrust Litig., 338 F. Supp. 3d 404, 458 (E.D. Pa. 2018)*. The Court decided Defendants' motions to dismiss state law claims regarding the Group 1 drugs in a subsequent decision. *See* *In re Generic Pharms. Pricing Antitrust Litig., 368 F. Supp. 3d 814, 819 (E.D. Pa. 2019)*

[15] *In re Generic Pharm., 338 F. Supp. 3d at 437*.

[16] The Defendants in each Overarching Complaint are listed in Appendix A to this Opinion.

[17] The generic drugs identified in each Overarching Complaint are listed in Appendix B to this Opinion.

[18] *See* DPP Am. Class Action Compl. ¶ 9; EPP Am. Class Action Compl. ¶ 122; IRP Am. Overarching Compl. ¶ 66; Plaintiff States' Consol. Am. Compl. ¶ 14; Humana Second Am. Compl. ¶¶ 262-267; Kroger Am. Compl. ¶ 9; Marion Second Am. Compl. ¶¶ 54-59.

[19] EPP Am. Class Action Compl. ¶ 104.

[20] DPP Am. Class Action Compl. Ex. A (table identifying MDL 2724 generic drugs as of December 2018).

"Fair share," as the Plaintiff States allege, approximates "how much market share each competitor is entitled to, based on the number of competitors in the particular drug market, with a potential adjustment based on the timing of the entry."[21] They allege that the "fair share" scheme has an objective of attaining "a state of equilibrium, where none are incentivized to compete for additional market **[*516]** share by eroding price" and that it is "implemented in different ways."[22] "There is no precise method for apportioning" market share between participants in the alleged scheme "because market share is obtained by winning the **[**87]** business of various customers, which is inherently variable in a given year."[23]

IRPs describe the fair share scheme as

> a system by which each Defendant is allocated its 'fair share' of the market for a certain drug or formulation[ ] based on the number of pre-existing competitors and their seniority. By making room for new entrants, the Defendants ensure that the newcomers will not attempt to win market share by offering lower prices . . . . The newcomers are therefore able to enter the market at artificially elevated prices, and thereafter, all of the competitors are able to raise their prices, customer by customer, with knowledge that their share is mostly safe from competition.[24]

EPPs allege that "[b]ecause Defendants are repeat players who routinely enter new markets but face the same competitors, their basic agreement—to eschew price competition and seek only a 'fair share' of the market — became the 'rules of the road' that governed their overarching conspiracy."[25] Kroger Plaintiffs allege that "Manufacturers implemented the 'fair share' agreement by refusing to bid for a particular customer or by providing a pretextual bid that they knew would not be successful."[26] Plaintiff **[**88]** States allege that the "rules about "'fair share' apply equally to price increases. . . . [T]he larger understanding dictates that [Defendants] will not seek to compete or take advantage of a competitor's price increase by bidding a lower price to take that business."[27]

> Defendants that "played fair" and maintained a "fair share" would benefit from the overarching conspiracy as a whole, even if Defendants would occasionally "lose out" on one specific drug. . . . Defendants who undercut other Defendants' prices were seen as "not playing fair" and "punishing" a competitor, which was contrary to the "fair share" agreement.[28]

Kroger Plaintiffs explain that "the success of each conspiratorial price increase, each rigged bid, and/or each individual market allocation agreement was interdependent, because a given Defendant's commitment to one price increase helped solidify and protect other conspiracy price increases that were implemented."[29]

Plaintiffs allege that the fair share arrangement necessarily extended beyond any individual drug. For example, Humana alleges that "Defendants understood that to effectuate a successful price-fixing and market allocation agreement on one drug, they would need **[**89]** to effectuate an agreement across each Defendant's portfolio of drugs."[30] Plaintiff States allege that "[d]ecisions on 'fair share' can, at times, be based on conduct that occurs between competitors across more than one generic drug market."[31] Correspondingly, IRPs allege that the

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[21] Plaintiff States' Consol. Am. Compl. ¶ 90.

[22] *Id.* ¶¶ 97-98.

[23] *Id.* ¶ 97; *see also* Marion Second Am. Compl. ¶ 55.

[24] IRP Am. Overarching Compl. ¶ 66.

[25] EPP Am. Class Action Compl. ¶ 103.

[26] Kroger Am. Compl. ¶ 9.

[27] Plaintiff States' Consol. Am. Compl. ¶ 106.

[28] EPP Am. Class Action Compl. ¶ 125.

[29] Kroger Am. Compl. ¶ 822.

[30] Humana Second Am. Compl. ¶ 262.

[31] Plaintiff States' Consol. Am. Compl. ¶ 101.

> **[*517]** "fair share" scheme was not limited to a specific drug. For example, customers in one generic drug market were sometimes traded for customers in a different generic drug market so that fair shares could be allocated across the industry as a whole. In other instances, competitors would support a price increase for one drug with the understanding that their competitors would support a price increase for a different drug.[32]

DPPs allege that "achieving a fair share as to one generic drug could involve horse trading across other generic drugs," noting that "manufacturers were generally aware of each manufacturer's entire portfolio of generic drugs, as well as pending and/or approved Abbreviated New Drug Applications ('ANDAs')."[33] IRPs allege that "[t]he overarching conspiracy works because, to manufacture a generic drug and sell it in the United States, a manufacturer must have a Food and Drug Administration approval known **[**90]** as an ANDA . . . ."[34] They contend that "Defendants can buy, trade, or license already-approved ANDAs," meaning that they "are always industry competitors of one another even if they are not product competitors at a certain moment."[35] Thus, EPPs cite common ANDAs between Defendants[36] as evidence of competitive overlap between the Defendants.[37] As an example, they allege that Defendants Par, Mylan, and Sun have overlapping ANDAs for at least three generic drug formulations and Defendants "Mylan and Heritage have overlapping ANDAs for at least 7" generic drug formulations.[38] EPPs contend that the Defendants named in their Overarching Complaint "are actual or potential competitors for all" of the generic drugs identified in their Overarching Complaint because of their overlapping ANDAs and, if all of the drugs in the MDL were taken into consideration, "the web of competitive overlap would be even denser."[39]

DPPs allege that under the fair share arrangement, generic drug manufacturers did not need to compete because they were "playing nice in the sandbox," which "entailed, among other things, getting along with ostensible competitors, communicating with them frequently about customers, **[**91]** new drug launches, prices, bids, and generally not disturbing their share of the generic industry sandbox."[40] IRPs allege that "[i]mplementation of the overarching conspiracy was accomplished by a series of overlapping bilateral calls, emails, texts, and online messages and by multilateral meetings at industry conferences, private dinners, cocktails, and similar social outings."[41] Plaintiff States allege that, "[f]or **[*518]** example, between February 20, 2013 and December 20, 2013 (a 41-week period), there were at least forty-four (44) different tradeshows or customer conferences where the Defendants had the opportunity to meet in person."[42] DPPs similarly allege that "[p]laying nice in the sandbox was facilitated by generic manufacturer employees frequently communicating and socializing both in-person at near constant trade association events, via telephone and texting, or via other electronic means (e.g., email, social

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[32] IRP Am. Overarching Compl. ¶ 70; *see also* EPP Am. Class Action Compl. ¶ 125.

[33] DPP Am. Class Action Compl. ¶ 17.

[34] IRP Am. Overarching Compl. ¶ 68.

[35] *Id.*

[36] EPP Am. Class Action Compl. ¶ 115 (table listing the ANDAs owned or licensed by Defendants in EPPs Overarching Complaint).

[37] *Id.* ¶ 117.

[38] *Id.*

[39] *Id.*

[40] DPP Am. Class Action Compl. ¶¶ 10-11.

[41] IRP Am. Overarching Compl. ¶ 69; *see also* EPP Am. Class Action Compl. ¶ 100 ("Defendants facilitated their conspiracy through personal connections formed through frequent movement within the industry, through frequent in-person meetings at various happy hours, dinners, lunches, golf outings, trade shows, and industry conferences, and through frequent direct communications in person, via chat and email, and on the telephone (both voice and text).").

[42] Plaintiff States' Consol. Am. Compl. ¶ 91.

media platforms, LinkedIn, WhatsApp)."[43] DPPs also allege that generic drug manufacturers' employees had opportunities for interaction "in less formal settings such as happy hours, events for women in the industry, dinners, lunches, golf outings, . . . etc."[44]

EPPs **[**92]** allege that

> Defendants implemented their conspiracy through numerous meetings and communications between and among their representatives, including at industry events such as [gatherings of] the Generic Pharmaceutical Association ("GPhA") (now the Association for Accessible Medicines), the National Association of Chain Drug Stores ("NACDS"), the Healthcare Distribution Management Association ("HDMA") (now the Healthcare Distribution Alliance) ("HDA"), Efficient Collaborative Retail Marketing ("ECRM"), and Minnesota Multistate Contracting Alliance for Pharmacy ("MMCAP").[45]

DPPs' Overarching Complaint alleges that generic drug manufacturers had extensive contacts through "almost constant trade association meetings," and, as an exhibit, includes a 49-page list of "Trade Association Contacts as to the Named Generic Drugs" identifying trade group meetings, their dates and locations, individual representatives of Defendants in attendance and their job titles.[46] Kroger Plaintiffs allege that "[t]he frequent trade association meetings provided an ideal mechanism through which Defendants could and did meet in person and reach agreements with their competitors to increase prices on the Price-Fixed **[**93]** Generic Drugs sold to Plaintiffs and others in the United States."[47]

Plaintiffs also allege that "the interwoven, cooperative generic drug industry culture" was furthered by movement of generic drug manufacturers' employees and executives between various generic drug manufacturers.[48] IRPs allege that the fair share scheme was often implemented by "salespeople at the rank of 'National Account Manager' (NAM) or equivalent."[49] They allege that

> [m]ost of these NAMS had had several years of experience in the generic drug industry and personal connections that facilitated the overarching conspiracy. NAM Susan Knoblauch worked at Caraco (Defendant Sun) for nearly ten years **[*519]** before moving to a different sales position at Defendant Citron. NAM Beth Hamilton worked at Defendant Apotex before moving to Defendant Mayne. NAM Daniel Lukasiewicz began his career at Defendant Aurobindo, moved to Defendant Zydus, and currently works at Defendant Heritage. These individuals all reached back to their prior employers in order to allocate markets and agree to higher prices.[50]

DPPs cite the following examples of employee movement:

> [Rajiv] Malik[51] worked at Ranbaxy (now Defendant Sun) and Defendant Sandoz before **[**94]** working at Defendant Mylan; Dan Lukasiewicz worked at Defendants Aurobindo and Zydus before working at Defendant Heritage; Susan Knoblauch worked at Defendant Sun before leaving to work as a NAM at Citron; Jan Bell worked at Defendant G&W before working at Defendant Mylan; Joseph Papa left Defendant Perrigo to become

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[43] DPP Am. Class Action Compl. ¶ 12.

[44] *Id.*; *see also* Plaintiff States' Consol. Am. Compl. ¶ 12.

[45] EPP Am. Class Action Compl. ¶ 13.

[46] DPP Am. Class Action Compl. ¶ 480(3) (citing *id.*, Ex. A); *see also* Plaintiff States' Consol. Am. Compl. ¶¶ 77-80.

[47] Kroger Am. Compl. ¶ 147.

[48] DPP Am. Class Action Compl. ¶ 13; *see* ***[**95]*** *also* EPP Am. Class Action Compl. ¶ 128 ("[M]any of the [National Account Managers ("NAMs")] and other marketing and sales personnel employed by Defendants have worked at multiple companies — including other Defendants — during their careers. These employees maintained contact with people at their prior employers.").

[49] IRP Am. Overarching Compl. ¶ 71.

[50] *Id.*

[51] Malik is named as a Defendant in the DPP, EPP, IRP and Plaintiff States' actions.

> Chairman and CEO of Defendant Valeant; Carole Ben-Maimon who worked in different roles at Defendants Impax, Par, and Teva; and Bhaskar Chaudhuri who was the General Manager of the Dermatology Division at Defendant Mylan before later becoming President of Defendant Valeant and a member of MDL Defendant Teligent's board of directors.[52]

EPPs also cite several examples of employee movement and continuing relationships, including the allegation that:

> Teva's Director of Strategic Customer Marketing Nisha Patel met Heritage's then-Sr. Vice President [Jason] Malek when she worked at [drug wholesaler] Amerisource Bergen, which was a Heritage customer that Malek managed. When Patel Moved to Defendant Teva in April 2013, she contacted Malek to determine which generic drug products Teva sold that overlapped with generic drugs sold by Heritage so that they could coordinate pricing.[53]

Illustrating the alleged consequences of the overlap between Defendants' employees, IRPs allege that Patel (then at Teva) and Malek (Heritage) had a "series of phone calls discussing price increases for multiple drugs, including at least Nystatin [tablets] and Theophylline" in February and March 2014, including a call from Malek to Patel on February 5, 2014 where they "spoke for more than an hour and discussed a price increase for at least the drugs Nystatin and Theophylline."[54] They also allege that Malek and Patel "had a seventeen-minute phone conversation" on April 15, 2014 where "they discussed at least seven different drugs," including acetazolamide, and agreed "that Teva would lead the price increases for Nystatin and Theophylline, and that if Heritage increased prices for the other five drugs . . . Teva would increase its prices for these drugs, or at a minimum, would not challenge Heritage's price increase."[55] Humana **[*520]** alleges that this phone conversation was part of "Heritage's attempt to impose industry-wide price increases simultaneously on eighteen drugs," an effort that "involved reaching out to competitors as to each of the drugs in an attempt to agree on price increases." **[**96]** [56] IRPs contend that effective April 4, 2014, Teva more than doubled its list price for nystatin tablets.[57] They allege that Teva began implementing price increases for theophylline on the same day and that it held to its price increase even though a customer emailed Teva seeking price relief.[58] IRPs also allege that by July 9, 2014, "Heritage increased Theophylline prices to at least 20 different customers."[59]

IRPs allege that Heritage's communications regarding nystatin tablet prices also extended to Defendant Sun. They assert that Ann Sather (Heritage) called Knoblauch (then at Sun) on April 22, 2014, to discuss an agreed upon price for nystatin tablets and other drugs.[60] IRPs allege that Sather then emailed colleagues at Heritage "to report that Sun was 'on board.'"[61] Glazer responded to Sather's email with an email telling her "not to write such emails."[62]

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[52] DPP Am. Class Action Compl. ¶ 130.

[53] EPP Am. Class Action Compl. ¶ 132.

[54] IRP Am. Overarching Compl. ¶ 77.

[55] *Id.* ¶ 79; *see also* DPP Am. Class Action Compl. ¶ 125 ("[D]uring an April 15, 2014 telephone conversation, Heritage President Jason Malek and Nisha Patel of Teva coordinated regarding price increases for several drugs, including acetazolamide capsules, glipizide-metformin, glyburide, glyburide-metformin, leflunomide, and nystatin tablets."); Plaintiff States' Consol. Am. Compl. ¶ 271 (citing a seventeen-minute phone conversation between Malek and a Teva employee "during which [the Teva employee] agreed that if Heritage increased prices for [seven drugs], Teva would follow or, at a minimum, would not challenge Heritage's price increases by underbidding Heritage").

[56] Humana Second Am. Compl. ¶ 272.

[57] IRP Am. Overarching Compl. ¶ 78.

[58] *Id.* ¶¶ 299, 301.

[59] *Id.* ¶ 303.

[60] *Id.* ¶ 81.

[61] *Id.*

EPPs allege that on April 16, 2014, one day after her seventeen minute conversation with Malek, Patel spoke on the phone for "nearly twenty minutes" with a Zydus employee to discuss acetazolamide pricing.[63] They allege that "Malek believed it was important to 'socialize' the idea of an Acetazolamide price increase with **[**97]** competitors before implementing it" and therefore, "he and the Heritage NAMs contacted Teva and Zydus to discuss pricing and customers either via phone, text or email, or in person, often through industry trade association meetings and conferences."[64] IRPs allege that Malek sent emails on May 6 and 7, 2014 explaining "that he had obtained agreements to raise the price of acetazolamide."[65] Plaintiff States allege that Heritage raised its acetazolamide prices to at least 17 different customers by July 19, 2014.[66] EPPs allege that Teva and Zydus employees "were also in close contact with each other about Acetazolamide" during the same timeframe, citing an exchange of "numerous text messages between Teva and Zydus employees on May 14, 2014.[67] Plaintiff States contend that because of Defendants' collective agreement to raise prices for generic drugs, they eliminated price competition between Heritage, Teva, and Zydus for acetazolamide.[68]

Other allegations in the Overarching Complaints demonstrate overlapping **[*521]** points of contact between Defendants and their employees. For example, DPPs allege that on May 14, 2014 (the same day as the above-referenced alleged text messages between Teva and Zydus **[**98]** employees), "executives from Heritage, Aurobindo and Sandoz met in person to discuss a fosi-HCTZ price increase at a MMCAP conference in Minnesota."[69] They allege that executives from Aurobindo and Sandoz continued discussions regarding the intended price increase via text message and telephone the next day.[70] DPPs allege that additional calls and text messages between executives for Aurobindo, Glenmark, and Sandoz regarding a planned fosi-HCTZ price increase continued into June 2014.[71] A Heritage executive is alleged to have had an 18 minute phone call with an Aurobindo executive on June 25, 2014 — the day before Heritage issued price increase letters for numerous drugs, including fosi-HCTZ . . . ."[72] After further alleged internal and external discussions, Citron began implementing its own fosi-HCTZ price increases on July 15, 2014.[73] DPPs allege that "[b]y early 2015, Defendants Heritage, Aurobindo, Citron, Glenmark, and Sandoz" had each increased their prices for fosi-HCTZ and "[n]o non-collusive market factors (e.g., product shortages) can explain Defendants' artificially inflated prices."[74]

More broadly, the States allege that from "July 1, 2013 through July 30, 2014, senior sales **[**99]** executives and other individuals responsible for the pricing, marketing and sales of generic drugs at Defendant Heritage spoke to representatives of every other U.S.-based corporate Defendant [in the Plaintiff States' action] by phone and/or text

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[62] *Id.* Plaintiff States allege that Defendants "all made consistent efforts to avoid communicating with each other in writing, or to delete written electronic communications after they were made." Plaintiff States' Consol. Am. Compl. ¶ 454.

[63] EPP Am. Class Action Compl. ¶ 439; *see also* IRP Am. Overarching Compl. ¶ 180.

[64] EPP Am. Class Action Compl. ¶ 439.

[65] IRP Am. Overarching Compl. ¶ 183.

[66] Plaintiff States' Consol. Am. Compl. ¶ 304.

[67] EPP Am. Class Action Compl. ¶ 446.

[68] Plaintiff States' Consol Am. Compl. ¶ 529.

[69] DPP Am. Class Action Compl. ¶ 200. "Aurobindo was also a competitor with Heritage for the drugs Glyburide and Glyburide-Metformin." Plaintiff States' Consol Am. Compl. ¶ 277.

[70] DPP Am. Class Action Compl. ¶ 200.

[71] *Id.* ¶ 202.

[72] *Id.* ¶ 204.

[73] *Id.* ¶¶ 207-210.

[74] *Id.* ¶¶ 213-214.

on multiple occasions."[75] Taking their allegations as true, Heritage had at least 513 phone or text contacts with alleged co-conspirators during that one year period.[76] The States also allege that "senior sales executives and other individuals responsible for the pricing, marketing and sales of generic drugs at Defendant Teva spoke by phone and/or exchanged text messages with representatives of every other U.S.-based corporate Defendant [in the Plaintiff States' action] during the same period."[77] Again, taking their allegations as true, Teva had at least 1,501 phone or text contacts with alleged co-conspirators that year.[78]

Some Overarching Complaints also specifically include allegations linking Defendants with portfolios that did not include the same generic drugs. In their Overarching Complaint, EPPs contend that the overarching nature of the conspiracy is underscored by alleged communications such as those between Teva and Defendants that **[**100]** did not concurrently sell any Teva-manufactured drug (Dr. Reddy's, Glenmark, Lannett, Mayne, Par and Sandoz).[79] EPPs also note that during one of the alleged text exchanges between Heritage's Sather and Sun's Knoblauch, "Sather informed **[*522]** Knoblauch of Heritage's pricing discussions with Actavis on Glyburide-Metformin and Verapamil, two drugs that Sun did not sell."[80]

The Overarching Complaints allege that the market for generic drugs is conducive to collusive activity between generic drug manufacturers.[81] For example, DPPs allege that "[a]bsent collusion, individual Defendants and co-conspirators could not have increased their prices to the high levels they did (or maintain high prices in the face of a competitor's significantly lower price) without incurring the loss of a significant volume of sales."[82] Kroger Plaintiffs allege that "each Price-Fixed Generic Drug has commodity-like characteristics, there are barriers to entry of a new competitor, the demand is highly inelastic, and the market for the sale of each generic drug is relatively concentrated. These economic conditions make the market for the manufacture and sale of the Price-Fixed Generic Drugs conducive to cartelization."[83] EPPs allege **[**101]** that "[b]ecause purchasers choose whose generic

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[75] Plaintiff States' Consol. Am. Compl. ¶ 94.

[76] *Id.*

[77] *Id.* ¶ 95.

[78] *Id.*

[79] EPP Am. Class Action Compl. ¶ 110.

[80] EPP Opp. Br. at 21 (citing EPP Second Am. Compl. at ¶ 555). Plaintiff States also allege that a Heritage employee exchanged text messages with a Sun employee "describ[ing] agreements that Heritage had reached with Actavis to increase prices of both Glyburide/Metformin and Verapamil." Plaintiff States' Consol. Am. Compl. ¶ 452.

[81] *See also* EPP Am. Class Action Compl. ¶ 10 ("The markets for the Drugs at Issue were controlled by Defendants, and are subject to high barriers to entry, including substantial manufacturing costs and regulatory requirements. Each generic drug described in this Complaint is a commodity product, for which reasonable substitutes are not available and demand is highly inelastic. Federal regulations require generic products to contain the same type and amount of active pharmaceutical ingredient and to be therapeutically equivalent to one another. Interchangeability facilitates collusion, as cartel members can easily monitor and detect deviations from a price-fixing or market allocation agreement."); IRP Am. Overarching Compl. ¶ 66 ("Generic drugs are commodity products. In a competitive commodity market, a new manufacturer must offer prices lower than the competition in order to win customers."); Plaintiff States' Consol. Am. Compl. ¶ 50 ("As generic drugs enter the market, competition typically leads to dramatic reductions in price. Generic versions of brand name drugs are priced lower than the brand-name versions") and ¶ 57 ("[A] generic drug is a commodity. Consequently, competition is dictated by price and supply."); Humana Second Am. Compl. ¶ 136 (citing high level of industry concentration, sufficient numbers to drive competition, high barriers to entry, high inelasticity of demand and lack of substitutes, commoditized market, absence of departures from the market, absence of non-conspiring competitors, opportunities for contact and communication among competitors, the size of price increases, and the generic reimbursement system).

[82] DPP Am. Class Action Compl. ¶ 107 ("Defendants had the capacity to dictate the market price and to influence the [Maximum Allowable Cost] prices set by [Pharmacy Benefits Managers], but only if they acted collectively.").

[83] Kroger Am. Compl. ¶ 16.

pharmaceutical product to buy based primarily on price, and unilateral price increases generally result in loss of market share, it would have been economically irrational for any one Defendant to raise its prices without assurance that its competitors either would also increase prices or at least not compete on pricing."[84] DPPs assert that "as the industry grew more comfortable with the Fair Share Agreement, generic drug manufacturers became bolder and would, at times, substantially raise generic drug prices."[85] Humana contends that the alleged **[*523]** "increases are not 5% or even 10% jumps—they are of far greater magnitude."[86] DPPs allege that during the time relevant to their claims the "pricing dynamics in the generic drug industry changed"[87] from what would have been expected given the characteristics of the generic drug market.[88]

Alleged price changes across a broad range of generic drugs "prompted close scrutiny of the industry,"[89] including: (1) a criminal investigation by the Antitrust Division of the U.S. Department of Justice ("DOJ") that has "resulted in price-fixing guilty pleas from two senior executives at Defendant **[**102]** Heritage" — Chief Executive Officer Jeffrey Glazer and President Jason Malek — "relating to the sale of Glyburide and Doxycycline Hyclate;"[90] (2) an "ongoing" investigation initiated by the State of Connecticut and joined by other states;[91] and (3) various congressional inquiries.[92] DPPs allege that many generic drug manufacturers have publicly reported that they have received investigative subpoenas regarding pricing and other information relevant to their generic drug portfolios — subpoenas reaching beyond any individual drug.[93] Humana alleges that "subpoenas to Defendants targeting inter-Defendant communications further support the existence of communication lines between competitors with respect to generic pricing and market allocation."[94] For example, it cites a quarterly report that Defendant Lannett filed with the Securities and Exchange Commission which reported that Lannett's Senior Vice President of Sales and Marketing had been "served with a grand jury subpoena relating to a federal investigation of the generic pharmaceutical company into possible violations of the Sherman Act" and explained that the subpoena was "not specifically directed to any particular product and is not limited **[**103]** to any time period."[95] EPPs allege that "DOJ's and the Connecticut AG's investigations, and the grand jury subpoenas and investigative demands that

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84 EPP Am. Class Action Compl. ¶ 11.

85 DPP Am. Class Action Compl. ¶ 19; *see also* Plaintiff States' Consol. Am. Compl. ¶7 ("At some point, that price dynamic changed for many generic drugs. Prices for dozens of generic drugs have risen — while some have skyrocketed, without explanation . . . .").

86 Humana Second Am. Compl. ¶ 136(i); *see also* Kroger Am. Compl. ¶ 12 (alleging "abrupt and substantial price increases" during the alleged conspiracy for 20 drugs with price jumps ranging from 75% to as high as 3,400%).

87 DPP Am. Class Action Compl. ¶ 1.

88 *See* Plaintiff States' Consol. Am. Compl. ¶ 5 ("Typically, when the first generic manufacturer enters a market for a given drug, the manufacturer prices its product slightly lower than the brand-name manufacturer. . . . As additional generic manufacturers market the product, the prices continue to fall slowly.").

89 EPP Am. Class Action Compl. ¶ 15.

90 EPP Am. Class Action Compl. ¶ 16; *see also* Humana Second Am. Compl. ¶¶ 144-158 (allegations regarding DOJ criminal investigation and DOJ subpoenas served on defendants).

91 Plaintiff States' Consol. Am. Compl. ¶ 1; *see also* Humana Second Am. Compl. ¶¶ 164-72.

92 *See* DPP Am. Class Action Compl. Ex. B (History of Government Investigations and Other Public Reports Concerning Anticompetitive Conduct in the Generic Drug Industry); *id.* Ex. C. (List of Generic Drug Manufacturers Known to Have Received a DOJ Subpoena and/or CID Relating to Anticompetitive Conduct in the Generic Drug Industry); *see also* Humana Second Am. Compl. ¶¶ 139-43 (allegations regarding congressional investigation into generic drug price increases).

93 DPP Am. Class Action Compl. ¶¶ 27-33; *see also* EPP Am. Class Action Compl. ¶ 657.

94 Humana Second Am. Compl. ¶ 136(h).

95 *Id.* ¶ 151.

have issued in conjunction with them, have uncovered numerous inter-competitor communications."[96] Plaintiffs' claims that Defendants **[*524]** engaged in an overarching multi-drug conspiracy rely on allegations arising from these investigations.

II. Standard of Review

HN1[] Defendants seek to dismiss the overarching conspiracy claims against them pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, which provides for dismissal of a complaint for failure to state a claim when a plaintiff's "plain statement" lacks enough substance to show that it is entitled to relief.[97] "[J]udging the sufficiency of a pleading is a context-dependent exercise."[98] On a motion to dismiss, the Court "consider[s] plausibility, not probability . . . ."[99] Plaintiffs must allege "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[100] "Speculative or conjectural assertions are not sufficient."[101] However, Plaintiffs are not required "to plead facts that, if true, definitively rule out all possible innocent explanations."[102] "[I]t is improper at **[**104]** this stage of the proceedings to weigh alternatives and [decide] which is more plausible."[103] "And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely."[104]

III. Discussion[105]

In this Opinion, the Court does not consider any Defendant's challenge to the sufficiency of allegations regarding any drug-specific conduct. Instead, the Court considers whether Plaintiffs have sufficiently alleged the existence of a conspiracy that extends beyond the boundaries of any individual drug. ***HN3***[] "So long as an alleged conspiracy is supported by enough facts to make it plausible, . . . it is of no matter whether it involves three conspirators or a score or more."[106] As EPPs argue, "the question here goes to the scope of each Defendants' anticompetitive

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[96] EPP Am. Class Action Compl. ¶ 657.

[97] *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

[98] *W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 98 (3d Cir. 2010)*.

[99] *In re Lipitor Antitrust Litig., 868 F.3d 231, 260 (3d Cir. 2017)*; *see also* *Twombly, 550 U.S. at 570* (holding that a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face").

[100] *Twombly, 550 U.S. at 556*.

[101] *Finkelman v. Nat'l Football League, 810 F.3d 187, 194 (3d Cir. 2016)*.

[102] *In re Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 753 (E.D. Pa. 2014)*.

[103] *In re Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 788 (N.D. Ill. 2017)*.

[104] *Twombly, 550 U.S. at 556* ***HN2***[] (internal quotation marks and citation omitted; *see also* *In re Capacitors Antitrust Litig., 106 F. Supp. 3d 1051 (N.D. Cal. 2015)* ("[T]he task of the district court is not to sustain or dismiss a complaint based on whether the Court feels it is a winner or has curb appeal. The Court's task is to determine whether the facts alleged in the complaint rise above mere speculation, even if the Court has doubts about them, . . . and whether they plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.") (citations and internal quotation marks omitted).

[105] The Court elects to bifurcate Defendants' separate motions regarding their individual defenses.

[106] *In re Capacitors, 106 F. Supp. 3d at 1064*; *see also* *id. at 1063* ("[M]ere size or breadth alone is not a reason to peremptorily jettison a conspiracy allegation.").

agreement, not its existence" and, based on the facts alleged in the Overarching Complaints, **[*525]** discovery will be required to answer the question.[107]

A. *TWOMBLY*

HN4[] To state a claim for a Sherman Act conspiracy, Plaintiffs must allege "enough factual matter (taken as true) to suggest that an agreement was made."[108] In the absence of **[**105]** allegations of direct evidence of such an agreement, Plaintiffs may allege parallel conduct plus "a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."[109] The necessary context may be shown through allegations of "plus factors" that "serve as proxies for direct evidence of an agreement."[110] "Plaintiffs are not required to plead simultaneous price increases — or that the price increases were identical — in order to demonstrate parallel conduct."[111] At least three "plus factors" support a finding that there is a suggestion of a preceding agreement: "(1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy."[112] "[T]he conspiracy must not be compartmentalized. The character and effect of [the] conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."[113]

For purposes of alleging an overarching conspiracy, plaintiffs have alleged parallel conduct in the form of price increases across the market for generic drugs that **[**106]** are "reasonably proximate in time and value."[114] Also, Plaintiffs have alleged that the structure of the market for generic drugs motivated Defendants to enter into an antitrust conspiracy and undertake actions against self interest in the form of pricing and bidding decisions that would be irrational in a competitive market for generic drugs. Plaintiffs' Overarching Complaints also allege facts implying the existence of a traditional conspiracy: inter-defendant communications, trade association leadership, membership, and meeting attendance, and ongoing state and federal investigations into generic drug pricing. Plaintiffs' allegations are not mere "labels and conclusions," "allegation[s] of parallel conduct and . . . bare assertion[s] of conspiracy."[115]

In support of their motion to dismiss the overarching conspiracy claims, Defendants cite a 2016 decision in *In re: Automotive Parts Antitrust Litigation* that denied a motion seeking to consolidate claims and amend complaints in order to assert an overarching conspiracy.[116] There, the court **[*526]** declined to allow the plaintiffs to file an

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[107] EPP Opp. Br. at 3.

[108] *Twombly, 550 U.S. at 556*.

[109] *Id. at 557*.

[110] *In re Flat Glass Antitrust Litig., 385 F.3d 350, 360 (3d Cir. 2004)*.

[111] *In re Blood Reagents Antitrust Litig., 756 F. Supp. 2d 623, 630 (E.D. Pa. 2010)* (citing *In re Baby Food Antitrust Litig., 166 F.3d 112, 132 (3d Cir. 1999)*.

[112] *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 322 (3d Cir. 2010)* (internal quotation marks and citations omitted).

[113] *In re Processed Egg Prods. Antitrust Litig., 821 F. Supp. 2d 709, 718 (E.D. Pa. 2011)* (internal quotation marks and citations omitted).

[114] *In re Chocolate Confectionary Antitrust Litig., 999 F. Supp. 2d 777, 787 (M.D. Pa. 2014)*, *aff'd*, *801 F.3d 383, 392 (3d Cir. 2015)*.

[115] *Twombly, 550 U.S. at 556*.

amended complaint alleging an overarching conspiracy for certain auto parts sold to Original Equipment Manufacturers, **[**107]** explaining that the plaintiffs were required to "allege facts creating at least an inference as to each Defendant's knowing participation in a conspiracy to raise, fix, maintain, or stabilize the price of auto parts, not just the parts it makes or sells."[117] The court determined that the plaintiffs alleged "multiple, separate, and product-specific" conspiracies rather than a single overarching conspiracy because the plaintiffs made "no allegations . . . of deals between makers of different component parts" and declined to make an inference of the defendants' knowledge outside their "own specific deals."[118]

Here, however, the Overarching Complaints allege that Defendants engaged in conduct that reached beyond their individual drugs (e.g., attendance at trade association events that "were not partitioned into drug-specific conclaves").[119] The facts in the Overarching Complaints are more like those alleged in a 2018 decision in the *Auto Parts* MDL, which determined that the plaintiffs had sufficiently stated a broad conspiracy among multiple defendants to rig bids and fix prices of air conditioning systems where the plaintiffs alleged defendants who **[**108]** manufactured different component parts of the systems (similar to Defendants here, who manufacture different drugs) "participated in trade meetings involving the AC Systems market, in which they discussed the market generally" and also alleged some admissions of guilt by certain defendants and "market conditions conducive to a price-fixing conspiracy."[120] Those allegations, combined with the plaintiffs' allegations that "employees attended automotive air conditioning industry meetings and discussed with employees of other Defendants the status of their respective companies' negotiations with [Original Equipment Manufacturers]," and "allegations about industry conditions supporting an inference that the market was susceptible to collusion," were sufficient to satisfy *Twombly*.[121]

The allegations in Plaintiffs' Overarching Complaints plausibly allege that Defendants engaged in a conspiracy regarding the broader market for generic drugs, and not just the market for any individual drug. The connective tissue Plaintiffs have alleged in their Overarching Complaints gives credence to a claim that Defendants engaged in "behavior that would probably not result from **[**109]** chance, coincidence, independent response to common stimuli, or mere interdependence unaided by an advance understanding among the parties."[122] Plaintiffs make plausible claims that the alleged individual drug conspiracies were connected by common goals, methods, or actors so as to form a broader overarching conspiracy.[123] Defendants' arguments that **[*527]** there are plausible

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[116] *See* Defs.' Mem. in Support of Joint Mot. to Dismiss Pls.' Overarching Conspiracy Claims at 21 (citing *In re Auto. Parts Antitrust Litig., No. 12-MD-2311, 2016 U.S. Dist. LEXIS 193193, 2016 WL 8200512, at *4 (E.D. Mich. Apr. 13, 2016)*; *see also* Defs' Reply Br. at 6 (citing *In re Auto. Parts, 2016 U.S. Dist. LEXIS 193193, 2016 WL 8200512, at *4*).

[117] *In re Auto. Parts, 2016 U.S. Dist. LEXIS 193193, 2016 WL 8200512, at *4*.

[118] *Id.*

[119] EPP Opp. Br. at 18.

[120] *In re Auto. Parts Antitrust Litig., No. 12-MD-2311, 2018 U.S. Dist. LEXIS 23710, 2018 WL 1138422, at *4 (E.D. Mich. Jan. 16, 2018)*.

[121] *2018 U.S. Dist. LEXIS 23710, [WL] at *5*.

[122] *Twombly, 550 U.S. at 556 n.4* (quoting 6 P. Areeda & H. Hovenkamp, ***Antitrust Law*** ¶ 1425 (2d ed. 2003) at 167-85) (internal quotation marks omitted).

[123] *See* *Precision Assocs., Inc. v. Panalpina World Transp. (Holding) Ltd., No. 08-0042, 2011 U.S. Dist. LEXIS 51330, 2011 WL 7053807, at *30 (E.D.N.Y. Jan. 4, 2011)* (holding that the plaintiffs sufficiently alleged an overarching conspiracy where their complaint "brought together actors, methods and markets" through allegations that a group of defendants allegedly involved in earlier conspiracies met at industry meetings where they conspired to "collectively impose surcharges"), *report and recommendation adopted*, *No. 08-0042, 2012 U.S. Dist. LEXIS 113829, 2012 WL 3307486 (E.D.N.Y. Aug. 13, 2012)*.

alternative explanations for the overarching conspiracy should be tested by discovery. They are not a matter for decision at this stage of the proceedings.

B. *UNITED STATES V. KELLY*

To determine whether Plaintiffs' allegations are enough to state an overarching conspiracy claim, Defendants argue the Court should apply the three-factor test set forth in *United States v. Kelly*.[124] They argue that "plaintiffs must plead facts showing that (1) each alleged conspirator was aware of, and committed to, a common goal that transcended individual agreements in which it is specifically alleged to have participated; (2) the alleged agreement contemplated a result 'that will not continue without the cooperation of the conspirators,' — i.e., that the individual conspiracies were interdependent; and (3) there **[**110]** was sufficient overlap among the participants in the individual conspiracies."[125]

In *Kelly*, the Third Circuit considered whether there was enough evidence to support the conclusion that a drug-dealer's criminal activities were part of a larger illegal drug distribution operation in the context of a post-trial appeal of a criminal conviction. Obviously, the circumstances here are different. This is not a criminal matter[126] and there has not yet been a trial — or even full discovery. Instead, the Court has been asked to consider the sufficiency of Plaintiffs' overarching conspiracy allegations in the context of motions to dismiss and the Court is required to accept all facts alleged in the complaints as true.[127] Defendants do not cite any binding precedent that would require the Court to apply the *Kelly* factors at the pleading stage in the context of an alleged civil conspiracy.[128]

[*528] *Twombly* ***HN6***[] sets the bar for Plaintiffs' overarching conspiracy allegations, not *Kelly*. But even if *Kelly* were the proper measuring stick for Plaintiffs' Overarching Complaints, their allegations plead an overarching conspiracy. *Kelly* requires consideration **[**111]** of the totality of the circumstances.[129] No one allegation must

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[124] *892 F.2d 255, 258-59 (3d Cir. 1989)*.

[125] Defs.' Mem. in Support of Joint Mot. to Dismiss Pls.' Overarching Conspiracy Claims at 6 (citations omitted).

[126] In the criminal context, "[t]he issue of whether a single conspiracy or multiple conspiracies exist is a fact question to be decided by a jury." *United States v. Bobb, 471 F.3d 491, 494 (3d Cir. 2006)*. Also, the question of whether a criminal defendant may be charged with participation in a single overarching conspiracy or multiple independent conspiracies raises questions under the *Double Jeopardy Clause*, which protects against successive prosecutions and punishments for the same criminal offense. *Cf. United States v. Becker, 892 F.2d 265, 268 (3d Cir. 1989)*. ("[T]he *double jeopardy clause* prohibits [the government] from splitting one conspiracy into several prosecutions."). That concern is not implicated here.

[127] *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* ***HN5***[] (holding that a "complaint must contain sufficient factual matter, *accepted as true*, to state a claim to relief that is plausible on its face") (emphasis added, internal quotation marks and citation omitted).

[128] In their joint response, Plaintiffs state that "the parties agree that *Kelly* supplies the substantive law with which Plaintiffs' overarching conspiracy allegations should be evaluated." Pls.' Joint Opp. Br. at 7-8. However, like Defendants, Plaintiffs do not cite any binding precedent that would require the court to apply *Kelly* in the context of a motion to dismiss civil antitrust conspiracy claims where Plaintiffs' allegations must be taken as true. *See id.* In the nearly 30 years since *Kelly* was decided, the Third Circuit has not cited it in a civil case, and except for the decision in *In re K-Dur Antitrust Litig., No. 01-1652, 2016 U.S. Dist. LEXIS 22982, 2016 WL 755623, at *18 (D.N.J. Feb. 25, 2016)*, cited by the parties, *Kelly* has not been featured in civil antitrust cases. *See, e.g., In re Processed Egg, 821 F. Supp. 2d 709* (not citing *Kelly* in evaluating claims of an overarching civil antitrust conspiracy). Moreover, in the criminal context, *Kelly* applies to post-trial motions. *Cf. United States v. Keystone Biofuels, 350 F. Supp. 3d 310, 320 (M.D. Pa. 2018)* (holding that the *Kelly* "test cannot be dispositive of whether a defendant's pre-trial motion to dismiss based upon the purported duplicity of a conspiracy count in an indictment should be granted . . . because, at the pretrial stage of prosecution, t[he] Court's standard of review requires us to accept as true all of the allegations in the Superseding Indictment").

prove Plaintiffs' overarching conspiracy claims. And "the absence of one [*Kelly*] factor does not necessarily defeat an inference of the existence of a single conspiracy."[130] The allegations that permit Plaintiffs' overarching conspiracy claims to withstand a challenge under *Twombly* also permit them to withstand a challenge under *Kelly*.

1. Common Goal

The "common goal" required under *Kelly* need not be complex or detailed to state a claim. In *Kelly*, the common goal "was simply to make money selling 'speed.'"[131] In the Overarching Complaints, Plaintiffs have alleged that Defendants shared the common goal of increasing and stabilizing the prices of generic drugs. For example, DPPs allege that Defendants had a "common understanding and goal . . . to achieve artificially inflated prices" by disincentivizing competition for additional market share through price erosion.[132] EPPs allege that "[t]he purpose of Defendants' unlawful "fair share" allocation was to fix, maintain and stabilize prices—either for a particular generic drug or any number of generic drugs. In this way, each entrant would benefit from coordination as a whole, **[**112]** even if a manufacturer did not seek a market allocation for a particular drug."[133] Humana alleges that "Defendants' shared understanding and goal is for the competitors in a particular market to discuss amongst themselves an agreement on 'fair share' with the objective of attaining a state of equilibrium where no competitor is incentivized to compete for additional market share by eroding price."[134] Kroger Plaintiffs allege that Defendants' common goal was "to cartelize the Price-Fixed Generic Drugs in order to achieve substantial supracompetitive **[*529]** profits."[135] Plaintiff States allege that Defendants' "overarching goal" was "to avoid price erosion and maintain inflated pricing within and across their respective broad product portfolios and, at times, increase pricing for targeted products without triggering a 'fight to the bottom' among existing competitors."[136] No more is required to allege a common goal at this stage of the case.[137]

Defendants argue that the Overarching Complaints should be dismissed because Plaintiffs have not alleged facts "showing that each Defendant shares the common goal of an overarching conspiracy involving other drugs sold by other Defendants."[138] ***HN8***[] But *Kelly* does not require **[**113]** proof "that each defendant knew all the details, goals or other participants in order" for the Court to find there was a single conspiracy.[139] "[A] common goal may

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[129] To determine whether conspiracy defendants are part of a single conspiracy or multiple conspiracies in the context of a double jeopardy claim arising from criminal conspiracy charges, the Third Circuit applies a "totality of the circumstances" test. *See* United States v. Travillion, 759 F.3d 281, 295 (3d Cir. 2014). Factors considered are whether the alleged conspiracies occurred in the same place, had a significant degree of temporal overlap or an overlap of personnel, and whether the defendants' roles and actions in the alleged conspiracies were similar. *Id.* But the "factors need not be applied in a rigid manner, as different conspiracies may warrant emphasizing different factors." *Id.* (citation omitted).

[130] United States v. Padilla, 982 F.2d 110, 115 (3d Cir. 1992).

[131] Kelly, 892 F.2d at 259 (noting that what mattered for the determination of whether a conspiracy had a "common goal" was that the conspiracy's "central purpose was common and pervasive" even though its "various personnel changed" during its existence).

[132] DPP Am. Class Action Compl. ¶ 10.

[133] EPP Am. Class Action Compl. ¶ 132.

[134] Humana Second Am. Compl. ¶ 268.

[135] Kroger Am. Compl. ¶ 814.

[136] Plaintiff States' Consol. Am. Compl. ¶ 12.

[137] ***HN7***[] *See* United States v. Fattah, 914 F.3d 112, 168 (3d Cir. 2019) (holding that to determine whether conspirators shared a common goal, a Court should consider the purpose of the alleged conspiracy "in a fairly broad sense").

[138] Defs.' Mem. in Support of Joint Mot. to Dismiss Pls.' Overarching Conspiracy Claims at 12.

exist even when conspirators individually or in groups perform different tasks in pursuing the common goal, and a single conspiracy may attract different members at different times or involve different sub-groups committing acts in furtherance of the overall plan."[140] "[A] defendant need not be accused of having engaged in all activities alleged to have advanced the conspiracy."[141] In other words, "one conspiracy can involve multiple subsidiary schemes."[142] That is what Plaintiffs have alleged in their Overarching Complaints: a single conspiracy with a common goal, facilitated by multiple schemes specific to various individual generic drugs.

2. INTERDEPENDENCE

HN9[] The second *Kelly* factor asks the Court to consider whether Defendants' conduct was intended to "bring to pass a continuous result that w[ould] not continue without the continuous cooperation of the conspirators."[143] "To evaluate interdependence, the court engages in an inquiry focused on 'the extent to which the success or failure of one conspiracy is independent of a corresponding **[**114]** success or failure by the other.'"[144] Courts "consider how helpful one individual's contribution is to another's goals."[145] Interdependence "helps establish whether the alleged coconspirators are all committed to the same set of objectives in a single conspiracy."[146]

Defendants argue that Plaintiffs' Overarching Complaints should fail because they "fail to allege facts demonstrating why an agreement as to all drugs would be necessary to reach agreement on one **[*530]** drug."[147] Responding to Defendants, Plaintiffs explain that "[w]hile Defendants' massive web of interlocking market allocation and price-fixing agreements might not have completely unraveled if one strand had to come apart, the Complaints contain multiple examples of how the agreements fit together and reinforced each other, allowing for easy collaboration and policing."[148] Further, by connecting multiple single-drug conspiracies, Defendants were able to better conceal their overarching conspiracy by "varying the leader of the price increase across drugs."[149]

Defendants argue that Plaintiffs' interdependence allegations make no economic sense — that individual Defendants had no incentive to increase prices for products that they did not sell. **[**115]** But in the Overarching Complaints, Plaintiffs have alleged the contrary. Humana alleges that "putative competitors declined to compete meaningfully on a bid for one drug in exchange for the opportunity to provide a pre-determined winning bid for a different drug" and that "an agreement by a putative competitor to join in the price increase for one drug often

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[139] *Kelly, 892 F.3d at 260* (internal quotation marks and citation omitted).

[140] *Fattah, 914 F.3d at 168* (internal quotation marks, alterations and citation omitted).

[141] *In re Generic Pharms. 338 F. Supp. 3d at 450* (quoting *In re Processed Egg, 821 F. Supp. 2d at 742*).

[142] *Fattah, 914 F.3d at 169* (citation omitted).

[143] *Kelly, 892 F.2d at 259*.

[144] *In re K-Dur Antitrust Litig., 2016 U.S. Dist. LEXIS 22982, 2016 WL 755623, at *21* (quoting *United States v. Macchia, 35 F.3d 662, 671 (2d Cir. 1994))*.

[145] *United States v. Kemp, 500 F.3d 257, 289 (3d Cir. 2007)*

[146] *Id.* (internal quotation marks and citation omitted).

[147] Defs.' Mem. in Support of Joint Mot. to Dismiss Pls.' Overarching Conspiracy Claims at 24.

[148] Pls.' Joint Opp. Br. at 20.

[149] Humana Opp. Br. at 9-10.

instigated a trade-off for that same competitor to lead a price increase for another drug."[150] Plaintiff States allege that

> [t]he agreement among all of the Defendants to adhere to the rules regarding 'fair share' is critical in order to maintain high prices. If even one competitor is not aware of (and behaving in accordance with) the larger understanding, it can lead to unwanted competition and lower prices. In the relatively few instances where a competitor prioritizes gaining market share over the larger understanding of maintaining "fair share," that competitor is viewed as "irresponsible," and is spoken to by competitors.[151]

EPPs assert that

> The effectiveness of an agreement on any one drug would be limited and unstable without a broader agreement that encompassed other drugs as well. For example, an agreement between two Defendants **[**116]** to raise prices or to allocate market share on one drug would not likely hold where those same two Defendants engaged in vigorous price competition on another drug, or where a third manufacturer not party to that agreement entered the market with an intent to compete on price. Therefore, Defendants understood that in order to be effective, their agreement needed to extend to multiple manufacturers and drugs.[152]

Similarly, IRPs allege that "Defendants who undercut other Defendants' prices were chastised for 'not playing fair' because lowering prices is considered irresponsible and to the detriment of all."[153] Under the allegations in the Overarching Complaints, Defendants who refused to "play fair" with competitors when asked to allocate markets or to raise prices risked retribution not just for the individual drugs implicated, but also for other generic drugs in their portfolios. These allegations create a plausible inference that "Defendants knew that they would need to **[*531]** enter into future agreements with other combinations of would-be competitors (in their existing markets or new markets) and therefore had a vested interest in 'playing fair' according to their shared code of conduct."[154] Whether **[**117]** this will ultimately prove to be the case is not before the Court at this time.

Defendants insist that Plaintiffs cannot show interdependence by alleging "the existence of an alleged 'series' of numerous individual conspiracies in the same industry."[155] They argue that "to state a claim for an overarching conspiracy, a complaint must allege facts demonstrating 'how, when, or where' the individual conspiracies became connected to each other in a single overarching conspiracy."[156] However, through detailed allegations regarding communications and other interactions between individual Defendants, Plaintiffs' Overarching Complaints have sufficiently alleged the how, when, or where needed to make plausible a claim that Defendants' actions regarding the prices of individual generic drugs in their portfolios were beneficial to and reinforced a broader scheme regarding generic drug prices. At this stage of the litigation, Plaintiffs have sufficiently alleged interdependence.

3. SUFFICIENT OVERLAP

Even if Plaintiffs' allegations did fall short on the other *Kelly* factors, their allegations of significant overlap among Defendants and the alleged individual drug conspiracies permit their overarching conspiracy **[**118]** claims to withstand dismissal. Defendants argue that there is insufficient overlap between the participants in the alleged individual conspiracies because "none of the Private Plaintiffs alleges that any single Defendant participated in each

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[150] Humana Second Am. Compl. ¶¶ 269-70.

[151] Plaintiff States' Consol. Am. Compl. ¶ 107.

[152] EPP Am. Class Action Compl. ¶ 102.

[153] IRP Am. Overarching Compl. ¶ 70.

[154] Pls.' Joint Opp. Br. at 22.

[155] Defs.' Mem. in Support of Joint Mot. to Dismiss Pls.' Overarching Conspiracy Claims at 21.

[156] *Id.* at 21-22.

of the individual drug conspiracies, and the Plaintiff States allege that only one Defendant participated in each of the 15 individual drug conspiracies alleged in the State Complaint."[157] Plaintiffs respond that their claims "rest on far more than the 'mere overlap' of some defendants in the interlocking conspiracies alleged."[158] The States argue that their Overarching Complaint "contains much more connective tissue between the Defendants and their agreements: overlapping, but not identical, sets of Defendants discussing price increases for multiple drugs at the same time; discussions on pricing activities for drugs that a Defendant did not manufacture; constant, crisscrossing communications among each other."[159]

There is no question that "mere overlap of some defendants in some of the transactions is, on its own, insufficient to establish an overarching agreement."[160] But in the Overarching Complaints, Plaintiffs allege much **[**119]** more than the "mere **[*532]** overlap" of some of the Defendants. Plaintiffs allege that Defendants have numerous and sustained contacts through (1) representation on trade association boards of directors; (2) trade association membership; (3) attendance at trade association meetings and events; and (4) other industry gatherings. Under the allegations in the Overarching Complaints, "Defendants participated in (and in many cases governed) the same trade associations and attended numerous trade association activities."[161] As EPPs argue, "Defendants' meetings at trade association events were not partitioned into drug-specific conclaves. Trade events . . . are broadly focused; there were not, for example, Glyburide conferences and Acetazolamide conferences, but rather, an incredible number of events at which all manufacturers of all drugs were together."[162]

DPPs cite their allegations regarding Defendant Zydus as an example of the points of overlap between the alleged individual drug conspiracies. They cite their allegations that: (1) Zydus was one of many Defendants that received a congressional letter inquiring about drug pricing; (2) like many other Defendants, Zydus received government subpoenas regarding **[**120]** generic drug industry practices; (3) Zydus and its co-Defendants actively participated in numerous trade associations; (4) Zydus's Chairman of the Board served on the GPhA's Board of Directors throughout the relevant time period and attended trade association gatherings at key points during alleged anticompetitive conduct as to acetazolamide pricing; (5) Defendant Heritage's NAM previously worked at Zydus and is alleged to "have colluded with other Defendants' personnel as to many drugs," including his former Zydus colleagues who moved to Citron; (6) communications between Zydus's Senior Director of National Accounts and Teva's Patel regarding pricing of at least acetazolamide; and (7) contacts between Zydus's Vice President of Sales and both Heritage's Malek (who has entered a guilty plea for his conduct relevant to glyburide and doxycycline hyclate) and Teva, which sold over a dozen drugs implicated in this MDL.[163] Many other allegations in the Overarching Complaints paint a similar picture of overlap between Defendants, although the allegations are more detailed with respect to some Defendants than others.

When Plaintiffs' allegations in each Overarching Complaint are viewed as a whole, **[**121]** they "do not simply reflect a series of disconnected conspiracies . . . ."[164] Plaintiffs "do not rely exclusively on the illustrative examples of collusive activity among Defendants or the trade meetings."[165] They also allege similar price trends across the

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[157] Defs.' Mem. in Support of Joint Mot. to Dismiss Pls.' Overarching Conspiracy Claims at 26.

[158] Pls.' Joint Opp. Br. at 23-24.

[159] States' Opp. Br. at 5. In support of their argument, Defendants cite *Dahl v. Bain Capital Partners, LLC*, a decision denying summary judgment on an overarching conspiracy claim where there was sufficient evidence to suggest that there was an "accepted code of conduct" between the Defendants, even though there was "no single Defendant that was involved in every transaction or other indication that the transactions were interdependent." ***937 F. Supp. 2d 119, 137-38 (D. Mass. 2013)***.

[160] *In re Auto. Parts, 2016 U.S. Dist. LEXIS 193193, 2016 WL 8200512, at *4*.

[161] Humana Opp. Br. 11 (citing Humana Second Am. Compl. ¶¶ 178-190 and Ex. A).

[162] EPP Opp. Br. at 18.

[163] DPP Opp. Br. at 12.

[164] *In re Auto. Parts, 2018 U.S. Dist. LEXIS 23710, 2018 WL 1138422, at *4*.

market for generic drugs and various investigations involving overlapping Defendants, including one resulting in Malek's admission of guilt. Malek is specifically alleged to have had numerous contacts with employees of Defendants other than his own employer. These allegations bolster the plausibility of the antitrust claims set forth in the Overarching Complaints. Whether the points of overlap alleged in the Overarching Complaints ultimately will be sufficient to prove Plaintiffs' overarching conspiracy claims is not the question before the Court. Plaintiffs have alleged enough overlap under *Kelly* to allow them to proceed with discovery regarding **[*533]** the question of whether there was or is a broad overarching conspiracy connecting the alleged individual generic drug conspiracies.

IV. CONCLUSION

Plaintiffs have sufficiently alleged the existence of an overarching conspiracy and the Court will permit the claims based on an overarching conspiracy **[**122]** theory to proceed. Defendants' joint motion to dismiss plaintiffs' overarching conspiracy claims will be denied. Whether any individual Defendant has a specific defense to the claims raised against it in the Overarching Complaints is a separate question not here resolved.

An appropriate Order follows.

ORDER

AND NOW, this 15th day of August 2019, upon consideration of Defendants' joint motion to dismiss plaintiffs' overarching conspiracy claims [Doc. Nos. 70 and 93 in Civil Action No. 17-3768 (Plaintiff States' Action); Doc. Nos. 83 and 112 in Civil Action No. 18-284 (Kroger Plaintiffs' Action); Doc. Nos. 116 and 146 in Civil Action No. 18-2401 (EPPs' Action); Doc. Nos. 37 and 59 in 18-2533 (IRPs' action); Doc. Nos. 39 and 64 in Civil Action No. 18-2641 (DPPs' Action; Doc. Nos. 73 and 104 in Civil Action No. 18-3299 (Humana Action); and Doc. Nos. 45 and 62 in Civil Action No. 18-4137 (Marion Plaintiffs' Action)] and all responses and replies thereto, and for the reasons set forth in the accompanying Opinion, it is hereby **ORDERED** that the Motion is **DENIED**.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFE, J.

APPENDIX A

Defendants in DPPs' action (Civ. A. No. 18-2641) are: Actavis Holdco U.S., **[**123]** Inc.; Apotex Corp.; Aurobindo Pharma USA, Inc.; Citron Pharma LLC; Dr. Reddy's Laboratories, Inc.; Fougera Pharmaceuticals Inc.; G&W Laboratories, Inc.; Glenmark Pharmaceuticals, Inc., USA; Heritage Pharmaceuticals, Inc.; Impax Laboratories, Inc.; Lannett Company, Inc.; Mylan Inc.; Mylan Pharmaceuticals, Inc.; Oceanside Pharmaceuticals, Inc.; Rajiv Malik; Par Pharmaceutical Company, Inc.

Defendants in EPPs' action (Civ. A. No. 18-2401) are: Actavis Holdco U.S., Inc.; Actavis Elizabeth LLC; Actavis Pharma, Inc., Apotex Corp.; Aurobindo Pharma USA, Inc.; Barr Pharmaceuticals, LLC; Citron Pharma LLC; Dava Pharmaceuticals, LLC; Dr. Reddy's Laboratories, Inc.; Fougera Pharmaceuticals Inc.; Generics Bidco I, LLC; Glenmark Pharmaceuticals, Inc., USA; Heritage Pharmaceuticals, Inc.; Lannett Company, Inc.; Mayne Pharma Inc.; Mutual Pharmaceutical Co., Inc.; Mylan Inc.; Mylan Pharmaceuticals, Inc.; Par Pharmaceutical, Inc.; Perrigo New York, Inc.; Pliva, Inc.; Rajiv Malik; Sandoz, Inc.; Sun Pharmaceutical Ind., Inc.; Taro Pharmaceuticals U.S.A., Inc.; Teva Pharmaceuticals USA, Inc.; West-Ward Pharmaceuticals Corp.; and Zydus Pharmaceuticals (USA), Inc.

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[165] *Id.*

Defendants in IRPs' action (Civ. A. No. 18-2533) **[**124]** are identical to those in the End Payor Plaintiffs' action.

Defendants in the Humana action (Civ. A. No. 18-3299) are: Actavis Elizabeth, LLC; Actavis Holdco US, Inc.; Actavis Pharma, Inc.; Akorn, Inc.; Apotex Corp., Breckenridge Pharmaceutical, Inc.; Dr. Reddy's Laboratories Inc., Endo International PLC; Epic Pharma, LLC; Fougera Pharmaceuticals Inc.; Glenmark Pharmaceuticals Inc., USA; Heritage Pharmaceuticals Inc.; Hi-Tech Pharmacal Co., Inc.; Impax Pharmaceuticals, LLC F/K/A Impax Pharmaceuticals, Inc.; Lannett Company, Inc.; Lupin Pharmaceuticals, Inc.; Mayne Pharma, Inc.; Morton Grove Pharmaceuticals, Inc.; Mylan Pharmaceuticals, Inc.; Mylan Inc.; Mylan N.V., Par Pharmaceutical Companies, Inc.; Perrigo Company PLC; Perrigo New York, Inc.; Sandoz, Inc.; Sun Pharmaceutical Industries, Inc.; Taro Pharmaceutical Industries Ltd.; Taro Pharmaceuticals USA, Inc.; Teligent, Inc.; Teva Pharmaceuticals USA, Inc.; UDL Laboratories, Inc.; Upsher-Smith Laboratories, LLC; West-Ward Pharmaceuticals Corp.; Wockhardt USA LLC; and Zydus Pharmaceuticals (USA) Inc.

Defendants in Kroger Plaintiffs' action (Civ. A. No. 18-824) are: Actavis Holdco U.S., Inc.; Actavis Pharma, Inc.; Akorn, Inc.; Apotex **[**125]** Corp.; Aurobindo Pharma USA, Inc.; Breckenridge Pharmaceutical, Inc.; Citron Pharma LLC; Dr. Reddy's Laboratories, Inc.; Epic Pharma, LLC; Fougera Pharmaceuticals, Inc.; G&W Laboratories, Inc.; Glenmark Pharmaceuticals **[*534]** Inc., USA; Heritage Pharmaceuticals, Inc.; Hi-Tech Pharmacal Co., Inc.; Impax Laboratories, Inc.; Lannett Company, Inc.; Lupin Pharmaceuticals, Inc.; Mayne Pharma USA Inc.; Morton Grove Pharmaceuticals, Inc.; Mylan Inc.; Mylan Pharmaceuticals, Inc.; Mylan N.V.; Oceanside Pharmaceuticals, Inc.; Par Pharmaceutical, Inc.; Perrigo New York, Inc.; Pliva, Inc.; Sandoz, Inc.; Sun Pharmaceutical Industries, Inc.; Taro Pharmaceuticals USA, Inc.; Teligent, Inc.; Teva Pharmaceuticals USA, Inc.; UDL Laboratories, Inc.; Upsher-Smith Laboratories, LLC; West-Ward Pharmaceuticals Corp.; Wockhardt USA LLC; Valeant Pharmaceuticals North America LLC; Valeant Pharmaceuticals International; and Zydus Pharmaceuticals (USA) Inc.

Defendants in Marion Plaintiffs' action (Civ. A. No. 14-4137) are: Ascend Laboratories, LLC; Apotex Corp.; Aurobindo Pharma USA, Inc.; Citron Pharma, LLC; Dr. Reddy's Laboratories, Inc.; Glenmark Pharmaceuticals, Inc., USA; Heritage Pharmaceuticals, Inc.; Lannett Company, **[**126]** Inc.; Mayne Pharma Inc.; Mylan Inc; Mylan Pharmaceuticals, Inc.; Par Pharmaceutical Companies, Inc.; Sandoz, Inc.; Sun Pharmaceutical Industries, Inc.; Teva Pharmaceuticals USA, Inc.; and Zydus Pharmaceuticals (USA) Inc. The Court dismissed Marion Plaintiffs' claims against Defendants McKesson Corporation and McKesson Medical Surgical Inc. on June 26, 2019. *See In re Generic Pharms. Pricing Antitrust Litig., No. 16-MD-2724, 386 F. Supp. 3d 477, 2019 U.S. Dist. LEXIS 106708, 2019 WL 2615592 (E.D. Pa. June 26, 2019)*

Defendants in Plaintiff States' action (Civ. A. No. 17-3768) are: Actavis Holdco, U.S., Inc.; Actavis Pharma, Inc.; Ascend Laboratories, LLC; Apotex Corp.; Aurobindo Pharma USA, Inc.; Citron Pharma, LLC; Dr. Reddy's Laboratories, Inc.; Glenmark Pharmaceuticals, Inc., USA; Heritage Pharmaceuticals, Inc.; Lannett Company, Inc.; Rajiv Malik; Mayne Pharma Inc.; Mylan Pharmaceuticals, Inc.; Par Pharmaceutical Companies, Inc.; Sandoz, Inc.; Sun Pharmaceutical Industries, Inc.; Teva Pharmaceuticals USA, Inc.; and Zydus Pharmaceuticals (USA), Inc. Plaintiff States assert that the alleged overarching conspiracy "is broader than the Defendants named in" their consolidated amended complaint. Plaintiff States' Consol. Am. Compl. ¶ 92.

APPENDIX B

The generic drugs identified in DPPs' first **[**127]** amended class action complaint (Civ. A. No. 18-2641) are: acetazolamide, doxycycline delayed release, doxycycline monohydrate, fosinopril-HCTZ, glipizide-metformin, glyburide, glyburide-metformin, leflunomide, meprobamate, metronidazole, nimodipine, nystatin, paromomycin, theophylline, verapamil, and zoledronic acid.

The generic drugs identified in EPPs' amended class action complaint (Civ. A. No. 18-2401) are: acetazolamide, doxycycline hyclate (regular release and delayed release), doxycycline monohydrate, fosinopril-HCTZ, glipizide-metformin, glyburide, glyburide-metformin, leflunomide, meprobamate, nimodipine, nystatin, paromomycin, theophylline, verapamil, and zoledronic acid.

The generic drugs identified in the IRPs' amended overarching complaint (Civ. A. No. 18-2533) are acetazolamide, doxycycline hyclate (regular release and delayed release), doxycycline monohydrate, fosinopril-HCTZ, glipizide-metformin, glyburide, glyburide-metformin, leflunomide, meprobamate, nimodipine, nystatin, paromomycin, theophylline, verapamil, and zoledronic acid.

The generic drugs identified in the second amended complaint in the Humana action (Civ. A. No. 18-3299) are: acetazolamide, **[*535]** doxycycline hyclate **[**128]** (regular release and delayed release), doxycycline monohydrate, leflunomide, nystatin, theophylline ER and verapamil.

The generic drugs identified in Kroger Plaintiffs' amended complaint (Civ. A. No. 18-824) are: acetazolamide, albuterol, amitriptyline, baclofen, benazepril-HCTZ, clobetasol, clomipramine, desonide, digoxin, divalproex ER, doxycycline hyclate (regular release and delayed release), doxycycline monohydrate, econazole, fluocinonide, fosinopril-HCTZ, glipizide-metformin, glyburide, glyburide-metformin, leflunomide, levothyroxine, lidocaine-prilocaine, metronidazole, meprobamate, nimodipine, nystatin, paromomycin, pravastatin, propranolol, theophylline ER, ursodiol, verapamil, and zoledronic acid.

The generic drugs specifically identified as being subject to market allocation and price fixing conspiracies in Marion Plaintiffs' second amended class action complaint (Civ. A. No. 14-4137) are: acetazolamide, doxycycline hyclate delayed release, doxycycline monohydrate, fosinopril-HCTZ, glipizide-metformin, glyburide, glyburide-metformin, leflunomide, meprobamate, nimodipine, nystatin, paromomycin, theophylline ER, verapamil, and zoledronic acid. Marion Second Am. Compl. ¶ 51. **[**129]** Marion Plaintiffs allege an overarching conspiracy that includes "all, or nearly all generic drugs" and they allege they purchased many other generic drugs not included in the above list. *See* Marion Second Am. Compl. ¶¶ 12-13.

The generic drugs identified in Plaintiff States' consolidated amended complaint (Civ. A. No. 17-3768) are: acetazolamide, doxycycline hyclate delayed release, doxycycline monohydrate, fosinopril-HCTZ, glipizide-metformin, glyburide, glyburide-metformin, leflunomide, meprobamate, nimodipine, nystatin, paromomycin, theophylline, verapamil, and zoledronic acid.

Sitzer v. Nat'l Ass'n of Realtors

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

August 19, 2019, Decided; August 19, 2019, Filed

Case No. 4:19-cv-00332-SRB

Reporter

2019 U.S. Dist. LEXIS 140195 *; 2019-2 Trade Cas. (CCH) P80,970; 2019 WL 3892873

JOSHUA SITZER AND AMY WINGER, SCOTT AND RHONDA BURNETT, and RYAN HENDRICKSON, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE NATIONAL ASSOCIATION OF REALTORS, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, THE LONG & FOSTER COMPANIES, INC., RE/MAX LLC, and KELLER WILLIAMS REALTY, INC. Defendants.

Subsequent History: Transfer denied by *Sitzer v. Nat'l Ass'n of Realtors, 2019 U.S. Dist. LEXIS 236447, 2019 WL 11648563 (W.D. Mo., Aug. 22, 2019)*

Motion denied by *Sitzer v. Nat'l Ass'n of Realtors, 2019 U.S. Dist. LEXIS 236446, 2019 WL 11648509 (W.D. Mo., Sept. 24, 2019)*

Motion denied by *Sitzer v. Nat'l Ass'n of Realtors, 420 F. Supp. 3d 903, 2019 U.S. Dist. LEXIS 178615, 2019 WL 5381984 (W.D. Mo., Oct. 16, 2019)*

Stay denied by *Sitzer v. Nat'l Ass'n of Realtors, 2020 U.S. Dist. LEXIS 60963 (W.D. Mo., Apr. 7, 2020)*

Motion denied by, Stay denied by *Sitzer v. Nat'l Ass'n of Realtors, 2020 U.S. Dist. LEXIS 86339 (W.D. Mo., Apr. 10, 2020)*

Stay granted by, in part *Sitzer v. Nat'l Ass'n of Realtors, 2020 U.S. Dist. LEXIS 248309, 2020 WL 8224831 (W.D. Mo., May 8, 2020)*

Later proceeding at *Sitzer v. Nat'l Ass'n of Realtors, 2020 U.S. Dist. LEXIS 248308 (W.D. Mo., May 8, 2020)*

Class certification granted by *Burnett v. N.A. of Realtors, 2022 U.S. Dist. LEXIS 73682, 2022 WL 1203100 (W.D. Mo., Apr. 22, 2022)*

Motion denied by, Stay denied by *Burnett v. N.A. of Realtors, Realtors, Realogy Holdings Corp., 615 F. Supp. 3d 948, 2022 U.S. Dist. LEXIS 127520, 2022 WL 2820112 (W.D. Mo., July 19, 2022)*

Motion denied by *Burnett v. Nat'l Ass'n of Realtors, 2022 U.S. Dist. LEXIS 226388, 2022 WL 17742121 (W.D. Mo., Dec. 16, 2022)*

Summary judgment denied by *Burnett v. Nat'l Ass'n of Realtors, 2022 U.S. Dist. LEXIS 226614, 2022 WL 17741708 (W.D. Mo., Dec. 16, 2022)*

Motion denied by *Burnett v. N.A. of Realtors, 2022 U.S. Dist. LEXIS 226389 (W.D. Mo., Dec. 16, 2022)*

Motion denied by *Burnett v. N.A. of Realtors, 2022 U.S. Dist. LEXIS 228412, 2022 WL 17827581 (W.D. Mo., Dec. 20, 2022)*

Dismissed by, in part, Dismissed by, Without prejudice, in part *Burnett v. Realtors, 2023 U.S. Dist. LEXIS 184310 (W.D. Mo., Oct. 13, 2023)*

Core Terms

venue, personal jurisdiction, transaction of business, service of process, transacts, broker, associations, long-arm, minimum contact, nationwide, Realtors

Counsel: **[*1]** For Joshua Sitzer, on behalf of themselves and all others similarly situated, Amy Winger, on behalf of themselves and all others similarly situated, Ryan Hendrickson, Plaintiffs: Amy R Jackson, Eric L. Dirks, Matthew Lee Dameron, Williams Dirks Dameron LLC, Kansas City, MO; Erin D Lawrence, Jeremy M. Suhr, Brandon J.B. Boulware, Boulware Law LLC, Kansas City, MO.

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For BHH Affiliates, LLC, Defendant: Brian C Fries, Lathrop Gage LLP - KCMO, Kansas City, MO.

For HSF Affiliates, LLC, The Long & Foster Companies, Inc., Defendants: C Fries, LEAD ATTORNEY, Lathrop Gage LLP - KCMO, Kansas City, MO.

For Re/Max LLC, Defendant: Danne Wayne Webb, LEAD ATTORNEY, Horn, Aylward & Bandy, LLC, Kansas City, MO; Odeshoo Hasdoo, Jones Day - Chicago, Chicago, IL.

Judges: STEPHEN R. BOUGH, UNITED STATES DISTRICT JUDGE.

Opinion by: STEPHEN R. BOUGH

Opinion

ORDER

[*3] Before the Court is a Motion of the National Association of Realtors to Transfer this Case to the Northern District of Illinois (Doc. #58). For the following reasons the motion is DENIED.

I. Background

Plaintiffs "bring this action on behalf of themselves and on behalf of the plaintiff classes . . . consisting of all persons and entities who listed properties on one of four Multiple Listing Services[1] (the "Subject MLS") and paid a broker commission from at least April 29, 2015 until the Present (the "Subject MLS Class Period)." (Doc. #38, p. 1). Defendants are the National Association of Realtors ("NAR") "and the four largest national real estate broker franchisors[,] . . . each of which has a significant presence in the Kansas City metropolitan area." (Doc. #38, p. 1). Plaintiffs allege that "[t]ogether, Defendants have conspired to require home sellers to pay the broker representing the buyer of their homes, and to pay an inflated amount, in violation of federal ***antitrust law***, the *Missouri Merchandising Practices Act* ("MMPA")[2], and the Missouri ***Antitrust Law***[.]" (Doc. #38, p. 1). Plaintiffs allege that "[t]he cornerstone of Defendants' conspiracy is NAR's adoption and implementation of **[*4]** a rule that requires all seller's brokers to make a blanket, unilateral and effectively non-negotiable offer of buyer broker compensation (the "Adversary Commission Rule") when listing a property on a [MLS]." (Doc. #38, p. 3). Plaintiffs allege "[t]he MLSs at issue in this case are controlled by local NAR associations, and access to such MLSs is conditioned on brokers agreeing to follow all mandatory rules set forth in NAR's Handbook on Multiple Listing Policy." (Doc. #38, p. 3). NAR moves the Court to transfer this case to the Northern District of Illinois, arguing "this Court lacks personal jurisdiction over NAR under either the Missouri long-arm statute, *Mo. Rev. Stat. § 506.500.1*, [or] under *§ 12 of the Clayton Act*[.]" (Doc. #58, p. 1).

II. Legal Standards

A. Transfer to Cure Lack of Personal Jurisdiction

When a "court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court . . . in which the action or appeal could have been brought at the time it was filed[.]" *28 U.S.C. § 1631*.

B. Transfer to Cure Improper Venue under the Clayton Act

"The district court of a district in which is filed a case laying venue in the wrong division or district **[*5]** shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." *28 U.S.C. § 1406(a)*. "[W]hen reviewing a motion to transfer, a court may consider evidence outside of the pleadings but must draw all reasonable inferences and resolve factual conflicts in favor of the non-moving party." *Thompson v. Titus Transp., LP, 2012 U.S. Dist. LEXIS 168730, 2012 WL 5933075, at *3 (D. Kan. Nov. 27, 2012)* (internal citation and quotation marks omitted).

III. Discussion

A. Personal Jurisdiction Under the Missouri Long-Arm Statute

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[1] Plaintiffs describe an MLS as "a database of properties listed for sale in a particular geographic region." (Doc. #38, p. 3). Plaintiffs state that if brokers are members of an MLS, they "are required to list all properties on the MLS." (Doc. #38, p. 3).

[2] Plaintiff states that "[t]he Class Period for the MMPA Class is April 29, 2014 (or earlier) until the Present." (Doc. #38, p. 1)

NAR argues this Court lacks personal jurisdiction over NAR under the Missouri long-arm statute. Plaintiffs do not rely on the Missouri long-arm statute to argue this Court's personal jurisdiction over Defendants. Plaintiffs rely solely on the Clayton Act's personal jurisdiction and venue rules. Accordingly, the Court will not entertain NAR's argument relating to personal jurisdiction under Missouri's long-arm statute, and NAR's motion to transfer pursuant to § 1631 is denied.

B. Personal Jurisdiction Under the Clayton Act

Section 12 of the Clayton Act provides special venue and service of process rules for private antitrust actions brought against corporate defendants. Section 12 provides:

> Any suit, action, or proceeding under the antitrust laws against **[*6]** a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22. "[A] corporation is engaged in transacting business in a district . . . if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character." *United States v. Scophony Corp. of Am., 333 U.S. 795, 807, 68 S. Ct. 855, 92 L. Ed. 1091 (1948)* (internal citation omitted). If venue is proper under Section 12, personal jurisdiction may be established by worldwide service of process. *In re Vitamin C Antitrust Litig., 2012 U.S. Dist. LEXIS 100075, 2012 WL 2930109, *4 (E.D. N.Y. July 18, 2012)*; *Go-Video, Inc. v. Akai Elec. Co. Ltd., 885 F.2d 1406, 1413-14 (9th Cir. 1989)*; 14D Fed. Prac. & Proc. Juris. § 3818 (4th ed.).

The Circuits are split regarding how the two clauses of Section 12—the venue clause and the service of process clause—may be used. The Third Circuit and Ninth Circuit have adopted a broad interpretation that permits plaintiffs to establish venue by using either the general venue statute, 28 U.S.C. § 1391, or the Section 12 venue clause, combined with the Section 12 service of process clause in order to establish personal jurisdiction over a corporate defendant. *See* *In re Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 296-97 (3rd Cir. 2004)*; *Go-Video, Inc., 885 F.2d at 1413*. The D.C. Circuit, Second Circuit, and Seventh Circuit require that in order to take advantage of the Section 12 service of process clause to establish **[*7]** personal jurisdiction, plaintiffs may only establish venue by using the Section 12 venue clause. *See* *GTE New Media Servs., Inc. v. BellSouth Corp., 199 F.3d 1343, 1351, 339 U.S. App. D.C. 332 (D.C. Cir. 2000)*; *Daniel v. Am. Bd. Of Emergency Med., 428 F.3d 408, 423-24 (2d Cir. 2005)*; *KM Enters., Inc., v. Global Traffic Techs., Inc., 725 F.3d 718, 730 (7th Cir. 2013)*. The Eighth Circuit has not adopted an interpretation.

Defendants urge the Court to adopt the narrow reading of Section 12 and forbid Plaintiff from combining the general venue statute with the nationwide service of process clause of Section 12 in order to establish this Court's personal jurisdiction over NAR. Defendants argue venue is improper in this District under the narrow reading of Section 12 because "plaintiffs do not allege any facts to support the conclusion that NAR 'transacts business' in this District within the meaning of § 12." (Doc. #59, p. 15). Defendants also argue that sporadic contact with this District does not rise to the level of transacting business within the District in a substantial way. Defendants argue that because venue is improper under Section 12, "the Court lacks personal jurisdiction over NAR under the nationwide service of process provisions of § 12." (Doc. #59, p. 18). Defendants also argue that NAR has insufficient minimum contacts with Missouri to support a finding of personal jurisdiction over NAR that satisfies Due Process.

Plaintiffs argue that venue is proper in the Western District of Missouri, **[*8]** and thus this Court has personal jurisdiction over NAR in this District, under both the broad and narrow interpretations of Section 12's personal jurisdiction provision. Plaintiffs argue venue is proper under the broad approach because "a substantial part of the events . . . giving rise to the claim occurred" in this District. § 1391. Plaintiffs argue "four of the five named class representative Plaintiffs sold homes located in this District, where they were injured because Defendants implemented and enforced NAR's Adversary Commission Rule on the Heartland [or the Kansas City] MLS." (Doc. #65, p. 16). Plaintiffs argue venue is proper under the stricter approach because NAR transacts business in this

District as contemplated by the *Clayton Act*. Plaintiffs argue that NAR has sufficient contacts with the United States, as is required by *Section 12*, to support a finding of personal jurisdiction that satisfies Due Process.

The Court need not adopt an interpretation of *Section 12* because this Court has personal jurisdiction over NAR in accordance with both the broad and narrow reading. Defendants urge the Court to adopt the narrow reading, but do not argue that personal jurisdiction is not satisfied under the broad reading. **[*9]** The broad reading allows Plaintiffs to establish venue by showing that "a substantial part of the events . . . giving rise to the claim occurred" in this District. *§ 1391*. Here, four of the five named plaintiffs "sold homes located in this District, where they were injured because Defendants [allegedly] implemented and enforced NAR's Adversary Commission Rule on the Heartland MLS," which corresponds with the Kansas City area within this District. (Doc. #65, p. 16). A substantial part of NAR's alleged implementation and enforcement of the Adversary Commission Rule against the sellers' brokers occurred in the District, given that three of the four Subject MLSs[3] correspond with cities within this District. Accordingly, venue is proper in the Western District of Missouri under *§ 1391*.

Venue is also proper in this District under *Section 12*'s venue clause, which dictates that venue is proper in any district in which a corporation, "in the ordinary and usual sense [] 'transacts business' therein of any substantial character." *Scophony Corp., 333 U.S. at 807* (internal citation omitted). *Section 12 of the Clayton Act* was enacted to enlarge jurisdiction over corporations. *Id. at 806-07*. "The construction gave the words 'transacts business' a much broader meaning for establishing **[*10]** venue than the concept of 'carrying on business' denoted by 'found' under the preexisting statute and decisions." *Id. at 807* (internal citation omitted). In enacting *Section 12 of the Clayton Act*, Congress "relieved persons injured through corporate violations of the antitrust laws from the 'often insuperable obstacle' of resorting to distant forums for redress of wrongs done in the places of their business or residence." *Id.* (internal citation omitted). "A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating to its headquarter defeat or delay the retribution due." *Id.*

"[T]he substantiality of the business transacted is to be judged from the point of view of the average businessman and not in proportion to the sales or revenues of the defendant." *Black v. Acme Markets, Inc., 564 F.2d 681, 687 (5th Cir. 1977)* (internal citations omitted); *Katz Drug Co. v. W. A. Sheaffer Pen Co., 6 F. Supp. 210, 212 (W.D. Mo. 1932)*. Further, "the purchases and/or sales which constitutes the transaction of business need not be connected to the subject matter of th[e] suit." *Id.* "The language of a particular case should not be taken as a standard to be erected as a set of rigid prescriptions of the particular incidents of business conduct which may constitute the transaction **[*11]** of business." 3 A. L. R. Fed. 120 (2019) (citing *Austad v. United States Steel Corp. 141 F. Supp. 437, 440 (N.D. Cal. 1956))*. "[W]hat constitutes transacting business . . . cannot be determined by drawing up a checklist of specific incidents of business done and comparing it with the activities in a particular case." *Id.* (citing *Abrams v. Bendix Home Appliances, Inc. 96 F. Supp. 3, 8 (S.D.N.Y. 1951))*. "Although there is no 'singular definitive test for transacting business,' the most important factor to consider is 'the dollar amount of business transacted in the district.'" *In re Blue Cross Blue Shield Antitrust Litig., 225 F. Supp. 3d 1269, 1293 (N.D. Ala. 2016)* (internal citation omitted).

NAR collects "substantial revenues and fees[] from its members located in this District." (Doc. #65, p. 12). NAR's affidavit filed as an exhibit to the instant motion confirms that approximately 22,600 of its members are located in Missouri but fails to specify how many of those members are located within the Western District of Missouri. Even assuming 10,000 of the Missouri members are located within the Western District of Missouri, which evidence supports and Defendants do not refute, with annual membership dues near $150 per member, NAR receives nearly $1.5 million in dues yearly from members in this District. *See* *Blue Cross Blue Shield, 225 F. Supp. 3d at 1296* ("Frankly, it is incredible for BCBS—MS to assert that its collection of approximately $190,000 in premiums per year from approximately **[*12]** 1,900 subscribers in this district constitutes de minimis business. That in itself would be enough for the court to conclude that BCBS—MS engages in substantial business in this district."). That "[l]ess than 1% of NAR's total dues revenue is derived from members in the Western District of Missouri" is inconsequential.

[3] Plaintiffs bring this class action on behalf of home sellers who paid a broker commission and whose homes were listed on MLSs corresponding with Kansas City, Missouri; Springfield, Missouri; Columbia, Missouri; and St. Louis, Missouri.

(Doc. #59-1, p. 2). *See* Brandt v. Renfield Imps., Ltd., 278 F.2d 904, 911 (8th Cir. 1960) ("The large amounts of the sales made . . . by [defendants] . . . demonstrate that the business transacted was very substantial. That the sales constituted a very small fraction of the business carried on in all the districts throughout the country . . . is immaterial.").

In addition to collecting membership dues, evidence supports—and NAR does not deny—that NAR requires its member associations to incorporate mandatory provisions verbatim into their bylaws. Membership associations must certify that their bylaws include such provisions, and the MLS Rules and Regulations of member associations and MLSs must also be reviewed and approved by NAR. Member associations and MLSs must also adopt new or amended NAR policies. The above demonstrates that NAR not only transacts substantial business in a monetary sense, but also exerts substantial power and **[*13]** control over its members in this District. *See* Daniel, 428 F.3d at 429 (citing Myers v. Am. Dental Assoc., 695 F.2d 716, 730, 19 V.I. 642 (3d Cir. 1983) ("[A] defendant professional organization transacts business in a district when it enforces its standards against constituent organizations through direct, continual supervision of those organizations in the judicial district.").

Additionally, NAR formed a partnership with Blue Springs, Missouri-based company Xceligent, "a national public marketing platform for commercial real estate listings" in 2013. Evidence demonstrates that Xceligent paid NAR directly at least $35,000 for royalties, goods, and services in 2017. NAR also hosted 140 NAR communication directors from state and local associations at a three-day Communication Directors Institute conference at the Crown Center Westin in Kansas City, Missouri, in 2019. Additionally, undisputed evidence shows that the Missouri Realtors, a trade association representing realtors throughout Missouri, budgets to pay NAR over $100,000 a year for unspecified expenses. These business transactions, combined with the roughly $1.5 million in dues NAR receives from its members within this District, show that NAR transacts business of a substantial character within the Western District of Missouri. **[*14]** That NAR does not have an "office, facilities, or employees in this District, [] is not registered to do business in Missouri," and does not specifically target Missouri residents for business solicitation or advertising does not change the analysis. *See, e.g.*, Health Care Equalization Comm. of Iowa Chiropractic Soc. v. Iowa Med. Soc., 501 F. Supp. 970, 980-83 (S.D. Iowa 1980) (finding defendant professional association transacted business in Southern District of Iowa even though association was "not licensed to do business in Iowa," had "no office, employees, or agents in Iowa," had "no property and [made] no purchases in Iowa, and" had "not held any meetings, seminars or workshops in Iowa," because "1.3% of its members reside in Iowa and receive publications, newsletters and other information from the [association], and are subject to its canon of ethics" and because a committee of the association had additional contacts with Iowa)[4]; Blue Cross Blue Shield, 225 F. Supp. 3d at 1298 (finding defendant entity conducted substantial business in district where entity had four members in district, "collected approximately $12,508 per year in premiums from its members" within the district, and "paid an average of approximately $86,700 per year . . . to settle claims" within the district).

None of the cases NAR cites involved such substantial business transactions as those transacted by NAR described above. *See* Bartholomew v. Virginia Chiropractors Asso., 612 F.2d 812 (4th Cir. 1979) *abrogated on other grounds by* Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982) (Defendant's solicitation of advertising time and dissemination of correspondence did amount to transacting business within meaning of Section 12); Golf City, Inc. v. Wilson Sporting Goods, Co., 555 F.2d 426, 438 (5th Cir. 1977) (fifty-five members of defendant association living in district, members' receipt of association's publications in

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[4] NAR argues plaintiffs failed "to mention the controlling decision of the Eighth Circuit in [this] case on appeal from the district court . . . compels the conclusion that assertion of jurisdiction over NAR in this case would violate the Due Process Clause of the Fourteenth Amendment." (Doc. # 71, p. 3). NAR is mistaken. In the Eighth Circuit's opinion, the Court affirmed the district court's finding that the court lacked personal jurisdiction over a defendant *pursuant to the Iowa long-arm statute* because that defendant did not have "sufficient minimum contacts with Iowa to satisfy the requirements of the due process clause of the fourteenth amendment." Health Care Equalization Comm. of the Iowa Chiropractic Soc. v. Iowa Med. Soc., 851 F.2d 1020, 1022-23 (8th Cir. 1988). The district court's finding of personal jurisdiction over a separate defendant *based on* Section 12 *of the Clayton* ***[*15]*** *Act* was not appealed. Accordingly, the Eighth Circuit's opinion and Due Process analysis do not affect the Section 12 personal jurisdiction standard and analysis.

district, and five-day business school in district did not amount to transacting business within meaning of *Section 12*); *Daniel, 428 F.3d at 429-30* (no substantial business transactions where defendant professional organization's contacts were with the state as a whole rather than the relevant district, and defendant "certified an unspecified number of physicians in New York" and "received an unspecified amount of revenue from the application fees of physicians in New York.").

NAR argues that "[s]ince it would violate due process to assert jurisdiction over NAR under the Missouri long-arm statute, it would also violate due process to assert jurisdiction under *§ 12 of the Clayton Act*." (Doc. #71, p. 4). In support of this argument, NAR cites *South Dakota v. Kansas City S. Indus., Inc., 880 F.2d 40, 44 n.10 (8th Cir. 1989)*, which states that the application of *Section 12* "must in every case satisfy constitutional **[*16]** due process principles, including "the familiar 'minimum contacts' requirements for personal jurisdiction." Defendants failed to cite the later-decided *In re Fed. Fountain, Inc., 165 F.3d 600, 601 (8th Cir. 1999)* (en banc), in which the Eighth Circuit "[took] the opportunity to disagree with that holding and to align [itself] with virtually every other court that has ruled on the issue" of whether there must "be minimum contacts between a defendant and the state in which he or she is expected to answer, before the court that issued the process may constitutionally assume personal jurisdiction over that defendant." The Court went on to clarify that when Congress "exercise[s] its authority to furnish federal district courts with the power to exert personal jurisdiction nationwide," as Congress did in *Section 12 of the Clayton Act*, "the fairness that due process of law requires" is satisfied when a defendant "has sufficient contacts with the United States." *Id. at 602*; *see also* *Action Embroidery Corp. v. Atl. Embroidery, Inc., 368 F.3d 1174, 1180 (9th Cir. 2004)* ("In a statute providing for nationwide service of process, the inquiry to determine minimum contacts is thus whether the defendant has acted within any district of the United States or sufficiently caused foreseeable consequences in this country.") (internal citation and quotation marks **[*17]** omitted); *KM Enters., Inc., 725 F.3d at 731*; *Go-Video, Inc., 885 F.2d at 1416*; *Blue Cross Blue Shield, 225 F. Supp. 3d at 1300*. NAR does not dispute that it has minimum contacts with the United States. Aside from NAR's multiple points of contact with the state of Missouri discussed above, NAR acknowledges that it is incorporated in Illinois, its principal place of business is in Chicago, Illinois, and it has an office in Washington, D.C. NAR is an association of real estate professionals throughout the United States and satisfies the standard of minimum contacts with the United States.

Accordingly, because venue is proper under *Section 12*'s special venue provision, nationwide service of process is authorized, and this Court has personal jurisdiction over NAR. The Court will not certify its decision to the Eighth Circuit, as NAR's request that this Court do so relies on a mistaken interpretation of the law, as this Court addressed in footnote 4 above.

IV. Conclusion

The Motion of the National Association of Realtors to Transfer this Case to the Northern District of Illinois (Doc. #58) is DENIED.

IT IS SO ORDERED.

/s/ Stephen R. Bough

STEPHEN R. BOUGH

UNITED STATES DISTRICT JUDGE

Dated: August 19, 2019

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Trendsettah USA, Inc. v. Swisher Int'l, Inc.

United States District Court for the Central District of California

August 19, 2019, Decided; August 19, 2019, Filed

SACV 14-1664 JVS (DFMx)

Reporter

2019 U.S. Dist. LEXIS 217428 *; 2019 WL 6837052

Trendsettah USA, Inc. et al. v. Swisher International Inc.

Subsequent History: Reconsideration denied by, Motion granted by *Trendsettah United States, Inc. v. Swisher Int'l, Inc., 2020 U.S. Dist. LEXIS 46088 (C.D. Cal., Jan. 21, 2020)*

Reconsideration denied by, Motion denied by *Trendsettah USA, Inc. v. Swisher Int'l Inc., 2020 U.S. Dist. LEXIS 263580, 2020 WL 13328486 (C.D. Cal., July 31, 2020)*

Reversed by, in part, Affirmed by, in part *Trendsettah USA, Inc. v. Swisher Int'l, Inc., 31 F.4th 1124, 2022 U.S. App. LEXIS 10221 (9th Cir. Cal., Apr. 15, 2022)*

Prior History: *Trendsettah United States v. Swisher Int'l, 2015 U.S. Dist. LEXIS 186869 (C.D. Cal., Feb. 3, 2015)*

Core Terms

excise tax, discovery, indictment, documents, imported, damages, argues, interview, costs, misrepresentation, monopolization, cigarillos, misconduct, invoices, products, objects, profits, profit margin, manufacturing, fraudulent, notice, financial records, motion for relief, judicial process, summary judgment, due diligence, lost profits, tax evasion, Declaration, proceedings

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

Attorneys for Defendants: Not Present.

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

Opinion by: James V. Selna

Opinion

CIVIL MINUTES - GENERAL

Proceedings: (IN CHAMBERS) Order Regarding Motion for Relief from Judgment or for Expedited Discovery, Motion to Stay, and Motion for Summary Adjudication

The Court, having been informed by the parties in this action that they submit on the Court's tentative ruling previously issued, hereby rules in accordance with the tentative ruling as follows:

Defendant Swisher International, Inc. ("Swisher") filed a motion for relief from judgment pursuant to *Federal Rules of Civil Procedure 60(b)(2)*, *60(b)(3)*, and *60(d)*, or in the alternative, for an order accelerating discovery into Plaintiffs' Trendsettah USA, Inc. and Trend Settah International, Inc. (collectively, "TSI") alleged misconduct. Mot., Docket No. 377. TSI filed an opposition. Opp'n, Docket No. 397. Swisher replied. Reply, Docket No. 414. With leave of the Court, TSI filed a sur-reply. Sur-Reply, Docket No. 421-1.

Swisher also moved to stay execution of any judgment against it in this case and related discovery under *Federal Rule of Civil Procedure 62* until five business days after the filing of an order resolving the above motion for relief from judgment or, if later, **[*2]** five business days after notice of entry of any judgment entailed by such resolution. Docket No. 380. TSI opposed. Docket No. 404. Swisher replied. Docket No. 418.

Lastly, TSI moved for summary adjudication as to Swisher's supersedeas bond. Docket No. 364. Swisher opposed. Docket No. 372. Swisher replied. Docket No. 386.

For the following reasons, the Court **grants** the motion for relief from judgment. Therefore, the motions to stay and for summary adjudication are **denied as moot**.

I. BACKGROUND

The background of this case is familiar to the parties and detailed in the Court's prior orders. Docket Nos. 262, 274, 340; see also Docket No. 349. The Court recites only those facts necessary to this order.

A. Procedural History

The parties are manufacturers of cigars and other related products who entered into multiple supply agreements between 2011 and 2014. See Docket No. 262 at 1-2. In 2014, TSI filed this action against Swisher, initially alleging nine causes of action: (1) monopolization and attempted monopolization in violation of the Sherman Act, *15 U.S.C. § 2*; (2) monopolization and attempted monopolization in violation of Florida ***Antitrust Law***, *Fl. Stat. § 542.19*; (3) breach of contract; (4) breach of the implied covenant **[*3]** of good faith and fair dealing; (5) trade libel; (6) tortious interference with contract; (7) intentional interference with prospective business relationships; (8) negligent interference with prospective business relationships; and (9) unfair competition in violation of the California Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.* Docket No. 1.

In May 2015, the Court dismissed the state law claims for negligent interference and unfair competition for failure to state a claim. Docket No. 40. In January 2016, the Court dismissed the state law claims for trade libel, tortious interference with contract, and intentional interference with prospective business relationships on summary judgment. Docket No. 99. The Court then scheduled trial on the remaining antitrust and contract claims for March 2016.

On August 17, 2016, following a jury verdict for TSI on its antitrust and breach of contract claims, the Court granted Swisher's motion for a new trial as to TSI's antitrust claims, but not its contract claims. Docket No. 262. The Court also granted Swisher judgment as a matter of law as to TSI's monopolization claim, but not as to its attempted monopolization claim. Id. Following the Ninth Circuit's decision in *Aerotec Int'l Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171 (9th Cir. 2016)* **[*4]** , the Court reconsidered its earlier decision denying Swisher summary judgment on TSI's antitrust claims, and granted Swisher summary judgment as to those claims. Docket No. 274.

Subsequently, the Ninth Circuit reversed the Court's grant of summary judgment to Swisher as to its antitrust claims, its grant of a new trial to Swisher as to the attempted monopolization claim, and its grant of judgment as a matter of law to Swisher as to the monopolization claim. Docket No. 349.

On July 8, 2019, TSI filed motions for attorneys' fees, expenses, and post-judgment interest, and for summary judgment as to Swisher's supersedeas bond. Docket Nos. 363, 364. On July 22, 2019, Swisher filed motions for relief from judgment or for expedited discovery, and to stay the proceedings. Docket Nos. 377, 380. The Court now turns to these motions.

B. Relevant Factual Background

On April 12, 2019, the Southern District of California unsealed the criminal indictment of Akrum Alrahib ("Alrahib") in connection with his arrest. See Declaration of Minae Yu, Docket No. 379, Ex. A. Alrahib is the founder, chief executive officer of TSI, and one of its principals/shareholders. Docket No. 162 at 3. He also oversees the **[*5]** day-to-day operations of TSI. Id.

The federal excise tax on imported cigarillos during the relevant time period was 52.75%. See Docket No. 377 at 4 n.3. According to the indictment, TSI fraudulently avoided paying federal excise taxes on cigarillos it imported from the Dominican Republic through its importer, Havana 59, for a period between 2013 and 2015. Yu Decl., Ex. A; see also Declaration of Ryan Roman, Docket No. 378, Ex. K at Response No. 22. The indictment lists a number of allegedly falsified invoices which marked down the price TSI was actually paying for cigars to avoid federal excise taxes. Yu Decl., Ex. A. The indictment further alleges that, in reality, TSI did not purchase cigarillos from Havana 59; instead, it purchased them from Productos del Tobacco ("Productos") at prices approximately 3 to 4 times the sales price reported to the government by wiring money from TSI's bank account in California to Productos' bank account. Id.; see also Yu Decl., Ex. G at Attachment C-6. The government also alleges that TSI received over $700,000 from Havana 59 as kickbacks in the form of payroll checks for TSI's employees and free cigar manufacturing equipment that TSI sent to Products. **[*6]** See id., Ex. A at 7, Ex. B at 7. The government is seeking a forfeiture judgment of $9,914,921 against property in which Alrahib has an interest allegedly traceable to these violations. Id., Ex. A at 14.

In a voluntary video-recorded interview conducted by Internal Revenue Service ("IRS") and Alcohol and Tobacco Tax and Trade Bureau ("ATTAB") agents on May 11, 2017, Alrahib made a number of admissions regarding his and Bryant's participation in a tax evasion scheme. Relevant portions of the interview are reproduced below:

> ALRAHIB: Okay. That's the time that Tony Bryant approached me and says, look, I could import it for you, and I could save you money, and then I'll kick you back the money on the side. Okay. . . .
> . . . .
> AGENT 2: On him giving you kickbacks on the 2 to 3 million dollars --
> ALRAHIB: Yes.
>
> AGENT 2: **Just to be clear, the kickbacks were from federal excise taxes evaded**.
>
> ALRAHIB: **That he evaded, yes. Yes**.
> . . . .
> ALRAHIB: Well, he was the importer. But was I aware that he was evading federal excise tax? Yes, if that's what you want me to say.
> AGENT 1: Yeah.
> ALRAHIB: I mean, that's what it was. Everybody knew that.
> . . . .
> AGENT 1: . . . [W]hat was your part in that?
>
> ALRAHIB: My part **[*7]** in what? In --
> AGENT 1: With the activity related to Tony [Bryant]'s importation.
> ALRAHIB: My part is, as the cheaper you could get it for me, Tony, and the more I could save on the back end, thank you very much.
> . . . .
> AGENT 1: What was it that you and Tony were doing, specifically, that allowed the product to, you know, be available cheaper? What was it that you were doing specifically to reduce your burden, your financial burden?

ALRAHIB: I wasn't doing anything. I wouldn't know how Tony was breaking up the importation tax. **He would just send me an email of how his BS breakdown was and then give us the invoice**. That was it. And then from that invoice of the total amount, I was supposed to take back 40, 50 percent, ...
AGENT 1: Okay. And then, so he would then have money to send back to you, to kick back to you, correct?
ALRAHIB: Yes.
AGENT 2: All right. So Tony invoices [ALRAHIB's company]. And you send him 36 grand. Of that 36 grand, your understanding was, you're getting half of it back?
ALRAHIB: I'm supposed to get 30 to 40 percent of that, of that money.
AGENT 2: And it's supposed to come back to you?

ALRAHIB: Yes. And however you break it down, however you do it, good luck to you. **[*8]** That's great. Give me my rebate.

AGENT 2: **No, I got -- let me figure -- but the rebate, though, is based on him evading federal excise tax**.

ALRAHIB: **Yes**.
AGENT 2: Okay.
AGENT 1: Thank you.
ALRAHIB: Yes, it is. Of course it is. I don't know what else to say, but I know I'm screwing — I mean, it is. I mean, yes. We all know that.
. . . .
AGENT 2: So Tony's scheme, there's -- putting someone in between, but Tony -- The scheme you worked with Tony, he took the extra step of instead of just putting someone in between --

ALRAHIB: I didn't work the scheme with Tony. I rode Tony's train because his scheme was already moving. And then Tony said, you want to come and save money riding my train? **Then I realized it's a scheme. Then when I saw his scheme, I said, wait a minute, I need to benefit from your scheme**.
. . . .
ALRAHIB: . . . let's say, for example, [the manufacturer] was charging me at the time 6 or 7 cents a stick, but Tony [Bryant] was claiming 2 cents a stick, so he never had extra money. He never had extra money because he never put the actual dollar amount that [the manufacturer] was charging us.
. . . .

AGENT 2: Tony [Bryant] never charged Trendsettah, being you, enough money to cover the **[*9]** actual cost of the product?

ALRAHIB: **No. Of course not. It was all a game**.
AGENT 2: No.
ALRAHIB: This water costs a dollar, right. But when Tony [Bryant] -- he's the importer, right?
AGENT 1: Yeah.
ALRAHIB: He's showing that this water is 30 cents. And then from the 30 cents, he's supposed to give me 10 cents.

Yu Decl., Ex. B at 3-5, 10-11 (quoting interview transcript) (emphasis in prosecutors' reproduction). Bryant pled guilty to related fraud and tax-evasion charges in 2016, and was sentenced to seven years in prison. See Yu Decl., Exs. D—F. Alrahib's criminal trial is scheduled to commence on December 16, 2019. Id., Ex. C.

C. Evidentiary Objections and Requests for Judicial Notice

On *Rule 60* motions, "[t]he proffered evidence must be admissible." *Winding v. Wells Fargo Bank, 2012 U.S. Dist. LEXIS 24089, 2012 WL 603217, at *9 (E.D. Cal. Feb. 23, 2012)*, aff'd *706 F. App'x 918 (9th Cir. 2017)*; *Norris v. F.B.I., 914 F.2d 263, 1990 WL 134276, at *2 (9th Cir. 1990)* (same). Furthermore, "[w]hen alleging a claim of fraud on the court, the plaintiff must show by clear and convincing evidence that there was fraud on the court, and all doubts must be resolved in favor of the finality of the judgment." *Weese v. Schukman, 98 F.3d 542, 552 (10th Cir. 1996)* (emphasis added).

TSI objects to the Court's consideration of either the indictment or the government's brief appealing the magistrate's grant of bail to Alrahib, which contains passages from Alrahib's interview **[*10]** transcript with IRS and ATTAB agents. Docket No. 403; see also Yu Decl., Exs. A, B.

TSI objects to the indictment on the ground that it is well-established that an indictment is not evidence. See *United States v. Ramirez, 710 F.2d 535, 545 (9th Cir. 1983)* ("[An] indictment is not evidence against the accused and affords no inference of guilt or innocence."). The Court agrees. Therefore, the Court will not consider the facts contained in the indictment for their truth. However, the Court takes judicial notice of the existence of the indictment and its contents as a public record, the accuracy of which cannot reasonably be questioned.

TSI objects to the government's brief appealing the magistrate's grant of bail to Alrahib, arguing (1) that statements in a brief are not evidence, and (2) that the evidence is inadmissible hearsay. Docket No. 403 at 2. However, admissions of a party opponent are not hearsay and are admissible. *Fed. R. Evid. 801(d)(2)*. Moreover, the record of the interrogations is also admissible as a public record, resolving concerns about a potential second layer of hearsay as to the government's filing itself. *Mike's Train House, Inc. v. Lionel, L.L.C., 472 F.3d 398, 412 (6th Cir. 2006)* (affirming admission of interrogation transcripts as public records and statements against declarant's interests). Therefore, TSI's objection **[*11]** to the Court's consideration of Alrahib's admissions in his interview with government agents is overruled because Alrahib's conduct is imputable to TSI, and thus his confession contained in the brief is admissible as an admission of a party opponent. *Fed. R. Evid. 801(d)(2)*; see also *Fed. R. Evid. 803(5)*, *803(8)*, and *804(b)(3)*.

TSI also objects to Exhibit A to the Supplemental Declaration of Minae Yu, Docket Nos. 415, 415-1. The document is a transcript of an April 30, 2019 hearing in the matter of USA v. Akrum Alrahib. TSI argues that the document, which contains statements of government employees characterizing what Alrahib supposedly told other government employees, constitutes double hearsay. Docket No. 419 at 1. The Court agrees. This evidence is distinct from direct statements from Alrahib quoted from an interview transcript. Therefore, the objection is sustained.

Swisher also filed evidentiary objections. Docket No. 416. Because there are 39 separate objections, the Court declines to address each one-by-one. To the extent the Order cites evidence to which Swisher objects, the objection is impliedly overruled. To the extent the Court does not rely on the evidence submitted, the Court declines to rule on the objections.

Finally, TSI filed **[*12]** a request that the Court take judicial notice of (1) The Order Denying Government's Motion for Pretrial Detention, filed in United States v. Alrahib, in the United States District Court for the Southern District of Florida, No. 1:19-cr-20165-RS, on May 1, 2019, as Docket Entry 17; (2) Swisher's Motion to Stay the Mandate, filed with the Ninth Circuit in the matter of Trendsettah USA, Inc., et al. v. Swisher International Inc., No. 1656823, on April 23, 2019, as Docket Entry 87; and (3) Swisher's Opposition to Lift Stay of the Mandate, filed with the Ninth Circuit in the matter of Trendsettah USA, Inc., et al. v. Swisher International Inc., No. 16-56823, on May 9, 2019, as Docket Entry 90. RJN, Docket No. 402, Exs. A—C. The Court may take judicial notice of matters of public record, *Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001)*, including related filings from another case. Headwaters Inc. v. U.S. Forest Service, *399 F.3d 1047, 1051 n.3 (9th Cir. 2005)*. Therefore, TSI's request for judicial notice is granted.

II. Legal Standards

A. *Federal Rules of Civil Procedure 60(b)(2)* and *(b)(3)*

"[T]he court may relieve a party or its legal representative from a final judgment, order, or proceeding [based on] . . . newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under *Rule 59(b)*." *Fed. R. Civ. P. 60(b)(2)*. To prevail, "the movant **[*13]** must show the evidence (1) existed at the time of the trial, (2) could not have been discovered through due diligence, and (3) was 'of such magnitude that production of it earlier would have been likely to change the disposition of the case.'" *Jones v. Aero/Chem Corp., 921 F.2d 875, 878 (9th Cir. 1990)*.

The court may also grant relief from judgment based on "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." *Fed. R. Civ. P. 60(b)(3)*. To prevail under this subsection, the movant "must prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct and the conduct complained of prevented the losing party from fully and fairly presenting the defense." *De Saracho v. Custom Food Mach., Inc., 206 F.3d 874, 880 (9th Cir. 2000)*. In addition, this subsection "require[s] that [the alleged] fraud . . . not be discoverable by due diligence before or during the proceedings." *Casey v. Albertson's Inc., 362 F.3d 1254, 1260 (9th Cir. 2004)*.

Under either *subsection (b)(2)* or *(b)(3)*, the motion "must be made . . . no more than a year after the judgment or order." *Fed. R. Civ. P. 60(c)(1)*.

B. *Federal Rule of Civil Procedure 60(d)*

The court may also "set aside a judgment for fraud on the court." *Fed. R. Civ. P. 60(d)(3)*. Relief under this subsection is not subsection is not subject to the one-year time limit. *United States v. Sierra Pac. Indus., Inc., 862 F.3d 1157, 1167 (9th Cir. 2017)* (citation omitted), cert. denied, *138 S. Ct. 2675, 201 L. Ed. 2d 1072 (2018)*.

"A court's power to grant relief from judgment for fraud on **[*14]** the court stems from 'a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry.'" Id. (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S.238, 244, 64 S. Ct. 997, 88 L. Ed. 1250, 1944 Dec. Comm'r Pat. 675 (1944))*. "[R]elief from judgment for fraud on the court is 'available only to prevent a grave miscarriage of justice.'" Id. (quoting *United States v. Beggerly, 524 U.S. 38, 47, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998))*. Thus, "not all fraud is fraud on the court." Id. (citation omitted).

"In determining whether fraud constitutes fraud on the court, the relevant inquiry is not whether fraudulent conduct prejudiced the opposing party, but whether it harmed the integrity of the judicial process." *United States v. Estate of Stonehill, 660 F.3d 415, 444 (9th Cir. 2011)* (internal quotation marks and citation omitted). Therefore, fraud on the court must be an "intentional, material misrepresentation," *In re Napster, Inc. Copyright Litig., 479 F.3d 1078, 1097 (9th Cir. 2007)*,[1] and "involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision." *Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128, 1131 (9th Cir. 1995)* (citation omitted).

The relevant misrepresentations must also go "to the central issue in the case," *Estate of Stonehill, 660 F.3d at 452*, and must "affect the outcome of the case," *id. at 448*. In other words, the newly discovered misrepresentations must "significantly change the picture already drawn by previously available evidence." **[*15]** *Id. at 435*. Thus, "[m]ere nondisclosure of evidence is typically not enough to constitute fraud on the court, and 'perjury by a party or witness, by itself, is not normally fraud on the court'" unless it is "so fundamental that it undermined the workings of the adversary process itself." *Id. at 444-45* (quoting *In re Levander, 180 F.3d 1114, 1119 (9th Cir. 1999))*. However, "perjury may constitute fraud on the court if it involves, or is suborned by, an officer of the court." *Sierra, 862 F.3d at 1168* (internal quotation marks and citation omitted).

Lastly, the fraud must have been unknown at the time of settlement or entry of judgment because "issues that are before the court or could potentially be brought before the court during the original proceedings 'could and should' be exposed at trial.'" Id. (quoting *In re Levander, 180 F.3d at 1120*). However, relief is available for fraud discovered after entry of judgment, or "after-discovered fraud," *Hazel-Atlas, 322 U.S. at 244*, particularly if the opposing party

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[1] Abrogated on other grounds by *Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009)*.

attempted to uncover the fraud before trial, but was "thwarted by a witness who blatantly lied about the relevant issue." *Sierra, 862 F.3d at 1168-69*. Accordingly, relief is supported if "key information" is revealed only after entry of judgment. *Sierra, 862 F.3d at 1169*.

III. DISCUSSION

A. *Rule 60(d)*

As noted, to grant Swisher relief for fraud on the court, it must prove that (1) TSI engaged in misconduct **[*16]** that undermined the judicial process and (2) the misconduct went to the central issues in the case. See *Estate of Stonehill, 660 F.3d at 445, 452*.

Swisher sought information relevant to TSI's payment of federal excise taxes during discovery. Swisher served on TSI requests for production seeking federal excise tax filings made by or on behalf of TSI, its costs and profits, and the sources of funds for its machinery. See Roman Decl., Ex. A, RFP Nos. 26-29, 32-34; Ex. B, Interrogatory No. 17; Ex. L, RFP Nos. 21-24, 26, 57. In response to the requests for production seeking the federal excise tax filings made by or on behalf of TSI, TSI objected on the grounds that the production of the actual filings was burdensome and that the documents were irrelevant. Id., Ex. C, Resp. Nos. 26-28. Swisher responded that "FET payments are an essential component to calculating profits and profitability, which, of course, is the baseline for the lost profits analysis TSI's allegations require." Id. ¶ 3, Ex. E. However, TSI would later argue that "[t]he information Swisher seeks will already be found in TSI's financial records, sales orders, and invoices, which it has agreed to produce," id. ¶ 4, Ex. F, and that "[g]iven that the tax rates are **[*17]** publicly available, and given that the same information you seek will be available in TSI's sales records (and it's fair to say that TSI has no incentive to overestimate its tobacco sales to the government), we do not think the probative value of these filings outweighs the burden of collecting them." Id. ¶ 7, Ex. I. TSI also sought to remove search terms relating to federal excise taxes in connection with electronically-stored information ("ESI") production. Id. ¶¶ 5-6, Exs. G—I. Swisher then agreed to remove these search terms. Id. ¶ 8. TSI's general counsel subsequently testified that TSI had produced all documents responsive to Swisher's discovery requests. See Yu Decl., Ex. R at 164:24-165:22.

Of course, TSI never disclosed the information Alrahib later admitted in his interview with federal agents, i.e., the scheme through which Bryant evaded federal excise taxes on TSI's cigarillos and passed along a portion of the profits from this evasion to Alrahib in the form of kickbacks. Nor did TSI disclose documents which demonstrated what Alrahib admits were falsified invoices prepared by Bryant which perpetrated the scheme. Therefore, the documents produced did not reflect the true **[*18]** cost of manufacturing and importing TSI's cigarillos, even though they were presented to Swisher as an accurate reflection of TSI's costs and profits. See, e.g., Yu Decl., Exs. J—L; Romand Decl., Ex. K at Resp. No. 17, Ex. P at Resp. No. 17, Ex. S at 88:5-95:2, 100:22-105:25, 113:1-7.

These misleading financial records were in turn relied on by TSI's economic expert, Dr. Deforest McDuff ("Dr. McDuff"), who used them as the basis of his damages analysis. See, e.g., Yu Decl., Ex. G at 42-48, Attachments C-1, C-6, C-7, D-13, D-14, E-12. Dr. McDuff also worked with Alrahib and Bryant, who submitted to his interviews. See, e.g., id. at 2-3, 23-25, 33-36. Dr. McDuff's damages calculations relied on TSI's profit margins during 2013 and 2014 which, based on Alrahib's admissions, were artificially inflated by the underpayment of federal excise taxes, infecting Dr. McDuff's entire analysis. See *id. at 47-48*, Attachments C-6, C-7. Swisher also presents the declaration of its own expert, Dr. Alan Cox ("Dr. Cox") concluding that TSI's avoidance of federal excise taxes would allow it to lower costs and charge "artificially low prices . . . to sell more cigarillos than they would have in the absence of fraud." Declaration of Alan Cox **[*19]** ("Cox Decl."), Docket No. 377-2 ¶ 20. Dr. Cox also opines that, because of TSI's low gross profit margins, when corrected for the correct federal excise tax, TSI would have operated on a negative margin on sales of imported cigarillos from 2013-15. Id. ¶¶ 30-31.

At trial, TSI moved to exclude "any evidence or argument regarding any tax or regulatory enforcement actions Mr. Alrahib faced in the years prior to TSI's manufacturing relationship with Swisher." Docket No. 112 at 1. Prior to founding TSI, Alrahib faced a civil forfeiture action for failing to pay excise taxes on tobacco products distributed through one of his prior businesses. Yu Decl., Ex. M at 48:11-51:12. In support of its motion, TSI argue that Alrahib's failure to pay excise taxes more than a decade prior had nothing to do with the two central issues in this case, and that the admission of such past crimes, wrongs, or tax issues would lead to unfair prejudice. Docket No. 112 at 1. The Court ruled in TSI's favor on the basis of these representations, reasoning that "[s]tripped of a proper link, the evidence is merely improper character evidence." Docket No. 163 at 4. Of course, had TSI disclosed Alrahib and Bryant's scheme, **[*20]** that "proper link" would have been clear. But based on TSI's inaccurate arguments that Alrahib's federal excise tax violations were merely past wrongs, Swisher was foreclosed from asking Alrahib about excise tax evasion, a line of questioning that, absent perjury, would likely have led to the disclosure of the fraudulent scheme he later disclosed to federal IRS and ATTAB agents.

Alrahib's credibility was central to the trial. He was TSI's first witness, and offered testimony regarding nearly element of TSI's claims. See Yu Decl., Ex. U at 28-102. In addition, other TSI witnesses presented a materially false portrayal of TSI's financial records, costs, profitability, injury, and damages. For instance, TSI's CFO Salah Kureh testified that every item of revenue or expense was properly recorded in TSI's financial records and that all this information was provided to TSI's expert. Id., Ex. V at 9-13. He also testified that TSI had higher profits on Productos-manufactured products compared to Swisher-manufactured products because Products' costs were lower, without disclosing the tax evasion scheme which reduced these costs. Id. at 20. Dr. McDuff further testified about TSI's profit margins, projected **[*21]** sales, lost profits, and the fact and extent of TSI's damages. Id. at 175-82, 187-88, 190, 193-98. TSI also offered, and the Court admitted into evidence, Trial Exhibits 135 and 136, which set forth artificially inflated profit margins for TSI. Id. at 193-95; id., Exs. X—Z. Based on these inaccurate profit margins, Dr. McDuff opined that TSI suffered $9,062,679 in lost profits between 2012 and 2015, and $5,752,815 in future sales, totaling $14,815,494 in damages. Id., Ex. V at 193-97, Exs. X—Y, Ex. A at 35, 53. After trial, the jury awarded the exact amounts Dr. McDuff computed based on TSI's false financial records. Id., Ex. Z at 35.

Based on the foregoing, TSI presented to the jury and the Court a theory of "lost profits" premised on inaccurate data which was a product of a fraudulent tax evasion scheme. Therefore, TSI's conduct tainted the integrity of the trial and interfered with the judicial process, and the judgment must be set aside. *Fed. R. Civ. P. 60(d)*.

TSI's opposition does not present any argument which persuades the Court to alter this conclusion. TSI argues that, even if it falsely represented that further responsive information did not exist, it is not "fraud on the court" because the representation was made to Swisher, not the Court. **[*22]** Opp'n, Docket No. 410 at 21-22. However, this "trail of fraud continued without break" into proceedings before the Court and infected key evidence presented to the jury. *Hazel-Atlas, 322 U.S. at 250*.

TSI further argues that no misrepresentations were made to the jury because, regardless of Alrahib's participation in a "private conspiracy," the cost basis that formed the basis of Dr. McDuff's damages calculations "would have been the same anyway." Opp'n, Docket No. 410 at 18. However, as demonstrated above, this statement is untrue based on Alrahib's own admissions. His tax evasion was not a "private conspiracy" because it was engineered to avoid taxes on TSI's products, artificially boosting TSI's profits. TSI contends that no false evidence was presented because "Swisher does not allege that Trendsettah actually had higher costs than were reported to the jury, or that it actually had a lower profit margin . . . only that Trendsettah should have had higher costs and/or lower profit margins" from 2013-15. Docket No. 410 at 12. This argument is unavailing. TSI had no rights to the "profits" that were, by Alrahib's admission, stolen from the government. See *AlphaMed Pharms. Corp. v. Arriva Pharms., Inc., 432 F. Supp. 2d 1319, 1348 (S.D. Fla. 2006)* ("It is beyond dispute that [a plaintiff] cannot recover **[*23]** lost profits that are predicated on the completion of illegal activity."); *Carruthers v. Flaum, 365 F. Supp. 2d 448, 470 (S.D.N.Y. 2005)* (dismissing claims with prejudice because plaintiff's claims for damages "are predicated on the completion of illegal activity . . . and are not recoverable for that reason alone").

TSI also argues that relief is not justified based on Swisher's counsels' lack of diligence, i.e., failure to uncover the fraud sooner. Id. at 6Opp'n, Docket No. 410 at 22. For instance, TSI argues that Swisher failed to pursue documentation regarding TSI's obligation to pay federal excise taxes, and failed to ask "a single witness a single question about" the subject. . However, as noted, Swisher served discovery calling for the production of the information which would have revealed the fraud, including "all documents showing or reflective of federal excise tax paid with respect to Splitarillos, whether paid by TSI or on TSI's behalf." Roman Decl., Ex. A, RFP Nos. 26, 27 (emphasis added). TSI resisted this discovery by objecting to its production on grounds of irrelevance and undue burden. Id., Ex. C, Resp Nos. 26, 27. Moreover, TSI's witnesses testified that all relevant documents were collected and produced. See Yu Decl., Ex. R at 164-65. **[*24]**

TSI also successfully moved in limine to exclude any evidence or argument regarding Alrahib's past tax-related enforcement actions, in part based on the argument that Alrahib's tax evasion was merely past conduct that had no relevance to this trial. Docket Nos. 112 at 1, 148-1 at 2. The Court found that there was no "proper link" between such evidence and this case. Docket No. 163 at 4. TSI also claimed that Swisher would be able to determine the amount of federal excise taxes paid on its products using other documents to be produced and the publicly available tax rate; however, this misrepresentation did not account for TSI's failure to comply with the law by paying that rate. Roman Decl.¶¶ 4, 7, Exs. F, I. Alrahib also testified in a deposition that he had learned from his past tax-related mistakes, giving Swisher even less of a basis on which to pursue a theory of ongoing tax fraud. Yu Decl., Ex. M at 48:11-49:1, 50:3-7, 541:7-12. Furthermore, TSI submits invoices with its opposition that it argues show that TSI did not fail to pay excise taxes, but those are the very types of documents that TSI's CEO has admitted are fraudulent. Docket No. 379-2 at 3-5, 10-11; Docket No. 410-2 at **[*25]** 3-4, 10-11. Therefore, TSI's claim that excise taxes were of "no interest" to Swisher in discovery or trial, and that the "criticality" of the issue was not asserted until over three years after the verdict was returned, is incorrect.

Based on the foregoing, Swisher's discovery efforts constituted "due diligence" for purposes of *Rule 60(d)(3)*. Swisher was "entitled to accept [TSI's] answers to [its] discovery requests as accurate and not to seek additional discovery relating to the issue." *Schreiber Foods, Inc. v. Beatrice Cheese, Inc., 305 F. Supp. 2d 939, 961 (E.D. Wis. 2004)*, reversed on other grounds, *402 F.3d 1198 (Fed. Cir. 2005)*. TSI cannot blame Swisher for the success of its obstructionist conduct. Id.; see also *Wyle v. R. J. Reynolds Industries, Inc., 709 F.2d 585, 591 (9th Cir. 1983)* (holding that it would be improper to allow a party to "profit from its own failure to provide discovery"); *Alpern v. UtiliCorp United, Inc., 84 F.3d 1525, 1537 (8th Cir. 1996)* (holding that plaintiff's failure to timely produce relevant documents requested by the defendant should not be viewed as lack of due diligence on the part of the defendant); *Hazel-Atlas, 322 U.S. at 246* (stating "[w]e cannot easily understand how, under the admitted facts, Hazel should have been expected to do more than it did to uncover the fraud" where plaintiff interfered with defendant's attempts to uncover the fraud); *Pumphrey, 62 F.3d at 1133* (where defendant prevented disclosure of critical evidence during trial through the use of **[*26]** misleading, inaccurate, and incomplete responses to discovery requests and presentation of fraudulent evidence and testimony during trial, defendant "is in no position to dispute the effectiveness of the scheme in helping to obtain a favorable jury verdict").

Moreover, where, as here, the Court itself was a victim of the fraud, "even if [the moving party] did not exercise the highest degree of diligence [the] fraud cannot be condoned for that reason alone." *Hazel-Atlas, 322 U.S. at 246*. As the Supreme Court explained, "[t]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." Id. Thus, "it cannot be that the preservation of the integrity of the judicial process must always wait upon the diligence of litigations." Id.

In sum, Swisher has shown by clear and convincing evidence that TSI engaged in misconduct that undermined the judicial process which went to the central issues in the case. See *Estate of Stonehill, 660 F.3d at 445, 452*; *Fed. R. Civ. P. 60(d)(3)*. Accordingly, the motion for relief from judgment under **[*27]** Federal *Rule 60(d)(3)* is granted.

B. *Rules 60(b)(2)* and *(b)(3)*

TSI argues that relief under *subsections (b)(2)* and **B. *Rules 60(b)(2)* and *(b)(3)*** is time-barred by their one-year statute of limitations. Opp'n, Docket No. 410 at 13-15. TSI argues that Swisher is not entitled to relief under *Rule 60(b)(2)* because Swisher discovered TSI's fraud before the Court entered a new operative judgment in this case. However, *Rule 60(b)(2)* states that new evidence is that which "could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). Here, the evidence demonstrating fraud — Alrahib's May 2017 interview which was revealed to the public in April 2019 — was not available during that time frame.

TSI also points to Ninth Circuit precedent holding that this "one-year limitation period is not tolled during an appeal." Nevitt v. United States, 886 F.2d 1187, 1188 (9th Cir. 1989). However, "if the appeal results in a substantive change, then the time would run from the substantially modified order entered on mandate of the appellate court." Transit Casualty Co. v. Security Trust Co., 441 F.2d 788, 791 (5th Cir. 1971). Here, the Ninth Circuit's decision substantially altered the judgment, and the time for bringing a Rule 60(b) motion restarts. Therefore, this case is distinguishable from Nevitt, in which the court affirmed the district court's initial judgment. Nevitt, 886 F.2d at 1187. TSI argues that "the clock is restarted only if the resulting 'change' to the **[*28]** prior judgment was such as to present a new basis for the moving party's challenge, which had not existed under the prior judgment," citing to Jones v. Swanson, 512 F.3d 1045, 1049 (8th Cir. 2008). Opp'n, Docket No. 410 at 15. However, Jones states that the relevant inquiry is whether the "legal rights and obligations of the parties" have changed as a result of the appellate court's decision. Jones, 512 F.3d at 1049. Distinguishing between liability and damages, the Eight Circuit in Jones found that the appellate court's decision did not result in substantial changes because it only modified the amount of damages, not the liability determination, while the defendant's Rule 60 motion challenged only the liability ruling. Id. Here, as noted, the Ninth Circuit's decision substantially altered both Swisher's liability and damages, and its motion challenges both. Therefore, the motion is timely.[2]

Moreover, based on the same reasoning applied above to Swisher's motion for relief from judgment under Rule 60(d), the requirements of Rule 60(b)(2) and 60(b)(3) are satisfied. To prevail under subsection (b)(2), the movant must show that (1) the evidence constitutes "newly discovered evidence" within the meaning of Rule 60(b), (2) the movant exercised due diligence to discover this evidence, and (3) the newly discovered evidence would have **[*29]** likely changed the disposition of the case. Feature Realty, Inc. v. City of Spokane, 331 F.3d 1082, 1093 (9th Cir. 2003). Subsection (b)(3) requires that the movant show (1) fraud, misrepresentation, or misconduct by an opposing party which (2) prevented it from fully and fairly presenting its case or defense. Jones, 921 F.2d at 879. As demonstrated above, Swisher exercised the requisite diligence, newly discovered evidence of fraud was uncovered in 2019, and the evidence fraud would have likely changed the disposition of the case. Furthermore, the absence of this evidence of fraud from the record substantially interfered with Swisher's defense.

In sum, because Swisher has shown that relief is appropriate under Rule 60(b)(2) and Rule 60(b)(3) by clear and convincing evidence, its motion is granted under these subsections as well.

C. Mandate Rule

TSI also argues that the Ninth Circuit's mandate deprives the Court of authority to grant Swisher's Rule 60 motion. Opp'n, Docket No. 410 at 22-25. The Court disagrees. "Absent a mandate which explicitly directs to the contrary, a district court upon remand can permit the plaintiff to 'file additional pleadings, vary or expand the issues.'" Nguyen v. United States, 792 F.2d 1500, 1502 (9th Cir. 1986) (quoting Rogers v. Hill, 289 U.S. 582, 587-88, 53 S. Ct. 731, 77 L. Ed. 1385 (1933)). The Supreme Court and several Courts of Appeals have held that district courts have the authority to rule on Rule 60 motions after the issuance of **[*30]** an appellate mandate. Standard Oil Co. of California v. United States, 429 U.S. 17, 18, 97 S. Ct. 31, 50 L. Ed. 2d 21 (1976); Gould v. Mut. Life Ins. Co. of New York, 790 F.2d 769, 775 (9th Cir. 1986); Rembrandt Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc., 818 F.3d 1320, 1329 (Fed. Cir. 2016). Therefore, the Ninth Circuit's mandate does not preclude the Court's consideration of Swisher's Rule 60 motion.

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[2] The Ninth Circuit's ruling did not alter anything with respect to the breach of contract claims. Therefore, they are time barred from relief under Rules 60(b)(2) and (b)(3). However, it is immaterial for purposes of this ruling because the judgment in favor of TSI on its breach of contract claims is vacated under Rule 60(d)(3).

IV. Conclusion

For the foregoing reasons, the Court **grants** the motion for relief from judgment. Therefore, the motions to stay and for summary adjudication are **denied as moot**.

IT IS SO ORDERED.

Tyntec Inc. v. Syniverse Techs., LLC

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

August 19, 2019, Decided; August 19, 2019, Filed

Case No. 8:17-cv-591-T-23SPF

Reporter
2019 U.S. Dist. LEXIS 231273 *; 2020-1 Trade Cas. (CCH) P81,240; 2019 WL 9829361

TYNTEC INC., a Delaware Corporation, and TYNTEC GROUP LTD. f/k/a Phoenix Spring Ltd., a United Kingdom Corporation, Plaintiffs, v. SYNIVERSE TECHNOLOGIES, LLC, a Delaware Corporation, Defendant.

Subsequent History: Adopted by, Summary judgment granted by *Tyntec Inc. v. Syniverse Techs., LLC, 2020 U.S. Dist. LEXIS 94138 (M.D. Fla., May 29, 2020)*

Prior History: *Tyntec Inc. v. Syniverse Techs., LLC, 2017 U.S. Dist. LEXIS 97914 (M.D. Fla., June 26, 2017)*

Core Terms

tyntec, Peering, messages, customers, carriers, terms, monopolization, telecommunications, wireless, anticompetitive, terminate, antitrust, Ticket, argues, negotiate, competitor, alleges, offers, prices, relevant market, asserts, traffic, mountains, summary judgment, monopolist, parties, renew, tortious interference, monopoly power, genuine

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Judges: SEAN P. FLYNN, UNITED STATES DISTRICT JUDGE.

Opinion by: SEAN P. FLYNN

Opinion

REPORT AND RECOMMENDATION

This is an antitrust action by Plaintiffs tyntec, Inc. and tyntec Group Ltd.'s (collectively "tyntec") against Defendant Syniverse Technologies, LLC ("Syniverse") alleging (1) monopolization, specifically refusal to deal, under *§ 2 of the Sherman Act*, *15 U.S.C. § 2*; (2) attempted monopolization under *§ 2 of the Sherman Act*, *15 U.S.C. § 2*; (3) common law tortious interference **[*2]** with contract; and (4) common law tortious interference with business relations. Doc. 42. The parties have filed cross-motions for summary judgment (Docs. 116 & 119), statements of undisputed facts in support of their motions (Docs. 117 & 120), responses (Docs. 132 & 130), as well as statements of disputed facts in support of their responses (Docs. 134 & 131). For the reasons that follow, it is recommended that tyntec's Motion for Summary Judgment (Doc. 116) be denied, and Syniverse's Motion for Summary Judgment (Doc. 119) be granted.

I. BACKGROUND

The amended complaint alleges that Syniverse is a monopolist in the U.S. inter-carrier vendor ("ICV") market. An ICV facilitates the delivery of text or short messages (SMS messages) and multimedia messages (MMS messages) from the subscribers of one wireless telecommunications carrier's network to the subscribers of another wireless telecommunications carrier's network. In other words, the ICVs allow interoperability for cell phone users to communicate between their provider and their recipients' provider such as Verizon and AT&T. The ICV uses its own facilities as an intermediary to "bridge the gap" between the two networks for delivery of **[*3]** messages. Doc. 52-1 at ¶ 10. There are three companies that sell ICV services in the U.S. ICV market: Syniverse, SAP, and tyntec.[1] Doc. 42 at ¶ 2.

ICVs have two types of customers: (1) telecommunication companies that hold Commercial Mobile Radio Service ("CMRS") licenses issued by the FCC, and (2) telecommunications companies that do not hold a CMRS license but have a "use case" that has been approved by the four major wireless carriers in the U.S. ("Non-CMRS"). Doc. 116, Ex. 4 at 42:23-43:2; Doc. 120 at ¶ 4. SMS and MMS message traffic predominantly occurs between individual wireless telecommunications customers. Messages are identified as either person-to-person ("P2P") messages, typically delivered from one human subscriber to another via carrier, or application-to-person ("A2P") messages, usually software communicating with a person, or carrier subscriber. Doc. 120 at ¶ 2.

Some telecommunication companies charge per-message fees to Non-CMRS companies who wish to deliver messages to carrier subscribers. Doc. 120 at ¶ 6. As a result, some Non-CMRS companies disguise A2P messages as P2P traffic to avoid paying fees; this is also known as "gray routing." Doc. 120 at ¶ 18. In **[*4]** turn, some telecommunication companies rely on ICVs for policing of A2P messages and messages from Non-CMRS companies, including ensuring Non-CMRS have approved use codes and do not spam customers. Doc. 120 at ¶ 5; Doc. 131 at ¶ 5. Syniverse is contractually obligated to some of its telecommunication carriers to stop unwanted A2P and Non-CMRS messages. Doc. 120 at ¶ 18. Efforts to stop unwanted A2P and Non-CMRS messages are complicated, labor-intensive, and expensive for ICVs. Doc. 120 at ¶ 18.

The two largest ICVs providers in the United States are Syniverse and SAP. Syniverse enjoys between a 75% and 80% market share of the U.S. ICV market. Doc. 116, Ex. 5 at 237:3-238:3. tyntec alleges "a dangerous possibility" of Syniverse acquiring monopoly power because there are high barriers to entry into the ICV market, and Syniverse is presently using its power to exclude tyntec by "increasing tyntec's peering costs to anti-competitive levels." Doc. 42 at ¶ 104(c).

A. Peering Agreements

ICVs interconnect with other ICVs through peering agreements. Wireless customers have become accustomed to being able to send messages from any wireless provider to any other, yet no ICVs provider has an agreement **[*5]** with every wireless provider. Therefore, ICVs have established peering agreements between themselves to deliver messages to their respective telecommunication clients and improve their reach and message delivery capabilities. Doc. 116, Ex. 2 at ¶ 8, Ex. 22 at ¶ 9, Ex. 23 at ¶ 8; Doc. 52-1 at ¶¶ 4-19; Doc. 237, Ex. 76 at 155:16-157:8.

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[1] Syniverse disputes the categorization of tyntec as an ICV as there is no binding definition of an ICV, and tyntec had no carrier customers at the inception of this suit while SAP and Syniverse had numerous wireless carrier customers. Doc. 134 at ¶ 16; *see also* ¶¶ 5, 26.

Historically, parties to peering agreements do not directly charge each other for carrying the other's messaging traffic, but rather pass the charges on to the telecommunications carriers for providing the interconnectivity. Doc. 42 at ¶ 61. This billing arrangement is referred to as "bill and keep," which has been the business model employed between Syniverse and other ICVs for more than twelve years. Doc. 42 at ¶¶ 37, 38, 51, 62.

Syniverse, however, has never directly entered into a domestic peering agreement with tyntec.[2] Syniverse's peering agreements with tyntec originated as peering agreements between Syniverse and Iris Wireless LLC ("Iris"), an ICV. Doc. 120 at ¶ 19. Syniverse's first peering agreement with Iris, executed in 2004, was amended in 2011 and 2012 to account for international message traffic imbalance.[3] Doc. 120 at ¶ 22. By 2014, Syniverse **[*6]** decided not to renew the peering agreement with Iris and exercised its contractual right to terminate. Doc. at 120 ¶ 30. In response, Iris filed a lawsuit seeking a temporary restraining order to keep the agreement in place and, after amending its complaint, alleging an antitrust violation. Doc. 120 at ¶ 31; *see* Doc. 11 in *Iris Wireless LLC v. Syniverse Techs.*, No. 8:14-cv-1741-T-30TGW (M.D. Fla.) ("Iris Litigation"). However, by late 2014, Syniverse and Iris settled the lawsuit. Doc. 120 at ¶ 34; Doc. 131 at ¶ 34. The Wireless Peer-to-Peer Messaging Peering Services Agreement Between Syniverse and Iris Wireless ("P2P Agreement") and the MMS Interworking Services Agreement Between Syniverse and Iris Wireless ("MMSAgreement"), both dated April 7, 2015, (collectively, the "Iris Peering Agreements") at issue here resulted from the Iris Litigation and were part of a package settlement deal. Doc. 42 at ¶ 60; Doc. 120 at ¶ 53; *see also* Docs. 65-1, 65-2. The Iris Peering Agreements provide for an initial two-year term with the option for one-year renewals.[4] Either party could choose to not renew with 90 days' written notice. Syniverse, however, did not plan to renew the Iris Peering Agreements **[*7]** with Iris because Iris's "only real customers were not companies that were licensed wireless telecommunications carriers but companies that traffic in SMS-IP messages."[5]*See* Doc. 52-1 at ¶ 30. Syniverse asserts that it did not earn a profit from the Iris Peering Agreements, Iris did not provide Syniverse any reach to carriers, and the Iris Peering Agreements were not otherwise beneficial to Syniverse. Doc. 120 at ¶ 57.

The Iris Peering Agreements were non-transferable without Syniverse's consent unless a company (1) merged with, acquired, or purchased a controlling interest in Iris, or (2) purchased all or substantially all of Iris's assets. Doc. 120 at ¶ 56; Doc. 236, Ex. 42. In June 2016, tyntec acquired all of Iris's assets, including the Iris Peering Agreements and its existing business.[6] Doc. 116, Exs. 29, 30; Doc. 120 at ¶ 49. In August 2016, tyntec gave Syniverse notice that Iris had transferred the Iris Peering Agreements to tyntec. Doc. 120 at ¶ 52.

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[2] Syniverse asserts that it has never done business with tyntec for P2P messaging prior to tyntec's acquisition of the peering agreements at issue in this suit. Doc. 120 at ¶ 54. tyntec, however, asserts that tyntec and Syniverse did have a business relationship for messaging in the form of an International SMS Hubbing Interconnect Services Agreement dated November 1, 2007. Doc. 120-9 at Ex. 67.

[3] Syniverse's corporate representative, Christopher Wright, testified:"[Syniverse] noticed that all the traffic was mainly coming from Iris Wireless. So [Syniverse] wanted to make sure that [it was] compensated and covered [its] potential losses for those termination fees. So [Syniverse] went through an amendment process to amend the agreement [with Iris] to cover those termination fees." *See* Doc. 236, Ex. 10 at 158:21-162:23.

[4] *See* Doc. 65-1, P2P Agreement, § 10.1; Doc. 65-2, MMS Agreement, § 10.1. ("This Agreement shall commence on the Effective Date and shall continue in full force and effect for two (2) year [sic] from the Effective Date (the "Initial Term"). This Agreement shall automatically be renewed for successive one (1) year terms (each a "Renewal Term") unless and until any Party gives the other Parties ninety (90) days' prior written notice prior to the end of the Initial Term or the applicable Renewal Term of its intent to terminate this Agreement as of the end of such Term.").

[5] SMS-IP companies obtain access to blocks of 10-digit telephone numbers to be used as the originating or terminating number for sending text messages over the Internet. Doc. 52-1 at ¶ 30. In those instances, Syniverse charges a "transit fee" when routing SMS-IP traffic to Syniverse's wireless telecommunications carrier customers. *Id.*

[6] tyntec's acquisition of Iris's assets originated with an option agreement entered into between Iris and Enigma Technology Services Consulting, Ltd. ("Enigma"), a personal holding company for a tyntec officer. Doc. 120 at ¶ 45; Doc. 131 at ¶ 45. Under the option agreement, Enigma could acquire the Iris Peering Agreements and an Iris-SAP peering agreement. Doc. 120 at ¶ 45. On June 28, 2016, Enigma assigned the option agreement to Phoenix Spring, Ltd ("Phoenix"), which was an acquisition

Syniverse was concerned about tyntec's acquisition of the Iris Peering Agreements for several reasons. tyntec had never provided ICV Services in North America to wireless carriers. Doc. 120 at ¶ 54. Syniverse questioned **[*8]** whether tyntec had the technical proficiencies to provide ICV services. Doc. 120 at ¶ 54. Syniverse knew of tyntec as an A2P operator in Europe and believed tyntec engaged in gray routing messages. Doc. 120 at ¶ 55. Syniverse was unsure if tyntec intended to use the Iris Peering Agreements to deliver Non-CMRS messages or gray route messages. Doc. 120 at ¶ 55. Finally, Syniverse remained (and remains) unsure whether Iris appropriately transferred the Iris Peering Agreements. Doc. 120 at ¶ 64. As such, Syniverse weighed whether to peer with tyntec for the five months left in the Initial Term of the Iris Peering Agreements. Doc. 120 at ¶ 64.

B. Alleged Antitrust Violations

On November 10, 2016, Syniverse conveyed to tyntec its intent not to renew the Iris Peering Agreements.[7] Doc. 42 at ¶ 5; Doc. 65-3 (the "November Letter"). The November Letter expressed Syniverse's skepticism concerning the validity of the assignment of the Iris Peering Agreements to tyntec, but also conveyed Syniverse's decision to honor the Iris Peering Agreements through April 7, 2017—the termination date of the Initial Term. Doc. 65-3 at 3. Syniverse stated that if tyntec desired to receive messaging services from **[*9]** Syniverse after April 7, 2017, it would be happy to provide tyntec with their "standard message aggregator agreement." Doc. 65-3 at 3. A "standard message aggregator agreement" would provide tyntec access to Syniverse's network by paying per-message and other fees for carrying tyntec's message traffic. Doc. 42 at ¶ 63; Doc. 65-4. tyntec characterizes the terms of the new proposed agreement set forth in the November Letter as evidence of a "predatory act that will exclude tyntec from the U.S. ICV market." Doc. 42 at ¶ 7. tyntec alleges that despite the "long-standing, customary and mutually advantageous course of dealing, and without any legitimate pro-competitive justification," Syniverse intended to terminate the Iris Peering Agreements without knowing the volume of traffic tyntec planned to send Syniverse's telecommunications customers. Doc. 42 at ¶ 5. On December 14, 2016, Syniverse sent formal notice of termination effective April 7, 2017, in compliance with the terms of the Iris Peering Agreements. Doc. 65-4.

On January 27, 2017, the President of tyntec Inc., Eddie DeCurtis, met with two representatives from Syniverse, Senior Vice President and General Manager of Connectivity and **[*10]** Mobility Services, John Wick, and Group Vice President for Syniverse, John McRae, in Tampa to negotiate a deal. Doc. 42 at ¶ 9; Doc. 120 at ¶¶ 64, 66. McRae presented new pricing terms to DeCurtis at the meeting. Doc. 120 at ¶ 68. According to Syniverse, these new terms were designed to reflect pricing that Syniverse had with customers similar to tyntec, such as Centurylink, *i.e.*, companies with a two Non-CMRS customer base. Doc. 120 at ¶ 66. As such, the pricing terms offered by Syniverse during the January 27 meeting were terms of a "customer agreement." Doc. 131 at ¶ 75. tyntec, however, wanted terms more like the Iris Peering Agreements; specifically, bill and keep terms. Doc. 120 at ¶ 73. tyntec argues that Syniverse was attempting to use its U.S. market monopoly to exclude tyntec by breaking the "bill and keep" course of dealing that had existed among the U.S. ICVs since 2004 by charging tyntec exclusionary per-message fees for +1 to +1 SMS and MMS messages. Doc. 117 at ¶¶ 53-68. tyntec disagrees that it is similar to Centurylink, or other Syniverse customers, because those customers do not have ICV capabilities nor did they invest the time and money that tyntec did in developing **[*11]** those capabilities. Doc. 131 at ¶¶ 66, 67. tyntec further disputes that its customer base was "two Non-CMRS companies."[8] Doc. 131 at ¶¶ 66, 67. McRae expected tyntec to make a counteroffer to the January 27, 2017 proposed agreement. Doc. 120 at ¶¶ 68, 109.

Subsequently, Syniverse claimed to have been drafting a peering agreement in reliance on tyntec's assurances, during a February 22, 2017, phone conference, that tyntec had signed a deal with Transaction Network Services

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company formed by tyntec. Doc. 120 at ¶ 49. On June 29, 2016 Phoenix exercised the option. Doc. 120 at ¶ 50; Doc. 42 at ¶¶ 18, 21,48, 60. Phoenix was later renamed tyntec Group Ltd. The peering agreement between Iris Wireless and SAP was also acquired by tyntec. *See* Doc. 42 at ¶ 48.

[7] The Initial Term of the Iris Peering Agreements terminated on April 7, 2017, during the pendency of this action.

[8] During the pendency of this litigation, tyntec negotiated and signed an exclusive contract to provide ICV services to Globe Telecom, the largest Philippine wireless carrier and a former Syniverse customer. Doc. 116, Exs. 15, 72. tyntec, however, did not procure this contract until January 2018.

("TNS") to provide ICV services to 21 of its carriers. Doc. 116, Ex. 60; Doc. 120 at ¶ 75. In February 2017, McRae directed Niaz Alibhai, the Director of Production Management in charge of Syniverse's ICV business, and his supervisor, Kyle Spinks, to prepare a peering agreement that included reciprocal transit fees payable by each party with a "guard band" that only required payment if the messages were out of balance by more than an agreed upon percentage. Doc. 120 at ¶ 75. The execution of this agreement depended on tyntec's verification of the 21 wireless carriers. Doc. 120 at ¶ 75.

McRae and DeCurtis met face-to-face again in March 2017 at a telecommunications trade show called Mobile World Congress. Doc. 120 at **[*12]** ¶ 77. They discussed the potential commercial relationship between Syniverse and tyntec, which McRae characterized as a reciprocal messaging agreement with certain protections for out-of-balance traffic (*e.g.*, "guardrails") provided that tyntec provide the names of its carrier customers. Doc. 120 at ¶ 77. tyntec, however, initiated this litigation on March 10, 2017, before DeCurtis could finish his negotiations. Doc. 120 at ¶ 78. tyntec's decision to sue ended the negotiations with Syniverse. Doc. 120 at ¶ 78. tyntec has continued trying to negotiate a "bill and keep" deal since filing suit, but Syniverse has refused tyntec's offers.[9] Doc. 116, Ex. 57. Syniverse claims that tyntec never actually wanted to negotiate a deal. *See* Doc. 134 at ¶ 73.

The amended complaint alleges that Syniverse refused to deal with tyntec on the traditional "bill and keep" or "no-fee" terms and, instead, sought to impose a restructuring of the agreement that would require tyntec to pay a per message fee, much like the charge Syniverse charges its telecommunication carrier customers. Doc. 42 at ¶ 6. According to tyntec, peering agreements always "involve a bill and keep revenue model whereby Syniverse and tyntec **[*13]** do not charge each other for carrying messaging traffic, but where Syniverse and tyntec generate revenue by billing their respective telecommunications carrier customers and keeping the proceeds." Doc. 42 at ¶ 51. The amended complaint alleges that Syniverse possessed the specific intent to "unilaterally terminate a voluntary, beneficial, and profitable multi-year course of dealing in order to achieve an anti-competitive end—the destruction of tyntec—even at the risk of degrading Syniverse's own service in the short run by jettisoning its connectivity with tyntec and the subscribers that tyntec delivers." Doc. 42 at ¶ 69. tyntec's allegations, however, focus on the course of dealing between Syniverse and Iris. The amended complaint further alleges that Syniverse's actions would "leave telecommunications carriers in the United States with only two ICVs to compete for their business - Syniverse and SAP. And, if Syniverse eliminates SAP, telecommunications carriers would be left with no choice at all - only Syniverse. This would leave Syniverse with the unrestricted ability to raise prices in the long run." *See* Doc. 42 at ¶ 70; *see also* Doc. 42 at ¶ 11.

II. STANDARD OF REVIEW

Summary judgment **[*14]** is appropriate if all the pleadings, discovery, affidavits, and disclosure materials on file show that there is no genuine disputed issue of material fact, and the movant is entitled to judgment as matter of law. *See* *Fed. R. Civ. P. 56(a)* and *(c)*. The existence of some factual disputes between the litigants will not defeat an otherwise properly supported summary judgment motion; "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (emphasis in original). A fact is material if it is a legal element of the claim that may affect the outcome of the suit under the substantive governing law. *Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997)*. A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could find for the non-moving party. *Anderson, 477 U.S. at 248*. In determining whether a genuine dispute of material fact exists, the court must view the evidence and all factual inferences drawn therefrom in the light most favorable to the non-moving party and must

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[9] Over a year after filing this lawsuit, tyntec offered to pay Syniverse $40,800 per year and then $48,000 per year in exchange for a bill and keep peering agreement. Doc. 131 at ¶ 69; Doc. 120 at ¶ 109; Doc. 237, Exs. 118, 119. Although not on bill and keep terms, Syniverse provided a counteroffer to tyntec's offer of $40,800 per year. Doc. 120, Ex. 27 ("Syniverse is willing to enter into a new messaging agreement with tyntec based upon the current type of traffic that tyntec carries. It is our understanding that none of tyntec's current customers are mobile network operators and therefore we believe the appropriate pricing is our SMS-IP aggregator pricing.").

resolve any reasonable doubts in the non-movant's favor. Skop v. City of Atlanta, 485 F.3d 1130, 1136 (11th Cir. 2007).

The non-moving party, however, "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Rather, the non-movant must go beyond the pleadings and "identify affirmative evidence" that **[*15]** creates a genuine dispute of material fact. Crawford-El v. Britton, 523 U.S. 574, 600, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998). "[M]ere conclusions and unsupported factual allegations are legally insufficient to defeat a summary judgment motion." Ellis v. England, 432 F.3d 1321, 1326 (11th Cir. 2005) (citing Bald Mountain Park, Ltd. v. Oliver, 863 F.2d 1560, 1563 (11th Cir. 1989)). Moreover, "[a] mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990) (citing Anderson, 477 U.S. at 252). Summary judgment "may be especially appropriate in an antitrust case because of the chill antitrust litigation can have on legitimate price competition." McGahee v. N. Propane Gas Co., 858 F.2d 1487, 1493 (11th Cir. 1988) (citing Matsushita, 475 U.S. at 594) (noting three Supreme Court decisions that vacated appellate reversals of district court orders granting summary judgment).

III. DISCUSSION

Section 2 of the Sherman Act prohibits the monopolization or attempted monopolization of "any part of the trade or commerce among the several States." 15 U.S.C. § 2. tyntec alleges that Syniverse both monopolized and attempted to monopolize the ICV industry in the United States by terminating the Iris Peering Agreements and refusing to offer any terms that would allow tyntec to remain as a competitor. tyntec also alleges claims for tortious interference with a contract and tortious interference with a prospective business relationship **[*16]** based on the termination of the Iris Peering Agreements. The Court will address each claim in turn.

A. Monopolization Claim

Monopolization under § 2 of the Sherman Act requires: (1) possession of monopoly power in the relevant market and (2) willful acquisition or maintenance of that monopolistic power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *See* U.S. v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 77 (1966). However, "[e]ven a company with monopoly power has no general duty to cooperate with its business rivals and may refuse to deal with them if valid business reasons exist for such refusal." Morris Communs. Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1295 (11th Cir. 2004) (citing Mid-Texas Commc'ns Sys., Inc. v. Am. Tel & Tel. Co., 615 F.2d 1372, 1388 (5th Cir. 1980)[10]). The purpose of the Sherman Act, however, is not to force firms to help one another as the results themselves would likely be inconsistent with the goals of ***antitrust law***. Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1073 (10th Cir. 2013). "In the absence of any purpose to create or maintain a monopoly, ... a company may deal or refuse to deal with whomever it pleases." Morris Communs, 364 F.3d at 1294-95 (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)).

In fact, "'as a general rule ... purely unilateral conduct' does not run afoul of section 2 - 'businesses are free to choose' whether or not to do business with others and free to assign what prices they hope to secure for their own products.'" Novell, 731 F.3d at 1072 (quoting Pac. Bell Tel. Co. v. Linkline Commc'ns, 555 U.S. 438, 448, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)); *see also* ***[*17]*** Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004) ("[T]he Sherman Act does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent

[10] The case law of the Fifth Circuit prior to September 30, 1981 has been adopted as precedent in this judicial circuit. Bonner v. City of Prichard, 661 F.2d 1206 1209 (11th Cir. 1981) (enbanc).

discretion as to parties with whom he will deal." (quotations and citation omitted; alteration in the original)). The Supreme Court has "been very cautious in recognizing ... exceptions" to this long-recognized rule "because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm." *Trinko, 540 U.S. at 408*. Accordingly, there are only a few "rare" exceptions to this general rule. *Novell, Inc., 731 F.3d at 1073*. Refusal to deal is one of these exceptions and is what tyntec alleges occurred here. *Id.* "Refusal to deal doctrine targets only a discrete category of *section 2* cases attacking a firm's unilateral decisions about with whom it will deal and on what terms." *Id. at 1076*.

To bring a claim for a refusal to deal, a party must show not just a refusal to deal, but a refusal that was unlawful. At least two elements must be present in order to establish a refusal as unlawful. First, there must be a "preexisting voluntary and presumably profitable course of dealing between the monopolist and rival." *Novell, 731 F.3d at 1074*. This requirement **[*18]** protects from antitrust liability unadulterated, unilateral conduct where no course of dealing ever existed. *Id.* Second, "the monopolist's discontinuation of the preexisting course of dealing must 'suggest[] a willingness to forsake short-term profits to achieve an anti-competitive end.'" *Id. at 1075* (quoting *Trinko, 540 U.S. at 407*) (alteration in the original). Moreover, this proof must be more than just the monopolist deciding to forsake short-term profits; "the monopolist's conduct must be irrational but for its anticompetitive effect." *Id. at 1075* (citing *Aspen Skiing, 472 U.S. at 597* (a refusal to deal with a competitor doesn't violate *§ 2* if "valid business reasons exist for that refusal"); *Trinko, 540 U.S. at 407* (defendant must be seeking "an anti-competitive end"); 3B Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 772, at 223 (3d ed. 2008) (the refusal must be "irrational" but for its anticompetitive tendencies); Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 Antitrust L.J. 413, 422-25 (2006)). With this in mind, the Court turns to the required elements of a monopolization claim.

1. Relevant Market & Monopoly Power

When determining whether a defendant has violated *§ 2* of the Sherman Act, the Court first determines the relevant market and then decides whether **[*19]** the defendant possessed monopoly power in that market. *See U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 994 (11th Cir. 1993)*. The relevant market has two components: the geographic market and the product market. *Duty Free Americas, Inc. v. Estee Lauder Cos., Inc., 797 F.3d 1248, 1263 (11th Cir. 2015)*. "The proper market definition in this case can be determined only after a factual inquiry into the 'commercial realities' faced by consumers." *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 482, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (quoting *Grinnell, 384 U.S. at 572*). The Court cannot decide the relevant market and market power based on the record before it.

Defining the relevant product market is a fact-intensive endeavor. *Duty Free Americas, 797 F.3d at 1264*. A product market consists of "products that have reasonable interchangeability for the purposes for which they are produced." *McWane, Inc. v. F.T.C., 783 F.3d 814, 828 (11th Cir. 2015)* (quoting *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404, 76 S. Ct. 994, 100 L. Ed. 1264 (1956))*. "The reasonable interchangeability of use or the cross-elasticity of demand between a product and its substitutes constitutes the outer boundaries of a product market for antitrust purposes." *U.S. Anchor, 7 F.3d at 995* (footnote omitted). "[A] high cross-elasticity of demand indicates that the two products in question are reasonably interchangeable substitutes for each other and hence are part of the same market." *Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1337 n.13 (11th Cir. 2010)*. tyntec argues that the relevant product market is the market for ICV services for which there is no viable economic substitutes. Doc. 116 at 13-14. Syniverse contends Over-The-Top ("OTT") applications like **[*20]** WhatsApp, Facebook Messenger, and iMessage provide messaging services that compete with ICVs. Doc. 134 at ¶ 10.

The relevant geographic market is defined as "the area of effective competition in which a product or its reasonably interchangeable substitutes are traded." *Duty Free Americas, 797 F.3d at 1263* (quoting *L.A. Draper & Son v. Wheelabrator-Frye, Inc., 735 F.2d 414, 423 (11th Cir. 1984))*. The Court considers whether outside sellers are precluded from entering the market and whether consumers could realistically obtain the product from outside the geographic area. *See id.* (citing *T. Harris Young & Assocs., Inc. v. Marquette Elecs., Inc., 931 F.2d 816, 823 (11th Cir. 1991))*. Therefore, barriers to expansion, including "transportation costs, delivery limitations and customer convenience and preference" are relevant to this determination. *Id.* (quoting L.A. Draper & Son, 735 F.2d at 423). tyntec argues that the relevant geographic market is the United States. tyntec asserts that Syniverse has a monopoly on ICV services within the United States due to its market share of between 75% and 80%. Doc. 116, Ex. 5 at 237:3-238:3. Syniverse does not dispute its market share in the United States but argues that the relevant ICV market is a global market. Price competition in the global market is extremely competitive and includes other ICV companies like SAP, TNS, BICs, and Orange France. Doc. 134 at ¶¶ 15, 32, 38.

The parties have **[*21]** established that material issues of fact exist as to the relevant market. Because "[t]he parameters of a given market are questions of fact . . . summary judgment is inappropriate if there are material differences of fact." *Thompson v. Metro. Multi-List, Inc., 934 F.2d 1566, 1573-74 (11th Cir. 1991)* (citation omitted). Regardless of whether Syniverse possessed monopoly power in the relevant market, however, Syniverse is entitled to summary judgment because, as shown below, it did not refuse to deal with tyntec, the parties did not have a preexisting voluntary and presumably profitable course of dealing, and Syniverse had valid business justifications for its actions. Therefore, even if Syniverse is monopolistic, it has not violated *§ 2* of the Sherman Act.

2. Refusal to Deal

tyntec argues that Syniverse's refusal to agree to a "bill and keep" arrangement or alternate but feasible terms constitutes a refusal to deal. The record, however, reflects that Syniverse's actions were lawful.

Syniverse first offered tyntec a "standard message aggregator agreement" in the November Letter, which would provide tyntec access to Syniverse's network by paying per-message and other fees for carrying tyntec's message traffic. Doc. 42 at ¶ 63; Doc. 65-4. Thereafter, on January 27, **[*22]** 2017, Syniverse provided tyntec with proposed terms that tracked agreements it had with companies Syniverse believed to be similarly situated to tyntec (*i.e.*, Centurylink). In addition, it is undisputed that the parties' negotiation did not end on January 27, 2017. Based on tyntec's representations that it had signed an exclusive deal to provide ICV services for P2P messaging for "ten wireless carriers," McRae explained during a February 22, 2017, conference call with tyntec that Syniverse required the carriers' names in order to negotiate a new agreement. Doc. 120 at ¶¶ 72, 73. DeCurtis later represented to Syniverse that there were actually 21 wireless carriers. Doc. 120 a ¶ 74. Based on this representation regarding tyntec's expanded customer base, McRae instructed Alibhai and his supervisor, Spinks, to begin drafting a peering agreement. Doc. 120 at ¶ 75. The peering agreement was to include reciprocal transit fees payable by each party with a "guard band" that only required payment if the messages were out of balance by more than an agreed upon percentage. Doc. 120 at 75. While tyntec disputes whether Syniverse began drafting such an agreement, it does not dispute that McRae and **[*23]** DeCurtis subsequently met face-to-face in March 2017 at a telecommunications trade show called Mobile World Congress, discussed the potential commercial relationship between Syniverse and tyntec, and were still negotiating an agreement based on tyntec's representations of an expanded customer base. Doc. 120 at ¶ 77; Doc. 131 at ¶ 75, 77. Shortly thereafter, however, tyntec filed this suit on March 10, 2017. Doc. 1. As such, there is no genuine issue of material fact as to whether Syniverse was willing to negotiate an agreement with tyntec, albeit on terms other than strictly "bill and keep."

Indeed, tyntec acknowledges that Syniverse attempted to negotiate a deal with tyntec but argues that Syniverse's offers, if accepted, would force tyntec to exit the market. Doc. 116 at 32.[11] In other words, tyntec urges this Court to consider Syniverse's offers as "practical refusals to deal" because they were offers that tyntec could not accept. *See MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1132 (9th Cir. 2004)* ("An offer to deal with a competitor only on unreasonable terms and conditions can amount to a practical refusal to deal."). tyntec, however, does not explain specifically why it was unable to accept Syniverse's initial or subsequent offers and does **[*24]** not submit any pertinent evidence in support of the proposition that tyntec would be "forced to exit the market" based on the terms offered by Syniverse. tyntec only asserts that "the January 2017 Proposal was so far afield of a 'bill and keep' course of dealing, tyntec could not possibly accept it," cites to the deposition testimony of tyntec Group, Ltd.'s board member Roland Dennert, and parenthetically describes the testimony as "noting that Syniverse's offer of a

[11] Page number references are to the CM/ECF electronic page number of the document, not to the movant's page numbering.

customer agreement was not a basis for negotiation, as it would not have allowed tyntec to compete in the U.S. ICV market." Doc. 130 at 26. This deposition testimony, however, does not support its contention as it fails to address tyntec's inability to compete, does not mention tyntec being "forced to exit the market," does not define "compete," and does not explain or support why the terms of the "customer agreement" offered by Syniverse were unreasonable. Doc. 236, Ex. 5 at 170:22-172:6. As such, this testimony does not create a material factual dispute as to whether Syniverse's offers equate to practical refusals to deal.

tyntec likens its situation to that found in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*, where the defendant extended an offer plaintiff could **[*25]** not accept. In *Aspen Skiing*, the defendant owned three of the four mountains comprising the ski area of Aspen, Colorado. The plaintiff owned the fourth mountain. For many years, the parties had jointly offered a multiple-day, multiple-area ticket that gave skiers admission to all four mountains (the "Joint Ticket"). *Id. at 589-90*. The Joint Ticket was often cheaper than purchasing multiple single-day tickets. *Id. at 589*. Revenues from the Joint Ticket were divided between the parties according to the relative percentage that buyers with the Joint Ticket used each mountain. *Id.* The defendant decided to discontinue the Joint Ticket by giving the plaintiff "an offer that it could not accept"—the defendant would continue participating in the Joint Ticket only if the plaintiff agreed to receive a fixed percentage of Joint Ticket revenues that was considerably lower than the historical average revenue based on actual usage of the plaintiff's mountain. *Id. at 592*. After the plaintiff rejected the offer, the defendant sold a joint ticket featuring only its three mountains. *Id. at 593*. The plaintiff attempted to market its own multiple-day, multiple-area package by offering ski passes to its mountain along with vouchers, each equal **[*26]** to the retail price of a single-day ticket, to defendant's three mountains. *Id. at 593-94*. The defendant, however, refused to accept these vouchers and to sell any of its lift tickets to the plaintiff at retail price. The Supreme Court upheld a jury verdict for the plaintiff, finding that "[t]he jury may well have concluded that [the defendant] elected to forgo these short-run benefits because it was more interested in reducing competition ... over the long run by harming its smaller competitor." *Id. at 608*. While considered the leading case for *§ 2* liability regarding refusal to deal claims, the Supreme Court subsequently recognized that "*Aspen Skiing* is at or near the outer boundary of *§ 2* liability." *Trinko, 540 U.S. at 409*; *see also* *Novell, 731 F.3d at 1074* ("Refusal to deal doctrine's high water mark came in *Aspen*.").

Here, unlike the *Aspen Skiing* defendant, Syniverse is not demanding that tyntec agree to a revenue or cost structure that is considerably out of sync with actual usage. To the contrary, Syniverse's offers were based on either a per message basis (*i.e.*, usage) or a "guard band" that only required payment if the messages were out of balance by more than an agreed upon percentage. Syniverse's offers demonstrated a willingness to engage in a **[*27]** cost structure that accounted for the relative percentage that each parties' customers used ICV services. In this regard, Syniverse's offers were more analogous to the historical agreement that was terminated by the defendant in *Aspen Skiing*.

Moreover, tyntec's insistence on a "bill and keep" agreement is distinguishable from the plaintiff in *Aspen Skiing*. To put tyntec's position in the context of *Aspen Skiing*, tyntec essentially wants to bill its customers for, and keep all revenue from, a ski ticket that its competitor must honor at their mountains regardless of whether tyntec's customers are disproportionately using the competitor's mountains. To go a step further, tyntec appears to want to be able to undercut the defendant by selling its ski ticket (*i.e.*, ICV service) at a price below what its competitor charges its own customers. *See* Doc. 116-1, Ex. 3 at ¶ 40, Ex. 62 at 0130 (tyntec was willing to sell ICV services to companies at prices lower than those offered by Syniverse). Neither *Aspen Skiing*, nor ***antitrust law*** generally, require a company to continue offering its competitor such favorable terms just because it may have done so in the past.

In addition, the Supreme Court, **[*28]** in *Aspen Skiing*, found "defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent." *Trinko, 540 U.S. at 409* (emphasis in original). The defendant's refusal to sell to the plaintiff at the prevailing retail price, in the Supreme Court's view, indicated a willingness to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition. *See* *Aspen Skiing, 472 U.S. at 608*. Here, Syniverse is attempting to charge tyntec the equivalent of retail prices, which indicates that it is attempting to maximize both short and long-term benefits. Syniverse has entered into agreements with Non-CMRS customers for the delivery of approved messages to telecommunication customers on a per-message fee. Doc. 120 at ¶ 14. Syniverse's offer to tyntec was consistent with its pricing to some of Syniverse's other SMS-IP customers. Doc. 237, Ex. 78 at ¶ 44. For example, for its first five million MMS messages in a given month, Twilio pays the same rate per MMS Message as Syniverse offered to tyntec. *Id.* In this regard, tyntec's insistence on a "bill and keep" agreement and refusal to pay retail rates more closely resembles the *Trinko* plaintiff and its **[*29]** insistence that the defendant had to deal with its rivals at cost. *See Trinko, 540 U.S. at 409* ("[Defendant's] reluctance to interconnect at the cost-based rate of compensation ... tells us nothing about dreams of monopoly."); *see also Duty Free Americas, 797 F.3d at 1267-68* (finding plaintiff's resistance of defendant's across the board price increases more similar to *Trinko* plaintiff than *Aspen Skiing* plaintiff).

tyntec also raises comments made by Alibhai as evidence that Syniverse was attempting to exclude tyntec from the U.S. ICV market. These comments, however, do not suggest Syniverse intended to forgo profits. *See Novell, 731 F.3d at 1078* (holding correspondence not anticompetitive if only shows "uncharitable intent towards rival); *see also Conoco Inc. v. Inman Oil Co., 774 F.2d 895, 905 (8th Cir. 1985)* (finding statements that head of division wanted "to drive [plaintiff] out of business" and wanted "100% of the lubricant business in the region" insufficient for attempt to monopolize intent).

Finally, the fact that Syniverse did not accept tyntec's proposals in April and May 2018, to pay Syniverse a monthly fixed fee is also irrelevant to the analysis of tyntec's refusal to deal claim because tyntec's offers occurred after tyntec had initiated this litigation.[12] An antitrust suit filed against a party is a legitimate reason **[*30]** for that party's refusing to deal. *See House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867, 871 (2d Cir. 1962)* (holding refusal to deal with litigating customer was not unreasonable because "the relationship between a manufacturer and his customer should be reasonably harmonious; and the bringing of a lawsuit by the customer may provide a sound business reason for the manufacturer to terminate their relation"); *Zoslaw v. MCA Distrib. Corp., 693 F.2d 870, 890 (9th Cir. 1982)* (affirming summary judgment for defendants on an antitrust claim where defendants' aim to avoid future litigation after settlement with plaintiffs constituted a legitimate business reason for refusing to deal). As such, tyntec's proposals made after initiating litigation are immaterial, and the undisputed material facts establish that Syniverse has not refused to deal with tyntec.

3. Voluntary Course of Dealing

Even if tyntec could establish a genuine issue of material fact regarding Syniverse's refusal to deal, it has not shown a course of established, voluntary, and profitable dealing between tyntec and Syniverse as required for a refusal to deal claim. tyntec argues that its course of dealing with Syniverse is derivative of the course of dealing between Iris and Syniverse; *i.e.*, tyntec contends it stepped into the shoes of Iris with the **[*31]** assignment of the Iris Peering Agreements, and Syniverse's course of dealing with Iris satisfies the voluntary, continuous and profitable course of dealing requirement. In support of this contention, tyntec argues that "[c]ase law from this state and district makes clear that, where a contract is assigned, the assignee 'stands in the shoes' of its assignor and has the legal right to enforce contract provisions and to pursue causes of action that the assignor would have been able to pursue." Doc. 130 at 32. tyntec then makes the tenuous argument that it, therefore, "has the right to pursue causes of action derived from the Peering Agreements, including this refusal to deal claim." Doc. 130 at 33. The cases cited by tyntec in support stand for the proposition that "[a]n assignment is a transfer of all the interests and rights to the thing assigned." *Gateway Greens Cmty. Ass'n, Inc. v. Comcast of the South, Inc., No. 2:09-cv-652-FtM-DNF, 2011 U.S. Dist. LEXIS 51513, 2011 WL 1832724, at *3 (M.D. Fla. May 13, 2011)* (quotations and citations omitted). Indeed, the general rule is that the assignee "stands in the shoes of the assignor" and is able to enforce the terms of the contract. *Id.*

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[12] The Amended Complaint, for obvious reasons, does not contain allegations regarding tyntec's subsequent proposals or Syniverse's response thereto. Doc. 42; *see* n.9 *supra*.

To the extent tyntec is arguing that it has the right to pursue a refusal to deal claim **[*32]** because Iris had such a cause of action, the argument fails. First, the refusal to deal claim as alleged had not accrued prior to the assignment of the Iris Peering Agreements. Moreover, even if a claim had accrued that could be assigned, an explicit assignment of an antitrust claim from Iris to tyntec would be required, and the record does not establish such an assignment. *See* *Winn-Dixie Stores, Inc. v. Southeast Milk, Inc., No. 3:15-cv-1143-J-39PDB, 2019 U.S. Dist. LEXIS 8804, 2019 WL 2347021, at *4 (M.D. Fla. Apr. 18, 2019)* (citing *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425, 438-39 (3d Cir. 1993)* ("Because we conclude that the inclusion of antitrust claims in a general assignment would be disfavored under the direct purchaser rule, we hold that only an express assignment of an antitrust claim can be valid."); *BUC Int'l Corp. v. Int'l Yacht Council Ltd., 517 F.3d 1271, 1278 n.7 (11th Cir. 2008)* (following *Gulfstream* in a copyright infringement case involving the application of the one-satisfaction rule to federal claims); *In re Prudential of Fla. Leasing, Inc., 478 F.3d 1291, 1302 (11th Cir. 2007)* (citing *Gulfstream* in a bankruptcy matter regarding issues of settlements involving multiple claims and parties); *In re: Domestic Drywall Antitrust Litig., 322 F.R.D. 188, 198 (E.D. Pa. 2017)* ("In order to be effective, the assignment must expressly relate to antitrust claims; a general assignment is insufficient." (citing *Gulfstream, 995 F.2d at 437-39*)); *Texas Life, Acc. Health & Hosp. Serv. Ins. Guar. Ass'n v. Gaylord Entm't Co., 105 F.3d 210, 218 (5th Cir. 1997)* ("[O]nly an express and knowing assignment of an ERISA fiduciary breach claim is valid." (citing *Gulfstream, 995 F.2d at 439*))). As such, there has been no assignment **[*33]** by Iris to tyntec of an antitrust claim.

tyntec's argument that Syniverse's course of dealing with Iris was assigned to tyntec along with the Iris Peering Agreements is equally unavailing. None of the cases cited by tyntec extend the assignee's ability to enforce the terms of an assigned contract to include the assignee's assumption of the assignor's course of dealing history in an antitrust refusal-to-deal claim. *See* *Gateway Greens, 2011 U.S. Dist. LEXIS 51513, 2011 WL 1832724, at *3; Dep't of Revenue v. Bank of Am., N.A., 752 So.2d 637, 642 (Fla. 1st DCA 2000)*; *Steward Health Care Sys., LLC v. Blue Cross & Blue Shield of R.I., 311 F. Supp. 3d 468 (D.R.I. 2018)*. In addition, in the context of antitrust litigation, the prior course of dealing between two parties is used, in part, as a gauge by which to measure the anticompetitive motivation of a defendant's refusal to deal, and, as such, Syniverse's prior course of dealing with Iris would be irrelevant to Syniverse's motivation when dealing with tyntec. *See* *Trinko, 540 U.S. at 409* ("The complaint does not allege that [defendant] voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion. Here, therefore, the defendant's prior conduct sheds no light upon the motivation of its refusal to deal—upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice."). It is, therefore, counterintuitive that the **[*34]** course of dealing between Syniverse and Iris, even if assignable, would be considered by the Court when determining Syniverse's motivation for terminating the Iris Peering Agreements as assigned to tyntec or for the terms offered during re-negotiation of an agreement with tyntec.

Similarly, the assignment of the Iris Peering Agreements to tyntec belies the required "voluntary" aspect of the course of dealing between tyntec and Syniverse. *See, e.g.,* *Covad Commc'ns Co. v. BellSouth Corp., 374 F.3d 1044, 1049 (11th Cir. 2004)* (affirming dismissal of refusal to deal claim where the relationship between the monopolist and rival was mandated by the Federal Telecommunications Act "and thus cannot be said to have initiated a 'voluntary' course of dealing, profitable or otherwise"); *see also* *Trinko, 540 U.S. at 409*. It is undisputed that Syniverse and tyntec never had an ICV relationship prior to tyntec's acquisition of the Iris Peering Agreements. Doc. 120 at ¶¶ 54-55, 80, 84, 113 (tyntec had never before provided ICV services in North America). There is no evidence that Syniverse would have entered into a peering agreement with tyntec absent tyntec's acquisition of the Iris Peering Agreements. As in *Trinko*, this lack of voluntary course of dealing removes the ability to gauge Syniverse's **[*35]** motivation for its conduct as competitive zeal or anticompetitive malice. Because Syniverse's relationship with tyntec was not "voluntary" but imposed by tyntec's acquisition of the Iris Peering Agreements, tyntec's refusal to deal claim fails. *Covad, 374 F.3d at 1049* ("*Trinko* now effectively makes the unilateral termination of a voluntary course of dealing a requirement for a valid refusal-to-deal claim under *Aspen*.").

tyntec also argues a course of dealing has been established directly between Syniverse and tyntec. Specifically, tyntec points to the fact that tyntec and Syniverse have been exchanging SMS and MMS messages on bill and keep terms for two customers, Flyp and Shelcomm, since late 2016 when tyntec acquired the Iris Peering Agreements. Doc. 130 at 33. The bill and keep terms for tyntec's two customers, however, was inherited under the Iris Peering Agreements, and, for the reasons discussed above, does not constitute a voluntary course of dealing.

In addition, any continuation of this course of dealing after the April 2017 termination of the Iris Peering Agreements was borne only from the initiation of this litigation.

Even if the Court gave credence to the assignability of Iris's course of dealing **[*36]** to tyntec, the course of dealing between Syniverse and Iris was not profitable and, therefore, would still not satisfy this requirement. tyntec argues that Syniverse and Iris's course of dealing must have been profitable at least to some extent because Syniverse would not have continued its peering relationship with Iris for over a decade otherwise. tyntec also argues that the course of dealing would have been profitable absent Syniverse's sabotage of Iris's customer relationships. However, "unadorned representations of counsel cannot create genuine issues of material fact." *Davidson v. Gov't Emps. Ins. Co., No. 8:09-cv-727-T-33MAP, 2010 U.S. Dist. LEXIS 126728, 2010 WL 4973494, at *4 n.7 (M.D. Fla. Dec. 1, 2010)* (quotation and citation omitted). Regardless of whether Syniverse's peering relationship with Iris could have potentially been profitable given various alternate scenarios, there is no dispute that the Iris Peering Agreements were, in fact, of no financial benefit to Syniverse. *See* Doc. 120 at ¶¶ 108, 110; Doc. 116, Ex. 7 at 513 (email dated 2/28/2017 from Alibhai to Spinks regarding draft contract for tyntec stating "There is no financial gain for us to sign them up as they would be more dependent on us for reach and with that comes high overhead."). **[*37]** Where, as here, there is no evidence that Syniverse has sacrificed short-term profits to further an anticompetitive agenda, tyntec cannot prevail.

4. Business Justifications for Refusal to Deal

Even assuming tyntec could establish Syniverse's refusal to deal along with a prior voluntary and profitable course of dealing, the claim will still fail if Syniverse had a valid business justification for the refusal. *See, e.g., Morris Communs, 364 F.3d at 1295* ("refusal to deal that is designed to protect or further the legitimate business purposes of a defendant does not violate the antitrust laws, even if that refusal injures competition"); *Tech. Res. Servs., Inc. v. Dornier Med. Sys., Inc., 134 F.3d 1458, 1466 (11th Cir. 1998)* ("A defendant can escape *§ 2* liability if the defendant's actions can be explained by legitimate business justifications."). Once the defendant has shown valid business justifications, the burden shifts and the plaintiff must show that the defendant's proffered business justifications are pretextual. *Morris Communs, 364 F.3d at 1296*.

Syniverse asserts several reasons for not renewing the Iris Peering Agreements with tyntec: it had concerns about the validity of the assignment of the Iris Peering Agreements from Iris to tyntec; it was worried that tyntec would send A2P messages over the P2P network; and there was no "strategic **[*38]** advantage" for Syniverse to have a peering arrangement with tyntec. Doc. 119 at 30-33. tyntec contends that Syniverse's proposed justifications for terminating the Iris Peering Agreements are pretextual. Specifically, it asserts that the timing of Syniverse's decision to terminate the Iris Peering Agreements renders Syniverse's business justifications pretextual. tyntec argues that it is "obvious that Syniverse's real motivation in terminating the Peering Agreements was to exclude tyntec from the U.S. ICV market; not the 'business justifications' that Syniverse cites...." Doc. 130 at 39.

Syniverse first asserts that it was apprehensive about tyntec's acquisition of the Iris Peering Agreements because it received inadequate information and answers from tyntec when trying to determine whether the assignment of the Iris Peering Agreements was valid.[13] Doc. 120 at ¶¶ 59, 60, 63. tyntec contends that representatives of tyntec and Iris answered Syniverse's questions in emails and at least two conference calls. Doc. 237, Exs. 131, 132, 133. tyntec also points to the timing of the November Letter and asserts that, because the November Letter was sent to tyntec less than 24 hours after receiving **[*39]** tyntec's answers to Syniverse's questions, this business justification is pretextual. Specifically, tyntec argues that there had not been enough time for Syniverse to have seriously considered tyntec's responses. Doc. 130 at 38.

The November Letter, however, details the contradictory information Syniverse received in response to its questions and concludes:

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[13] In the absence of Syniverse's prior written consent, assignment of the Iris Peering Agreements could only be validly made in connection with a sale of all or substantially all of Iris's assets. Doc. 120 at ¶ 56; Doc. 236, Ex. 42.

> Syniverse strongly believes that it does not have any obligation, based on the information it has received to date, to recognize the attempted assignment of the Peering Agreements from Iris Wireless to [tyntec]. However, at this point Syniverse does not desire to incur additional effort or expense on this matter. Therefore we will provide the information that [tyntec] is requesting and provide the services outlined in the Peering Agreements to [tyntec] until they expire on April 7, 2017. Under separate letters, Syniverse will be providing the written notices described in ... [the Peering Agreements] of Syniverse's intention not to renew the Peering Agreements. If [tyntec] desires to receive messaging services from Syniverse after April 7, 2017, we will be happy to provide [tyntec] with our current standard message aggregator agreement. **[*40]**

Doc. 236, Ex. 42. tyntec does not dispute Syniverse's summary of the contradictory information regarding the assignment of the Iris Peering Agreements outlined in the November Letter or the legitimacy of Syniverse's concerns regarding the same. As evidence of pretext, tyntec simply relies on the proximity in time of the November Letter with some of tyntec's responses to some of Syniverse's inquiries. This is insufficient evidence that Syniverse's concerns about the validity of the assignment of the Iris Peering Agreements was a pretextual business justification for terminating the Iris Peering Agreements.

Syniverse states that it was also worried that tyntec, because it was an A2P business, would use the Iris Peering Agreements to send A2P messages or only Non-CMRS messages to Syniverse's customers. Syniverse asserts that this concern was justified because, in late 2016 and early 2017, tyntec did not have any wireless carrier customers, and other than DeCurtis's suggestion of 21 unnamed carriers, there was no indication that tyntec would be a real partner for P2P messaging. Doc. 119 at 32; Doc. 120 at ¶¶ 74, 80. Syniverse also argues that it had rational financial fears that tyntec was **[*41]** free riding on Syniverse's labors. Syniverse contends there is no dispute that the Iris Peering Agreements whether with Iris or as assigned to tyntec did not financially benefit Syniverse. Doc. 119 at 32; Doc. 120 at ¶¶ 108, 110. Syniverse points to the fact that tyntec has two small Non-CMRS customers with an "infinitesimal" amount of messaging traffic compared to Syniverse's relationships with more than a thousand carrier and Non-CMRS customers on a global scale. Doc. 120 at ¶¶ 13-14, 66. tyntec's argument that it "has indications of activity . . . that would map to an ICV" is not sufficient to establish pretext regarding these concerns. Doc. 116 at 17. Although tyntec asserts that its relationship with Globe Telecom, a Philippine carrier, qualifies tyntec as an ICV entitled to a peering agreement, this relationship is not relevant for purposes of this motion because tyntec did not enter into an agreement with Globe until a year after this litigation was filed. Doc. 120 at ¶ 118. As such, it cannot serve as evidence of pretext for Syniverse's decision to terminate the Iris Peering Agreements.

Syniverse's business relies in part on charging companies for the contractual right to send **[*42]** messages to those carriers. As such, the Court does not find it "irrational" for Syniverse to want to charge tyntec rather than give its services away via tyntec's preferred billing terms. *See* *Morris Communs, 364 F.3d at 1295-96* (finding defendant met its business justification burden by showing that defendant sought to prevent plaintiff from "free-riding" on defendant's technology and rejecting plaintiff's claims of pretext) (citing *Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)* (stating that prevention of "free-riding" by competitors is a legitimate business purpose); *Consultants & Designers, Inc. v. Butler Serv. Grp., Inc., 720 F.2d 1553, 1559 (11th Cir. 1983)* (concluding that defendant "had a legitimate interest in protecting from opportunistic appropriation its investment in acquiring the information necessary to carry on its business")). Accordingly, summary judgment is additionally warranted on the basis of Syniverse's business justifications. *See* *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1184 (9th Cir. 2016)* ("[T]here is only a duty not to refrain from dealing where the only conceivable rationale or purpose is to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition." (citations and internal quotations omitted)).

5. Harm to Competition

An antitrust plaintiff must show harm to competition in general rather than harm to an individual competitor. *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc., 376 F.3d 1065, 1069 (11th Cir. 2004)*; *see* ***[*43]*** *also* *Am. Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1579 n.8 (11th Cir. 1985)* ("Harm to competition is a necessary element of all private antitrust suits under *Section[] ... 2 of the Sherman Act*...."). The *Sherman Act* is not intended to protect businesses from conduct that is competitive but, instead, is to protect the public from conduct that unfairly tends to destroy competition itself. *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. Here, tyntec alleges that Syniverse's anticompetitive conduct harmed market-wide competition. Doc. 116 at 24. More specifically, tyntec asserts that by excluding tyntec from the U.S. ICV market, Syniverse limited customer choice and price competition. Doc. 116 at 24. tyntec's argument that many of its contract negotiations are "waiting for Syniverse . . . [litigation] issue to be resolved" and that companies such as Sprint and TNS expressed an interest in purchasing ICV services from tyntec but were denied that choice is unavailing. Doc. 116, Ex. 2 at ¶ 13, Ex. 3 at ¶¶ 49-50, Ex. 22 at ¶ 14, Ex. 27 at 171:11-173:2, Ex. 33 at ¶ 13, Ex. 60, Ex. 61 at ¶ 13, Ex. 63. tyntec points solely to Syniverse's negotiations with Flyp as an illustration of how tyntec's exclusion from the market affects pricing. This isolated example, however, is insufficient to establish market-wide **[*44]** harm because it pertains to only one customer in an industry of hundreds of messaging companies and may not be representative of the market as a whole. Additionally, Flyp rejected the increased pricing offered by Syniverse. tyntec has not offered any other evidence that Syniverse otherwise has any power to control prices or restrict output in any relevant market. *See* *Ohio v. Am. Express Co., 138 S. Ct. 2274, 201 L. Ed. 2d 678 (2018)* (holding that, despite evidence of increased fees, plaintiffs did not prove the ability to charge anticompetitive prices); *Smalley & Co. v. Emerson & Cuming, Inc., 13 F.3d 366, 368 (10th Cir. 1993)* ("To establish a *§ 2* violation, a plaintiff must prove a defendant had 'the power to control prices or exclude competition' in the relevant market.").

tyntec also contends that Syniverse's exclusion has done serious damage to tyntec's plans to compete in the U.S. ICV market. Doc. 116 at 25. This contention, however, is irrelevant as a monopolist's harm, as discussed above, "must tend to cause harm to competition; unrelated harm to an individual competitor or consumer is not sufficient." *Mr. Furniture Warehouse, Inc. v. Barclays Am./Commercial Inc., 919 F.2d 1517, 1522 (11th Cir. 1990)*; *see also* *Spanish Broad., 376 F.3d at 1075* ("[C]onduct that injures individual firms rather than competition in the market as a whole does not violate Section Two."). As such, tyntec has failed to establish harm to competition in general.

B. Attempted [*45] Monopolization Claim

Section 2 of the Sherman Act forbids attempts to monopolize. *15 U.S.C. § 2*. "The phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it...." *Gulf States Reorganization Grp., Inc. v. Nucor Corp., 721 F.3d 1281, 1285 (11th Cir. 2013)* (quoting *Am. Tobacco Co. v. United States, 328 U.S. 781, 785, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946))*. The elements of an attempted monopolization are: (1) the defendant engaged in predatory or anti-competitive conduct with (2) a specific intent to monopolize the relevant market and (3) a dangerous probability of achieving monopoly power. *Spectrum Sports, 506 U.S. at 456*. "This anticompetitive conduct criterion captures the critical antitrust idea of harm to competition, rather than to competitors." *Spanish Broad., 376 F.3d at 1075*. Just as for the monopolization claim, conduct that injures individual firms rather than competition in the market as a whole is not violative of *§ 2* in the form of an attempted monopolization claim. *Id.* If a defendant's conduct proves lawful despite the defendant's possession of monopoly power in the relevant market for purposes of a monopolization claim, then the defendant's conduct could not constitute an attempt to monopolize. *Transamerica Comput. Co., Inc. v. Int'l Bus. Machs. Corp., 698 F.2d 1377, 1382 (9th Cir. 1983)*. Because tyntec has failed to establish harm to competition **[*46]** in general and because Syniverse's conduct was otherwise lawful, tyntec's attempted monopolization claim fails.

C. Tortious Interference Claims

Tortious interference with a contract and tortious interference with a prospective business relationship have roughly equivalent elements: (1) the existence of a contract or business relationship, (2) defendant's knowledge of it, (3) defendant's intentional procurement of the contract's breach or interference with the relationship, (4) absence of any justification, and (5) damages. *Jeunesse, LLC v. LifeWave, Inc., No. 6:15-cv-131-Orl-28DAB, 2015 U.S. Dist. LEXIS 108310, 2015 WL 4911349, at *3 (M.D. Fla. Aug. 17, 2015)*; *Smith v. Ocean State Bank, 335 So.2d 641, 642 (Fla. 1st DCA 1976)* (the two claims are "basically the same cause of action"). "The only material difference appears to be that in one there is a contract and in the other there is only a business relationship." *Smith, 335 So.2d at 642*; *see also* *Pilkington v. United Airlines, Inc., 921 F. Supp. 740, 749 (M.D. Fla. 1996)*.

Here, tyntec simply asserts that Syniverse was aware that tyntec acquired Iris's assets and planned to compete for many of Syniverse's existing customers and argues that "Syniverse knowingly interfered in tyntec's ongoing negotiations and existing contracts for ICV services by breaking the traditional bill and keep course of dealing and did so with a naked intent to exclude tyntec from the market." Doc. **[*47]** 116 at 37. These claims are exclusively predicated on tyntec's inability to peer with Syniverse under the Iris Peering Agreements. *See* Doc. 42 at ¶¶ 107-112 ("If tyntec is unable to peer with Syniverse under the current terms of the Peering Agreements, neither tyntec nor its customers will be able to honor the terms of the Customer Contracts and tyntec's customers will have no choice but to do business with an ICV other than tyntec, namely Syniverse itself or SAP."). For the reasons discussed above, these claims concomitantly fail. Syniverse had a contractual right not to renew the Iris Peering Agreements and engaging in acts expressly permitted under the terms of a contract does not constitute tortious interference. *See* *Networkip, LLC v. Spread Enters., Inc., 922 So.2d 355, 358 (Fla. 3d DCA 2006)* ("No cause of action for intentional interference exists which is the consequence of a rightful action."). As such, Syniverse is entitled to summary judgment on these claims.

Accordingly, it is hereby

RECOMMENDED:

1. tyntec's Motion for Summary Judgment (Doc. 116) be denied.
2. Syniverse's Motion for Summary Judgment (Doc. 119) be granted.

IT IS SO REPORTED in Tampa, Florida, on August 19, 2019.

/s/ Sean P. Flynn

SEAN P. FLYNN

UNITED STATES MAGISTRATE JUDGE

Diverse Power, Inc. v. City of Lagrange

United States Court of Appeals for the Eleventh Circuit

August 20, 2019, Decided; August 20, 2019, Filed

No. 18-11014

Reporter

934 F.3d 1270 *; 2019 U.S. App. LEXIS 24772 **; 2019-2 Trade Cas. (CCH) P80,890; 28 Fla. L. Weekly Fed. C 155; 2019 WL 3928624

DIVERSE POWER, INC., Plaintiff-Appellee, versus CITY OF LAGRANGE, GEORGIA, Defendant-Appellant.

Subsequent History: Petition for certiorari filed at, 09/25/2020

Prior History: [1]** Appeal from the United States District Court for the Northern District of Georgia. D.C. Docket No. 3:17-cv-00003-TCB.

Diverse Power, Inc. v. City of LaGrange, 2018 U.S. Dist. LEXIS 226681, 2018 WL 9651475 (N.D. Ga., Feb. 21, 2018)

Disposition: AFFIRMED and REMANDED.

Core Terms

immunity, state-action, foreseeable, Ordinance, municipal, anticompetitive, water service, anticompetitive conduct, city limits, natural gas, unincorporated, powers, sewage, displace, acquire, hospital authority, clear-articulation, appliances, monopoly, antitrust liability, facilities, customers, install, sewage system, electric, leverage, markets, houses, limits, zoning

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine

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

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

HN1[] **Exemptions & Immunities, Parker State Action Doctrine**

An appellate court reviews de novo the denial of a motion to dismiss based on state-action immunity.

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

HN2[] **Defenses, Demurrers & Objections, Motions to Dismiss**

On a motion to dismiss, the factual allegations in the complaint are taken as true, even if they are subject to dispute. But a court is not bound to accept as true a legal conclusion couched as a factual allegation.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN3[] **Parker State Action Doctrine, Local Governments & Private Parties**

The doctrine of state-action immunity insulates states from suit under the federal antitrust laws. Because nothing in the language of the Sherman Act or in its history suggested that Congress meant to restrict the states' sovereign prerogative to regulate their economies, the act should not be read to bar states from engaging in anticompetitive conduct as an act of government. But because political subdivisions are not themselves sovereign, they do not receive all the federal deference of the states that create them. Instead, political subdivisions enjoy state-action immunity when they undertake activities pursuant to a clearly articulated and affirmatively expressed state policy to displace competition. This is commonly known as the clear-articulation requirement.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN4[] **Parker State Action Doctrine, Local Governments & Private Parties**

The clear-articulation requirement for municipalities invoking state-action immunity is itself anything but pellucid. And unlike clear-statement requirements in other domains of law, the clear-articulation requirement is often satisfied by articulations that are admittedly less than clear. The Supreme Court has rejected the contention that the clear-articulation requirement can be met only if the delegating statute explicitly permits the displacement of competition. Instead, state-action immunity applies when a municipality's anticompetitive conduct is the foreseeable result of state legislation.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN5[] **Parker State Action Doctrine, Local Governments & Private Parties**

State policy to displace federal ***antitrust law*** is sufficiently expressed where the displacement of competition is the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. The ultimate requirement is that the state must have affirmatively contemplated the displacement of competition such that the challenged anticompetitive effects can be attributed to the state itself.

Governments > Public Improvements > Sanitation & Water

HN6[] **Public Improvements, Sanitation & Water**

By state statute and constitution, Georgia municipal corporations have the power to acquire, to construct, to reconstruct, to improve, to better, and to extend any water system or sewage system, or both, within the municipal corporation. *O.C.G.A. § 36-34-5(a)(1)*; *Ga. Const. art. IX, § 2, para. 3(a)(7)*. Also by state constitution, Georgia cities may choose to deny water and sewer services to areas outside their corporate limits. *Ga. Const. art. IX, § 2, para. 3(b)(2)*. Georgia statutes even provide that in the exercise of powers specifically granted to them by law, local governing authorities of cities and counties are acting pursuant to state policy, as stated in *O.C.G.A. § 36-65-1*, meaning that in the exercise of such powers, such local governing authorities shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia. *O.C.G.A. § 36-65-2*.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Governments > Public Improvements > Sanitation & Water

HN7[] **Parker State Action Doctrine, Local Governments & Private Parties**

The "exercise of such powers" referred to in *O.C.G.A. § 36-65-2* refers to the powers authorized in *O.C.G.A. § 36-34-5(a)(3)*, the authority to operate water or sewage systems. And the immunity granted by *§ 36-34-5(a)(3)*—in conjunction with *§ 36-65-2*—is only immunity "to operate and maintain any such systems," which is a reference to water and sewage systems. Read together, these statute suggest that the Georgia legislature expressly contemplated municipal anticompetitive conduct in the provision of water and sewage services. Accordingly, some actions directly connected to the provision of water and sewage services—e.g., a municipality's dividing up water-service territory with neighboring municipalities—are protected. This is because market division and similar anticompetitive actions are the inherent, logical, or ordinary result of *§ 36-34-5(a)(3)*. But the tying of an unrelated service in a different market to the provision of water service falls outside the statutes' grant of immunity.

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For CITY OF LAGRANGE, GEORGIA, Defendant - Appellant: Teresa Bonder, Allison Stephens Thompson, Andrew J. Liebler, Alston & Bird, LLP, ATLANTA, GA; Jeffrey Marshall Todd, Lewis Taylor & Todd, PC, LAGRANGE, GA.

Judges: Before TJOFLAT, JORDAN and ANDERSON, Circuit Judges.

Opinion by: TJOFLAT

Opinion

[*1271] TJOFLAT, Circuit Judge:

This interlocutory appeal asks us to determine whether the City of LaGrange, Georgia, enjoys state-action immunity when it ties its water-utility service to its natural-gas service for customers in unincorporated Troup County, Georgia. The District Court held that LaGrange was not entitled to state-action immunity and, for the reasons explained below, we affirm.

I.

LaGrange owns and operates a water-utility system that serves customers within LaGrange's city limits as well as customers beyond its city limits in unincorporated Troup County. For much of unincorporated Troup County, LaGrange is the only provider of water-utility **[**2]** service. LaGrange maintains this monopoly through explicit, market-dividing agreements with other municipalities in the area. In addition to water, LaGrange provides natural gas to customers inside and outside its city limits. As with water, LaGrange's gas is the only game in town for much of unincorporated Troup County.

Diverse Power is a Georgia corporation that provides electric service throughout much of unincorporated Troup County. While LaGrange also provides electric service, it does so primarily within its city limits. Where Diverse Power's electric service and LaGrange's gas service overlap—in much of unincorporated Troup County—the two entities are in direct competition for retail energy customers.

In 2004, the LaGrange City Council enacted Ordinance No. 4-29 (the "Ordinance"), now codified at *§ 20-15-6* of the LaGrange Code of Ordinances. Titled "Water service outside city limits," the Ordinance provides:

> For all new construction outside of the corporate limits of the city, . . . water service as set forth in this chapter shall be available only to those customers who install at least one (1) natural gas furnace, one (1) natural gas water heater, and at least one (1) additional natural **[**3]** gas outlet sufficient for potential future use for a clothes dryer, range, grill, pool heater or outdoor lighting fixture.

LaGrange, Ga. Code § 20-15-6 (2004). LaGrange enforces the Ordinance by sending form letters to prospective builders and developers in the area informing them of the Ordinance's conditions. The letter, headed "IMPORTANT NOTICE CONCERNING WATER SERVICE OUTSIDE THE CITY LIMITS," states:

> This letter is to inform you of a utility policy that applies to all new water connections outside of the city limits of LaGrange. In areas where natural gas service is available, new homes or businesses must install gas appliances in order to receive water service from the City. Specifically, at least one gas furnace, one gas water heater, and one gas outlet for a future appliance such as a dryer or stove must be installed. Builders that do not comply with this policy will be denied permanent water service.

The purpose of the Ordinance is clear. As LaGrange's utility director stated in a 2008 email, "[LaGrange] decided to use water as leverage to require gas" in developments outside LaGrange's city limits. But for subdivisions within LaGrange's city limits, the utility director explained that LaGrange **[**4]** "can't use water as leverage to require gas." For these intracity developments, the director continued, LaGrange uses a combination of rebates and incentives to encourage developers to install gas appliances.

The effect of the Ordinance is equally clear. Consider the Cameron Pointe subdivision, which sits on the north and south **[*1272]** sides of Cameron Mill Road in unincorporated Troup County. The houses on the south side of the road were built before the enactment of the Ordinance, and the houses on the north side were built afterward. Predictably, the houses on the south side of the road were built to use electricity for all appliances, while the houses on the north side of the road were built for natural-gas appliances. To be sure, this temporal relationship doesn't prove that developers switched to natural gas *because of* the Ordinance. But lest one suspect that market forces drove this strange arrangement, the developer told Diverse Power that, but for the Ordinance, it would have built the houses on the north side of the road to use electric rather than natural-gas appliances.

On March 3, 2017, Diverse Power filed suit against LaGrange for violations of the Sherman and Clayton Antitrust **[**5]** Acts. Specifically, Diverse Power alleged that LaGrange's practice of conditioning water service on the installation of natural gas appliances constituted an unlawful tying arrangement. LaGrange moved to dismiss the complaint under *Federal Rule of Civil Procedure 12(b)(6)* on several bases, including immunity under the state-action doctrine. The District Court denied LaGrange's motion. *Diverse Power, Inc. v. City of LaGrange*, No. 3:17-v-00003-TCB, slip op. at 25 (N.D. Ga. Feb. 21, 2018). LaGrange timely appealed the District Court's order denying state-action immunity, which we have jurisdiction to review under the collateral order doctrine. *See Commuter Transp. Sys., Inc. v. Hillsborough Cty. Aviation Auth., 801 F.2d 1286, 1289-90 (11th Cir. 1986)* (holding that denial of state-action immunity is an appealable collateral order under *Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949))*.[1]

[1] Diverse Power argued in response to LaGrange's civil appeal statement that the District Court's order denying state-action immunity was not an appealable collateral order under *Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)*. *See* Diverse Power's Resp. to Civil App. Statement at 4 (filed April 16, 2018). Specifically, Diverse Power suggested that *Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority*—where we initially extended

[*1273] II.

HN1[] We review *de novo* the denial of a motion to dismiss based on state-action immunity. *Danner Constr. Co. v. Hillsborough County, 608 F.3d 809, 812 (11th Cir. 2010)*. ***HN2***[] "On a motion to dismiss, the factual allegations in the complaint are taken as true, even if they are subject to dispute." *Devengoechea v. Bolivarian Republic of Venezuela, 889 F.3d 1213, 1220 (11th Cir. 2018)*. But we are not "bound to accept as true **[**6]** a legal conclusion couched as a factual allegation." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007)* (citation omitted).

III.

A.

HN3[] The doctrine of state-action immunity insulates states from suit under the federal antitrust laws. In *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, the Supreme Court held that because "nothing in the language of the Sherman Act or in its history" suggested that Congress meant to restrict the states' sovereign prerogative to regulate their economies, the Act shouldn't be read to bar states from engaging in anticompetitive conduct "as an act of government." *Id. at 350, 352, 63 S. Ct. at 313-14*. But because political subdivisions—like the City of LaGrange—"are not themselves sovereign[,] they do not receive all the federal deference of the States that create them." *City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 412, 98 S. Ct. 1123, 1136, 55 L. Ed. 2d 364 (1978)* (plurality opinion). Instead, political subdivisions enjoy state-action immunity when they undertake activities "pursuant to a 'clearly articulated and affirmatively expressed' state policy to displace competition." *FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 226, 133 S. Ct. 1003, 1011, 185 L. Ed. 2d 43 (2013)* (quoting *Cmty. Commc'ns Co. v. Boulder, 455 U.S. 40, 52, 102 S. Ct. 835, 841, 70 L. Ed. 2d 810 (1982))*. This is commonly known as the clear-articulation requirement.

Cohen to denials of state-action immunity—was either "wrongly decided" and/or "abrogated by more recent decisions of the Supreme Court emphasizing the narrowness of [the collateral order] doctrine." *Id.*

We happen to think that *Commuter Transportation* was correctly decided. For the reasons articulated in that opinion and more, we think it's clear that state-action immunity is a form of immunity from suit, not merely from liability. And denials of immunity from suit—like denials of sovereign and qualified immunities—are immediately appealable under the collateral order doctrine. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 147, 113 S. Ct. 684, 689, 121 L. Ed. 2d 605 (1993)* (sovereign immunity); *Mitchell v. Forsyth, 472 U.S. 511, 536, 105 S. Ct. 2806, 2820, 86 L. Ed. 2d 411 (1985)* (qualified immunity). But even if we agreed with Diverse Power on this point, we'd be powerless to do anything: *Commuter Transportation* is a decision of this Court that has not been overturned en banc.

That we haven't overturned *Commuter Transportation* wouldn't matter if the Supreme Court had abrogated *Commuter Transportation* or another case presenting the same issue. This brings us to Diverse Power's second argument: that *Commuter Transportation* has been abrogated by more recent Supreme Court decisions narrowing the collateral order doctrine. Though Diverse Power confidently stated this conclusion in its response, none of the cases it cited has anything to do with the state-action doctrine. *See* *Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009)* (attorney-client privilege); *Will v. Hallock*¸ *546 U.S. 345, 126 S. Ct. 952, 163 L. Ed. 2d 836 (2006)* (Federal Tort Claims Act's judgment bar); *Cunningham v. Hamilton County, 527 U.S. 198, 119 S. Ct. 1915, 144 L. Ed. 2d 184 (1999)* (order imposing sanctions for discovery abuses); *Dig. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994)* (order vacating dismissal and rescinding a settlement agreement); *P.R. Aqueduct, 506 U.S. 139, 113 S. Ct. 684, 121 L. Ed. 2d 605* (*Eleventh Amendment* immunity); *Van Cauwenberghe v. Biard, 486 U.S. 517, 108 S. Ct. 1945, 100 L. Ed. 2d 517 (1988)* (immunity from civil process).

So Diverse Power must be inferring from refusals to extend *Cohen* in *completely different areas of substantive law* that the Supreme Court will *eventually* declare denials of state-action immunity to be outside of *Cohen*. Suffice it to say, that's a far cry from an abrogation.

HN4[] The clear-articulation requirement is itself anything but pellucid. And unlike clear-statement requirements in other domains of law,[2] the clear-articulation requirement is often satisfied by articulations that are admittedly less than clear. **[**7]** The Supreme Court has "rejected the contention that [the clear-articulation] requirement can be met only if the delegating statute explicitly permits the displacement of competition." City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 372, 111 S. Ct. 1344, 1350, 113 L. Ed. 2d 382 (1991). Instead, state-action immunity applies when a municipality's anticompetitive conduct is the "foreseeable result" of state legislation. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 42, 105 S. Ct. 1713, 1718, 85 L. Ed. 2d 24 (1985).

For example, in City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991), the City of Columbia, South Carolina used its zoning power to protect an entrenched billboard provider—who had 95% market share—against outside competition. Id. at 367-68, 111 S. Ct. at 1347-48. Even though the state zoning statute under **[*1274]** which the city promulgated the zoning restrictions had nothing to do with the suppression of competition—much less in the commercial billboard industry—the Supreme Court held that the city's actions were immune from federal antitrust liability. As the Court explained,

> The very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants. A municipal ordinance restricting the size, location, and spacing of billboards (surely a common form of zoning) necessarily protects **[**8]** existing billboards against some competition from newcomers.

Id. at 373, 111 S. Ct. at 1350.

And *Omni* isn't an outlier. In the earlier *Hallie* case, the Supreme Court held that the City of Eau Claire was immune from federal antitrust liability based on similarly broad state statutes that were facially unrelated to the suppression of competition. In *Hallie*, a Wisconsin statute authorized cities to construct sewage systems and provided that municipal utilities had no obligation to serve areas outside their corporate limits. 471 U.S. at 41, 105 S. Ct. at 1717. Under these statutes, Eau Claire offered sewage-treatment services (over which it had a local monopoly) to adjacent towns, but only on the condition that the towns accepted sewage-collection and-transportation services from Eau Claire. Id. at 36-37, 105 S. Ct. at 1715. Several neighboring towns sued, alleging that Eau Claire had impermissibly used its monopoly over sewage-treatment services to increase its share of the sewage-collection and-transportation markets. *Id.* Eau Claire raised the defense of state-action immunity, and the towns responded that the state laws authorizing Eau Claire to refuse service to unincorporated towns did "not evidence a state policy to displace competition in the provision of sewage services because **[**9]** they ma[d]e no express mention of anticompetitive conduct." Id. at 41-42, 105 S. Ct. at 1718.

The Court disagreed. Rejecting the towns' clear-articulation argument, the Supreme Court explained that Eau Claire's anticompetitive conduct logically resulted from the city's authority under Wisconsin law:

> [T]he statutes clearly contemplate that a city may engage in anticompetitive conduct. Such conduct is a foreseeable result of empowering the City to refuse to serve unannexed areas. . . . [I]t is sufficient that the statutes authorized the City to provide sewage services and also to determine the areas to be served. We think it is clear that anticompetitive effects logically would result from this broad authority to regulate.

Id. at 42, 105 S. Ct. at 1718.

It was against this legal backdrop that we decided FTC v. Phoebe Putney Health System, Inc., 663 F.3d 1369 (11th Cir. 2011), *rev'd*, 568 U.S. 216, 133 S. Ct. 1003, 185 L. Ed. 2d 43 (2013).

B.

In Phoebe Putney, two Georgia laws—a provision of the state constitution and a concurrently enacted statute—gave municipally created hospital authorities 27 enumerated powers, including "the power '[t]o acquire by purchase,

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[2] *See generally* John F. Manning, *Clear Statement Rules and the Constitution*, 110 Colum. L. Rev. 399 (2010).

lease, or otherwise and to operate projects [*i.e.*, hospitals and other public health facilities].'" Phoebe Putney, 568 U.S. at 221, 133 S. Ct. at 1007-08 (first alteration in original). Under these laws, the Hospital Authority of Albany-Dougherty County—which already owned **[**10]** one major regional hospital—sought to acquire another hospital. Id. at 221-22, 133 S. Ct. at 1008. Together, the two hospitals accounted for 86 percent of the market for acute-care hospital services in the six surrounding counties. *Id.* As such, the transaction raised the regulatory **[*1275]** eyebrows of the FTC, which ultimately filed suit (along with the State of Georgia) to enjoin the transaction.

When the case came before us, we acknowledged that the transaction would "substantially lessen competition or tend to create, if not create, a monopoly." Id. at 222-23, 133 S. Ct. at 1009. But we also acknowledged that Georgia law gave hospital authorities the prerogative to purchase hospitals and other health facilities, a grant of authority that might foreseeably produce anticompetitive results. *Id.* This was especially true given that many of Georgia's more rural healthcare markets were at the time of the authorizing laws' passage so sparsely populated as to support only a few regional hospitals. Id. at 231, 133 S. Ct. at 1014. As a result, most state-law-authorized purchases of a hospital by a hospital authority would substantially lessen competition in a given market. Accordingly, because it appeared clear that the power to acquire hospitals in markets with few hospitals reasonably anticipated **[**11]** the power to anticompetitively consolidate the hospital-services market, we affirmed the District Court's order granting state-action immunity. Phoebe Putney, 663 F.3d at 1378.

We got reversed, nine-zip. While the Supreme Court reaffirmed foreseeability as the touchstone of the clear-articulation test, id. at 226-27, 133 S. Ct. at 1011, the Court placed narrower bounds on the meaning of foreseeability. Under the reformulated test, **HN5**[] "state policy to displace federal ***antitrust law*** [is] sufficiently expressed where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." Id. at 229, 133 S. Ct. at 1012-13. "[T]he ultimate requirement [is] that the State must have affirmatively contemplated the displacement of competition such that the challenged anticompetitive effects can be attributed to the 'state itself.'" Id. at 229, 133 S. Ct. at 1012 (citation omitted).

How did this rearticulated test apply to the facts of *Phoebe Putney*? According to the Court, the state-conferred power of hospital authorities to acquire hospitals did not "inherent[ly], logical[ly], or ordinar[ily] result" in the displacement of competition for two reasons. First, the Georgia law allowing hospital authorities to acquire hospitals, O.C.G.A. § 31-7-75(4), "is not principally **[**12]** concerned with hospital authorities' ability to acquire multiple hospitals and consolidate their operations" because it allows them to acquire other healthcare facilities as well. Id. at 232, 133 S. Ct. at 1014. So presumably many of the actions taken under § 31-7-75(4) would not relate to hospitals, let alone reduce competition in the market for hospital services. Second, "the power to acquire hospitals still does not ordinarily produce anticompetitive effects." Id. at 232, 133 S. Ct. at 1014. This is because the acquisition of a hospital by a hospital authority would significantly decrease competition "only in markets that are large enough to support more than one hospital but sufficiently small that the merger of competitors would lead to a significant increase in market concentration." *Id.* In other contexts—*e.g.*, the acquisition of a hospital authority's initial hospital or of one in a large hospital-services market like Atlanta—the acquisition of a new hospital doesn't significantly decrease competition.

Whatever the merits of the Court's new and improved clear-articulation requirement, it's hard to argue that the result in *Phoebe Putney* naturally follows from *Hallie* and *Omni*.[3] To illustrate the point, **[*1276]** consider the facts of Hallie. Was the anticompetitive **[**13]** tying arrangement there the "inherent, logical, or ordinary result" of a pair of statutes authorizing the construction of sewage treatment facilities and the withholding of services from areas outside cities' limits? Probably not—most cities likely just constructed sewage-treatment facilities and limited their services to city residents. There's nothing "inherent[ly], logical[ly], or ordinar[ily]" anticompetitive about giving cities the ability to construct sewage facilities and the right to deny service to out-of-towners. But it was still *foreseeable*—albeit not in the sense that *Phoebe Putney* uses the term—that Eu Claire would use its sewage-services monopoly to gain leverage in another market. *See* Hallie, 471 U.S. at 42, 105 S. Ct. at 1718 ("[T]he statutes clearly

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[3] *See, e.g.*, Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 Va. L. Rev. 1387, 1406 (2016) (noting that "[t]he *Phoebe Putney* Court articulated a higher [clear-articulation] standard" than the Court had in previous cases).

contemplate that a city may engage in anticompetitive conduct. Such conduct is a *foreseeable result of empowering the City to refuse to serve unannexed areas*." (emphasis added)).

Nevertheless, *Phoebe Putney* is the law, and our job is to apply it to the facts of this case. Turning to those facts, it's hard to see much legally relevant daylight between the conduct described in Diverse Power's complaint and the facts **[**14]** of *Hallie*. ***HN6***[] By state statute and constitution, Georgia municipal corporations have the power "[t]o acquire . . ., to construct, to reconstruct, to improve, to better, and to extend any water system or sewage system, or both, within the municipal corporation." *O.C.G.A. § 36-34-5(a)(1)*.[4] Also by state constitution, Georgia cities may choose to deny water and sewer services to areas outside their corporate limits.[5] Georgia statutes even provide that "in the exercise of powers specifically granted to them by law, local governing authorities of cities and counties are acting pursuant to state policy," *O.C.G.A. § 36-65-1*, meaning that "in the exercise of such powers, such local governing authorities shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia," *O.C.G.A. § 36-65-2*.

So for those keeping score at home, in both *Hallie* and the instant case a state law empowered municipalities to develop a certain utility. In both cases, another state law gave municipalities the right to refuse service to unannexed areas. And in both cases, the municipality foreseeably used those two powers to gain leverage in another market.[6]

There are two potential differences between *Hallie* and the instant **[**15]** case, but we don't think either difference is especially salient under these circumstances. First, **[*1277]** the tied service here (natural gas) is arguably less related to water service than sewage-collection and-transportation services were to sewage treatment in *Hallie*. But monopolists tie products and services in unrelated markets all the time—that's kind of the point of a tying arrangement. So it would seem foreseeable that a monopolist would seek to leverage his monopoly in one market to increase his share of another.

Second, the statute in *Hallie* authorized the city to operate the typing service (sewage treatment) and the tied service (sewage collection and transportation). *See* Wis. Stat. § 66.076.[7] Here, in contrast, the relevant statute authorizes the city to operate the tying service (water), but is silent as to the tied service (natural gas). But this distinction does not affect the foreseeability of the anticompetitive conduct. What makes the anticompetitive conduct foreseeable is the ability to deny services to unincorporated areas—not the number of services tied together. Besides, the Supreme Court did not rely on the fact that the statute authorized both services in its foreseeability analysis in **[**16]** *Hallie*, so it would be odd for us to endow that fact with dispositive impact now.

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[4] *See also* *Ga. Const. art. IX, § 2, para. 3(a)(7)* ("[A]ny county, municipality, or any combination thereof may exercise the following powers and provide the following services: . . . [d]evelopment, storage, treatment, purification, and distribution of water.").

[5] *See* *Ga. Const. art. IX, § 2, para. 3(b)(2)* ("Unless otherwise provided by law, ... [n]o municipality may exercise any of the powers listed in subparagraph (a) of this Paragraph or provide any service listed therein [including "treatment, purification, and distribution of water," *see supra* note 4] outside its own boundaries except by contract with the county or municipality affected."); *Zepp v. Mayor of Athens, 255 Ga. 449, 339 S.E.2d 576, 577 (Ga. 1986)* ("A municipal corporation may not compel any person outside its territorial limits to accept water service which it undertakes to furnish, nor may the municipal authorities be compelled to render such service." (quoting *Barr v. City Council of Augusta, 206 Ga. 753, 58 S.E.2d 823, 824-25 (Ga. 1950)))*.

[6] The case for immunity is arguably stronger than in *Hallie* because *O.C.G.A. § 36-65-1* and *§ 36-65-2* clearly express the legislature's intent that municipalities receive immunity when performing enumerated functions.

[7] Although that statutory provision has been amended and renumbered since *Hallie* was decided, the Wisconsin State Legislature website contains the text of the provision as it was then. *See* https://docs.legis.wisconsin.gov/1995/statutes/statutes/66/076; *see also* Br. for Petitioners, *Hallie, 471 U.S. 34, 1984 WL 564126, at *30-31*.

In any event, we're in a post-*Phoebe Putney* world. And in that world we have to ask not only whether the Georgia legislature could have foreseen that cities would use their water monopoly to increase their share of an unrelated market. We also have to ask if such an anticompetitive move is the "inherent, logical, or ordinary result" of the legislative scheme.

The answer to that question is no.

O.C.G.A. § 36-65-2 provides that "in the exercise of such powers [*i.e.*, the "powers specifically granted to them by law," *O.C.G.A. § 36-65-1*], . . . local governing authorities shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia." If LaGrange is immune from federal antitrust liability, it is by virtue of this statute. The "power[] specifically granted to [LaGrange] by law" here is the power authorized by *O.C.G.A. § 36-34-5(a)(3)*, which is the authority to operate water or sewage systems. LaGrange argues that so long as it's exercising a power granted by state law, its related anticompetitive actions are beyond federal antitrust liability. So it doesn't matter if LaGrange conditions water service on the installation **[**17]** of natural-gas fixtures or the purchase of Goodyear tires. So long as the condition is connected to the "power specifically granted . . . by law," the entire arrangement is above board, immunity-wise.

We don't think this is the best reading of *O.C.G.A. § 36-65-2*, especially after *Phoebe Putney*. As the District Court recognized, ***HN7***[] the "exercise of such powers" referred to in *O.C.G.A. § 36-65-2* (the immunity statute) refers here to the powers authorized in *O.C.G.A. § 36-34-5(a)(3)*, the authority to operate water or sewage systems. And the immunity granted by *O.C.G.A. § 36-34-5(a)(3)*—in conjunction with *O.C.G.A. § 36-65-2*—is only immunity "[t]o operate and maintain any *such* systems," which is a reference to "water and sewage systems." Read together, these statute suggest that the Georgia legislature expressly "contemplate[ed] . . . municipal anticompetitive conduct" in the provision of water and sewage services. **[*1278]** *McCallum v. City of Athens, 976 F.2d 649, 655 (11th Cir. 1992)*. Accordingly, some actions directly connected to the provision of water and sewage services—*e.g.*, LaGrange's dividing up water-service territory with neighboring municipalities in Troup County, *see supra* page 2—are protected. *See* *McCallum, 976 F.3d at 655*. This is because market division and similar anticompetitive actions are the "inherent, logical, or ordinary result" of *O.C.G.A. §§ 36-34-5(a)(3)*. But whatever the outer limits of **[**18]** *Phoebe Putney*'s "inherent, logical, or ordinary" gloss, we think it is safe to say that the tying of an unrelated service in a different market to the provision of water service falls outside the statutes' grant of immunity.

Buttressing this interpretation is the astonishingly vast power LaGrange would have if we adopted its read of Georgia law. In its briefing and at oral argument, LaGrange contended that its actions are blanketed in state-action immunity whenever it exercises its water-utility power. The District Court rightly observed that there is "no limiting principle to this assertion" which, if true, "would [give LaGrange] immunity to take anticompetitive actions affecting *any* industry so long as the demand were made as a condition of refusing water service." *Diverse Power*, slip op. at 11-12. And our attempts to ferret out a limiting principle fared no better. *See* Oral Argument at 2:42-7:48, *Diverse Power, Inc. v. City of LaGrange*, __ F.3d __ (2019) (No. 18-11014), http://bit.ly/2YOksqM. We have a hard time believing that the Georgia legislature could have foreseen granting LaGrange powers so unlimited.

IV.

The District Court correctly denied LaGrange's motion to dismiss for state-action immunity, the only issue we review in this interlocutory appeal. We accordingly **[**19]** affirm the District Court's judgment and remand the case for further proceedings.

AFFIRMED and REMANDED.

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